

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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BINDING ARBITRATION CLAUSES AND THE RIGHT TO SUE UPON A MILLER ACT BOND

If you are a contractor and have in the body of your contract a binding arbitration clause however you have also posted a required Miller Act Bond upon a Federal Project, what do you do if you are sued in Federal Court upon the Bond; however, you also believe binding arbitration is the cost effective method for your case to be heard. Many construction contracts contain a binding arbitration clause similar to the language below:

All claims, disputes and matters in question arising out of, or relating to, this Agreement thereof, except for claims which have been waived by the making or acceptance of final payment, and the claims described herein shall be decided by arbitration in accordance with the construction industry arbitration rules of the American Arbitration Association then in effect unless the parties mutually agree otherwise. Notwithstanding other provisions in the Agreement, this is an agreement to arbitrate.

Federal case law is replete that there is a policy that is fundamental and powerful that favors arbitrational disputes and narrowly constructs the scope of judicial intervention when there is a binding arbitration clause as set forth in a contract between the parties. Hanes Corp. v. Millard, 531 F.2d 585, 597 (DC Cir. 1976). The arbitration of a dispute should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Any doubt should be resolved in favor of coverage. United Steel Work of American v. Warrior & Gulf Navigation Co., 363 U.S. 574, 582-83 (1960). Additionally, where an arbitration clause in a contract, on its face, covers all disputes involving the interpretation or application of a contract, the Courts have held that "... in the absence of any express provisions excluding a particular grievance from arbitration ..." only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail. Parties to a contract should be held to the terms to which they have agreed. Indeed, arbitration often is of a particular importance especially in construction disputes because it permits experts in the field who are more familiar than the courts to make a tailored decision in the specific industry. See Pearce v. E.E. Hutton Group Inc., 828 F.2d 826, 829 (D.C. Cir. 1987). The 4th Circuit Court of Appeals, has held as a rule of thumb, that parties by contract lawfully may make the decision for arbitration as a condition precedent to a right of action on the contract. Until such a decision has been made, the court has no jurisdiction of the case and therefore cannot be said to be ousted of their jurisdiction. Air-Con, Inc. v. Alcon Development Corporation, 271 F.2d 904, 907 (4th Cir. 1959).

An arbitration clause in conjunction with the Federal Miller Act, the Courts clearly side with the binding arbitration clause upon the Miller Act suit. As set forth in Industrial Engineering & Metal Fabricators, Inc. v. Elevator Corporation, 214 F. Supp. 947 (D.C. Mass. 1963) the Court held that:

It seems clear, and plaintiff appears to agree, that in general the provision of the Federal Arbitration Act (9 USCA §2 et seq.), are applicable to suits under the Miller Act. The language of the Arbitration Act is clearly broad enough to include Miller Act suits within its scope and nothing in the language of the Miller Act itself precludes agreements to arbitrate. In general, parties can agreed to submit to arbitration rights created by statute as well as those arising at common law unless the right is one of a character inappropriate to enforce by arbitration. Miller Act case have been pointed out as typical of those in which arbitration is not only appropriate but useful, Wilko v. Swan, 346 U.S. 427, 432, ... and the courts uniformly appear to have held that the provisions of the Arbitration Act are ordinarily applicable to them. United States for Use and Benefit of Air-Con Inc. v. Alcon Development Corporation, 4th Cir., 271 F.2d 904; ...

Case law supports the proposition that an agreement to arbitrate between a contractor and its subcontractor will be upheld even though Miller Act jurisdiction exists and that a suit brought in federal court under the Act may be stayed pending such arbitration. The Miller Act does not prohibit arbitration before resort to the courts if there was an agreement to arbitrate. Portland Construction Company v Weiss Pollution Control Corp., 532 F.2d 1009, 1011 (5th Cir. 1976).

If you should have any questions on this issue please contact Mr. Sissman at his website at www.contractoralert.com or by phone at (703) 903-9646 or (301) 762-0402.