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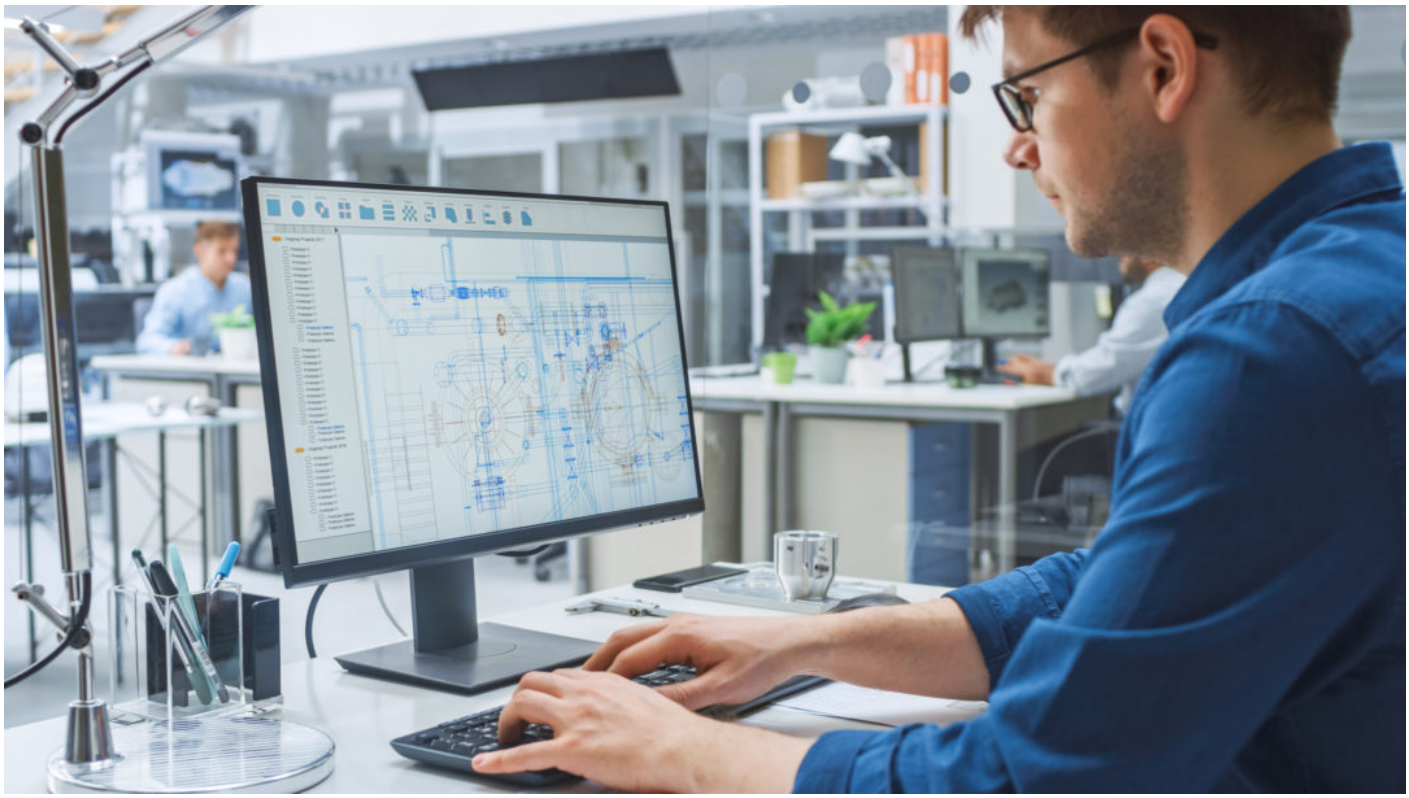

The Miller Act Matters to Design Professionals

Although design work itself is not protected, construction administration services provided by the architect or engineer are protected.

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Contractors and design professionals who work on projects for the federal government must contend with a complex web of federal statutes and regulations. In this column, we take a close look at one such statute — the Miller Act — as well as the Federal Acquisition Regulations promulgated thereunder jointly by the Department of Defense, the General Services Administration and the National Aeronautics and Space Administration (NASA).

More specifically, we look at all this material from the vantage point of a design professional, which is admittedly uncommon in the world of federal contracting.

