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Reminder: Second Tier Subcontractors Have Miller Act Claim

Here at Construction Law Musings, we often discuss the Federal Miller Act and its Virginia equivalent (the "Little Miller Act"). These two statutes provide subcontractors on government projects (on which no mechanic's lien can attach) the protection of payment and performance bonds.

One question that often arises in this context is *which subs can claim against the payment bond.* Recently, the Eastern District of Virginia District Court affirmed that a second tier subcontractor has the right to claim against a payment bond under the Federal Miller Act. In U.S. ex rel IGW Electric LLC v. Scarborough, the Virginia federal court considered the claim of an electrical "sub-subcontractor" which held a contract with the subcontractor to build cottages in Norfolk, Virginia for the U. S. Navy.

After some discussion of certain procedural issues unique to the "Rocket Docket," the Court went on to discuss the Motion to Dismiss filed by the surety claiming that the Complaint did not state a cause of action under the Miller Act because the sub-subcontractor did not provide the required notice of claim within the 90-day window set forth in the statute. The Court denied the Motion to Dismiss. Interestingly, the Court held that the Complaint, which alleged that a notice of the debt owed *that had not been provided directly to the Prime Contractor by the sub-subcontractor* but provided through the subcontractor was adequate (at least at the pleading stage) to avoid early dismissal.

In coming to this conclusion, the Court cited two opinions, one which found that provision of the notice to the party with authority over the sub-subcontractor (like in this case) and which was provided to the Prime within the 90 days is enough, and another that required direct notice to the Prime. Because of these multiple interpretations of the notice requirement, the Court refused to dismiss the claim at the pleadings stage. What may happen later is anyone's guess and I recommend that you read the entire opinion for the entirety of the Court's reasoning.

Of course, given the multiple ways this seemingly simple notice requirement can be read, you need to talk with an experienced construction attorney prior to making a decision about either the pursuit or defense of a Miller Act claim.

What do you think about this case? Am I reading too much into it? Too little? Should the Court have dismissed because notice was not provided directly to the Prime? Let me know your thoughts.

Image via Wikipedia.

Please check out my Construction Law Musings Blog for more on Virginia construction law and other topics.