



# Collecting Debts On Government Work

by Jeffrey G. Gilmore & Karen E. Harrison

We have previously discussed mechanic's-lien remedies available to subcontractors and suppliers on private construction projects. These are statutory remedies available under state law that allow claimants a security interest in the property that has benefited from their work and materials. Mechanic's liens cannot, however, attach to real estate that is owned by either the federal government or many state governments.

To address this problem, Congress enacted the Miller Act in 1935. The Act requires that prime contractors for federal construction projects that exceed \$25,000 in value furnish the government with a performance and payment bond. The payment bond must be executed by a surety company. Subcontractors and suppliers have a right to sue on the bond if they are not paid. Many states have enacted similar statutes. Modeled after the federal act, these statutes are generally known as "Little Miller Acts."

The Act requires the comptroller general to provide a copy of the bond to anyone who supplies labor or material to the project—and so certifies in writing. In most cases, a copy of the bond can be secured from the project manager. The bond itself is a two-page document that clearly identifies the principle, surety, and project.

## Claimants Covered

The Act protects only those who have a contract with the prime contractor or a direct contractual relationship with a subcontractor. Third-tier subcontractors, and others who have a more remote relationship with the prime contractor and its subcontractors, are not covered. Similarly, second-tier subcontractors or suppliers who have a contract with a first-tier "materialman," as distinguished from a "subcontractor," are not covered.

A frequent problem area involves material suppliers. A supplier to the prime contractor is covered, as is a *supplier* who furnishes material to a subcontractor. However, a supplier to a supplier is considered too remote, and is thus precluded from asserting a claim against a Miller Act bond.

Claimants must wait 90 days from the date of the last furnished labor or material before they assert claims. If the suit is begun before 90 days elapse, the action is premature and subject to dismissal.

## Written Notice

Claimants who only have a contract with a subcontractor can recover on the bond only if they furnish the prime contractor with written notice by registered mail within 90 days from the date they last furnished labor and materials. This protects the general contractor against the claims of unpaid second-tier subcontractors and suppliers by withholding payment for 90 days.

Once 90 days elapse without notice, the prime contractor is free to pay the subcontractors without risk of liability to suppliers. No written notice is required of a first-tier subcontractor.

## Limitation Periods

Claimants must file suit on the bond within one year from the date they last furnished labor and materials for the project. This applies to all claimants.

Both the 90-days written notice and the one-year time limit begin to run on the date on which the claimant performed the last labor and supplied the last material. The courts have uniformly held that—under the Miller Act—corrective or remedial work does not determine the last day on which labor and materials were furnished. The applicable legal test is whether the work was performed as "part of the original contract" or for the "purpose of correcting defects or making repairs following inspection of the project."

The following is sample language that could be incorporated into a second-tier claimant's notice:

To the prime contractor:  
In accordance with the

provisions of the Miller Act, 40 U.S.C. §270b, and the terms of the payment bond furnished by you for the above-referenced project, notice is hereby given of our claim against the payment bond for [state total dollar amount of claim with substantial accuracy]. This amount is due and owing to the undersigned for labor and/or materials furnished to [insert name of the party to whom the labor and/or materials were furnished]. Sincerely,  
In many respects, the remedy afforded by the Miller Act is more efficient and less cumbersome than mechanic's-lien litigation in most states. In pursuing this, pay careful attention to the deadlines for providing notices and filing suit. Failure to meet any of the requirements established by the Act will be fatal to your claim. ■

*Jeffrey G. Gilmore and Karen E. Harrison are lawyers with the firm of Wickwire, Gavin & Gibbs of Vienna, Va., specializing in construction and public-contract law. Questions may be sent to the authors c/o The Legal Column, New England Builder, P.O. Box 5059, Burlington, VT 05402.*