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An Essential Brick and Its Chip: A Refresher on Payment Bond Claims Under the Miller Act and the 'Little Miller Act'

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Introduction

One of the first things an aspiring construction attorney typically encounters is the availability of the lien right, its value as a tool, and the details that must be mastered to assert it or defend against it. The next thing the aspiring construction attorney typically learns is that the lien right is of no (or little) use on a public construction project (i.e., a construction project involving federal or state property). For securing a recovery on a public construction project, the unpaid subcontractor must rely on the federal Miller Act (for federal construction projects) or the North Carolina "Little Miller Act" (for State of North Carolina construction projects).

The Miller Act

Generally. What is commonly known as the Miller Act is codified at 40 U.S.C. §§ 3131-3134. The Miller Act requires a genera contractor contracting with the federal government or a federal governmental entity for a construction project with a general or prime contract in excess of $100,000 to obtain both a performance bond and a payment bond from a surety acceptable to the officer awarding the contract. This article focuses on the payment bond requirements of the Miller Act and Little Miller Act and, thus, the performance bond provisions of those Acts are not addressed in detail.

As a matter of terminology, the general contractor obtaining the payment bond is referred to as the "principal," the surety issuing the payment bond is referred to as the "surety," and the owner is referred to as the "obligor." Subcontractor and materialman claimants against the payment bond are typically referred to as "claimants," but could also be considered and are sometimes referred to as "obligees."

The primary public policy purpose of the Miller Act payment bond is to replace the security provided by the lien right that would otherwise be available on a non-public or non-government construction project - the payment bond effectively stands in place of the real property for purposes of security. See, e.g., Robinson Mfg. Co. v. Blaylock, 192 N.C. 407, 412, 135 S.E.136, 138 (1926) (stating that the prior version of the Little Miller Act was "passed as a substitute for the lien statutes in an effort to place public construction somewhat on a parity with private work of a similar kind"). As in a lien case, the claimant must still establish that it is owed the money it is seeking to recover in order to establish the right to recover against the payment bond. Put simply, the claimant must not only perfect the claim against the payment bond, but also establish that it has improved the project consistent with the prime contract and not been paid for its work performed or materials furnished.

The payment bond must be in an amount such that the officer awarding the contract is satisfied that it protects "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). The payment bond cannot be in an amount less than the amount of the performance bond. Id.

Although logical arguments could be made to the contrary, the performance bond required by the Miller Act is not available to assure performance of the general contractor's obligations to pay subcontractors and materialmen, and the payment bond is not available to assure performance to the owner. See, e.g., P.J. Keating Co. v. Warren Corp., 624 F. Supp. 1163 (D. Mass. 1986); U.S. Fidelity & Guar. Co. v. A & A Mach. Shop, Inc., 330 F. Supp. 1403 (S.D. Tex. 1970). Thus, the remedies and protection provided by the Miller Act performance bond and the Miller Act payment bond are exclusive: owners seeking performance by the general contractor pursue recovery under the performance bond, while subcontractors and materialmen seeking payment pursue recovery under the payment bond.

From a purely practical standpoint, the general contractor on a public construction project – the principal under the Miller Act payment bond – will ultimately be required to reimburse the surety for any amounts the surety pays out to satisfy a payment bond claim. Thus, unless the general contractor is or becomes insolvent, it is typically the general contractor that is ultimately liable under a Miller Act payment bond claim, even if it is the surety that initially writes the check to the claiming subcontractor.

Who is Protected

Although the payment bond is intended to protect "all persons supplying labor and material in carrying out the work provided for in the contract," 40 U.S.C. § 3131(b)(2), the parties that may assert a claim under it are limited to:

- First-tier subcontractors; i.e., subcontractors who contract directly with the general contractor.
- Second-tier subcontractors; i.e., subcontractors who contract with a first-tier subcontractor.
- First-tier material suppliers; i.e., material suppliers who contracted directly with the general contractor.
- Second-tier material suppliers who contracted with a first-tier subcontractor and not a first-tier material supplier (i.e., material suppliers that supplied a first-tier subcontractor).

Third-tier and more remote subcontractors and material suppliers cannot recover against the Miller Act payment bond. Further, a second-tier material supplier who supplied a first-tier material supplier and not a first-tier subcontractor, likewise cannot recover under the Miller Act payment bond. See Clifford F. MacEvoy Co. v. Calvin Tomkins Co., 322 U.S. 102 (1944).

