
SUBCONTRACTORS' REMEDIES UNDER THE MILLER ACT

Should I File in State or Federal Court?

INTRODUCTION

As explained in a [previous post](#), Subcontractors and Sub-subcontractors on federal government construction projects can recover payments due to them under the Miller Act. In pursuing recovery, several important questions need to be answered: How do I pursue payment? Should I file in state court or federal court? Can state laws prevent recovery on my Miller Act claim?

We answer these questions below, including a recent court case that “answers the question” of whether state or federal law governs the claim.

THE MILLER ACT

The Miller Act¹ provides a guarantee of payment for first-tier and second-tier subcontractors on federally owned contracts of more than \$100,000. Under the Miller Act, a general contractor must furnish a payment bond to the government, in the amount of the contract price, “for the protection of all persons supplying labor and material in carrying out the work provided for in the contract.”² This rule allows first and second-tier subcontractors and suppliers to receive payment from the payment bond in the event the first-tier or second-tier Subcontractor does not receive full payment from the Prime Contractor.

The Supreme Court has specified that the Miller Act allows for recovery for subcontractors and suppliers who contracted with the prime contractor (first-tier), as well as subcontractors and suppliers who contracted with a first-tier subcontractor (second-tier).³ (note that that the Miller Act does not cover second-tier subs who contracted with a first-tier supplier).

MILLER ACT TRUMPS STATE LAW

Because the Miller Act is a federal statute, causes of action for payment recovery under the Act must be brought in federal court.

¹ 40 U.S.C. §§ 3131-3134.

² *Id.*

³ See *Clifford F. MacEvoy Co. v. United States ex rel. Tomkins Co.*, 322 U.S. 102 (1944).

A recent case out of California addressed the question of whether a state law can preclude recovery under a Miller Act claim. In *Technica LLC v. Carolina Casualty Ins. Co.*,⁴ the general contractor furnished a payment bond, as required by the Miller Act, on a federal construction project in California. The general contractor subcontracted part of its work under the contract, and the Subcontractor then sub-subcontracted part of its work. When the general contractor terminated the subcontract, the Sub-subcontractor had been paid only \$288,000 of the \$893,000 that it provided in labor, materials and services on the project.

The Sub-subcontractor *then* commenced an action in federal court against the payment bond, seeking recovery under the Miller Act of the unpaid amounts it was owed. The district court dismissed the action based on a California state law that precludes any contractor from bringing a court action for payment for services *if the contractor does not have a California contractor's license*.

The Sub-subcontractor appealed the decision, and the circuit court **reversed**, finding that the California licensing law did not preclude entitlement of payment on the bond.

The circuit court further held that **federal law governs** claims under the Miller Act (a federal statute), which was intended to “protect persons supplying labor and material for the construction of *federal* public buildings.” *Accordingly, the rights and remedies created by the Miller Act are a matter of federal law, not state law, and federal law will govern such claims.*

The court further explained that state law only applies to Miller Act claims with respect to the substantive law of contracts (and therefore cannot override a federal statute provision).

Notably, other courts have held likewise. For example, the Supreme Court has held that state laws cannot provide for award of attorneys' fees where no provision exists in the Miller Act. Another court held that failure to file an affidavit with the county clerk pursuant to state law could not preclude recovery of payment under the Miller Act. Citing these examples, the court in *Technica* noted that many subcontractors bid on jobs throughout the country, and that requiring them to comply with licensing requirements in every state would be contrary to the purpose of the Miller Act.

CONCLUSION

The Miller Act provides a mode of recovery for subcontractors, where they otherwise would not have one.

While the Act requires a payment bond, Subcontractors should pay special attention to ensure that the prime contractor actually posted/issued a bond for their particular contract before

⁴ 749 F.3d 1149 (9th Cir. 2014).

contracting with the prime. Many subcontractors have learned the hard way that, failure to do so can lead to disastrous consequences.

The professional consultants at Excell Consulting International, Inc. can help you gain a better understanding of how the Miller Act works and help you understand what remedies may be available. When you partner with Excell Consulting, our consultants will conduct a specialized review of your particular situation and develop recommendations to guide you in making a business judgment towards potential recovery of funds.

In the end, you will be glad you made the call; by the way, it's a FREE CALL.

EXCELL CONSULTING: “HERE TODAY FOR YOUR TOMORROW.”

Author's note: The information contained in this article is for general informational purposes only. This information does not constitute legal advice, is not intended to constitute legal advice, nor should it be relied upon as legal advice for your specific factual pattern or situation. – Taylor Benson, Esq., Asst General Counsel