Background

The Miller Act requires prime contractors to post payment bonds for federal contracts valued at more than $100,000.
See
U.S.C. § 3131
et seq.
Payment bonds are a form of collateral used to ensure that contractors pay subcontractors for the work that the latter performs on a project. The scope of a payment bond is typically defined in the parties' contract, relevant statutes or both.

Many state legislatures passed replicas of the Miller Act (for state public works projects), which are commonly known as "Little Miller Acts."

See, e.g.
, Ala. Code. §§ 39-1-1
et seq.
(Alabama); Cal. Civ. Code §§ 9550
et seq.
(California); Conn. General Stat. §§ 49-41
et seq.
(Connecticut); Fla. Stat. § 255.05 (Florida); O.C.G.A. §§ 13-10-1
et seq.
(Georgia); 30 ILCS 550/1
et seq.
(Illinois); Iowa Code. § 573.2 (Iowa); M.G.L. c. 149, § 29 (Massachusetts); N.J.S.A. 2A:44-143 et seq. (New Jersey); New York State Finance Law § 137
et seq.
(New York); 8 P.S. §§ 191
et seq.
(Pennsylvania); and Tex. Gov't Code §§ 2253
et seq.
(Texas).

Litigation often arises because subcontractors and the sureties that issue the payment bonds dispute the scope of coverage. The Miller Act, for example, requires a payment bond for the protection of "all persons supplying labor and material in carrying out the work provided for in the contract for the use of each person." 40 U.S.C. § 3131(b)(2).

While this seems relatively straightforward, the issue of what constitutes "labor" and "material" is more complicated than it sounds.
See, e.g., U.S. ex rel. Cobb-Strecker-Dunphy & Zimmerman, Inc. v. M.A. Mortenson Co., 894 F.2d 311, 313
(8th Cir. 1990) (deciding whether furnishing workers compensation qualifies as labor or material).

Purpose of a Payment Bond

The scope of the payment bond is critical for subcontractors. While they typically have mechanic's lien rights for private projects under state law, public works projects for the federal government are a horse of a different feather. Subcontractors do not have mechanic's lien rights for federal projects. Instead, they are left to rely on payment bonds to ensure they get paid for their labor and material.

Since the subcontractor is a beneficiary under the payment bond, if the subcontractor is owed money, it may make the appropriate bond claim with the surety (in accordance with the applicable statutes and terms of the bond). If the surety fails to pay on a bond claim that the subcontractor feels is justified, then the subcontractor may sue not only the contractor, but the surety as well.

Although the Miller Act protects subcontractors who work on federal projects, the outlook for design professionals, such as architects and engineers, is foggy at best. Unfortunately for design professionals, federal courts interpreted the Miller Act to exclude their professional services as work protected by the bond.

All is not lost for architects and engineers, however.

Limited Protection for Design Professionals

Although
design
work itself is not protected by the Miller Act,
construction administration
services provided by the architect or engineer are protected.

See U.S. ex rel. Naberhaus-Burke, Inc. v. Butt & Head, Inc.
, 535 F. Supp. 1155, 1158 (S.D. Ohio 1982) (interpreting "labor" to require "physical toil, not work by a professional, such as an architect or engineer" except if the architect or engineer "actually superintends the work as it is done on the job site").

See also
U.S. ex rel. Barber-Colman Co. v. U.S. Fidelity & Guar. Co.,
19 F.3d 1431, 1994 WL 108502, at *4 (4th Cir. 1994) (agreeing with
Butt & Head
Court that only on-site professional services qualify as labor under the Miller Act);
accord Prime Mech. Serv., Inc. v. Fed. Solutions Group, Inc.,
No. 18-cv-03307, 2018 WL 6199930, at *3 (N.D. Cal. Nov. 28, 2018).

The seminal
Butt & Head
case was originally decided by a federal magistrate, who provided the following background in their report:

"The following facts are set forth in the pleadings and are undisputed: The United States of America entered into a written contract with Defendant Butt & Head, Inc. (hereinafter Butt & Head), the prime contractor, to furnish all labor and materials to perform all work required for Wright

Patterson Air Force Base, Dayton, Ohio. Butt & Head, in turn, subcontracted with J&D Erection, Inc. (hereinafter J&D) to perform certain obligations of the prime contractor.