Proper claimants against the Miller Act payment bond also include professionals such as architects, engineers, and surveyors who provide professional services for the benefit of the project. See, e.g., Price v. H. L. Coble Const. Co., 317 F.2d 312, 322 (5th Cir. 1963) (holding that an architect could recover against a Miller Act payment bond even where the architect's compensation was calculated on a percentage basis).

What is Covered

As a general rule, the claimant must show that the labor or materials for which it is seeking recovery were furnished in prosecution of the work provided for in the prime contract and that the subcontractor has not been paid for those labor or materials. See Warren Painting Co., v. J.C. Boespflug Constr. Co., 325 F.2d 54 (9th Cir. 1963). In determining whether certain specific material is recoverable, the federal courts will often look to the local state lien statutes to determine whether the material or the manner in which it was furnished qualifies for recovery. See, e.g., Price, 317 F.2d at 320-21 (relying on state law cases from the state in which the project was located to determine that an architect could recover for its professional services against a Miller Act payment bond). However, some courts have rejected any reliance on state law when determining whether furnished material qualifies for recovery under the Miller Act payment bond. See, e.g., Cont'l Cas. Co. v. Allsop Lumber Co., 336 F.2d 445, 455 (8th Cir. 1964), cert. denied 379 U.S. 968 (1965) (holding that any local lien rule requiring proof of actual incorporation of the material in question into the project was not applicable in a claim against a Miller Act payment bond – the supplier only needed to demonstrate that in good faith it reasonably believed that the materials were intended for the project).

The breadth of labor, materials and equipment that are covered under the Miller Act payment bond is substantial. In addition tc the general or obvious items that are covered by the payment bond such as labor provided by subcontractors and materials supplied by materialmen, there are numerous other items that are also compensable under a Miller Act payment bond. For example:

- Gasoline and oil used in trucks which were utilized on the project at issue. See A&M Petroleum, Inc. v. Santa Fe Eng'rs, Inc., 822 F.2d 547 (5th Cir. 1987).
- Tires, tubes, and tire repairs where such materials were provided with the understanding that they would be used substantially on the project at issue. See, e.g., Tom P. McDermott, Inc. v. Woods Const. Co., 224 F. Supp. 406 (N.D. Okl. 1963).
- Lumber, tools, and hardware indispensable for the prosecution of the work, even if some portions of that material were reusable. See, e.g., Koppers Co. v. Five Boro Constr. Corp., 310 F.2d 701 (4th Cir. 1962); Color Craft Corp. v. Dickstein, 157 F.Supp. 126 (E.D.N.C. 1957).
- Rental equipment. See, e.g., Malpass Constr. Co. v. Scotland Concrete Co., 294 F. Supp. 1299 (E.D.N.C. 1968).
- Groceries and provisions consumed in a boarding house required to be maintained by the general contractor for its laborers as part of the public project at issue. Brogan v. Nat'l Surety Co., 246 U.S. 257, 62 L.Ed. 703, 38 S.Ct. 250 (1918).
- Delay costs, so long as the claimant did not create the delay. Metric Elec., Inc. v. Enviroserve, Inc., 301 F.Supp.2d 56 (D. Mass. 2003).

The Notice Requirement

All claimants must wait 90-days after they last furnished labor or material to the project before they can pursue a civil action against the Miller Act payment bond. 40 U.S.C. § 3133(b)(2). The 90-day period is considered a reasonable amount of time for money to flow down from the owner and the general contractor to the subcontractor performing the work. Thus, until this period accrues, the claim against the Miller Act payment bond is inchoate and a civil action filed against the surety within this time period is premature.

Where a claimant contracts directly with the general contractor, there are no special notice requirements in order to maintain an action against the Miller Act payment bond. However, if the claimant did not contract directly with the general contractor, but instead contracted with a subcontractor of the general contractor (i.e., the claimant is a second-tier subcontractor) then the claimant must provide notice of its claim to the general contractor within 90-days of the claimant's last furnishing of labor or material to the project The notice:

- Must be in writing. 40 U.S.C. § 3133(b)(2)(A); see also Pittsburgh Builder Supply Co. v. Westmoreland Const. Co., 702 F. Supp. 106 (W.D. Pa. 1989) (holding that actual, but not written, notice was insufficient to satisfy the 90-day notice requirement).
- Must state with substantial accuracy the monetary amount claimed. 40 U.S.C. § 3133(b)(2).
- Must name the party to or for whom the labor or material was furnished. Id.
- Must be delivered by any means that provides written verification of delivery or by any means by which the United States marshal of the district in which the project is located may serve summonses. Id.

