A Primer on the Miller Act’s Federal Bonding Requirements

If you have ever been involved with a federal construction project—either as a contractor, subcontractor, supplier, or surety—you have probably had to deal with the Miller Act. That’s not surprising. Few pieces of legislation are more ubiquitous when it comes to construction work on federal projects. Passed by Congress in 1935, the Miller Act generally requires general contractors on all federal public works projects to post two surety bonds as a condition of awarding the contract: a performance bond guaranteeing performance of the work and a payment bond guaranteeing payment of subcontractors and suppliers. These surety bonds are commonly referred to as Miller Act bonds, and they pose unique issues and opportunities for participants on federal projects.

Although the burden is on the general contractor on a federal public works project to furnish Miller Act-compliant bonds, the bonds do not protect the general contractor. The bonds are instead for the benefit and protection of the United States government owner and certain subcontractors and suppliers. Subcontractors and suppliers cannot assert a lien against, or otherwise encumber in any way, property owned by the United States. The Miller Act protects eligible subcontractors and suppliers against nonpayment by providing them with an alternative means of recovery should the general contractor fail to make payment on federal projects. Rather than recording a lien, qualifying subcontractors and suppliers may bring a civil action on the payment bond for any unpaid amount. The United States also benefits from the Miller Act. If the general contractor defaults in the performance of its work or is terminated for cause, the United States may turn to the surety to step in and take over the general contractor’s obligations under the prime contract. Last but not least are the sureties who provide Miller Act bonds and benefit from the large market for surety bonds created by the Miller Act.

The Miller Act in a Nutshell

The Miller Act, 40 U.S.C. §§ 3131–3134, provides that, before any contract for the construction, alteration, or repair of any public building or public work of the United States of more than $150,000 (increased from $100,000 in 2010 to keep up with inflation) is awarded to any person, that person (usually the general contractor) must furnish:

(1) A performance bond in an amount the contracting officer considers adequate for the protection of the United States; and

(2) A payment bond for the protection of subcontractors and suppliers. The penal sum of the payment bond is equal to the total amount of the contract unless the contracting officer determines that amount is impractical, in which case the contracting officer may set the amount not less than the amount of the performance bond.

The Act also delineates who can recover against the payment bond. Miller Act payment bonds cover subcontractors and suppliers who have direct contracts with the general contractor (first-tier claimants) and subcontractors and suppliers who have contracts with a first-tier subcontractor.
Lower-tier subcontractors and suppliers are not protected. Lastly, the Miller Act establishes pre-suit written notice requirements for second-tier claimants (first-tier claimants are excused because of their direct contractual relationships with the general contractor), the proper venue for bringing civil actions on the payment bond, and a one-year deadline for bringing the action after the claimant performs its work.

Absent from the Miller Act are any forms for the required bonds. There are, however, standard bond forms in Chapter 48 of the Code of Federal Regulations which are commonly used and often required. They are Federal Standard Form 25 Performance Bond, 48 C.F.R. § 53.301–25, and Form 25–A Payment Bond, 48 C.F.R. § 53.301–25–A. The Miller Act does not mandate the use of these forms so long as the bonds meet the requirements laid out in the Act. Because the Miller Act is remedial in nature—and often the only viable recourse available to unpaid subcontractors and suppliers—courts interpret its provisions liberally in order to properly effectuate congressional intent to protect those whose labor and materials go into public projects. This means that, as a practical matter, courts will uphold bonds as Miller Act bonds when possible, even when they deviate from the CFR’s standard bond forms.

Mandatory Claim Pass-Through Provisions and the Miller Act

A claimant’s right to recover on a Miller Act bond is independent of—and in addition to—the claimant’s contractual rights, and the two should be treated separately. One way this comes into play is when a subcontract contains a mandatory claim “pass-through” provision for bringing claims against the government. Pass-through claims are claims made by a subcontractor against the government (with whom it has no contract) presented by the contractor who has a contract with both the government and subcontractor. The contractor acts as a conduit for the subcontractor’s claim against the government and shields itself from liability by limiting the subcontractor’s recovery to the amounts actually paid by the government. It can take time for a subcontractor to submit a claim to the contractor, for the contractor to pass the claim to the government, and for the government to determine whether it will pay the claim. While this process is ongoing, the clock keeps ticking toward the subcontractor’s one-year deadline for filing its Miller Act bond claim. A mandatory pass-through provision—or any other contractual provision—will not toll or extend the filing deadline. Bringing suit beyond the filing deadline is an absolute bar to recovery. To be safe, prudent claimants will file a Miller Act suit before the deadline expires and stay the suit pending resolution of its pass-through claim. This leaves the bond open as an alternate source of recovery if the subcontractor does not fully recover on its pass-through claim.

The Miller Act’s Contingent Payment Clause Run-Around

Classifying a bond as a Miller Act bond is important because the Miller Act presents unique risks for principals and sureties on bonded federal public works projects. One feature that differentiates Miller Act bonds from other surety bonds is that the liability of the surety is not always congruent with that of its principal. This apparent oddity occurs when a claimant with a contingent payment clause in its contract—usually an unpaid subcontractor—makes a Miller Act bond claim.

A basic precept of surety law is that, when a claim is made against a
surety bond, the surety “stands in the shoes of its principal” because the surety’s liability is coextensive with that of its principal. If the principal is not liable to the claimant, the surety has no obligation to perform under the bond. It is to the surety’s benefit, therefore, to raise any contractual defenses available to its principal to avoid liability. One such defense often raised by general contractors is the “contingent payment” defense, also known as “pay if paid.” These clauses condition payment to subcontractors upon receipt of payment from the owner. Payment by the owner to the general contractor is a condition precedent to the general contractor’s obligation to pay the subcontractor.

Some states permit a surety to raise a conditional payment clause as a defense to a state statutory payment bond claim, but federal courts routinely reject the defense in the context of Miller Act claims. They hold that the liability of a surety and its principal on a Miller Act payment bond is coextensive with the contractual liability of the principal, but only to the extent that it is consistent with the rights and obligations created under the Miller Act. By its express terms, the Miller Act conditions a claimant’s recovery on the passage of time from completion of work or provision of materials rather than on payment by the owner. Under the Miller Act, subcontractors and suppliers who have not been paid in full “within 90 days after the day on which the person did or performed the last of the labor or furnished or supplied the material for which the claim is made” have the right to sue on the payment bond. It is possible, therefore, for a Miller Act surety to be liable to a subcontractor on a Miller Act payment bond even though the bonded principal owes nothing to that subcontractor.

Summary

Miller Act bonds are important risk shifting instruments that have important consequences for participants on federal public works projects. Although similar in some ways to the bonds used on private and state projects, there are important differences that separate Miller Act bonds from the pack. Contractors, subcontractors, suppliers, and sureties need to understand how the Miller Act works to insulate the United States from contractor nonperformance and subcontractors and suppliers from contractor nonpayment because they all have a potential stake in the outcome of a Miller Act claim.