

Commercial Counsel

THE CONTRACTORS' FRIEND (THE FEDERAL MILLER ACT)

While you can't lien a federal construction job, you can still recover your payment on a bond claim. If you furnish labor or materials for a construction project owned by the federal government, federal law prevents you from filing a mechanics' lien against the jobsite property. However, generally speaking, most federal construction projects must be covered by a payment bond furnished by the prime contractor, and you may instead be able to assert a claim against that payment bond.

The Federal Miller Act governs claims against payment bonds issued in connection with federal construction projects. A payment bond is issued by a surety company, which undertakes to pay the claims of qualifying parties who furnish labor or materials to the federal construction job, subject to the provisions of the Miller Act, and the terms and conditions of the payment bond itself.

Under the Miller Act, there are two classes of claimants who are eligible to assert a claim against the payment bond: (1) those who furnish labor or materials to the prime contractor for the project, and (2) those who furnish labor or materials to a first-tier subcontractor for the project (that is, to a subcontractor who has a contract with the prime contractor). A party who furnishes labor or materials to a second-tier or lower subcontractor is *not* eligible to assert a claim against the payment bond. Neither is a party who furnishes materials to another material supplier.

If your contract is directly with the prime contractor, you are not required to furnish any written notices that you are asserting a claim against the payment bond. **You need only file suit to enforce your payment bond claim within one year of the last date that you furnished labor or materials** for the job for which a balance remains due. In practice, however, it is generally advisable to obtain a copy of the payment bond and give written notice of nonpayment and written notice of your payment bond claim to the owner, the prime contractor, and the surety company well before the one-year suit deadline. This may get you paid without the need to file suit to enforce your bond claim.

However, if your contract is with a first-tier subcontractor, then there are further requirements, in addition to filing suit within one year. In this circumstance you must also furnish (1) a written notice of nonpayment and (2) a written notice of your payment bond claim to the prime contractor within 90 days of the last date that you furnished labor or

General Discussion Relating to Business Legal Issues

The information contained herein is not provided as legal advice. Legal advice should be sought as to any factual and legal issue.

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materials to the job for which a balance remains due. This notice must be actually received by the prime contractor by this deadline, not just mailed by the deadline. The notices must be sent by registered mail with a return receipt requested. Although not required by the Federal Miller Act, the notice should also be furnished within the same time frame to the owner, the surety company, and the claimant's customer on the job (the first-tier subcontractor).

In some cases, it is difficult to determine the last date a claimant furnished labor or materials for the federal construction job. The court cases decided under the Federal Miller Act, however, do provide some guidance on the issue. For example, the courts have made it clear that the 90-day notice deadline and the one-year suit filing deadline begin to run when the last of the services were furnished or the last of the materials were provided as part of the original contract, and these deadlines do not restart if you subsequently furnish labor or materials to correct defects or make repairs on items previously furnished for the federal job. These deadlines also do not restart if you furnish punch list or warranty work or materials for the job.

The Miller Act requires that a lawsuit to enforce a payment bond claim must be brought in the federal district court for the district in which the job was located.

Not all federal jobs are bonded. The general requirement is that federal jobs in excess of \$100,000 are to be bonded. However, the Miller Act specifically exempts certain jobs, including, for example, certain Army, Navy, Air Force and transportation jobs. Thus, it is crucial for potential bond claimants to find out whether any federal job that they are subcontracting for is (a) covered by a payment bond, and (b) that they would qualify as a party able to claim against the bond.

There are many complex and technical issues that can arise under the Federal Miller Act. **Anyone contemplating reliance on such a bond, or estimating the risk posed by entering into a contract as a subcontractor on a federal job is strongly advised to consult with an attorney with a record of enforcing such claims before committing.** The key is to find out at the inception of the job if the prime contractor furnished a payment bond for the job and whether you can claim against it. The Miller Act gives eligible bond claimants a statutory right to a copy of the bond. Then, the key is to ensure that you are positioned such that you have available the information and documentation necessary to timely satisfy applicable notice and suit filing deadlines, which trip up many who would otherwise have been able to claim. Taking these steps from the outset will

significantly enhance your prospects for getting paid on the federal job.

If you want to enhance your protection and ability to recover against a distressed constructor, a Miller Act claim is an excellent remedy. If you seek help, or wish more information on construction liens and bonds to secure your business, call Dave Henry of our office at 414.962.5110, dhenry@kmksc.com.

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John Bandsma, Chief Financial Officer, Volm Companies Inc.

MAKE A DIFFICULT TASK EASIER

(PARTING WAYS WITH KNOWLEDGEABLE PERSONNEL)

The imminent departure of employees or consultants familiar with confidential information often prompts a company to reassess its defenses against the exposure of such information to those outside the company. In fact, employers may have more exposure than they realize.

Most companies utilize written employment agreements to secure confidentiality obligations. Typically, confidentiality clauses in such contracts have long lists of categories of information to be considered confidential, such as: "Trade secrets" (a term with a specific statutory definition), business strategies, projections, processes, methods, customer information, financial and pricing information, etc., with the intent of minimizing the risk that valuable information is unprotected. Realizing that courts rigorously scrutinize the terms of non-compete clauses, employers also typically want "confidential information" clauses to run longer than a non-compete, on the grounds that information retains value longer than the time that the business can legitimately stop competitive activity. **Unfortunately, in practice, a "kitchen sink" approach may preclude protection altogether.**

In recent years, courts have strictly limited agreements with the intended effect of preventing employees who leave from utilizing experience in related areas of business activity. Overbroad confidentiality clauses can have the unintended effect of preventing the former employee from using his experience legitimately, by operating as a

disguised non-compete clause. Courts base decisions as to enforceability on the actual effect, not the stated purpose, of contractual wording, **and a clause that imposes unreasonable bars on competition, regardless of its title, is likely to be struck down.** If the unreasonable clause is that which protects confidentiality, all such protection will fall.

Negotiation of separation agreements can be effective. However, positioning may not be ideal and there may be thinly-veiled tension between the employer's need to protect commercially valuable information, and the employee's desire for terms clearly setting out what she may do.

One practical solution is to adopt an objective definition for what will be considered "confidential" under the agreement, rather than listing types of information. In essence, this approach defines confidential information not by its nature, but by its potential to cause identifiable harm were it to fall into the possession of a competitor.

This tactic effectively removes a number of problems. By focusing on attributes of information to be covered, it has the advantage of deferring decisions on whether or not a particular item of information is confidential or has commercial value until they crystallize. It also helps avoid disputes, by providing the former employee with a benchmark against which he—or a future employer—can evaluate whether actions are permitted. **If a dispute arises, the definition lends itself to a straightforward determination as to whether or not the information was not generally known, and if disclosure harmed the company.**

This approach reflects the requirements of the business, by promoting awareness of both the needs of the company and the role of the departing employee. **A well-framed definition is likely to avoid enforcement problems, is adaptable to the changing significance of information over time, and saves time in negotiating the agreement.** In addition, company and employee benefit from a better understanding of the parties' rights and ability to act.

If you have questions as to whether your confidential business information is adequately protected against the departure of key personnel, call William "Bill" Fischer at 414.962.5110, wfischer@kmksc.com.

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