The Fourth Circuit Court of Appeals, in a North Carolina case, has held that the notice must actually be received by the general contractor within the 90-day period. See Pepperburn's Insulation, Inc. v. Artco Corp., 970 F.2d 1340 (4th Cir. 1992).

The 90-day notice requirement for second-tier subcontractors and second-tier materialmen is mandatory (i.e., it is a condition precedent). See John D. Ahern Co. v. J.F. White Contracting Co., 649 F.2d 29 (1st Cir. 1981). If the second-tier subcontractor or materialman does not provide the notice, then the claim against the payment bond and the surety is barred. Id.

The risk to a general contractor who is subject to a Miller Act payment bond claim is that it could ultimately be required to pay for the same work twice. It is not a defense that a general contractor may have paid its first-tier subcontractor for the work that a second-tier or more remote subcontractor is seeking payment for, although the general contractor can seek indemnity from the first-tier subcontractor that has improperly failed to pay its second-tier subcontractor.

The purpose of the 90-day notice requirement is to make the general contractor aware of claims from subcontractors and materialmen that the general contractor would otherwise be unaware of. In this manner, the general contractor can withhold payment to its first-tier subcontractors that are delinquent on payment to their subcontractors and, ideally, avoid the problem of having to pay twice for the same work. The 90-day notice requirement is not imposed on first-tier subcontractors because the general contractor should be fully aware of the amounts claimed to be owed for work performed by a first-tier subcontractor and there should be no risk of a "hidden" claim being asserted by a first-tier subcontractor.

A majority of federal courts, including the Fourth Circuit Court of Appeals, have determined that repair or warranty work does not operate to extend the 90-day period for notice under the Miller Act. See Noland v. Andrews, 406 F.2d 790, 792 (4th Cir. 1969) (quoting Austin v. Western Elec. Co., 337 F.2d 568, 572-73 (9th Cir. 1964)); see also Barber-Colman Co. v. United States Fid. & Guar. Co., 19 F.3d 1431 (4th Cir. 1994) (same). Material supplied to a project which replaces deficient material or is provided as part of a warranty obligation does not count as furnishing for purposes of the 90-day notice requirement or the one-year statute of limitations. See, e.g., Magna Masonry v. Woodfield, Inc., 709 F.2d 249, 250 (4th Cir. 1983) (quoting Austin, 337 F.2d at 572-73) (concluding that since no work was performed within 90 days before the notice period other than "the making of repairs or the correcting of defects…the filing of this action…was barred by the one year limitations period of" the Miller Act); Balf Co. v. Casle Corp., 895 F. Supp. 420, 425 (D. Conn. 1995) (holding that if the work was done "for the purpose of correcting or repairing defects in a completed project, i.e., punch list work," such work "does not serve to toll the notice period of the Miller Act.").

Technical Requirements

If the requirements discussed above are satisfied or can be established, the claimant may bring a civil action, without regard to the amount in controversy, against the Miller Act payment bond in United States District Court, naming the surety as a defendant. The civil action must be brought "in the name of the United States for the use of the person bringing the action." 40 U.S.C. § 3133(b)(3)(A). The federal government, however, is explicitly not liable for the payment of any costs or expenses of any civil action brought under the Miller Act.

The Miller Act states: "A civil action brought under this subsection must be brought in the United States District Court for any district in which the contract was to be performed and executed, regardless of the amount in controversy." 40 U.S.C. § 3133(b)(3) (emphasis added).

Notwithstanding this, there is authority indicating that this venue requirement may be modified by contract. See, e.g., Coken v. Nat'l Union Fire Ins. Co of Pittsburgh, PA, 103-CV-00222, 2003 WL 22937731 at *2-3 (M.D.N.C. Dec. 2, 2003) (unpublished) (allowing transfer of a Miller Act case where there was an applicable venue selection clause in the parties' subcontract selecting a federal district other than the district in which the project was performed and in which the suit had been brought). Where an action is filed in the district required by the Miller Act but the parties have contractually agreed to a different venue and the defendant moves to dismiss for improper venue, courts usually treat such motions as motions to transfer, reasoning that the district in which the action is filed is not an "improper" venue since the Miller Act provides for it. Id.

