

CONTRACTOR ALERT

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RECENT CHANGES TO THE FEDERAL MILLER ACT

In a recent article published by attorney Robert Cox he provides an overview of recent changes to the Miller Act. His Article follows. On August 17, 1999, the President signed legislation changing the Miller Act protection for persons providing labor and/or materials upon construction projects, federal in nature. In addition to the new law, a number of recent judicial decisions have addressed open issues under the Act.

A. ~~The Construction Industry Protection Act of 1999~~

The Act requires general contractors performing a construction contract for the federal government to provide payment bonds for the protection of certain subcontractors, materialmen that they will be paid for labor and/or materials provided on a federal construction project. The general contractor's bond covers those contracting directly with the general contractor, i.e. first-tier subcontractors, materialmen and suppliers as well as second-tier sub-subcontractors, materialmen and suppliers providing labor, equipment and materials to a first-tier subcontractor. The Act does not, however, cover second-tier sub-subcontractors, materialmen or suppliers providing labor, equipment or materials to a first-tier materialman or supplier nor does the Act cover third-tier subcontractors, materialmen and suppliers. Since 1935, the maximum value of a Miller Act payment bond did not have to be greater than \$2.5 million regardless of the value of the general contractor's contract with the federal government. Now, the Construction Industry Payment Act of 1999 (Public Law 106-49) changes the \$2.5 million limit and provides other protection as well for full payment of subcontractors and suppliers on federal construction projects.

The new law amends the Miller Act so as now to require payment bonds to be equal to the total amount payable under the contract, unless the contracting officer determines that a payment bond in that amount is impractical. Other amendments include allowing delivery of written notice of claim by any means which provides written, third-party verification of delivery. Previously, the Miller Act called for delivery of notice by registered mail. Third, the new law voids any waiver of right to sue on the payment bond unless the waiver is in writing, signed by the waiving party and executed after the party has furnished covered labor or materials.

B. ~~Recent Case Decisions~~

In addition to statutory changes to the Miller Act, there have been a number of recent cases that have addressed some significant open issues under the Miller Act.

1. ~~Timely Notice~~

One area of the Miller Act that has remained the subject of some debate is what constitutes timely notice. Under the Act, a subcontractor, materialman or supplier who claims under the payment bond but does not have a contractual relationship with the prime contractor must give written notice to the prime contractor within ninety (90) days from the date on which the subcontractor, materialman or supplier last performed work or provided materials for the project. A question that repeatedly arises is whether mailing the notice of claim within the ninety-day period fulfills the statutory requirement or whether the general contractor must receive the notice of claim within the ninety-day period. The issue of receipt versus mailing was recently addressed in ~~United States ex rel. B&R, Inc. v. Donald Lane Construction~~, 19 F.Supp.2d 217 (D.Del. 1998), where the court held that notice must be received within the ninety day period. This decision adopts the holding in ~~Pepper Burns Insulation, Inc. v. Arco Corp.~~, 970 F.2d 1340 (4th Cir. 1992), and is contrary to a number of earlier cases in other courts which had held that mailing of the notice was sufficient.

Miller Act notice issues also often arise on open account cases. In the case of an open account, the issue is whether notice begins to run on the date of the last delivery to the project or from the date each order is delivered. In ~~United States ex rel. Water Works Supply Corp. v. George Hyman Construction, Co.~~, 131 F.3d 28 (1st Cir. 1997), the First Circuit addressed the open account notice issue, holding that the Miller Act notice period on an open account begins to run on the date of the last delivery to the project rather than upon the delivery of each individual order.

2. ~~Proper Venue~~

Another recent Miller Act case involves the location of proper venue for payment bond actions under the Act. Addressing a prime contractor's attempt to enforce a contract clause limiting venue for all disputes arising under its subcontract to a specific county in Texas, the Western District of Louisiana refused to enforce the provision, holding that it was against public policy and void as a matter of law since the Miller Act provides exclusive, non-waivable venue in federal court for the district where the project is located. ~~United States ex rel. Cal's A/C v. Famous Const. Corp.~~, 982 F.Supp. 1219 (W.D.La. 1997).

3. ~~Recoverable Damages~~

Finally, two cases have recently addressed whether certain types of damages (i.e., lost profits and "savings" under a subcontract savings clause) are recoverable under the Miller Act. In ~~Consolidated Electrical & Mechanicals, Inc. v. Biggs General Contracting Inc.~~, 167 F.3d 432 (8th Cir. 1999), an electrical subcontractor sought to recover lost

profits as a result of delays and inefficiencies caused, in part, by the prime contractor. The Eighth Circuit held that lost profits are not out-of-pocket expenditures for "labor and material" and consequently are not recoverable under the Miller Act.

C. Conclusion

The courts have broadly interpreted the Miller Act provisions so as to protect subcontractors and suppliers on federal construction projects. The new law and recent case decisions cited above continue that philosophy of protecting federal construction project subcontractors, suppliers and materialmen.

If you have any questions, please call Mr. Sissman at (703) 903-9646 in Virginia.