“J&D then subcontracted with Plaintiff NA [Engineering Company (“NA”)] to furnish calculations and certain specified shop drawings for the project. In order to protect the subcontractor's labor and materials invested, Butt & Head furnished a payment bond, pursuant to [the Miller Act] naming Defendant Federal Insurance Company as surety (hereinafter Federal).

“Upon completion of Plaintiff's contractual duties, Plaintiff demanded payment from J&D for the outstanding balance of $22,140.00 due on the contract. Such payment was not made. Plaintiff then demanded payment from Federal.”

Butt & Head
, 535 F. Supp. at 1157

NA eventually brought suit against the surety under the Miller Act. The surety moved for summary judgment. Analyzing the applicable case law, the magistrate concluded: “Plaintiff must have provided services in the nature of supervision or inspection to satisfy the ‘labor in prosecution of the work’ provision of the Miller Act, 40 U.S.C. § 270b.”
Id.
at 1158.

The magistrate recommended that the surety’s motion be denied, finding that there were genuine issues of material fact regarding the precise nature of the work performed by NA on the project. The federal district court agreed with the magistrate and remanded the matter for trial. While
Butt & Head
was decided in 1982, it remains good law to this day — nearly 40 years later.

Details Matter for Bond Claims

While the scope of coverage under a payment bond is an extremely important issue to the design professional with a claim, it is not the only issue. Any party that makes a claim under a payment bond must follow the requirements of the Miller Act (for federal projects) as well as any requirements set forth in the bond itself.

In
U.S. ex rel. Thayer v. Metro Constr. Corp.,
330 F. Supp. 386 (E.D. Va. 1971), the plaintiff made a claim under the payment bond in an effort to collect monies that were not paid by the now-bankrupt contractor. While this is a frequent occurrence, the twist in
Thayer
was that the plaintiff was an engineering firm.

Specifically, Thayer drafted plans to construct a water tower, but had no supervisory role on the project. Unfortunately for Thayer, it took too long to file a claim under the Miller Act and the contractor was on the brink of bankruptcy. In an effort to “bootstrap” its claim, Thayer sent engineers to

the project site to perform final inspections not required by its contract. Thayer had hoped to reignite the time allotted by the Miller Act to file a claim against the payment bond.

The federal district court rejected Thayer's belated effort and rejected its claim as untimely. Although engineers and architects are generally not beneficiaries under a payment bond for their professional design services (as set forth in
Butt & Head
), the court never addressed this fundamental principle. Instead, it denied Thayer's claim on other grounds.

The court found that Thayer's final inspection was a thinly veiled attempt to circumvent the contractor's bankruptcy since Thayer did not have a contractual obligation to perform the inspection. In the eyes of the court, Thayer's extra-contractual conduct did nothing to transform Thayer into a beneficiary under the payment bond.

Although design professionals such as architects and engineersenjoy limited rights under a payment bond for federal projects (i.e., for construction administration, not design services), they still need to pay attention to the court's holding in
Thayer
.

The case is significant for two reasons. First, it highlights how important it is for a claimant to understand the mechanics and details of a payment bond claim under the Miller Act. The claimant needs to understand both the statutory and contractual requirements (set forth in the bond itself) to make a claim. Otherwise, the claimant jeopardizes its ability to make an enforceable claim under the bond.

As demonstrated by
Thayer
, courts will not recognize technically correct, but substantively suspect attempts by a prospective claimant to seek relief under a payment bond.

Second,
Thayer
reminds us what can happen in the unfortunate situation when a bankrupt contractor fails to pay its subcontractors. This scenario, while unpleasant, is hardly uncommon. In such a case, not only does the engineer go unpaid, but it incurs attorneys' fees and litigation costs in a vain attempt to collect against a bankrupt entity.

Contractors, as well as engineers and architects, on federal projects should learn from
Thayer
. They all must think very carefully about the risk attendant to prospective projects subject to the Miller Act (or Little Miller Act, in the case of state projects).

While large-scale, federal projects, often with glitz and glamour, may seem appealing, such projects may not be worth the risk of being unpaid by an insolvent contractor — especially if a claim is not filed properly under the terms of the bond and Miller Act.