In these cases the motion to transfer relies on various weighing factors including the parties' venue selection in their contract, which is often given significant weight. See, e.g., Id.; Jumara v. State Farm Ins. Co., 55 F.3d 873, 879 (3d Cir. 1995); Nutter v. New Rents, Inc., 945 F.2d 398, 1991 WL 193490 (4th Cir. Oct. 1, 1991) (unpublished); Coffey v. Van Dorn Iron Works, 796 F.2d 217, 219-20 (7th Cir. 1986).

Although the venue requirements of the Miller Act may be waived by agreement of the parties, the jurisdictional requirements may not. See B&D Mech. Contractors v. St. Paul Mercury Ins. Co., 70 F.3d 1115, 1117-18 (10th Cir. 1995). Thus, a provision which attempts to make a state court the exclusive forum for a Miller Act claim would be unenforceable as that claim can only be heard in federal court. Id. At this time, the Fourth Circuit Court of Appeals has not expressly considered whether the mandatory venue requirements of the Miller Act can be waived by agreement of the parties.

As the surety's liability is derivative of the general contractor's, the surety may typically avail itself of any defense properly available to the general contractor. Thus, an otherwise enforceable agreement to arbitrate between the subcontractor and the general contractor is not barred by the Miller Act; i.e., Miller Act claims can be arbitrated if the parties have so agreed. See, e.g., Bay State York Co. v. Seward Constr. Co., 298 F.Supp. 1356 (D.N.H. 1969); Ray Gains, Inc. v. Essential Constr. Co., 261 F. Supp. 715 (D. Md. 1966).

A civil action asserting a claim against the Miller Act payment bond "must be brought no later than one year after the day on which the last of the labor was performed or material was supplied by the person bringing the action." 40 U.S.C. 133(b)(4). Practically, this creates a nine-month window in which the Miller Act complaint must be filed, dating from 90 days to one year after the completion of the claimant's project work. Failure to file suit within the one-year period following last furnishing is a complete bar to the claimant's payment bond claim. See Pippin v. J.R. Youngdale Const. Co., Inc., 923 F.2d 146 (9th Cir. 1991); Bailey v. Faux, 704 F. Supp. 1051 (D. Utah 1989).

A claimant cannot prospectively waive a claim against a Miller Act payment bond. Thus, a provision in a contract that attempts to have a subcontractor waive its right to pursue a claim against the Miller Act is void and unenforceable. If the subcontractor consents to waiving its claim against the Miller Act after it has completed its work (e.g., as part of a settlement of claims), the Miller Act requires that the waiver must be in writing, signed by the party waiving its claim, and signed after the work at issue has been performed. 40 U.S.C. § 3133(c).

Attorneys' Fees Recovery

Unlike the Little Miller Act discussed below, there is no specific provision in the Miller Act which expressly allows for the recovery of attorneys' fees in payment bond cases. The Fourth Circuit Court of Appeals has held that interest and attorneys' fees are recoverable in a Miller Act claim if the claimant is entitled to interest and fees pursuant to its contract with its customer. See Maddux Supply Co. v. St. Paul Fire & Marine Ins. Co., 86 F.3d 332, 336 (4th Cir. 1996); see also Stewart Constr. Co. v. P. Browne & Assocs., Inc., No. 1:08CV260, 2010 WL 4644438, at *1-7 (M.D.N.C. Nov. 9, 2010) (allowing second-tier subcontractor in Miller Act claim to recover its attorneys' fees where its contract allowed for the recovery of attorneys' fees pursuant to N.C. Gen. Stat. § 6-21.2)

Practical Aspects

Even though a first-tier subcontractor or materialman is not required to provide notice to the surety or the general contractor before filing a Miller Act complaint, it is often expedient to do so and there is very little harm, practical or otherwise, in taking this step. Since the first-tier subcontractor must wait 90 days after the completion of its work to file suit – like every other subcontractor – there is typically no reason why this period should not be used by the first-tier subcontractor to go "on the record" formally with the surety and the general contractor in a last-ditch attempt to resolve the claim short of litigation.

Moreover, the surety or principal may settle the bond claim before the claimant even files suit.
Frequently, the payment bond will include additional requirements for perfecting a claim against it. However, a payment bond provided pursuant to the Miller Act cannot diminish or reduce the protection it is required to provide by the terms of the Miller Act. Thus, arguably, so long as a claimant satisfies the requirements found in the Miller Act to perfect a payment bond claim, no additional term in the payment bond itself should be able to act to defeat the claim. However, unless the additional

requirements set forth in the payment bond are onerous or burdensome, it is generally the better practice to attempt to comply with both the requirements of the Miller Act and any additional requirements found in the payment bond itself.

