

CONTRACTOR ALERT

Contractor Alert is a joint publication by this Contractor and the Law Offices of Richard M. Sissman, Esquire, located at 1485 Chain Bridge Road, Suite 105, McLean, VA 22101. This newsletter is designed to give general information on the matters covered. Space limitation prevents exhaustive treatment or analysis of this topic. This newsletter is not intended to substitute for advice on specific legal problems. If you are interested in receiving a complimentary issue or to be placed on our mailing list, contact Richard M. Sissman, Esquire. We welcome and appreciate your suggestions for future article topics.

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MARYLAND'S LITTLE MILLER ACT TIER STRUCTURE

As a subcontractor or materialman upon a Maryland Little Miller Act (LMA) project, do you know what tier is covered? Is a materialman to a materialman covered under a payment bond under the LMA? Is a materialman to a first or second tier subcontractor covered under the bond?

When the Maryland legislature patterned the LMA, it was done so in accordance with the federal Miller Act; it intended to import federal judicial interpretation restricting class of persons who may claim under statute to persons who contract directly with contractor, subcontractor, or sub-subcontractor.

For purposes of the LMA a "subcontractor" is one who performs for and takes from the prime contractor specific part of labor or material requirements of original contract, and "sub-subcontractor" is one who performs for and takes from subcontractor specific part of labor or material requirements of subcontract

The portion of the LMA which provides "that any person having direct contractual relationship with subcontractor of contractor, or with any sub-subcontractor of contractor but no contractual relationship expressed or implied with contractor shall have right of action upon payment bond" is standing requirement that restricts protection of payment bond to those who supply materials or labor to primary contractor, its subcontractor, or its sub-subcontractor; relationship of supplier of labor or materials to mere materialman is too remote to collect under principal contractor's bond.

In the context of the federal Miller Act, the Supreme Court defined "subcontractor" as "one who performs for and takes from the prime contractor a specific part of the labor or material requirements of the original contract." As previously discussed, this definition prevailed in the case law existing at the time the Maryland Legislature patterned the LMA after the federal Act.

To further extend the protection of the LMA to those who supply materials or labor to mere materialman could broaden the reach of the statute *ad infinitum*. For example, suppose that a primary contractor purchases materials for use in a public project from a hardware store and the hardware store later files a petition

for bankruptcy. The broad interpretation of the LMA might allow manufacturers, wholesalers, or other intermediary suppliers to claim under the payment bond if they furnished inventory to the hardware store and if they could trace that inventory to the public project. Further, a common carrier who delivered the materials to the hardware store might be covered. Maryland Courts do not believe the Legislature intended that the LMA should have so broad a sweep.

To summarize, Maryland presumes that the Legislature was cognizant, when it enacted and later revised the LMA of the Supreme Court's interpretation of the Miller Act to protect only persons dealing directly with the primary contractor or its subcontractors. Maryland Courts find no evidence of intent either in Maryland legislative history or in prior Maryland case law to deviate from the federal interpretation of its definition. The term "sub-subcontractor" should be defined consistently with this definition of "subcontractor." For these reasons, in construing the LMA, Maryland Courts will look to the federal Miller Act decisions for guidance.

The relationship of a supplier of labor or materials to a mere materialman is too remote to collect under the principal contractor's bond.

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