Normally, the best place to obtain the information necessary to name and serve the surety is found within the payment bond itself. Subcontractors and materialmen often do not have a copy of the Miller Act payment bond to obtain the information necessary to pursue a Miller Act payment bond claim. Where obtaining a copy of the payment bond from the general contractor proves difficult, the Miller Act includes a specific provision allowing the subcontractor to request both a copy of the payment bond and a copy of the prime contract from the government contracting officer responsible for the project. 40 U.S.C. § 3133(a). The requesting subcontractor must submit an affidavit that the person has supplied labor or material for work described in the contract and payment for the work has not been made or that the person is being sued on the bond. Typically, this request can be combined with a Freedom of Information Act Request (5 U.S.C. § 552) to obtain additional information the subcontractor believes would be helpful in supporting or buttressing its claim.

The North Carolina "Little Miller Act" Generally

Payment bond claims on North Carolina state construction projects or construction projects where a State of North Carolina governmental or public body is the owner are governed by Article 3 of Chapter 44A of the North Carolina General Statutes (N.C.G.S. § 44A-25 - 44A-35). This article is commonly referred to as the "Little Miller Act" as it is modeled after the federal Miller Act, closely tracks it, and attempts to achieve the same purpose.

The Little Miller Act requires both a performance bond and a payment bond on state public construction projects where the total contracts awarded exceed $300,000. N.C.G.S. § 44A-26. The performance and payment bonds are required by any contractor or construction manager at risk where that contractor's or construction manager's contract with the contracting body exceeds $50,000. Id. This general requirement of performance and payment bonds includes projects where the owner is "any department, agency, or political subdivision of the State of North Carolina which has authority to enter into construction contracts." N.C.G.S. § 44A-25(3) (emphasis added). Thus, the requirement includes projects where the owner is a county or municipality. However, a recent amendment to the statute requires that in the case of state departments, state agencies, and The University of North Carolina and its constituent institutions, the total amount of construction contracts for any one project must exceed $500,000 before performance and payment bonds are required from the general contractor. See 2010 N.C. Sess. Laws 148.

Incorporation

In cases of first impression regarding issues arising under or subject to the Little Miller Act, North Carolina courts will look to federal cases as persuasive authority when resolving similar issues under the federal Miller Act. See McClure Estimating Co. v. H.G. Reynolds Co., Inc., 136 N.C. App. 176, 181, 523 S.E.2d 144, 181 (1999) ("This Court has determined that the court will look to the Miller Act where there is no corresponding state case regarding" the Little Miller Act.). However, decisions under the Miller Act are not controlling on the Little Miller Act. See HSI North Carolina, LLC v. Diversified Fire Prot. of Wilmington, Inc., 169 N.C. App. 767, 771, 611 S.E.2d 224, 227 (2005) (citing Syro Steel Co. v. Hubbell Highway Signs, Inc., 108 N.C. App. 529, 534, 424 S.E.2d 208, 211 (1993)). ("Our courts have previously noted that guidance can be obtained from federal interpretations of the Miller Act, on which our corresponding state act is modeled, but have not held such interpretations to be binding."). The Little Miller Act operates substantially similarly to the Miller Act but with certain important exceptions or differences.

Who is Protected

A valid claimant under the Little Miller Act is any first-tier subcontractor or "[a]ny claimant who has a direct contractual relationship with any subcontractor." N.C.G.S. § 44A-28(a), (b). "'Subcontractor' means any person who has contracted to furnish labor or materials to, or who has performed labor for, a contractor or another subcontractor in connection with a construction contract." N.C.G.S. § 44A-26 (emphasis added).

Thus, unlike the Miller Act, the Little Miller Act extends beyond the second-tier of the subcontracting structure. See HSI, 169 N.C. App. at 770-72, 611 S.E.2d at 226-27 (holding that a third-tier subcontractor could recover against a Little Miller Act payment bond where the statutory language made it clear that the term "subcontractor" included both first and second tier subcontractors and, therefore, the third-tier subcontractor had contracted with the statutorily required party). Conceivably, any subcontractor or materialman on a North Carolina public project, regardless of how remote from the general contractor they were, could maintain a claim against a Little Miller Act payment bond.

What is Covered

The items recoverable under a Little Miller Act payment bond include labor and material furnished in the prosecution of the work required by the prime contract. See N.C.G.S. § 44A-27(a). Thus, as with the Miller Act, if the claimant can demonstrate that the labor or material was provided with a reasonable good faith intent that it be used for the furtherance of the project work, it will generally be recoverable under the Little Miller Act. Syro Steel Co. v. Hubbell Highway Signs, Inc., 108 N.C. App. 529, 424 S.E.2d 208 (1993); see, e.g., James River Equip., Inc. v. Tharpe's Excavating, Inc., 179 N.C. App. 336, 342, 634 S.E.2d 548, 554 (2006) (holding that Little Miller Act payment bond was for benefit of subcontractors and materialmen including the claimant which had provided rental equipment as part of the project).

The Wait Period & The Notice Requirement

Like the Miller Act, the Little Miller Act prohibits the filing of suit against the payment bond until 90 days have passed since the claimant last performed work or furnished materials to the project. However, unlike the Miller Act which has a 90-day notice requirement for subcontractors and materialmen that are more remote than first-tier, the Little Miller Act requires that second-tier and more remote subcontractors and materialmenprovide notice within 120 days of the claimant's last providing of work or furnishing of materials to the project. N.C.G.S. § 44A-27. The notice must be sent by certified mail to any office where the general contractor regularly maintains business or served in any manner provided by law for the service of summonses. The claimant is under no duty to provide notice to the general contractor any sooner than the statutorily required 120 days. See HSI, 169 N.C. App. at 772-73, 611 S.E.2d at 227 (holding that a third-tier subcontractor was not estopped from bringing its claim by failing to notice it sooner where the claimant had noticed it within the statutorily required 120 days).

Technical Requirements

For venue purposes under the Little Miller Act, North Carolina's counties stand in place of federal districts. Thus, venue is appropriate "in a court of appropriate jurisdiction in a county where the construction contract or any part thereof is to be or has been performed." N.C.G.S. § 44A-28(a). The Little Miller Act does not allow the fabrication of parts, preparation or provisioning of materials, and planning activities to count as performing of work for this venue requirement. Thus, venue is appropriate in the county (or counties) where the improvement at issue is actually situated. See, e.g., McClure Estimating Co. v. H.G. Reynolds Co., Inc., 136 N.C. App. 176, 182, 523 S.E.2d 144, 148 (1999) (holding that venue under the Little Miller Act is proper in a county where the prime contract is situated and does not include counties where parts may have been fabricated or services performed if the improvement at issue is not located in or does not span those other counties).

The statute of limitations for a Little Miller Act claim is also slightly different than that for a Miller Act claim. The Little Miller Act requires that the complaint asserting the claim against the payment bond be filed no later than the longer of: 1) one year after the claimant last performed work or furnished material to the project; or 2) one year from the date upon which final settlement is reached between the general contractor and the owner. Thus, the claimant can rely on the same one-year period available to it under the Miller Act, or can rely on the presumably longer period of one year from the date final settlement is reached. Since the claimant will often not know when final settlement is reached, it will typically rely on the safe harbor that expires one year from the date it last performed work or furnished material to the project.

Attorneys' Fees

Unlike the Miller Act, the Little Miller Act includes a provision expressly authorizing an award of attorneys' fees if certain conditions are met. N.C.G.S. § 44A-35. Note that this provision applies not only to Little Miller Act cases, but also to lien enforcement actions pursuant to Article 2 of Chapter 44A. N.C.G.S. § 44A-35 states that the court may award attorneys' fees to the prevailing party if it can be shown that the losing partyunreasonably refused to fully resolve the matter. If a claimant recovers half or more of its claim, it is considered the prevailing party. If a claimant does not recover at least half of its claim, the defendant is considered the prevailing party. Further, if an offer of judgment is served pursuant to N.C. R. Civ. P. 68, then the prevailing party is an offeree who obtains a judgment greater than the last offer or is an offeror against whom judgment is rendered in an amount less favorable than the last offer.

Practical Aspects

Pursuant to N.C.G.S. § 44A-31, a claimant can request certified copies of the payment bond, performance bond, and prime contract from the government contracting body upon not less than 10 days notice and the government contracting body will have the duty to provide certified copies of these documents to the requesting claimant.

Conclusion

The Miller Act and the Little Miller Act are probably the most important tools for guaranteeing payment on a federal public construction project and a North Carolina public construction project, respectively. Knowing and understanding the technical requirements of perfecting a Miller Act or Little Miller Act claim is essential in being able to assert such a claim or defend against one.

For further information regarding the issues described above, please contact Jason T. Strickland.

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