

The Miller Act

In the United States, the law requiring contract surety bonds on federal construction projects is known as the Miller Act (40 U.S.C. Section 3131 to 3134). This law requires a contractor on a federal project to post two bonds: a performance bond and a labor and material payment bond. A corporate surety company issuing these bonds must be listed as a qualified surety on the [Treasury List](#), which the U.S. Department of the Treasury issues each year.

The Miller Act provides that, before a contract that exceeds \$100,000 in amount for the construction, alteration, or repair of any building or public work of the United States is awarded to any person, that person shall furnish the federal government with the following:

1. A performance bond in an amount that the contracting officer regards as adequate for the protection of the federal government.
2. A separate payment bond for the protection of suppliers of labor and materials. The amount of the payment bond shall be equal to the total amount payable by the terms of the contract unless the contracting officer awarding the contract makes a written determination supported by specific findings that a payment bond in that amount is impractical, in which case the amount of the payment bond shall be set by the contracting officer. The amount of the payment bond shall not be less than the amount of the performance bond.

The Miller Act payment bond covers subcontractors and suppliers of material who have direct contracts with the prime contractor. These are called first-tier claimants. Subcontractors and material suppliers who have contracts with a subcontractor, but not those who have contracts with a supplier, are also covered and are called second-tier claimants. Anyone further down the contract chain is considered too remote and cannot assert a claim against a Miller Act payment bond posted by the contractor.

Many states in the U.S. have adapted the Miller Act for use at the state level. These state statutes may be referred to as, "Little Miller Acts."

Miller Act Statute

TITLE 40. PUBLIC BUILDINGS, PROPERTY, AND WORKS

§ 3131. Bonds of contractors of public buildings or works

(a) **Definition.**--In this subchapter, the term "contractor" means a person awarded a contract described in subsection (b).

(b) Type of bonds required.--Before any contract of more than \$100,000 is awarded for the construction, alteration, or repair of any public building or public work of the Federal Government, a person must furnish to the Government the following bonds, which become binding when the contract is awarded:

(1) Performance bond.--A performance bond with a surety satisfactory to the officer awarding the contract, and in an amount the officer considers adequate, for the protection of the Government.

(2) Payment bond.--A payment bond with a surety satisfactory to the officer for the protection of all persons supplying labor and material in carrying out the work provided for in the contract for the use of each person. The amount of the payment bond shall equal the total amount payable by the terms of the contract unless the officer awarding the contract determines, in a writing supported by specific findings, that a payment bond in that amount is impractical, in which case the contracting officer shall set the amount of the payment bond. The amount of the payment bond shall not be less than the amount of the performance bond.

(c) Coverage for taxes in performance bond.--

(1) In general.--Every performance bond required under this section specifically shall provide coverage for taxes the Government imposes which are collected, deducted, or withheld from wages the contractor pays in carrying out the contract with respect to which the bond is furnished.

(2) Notice.--The Government shall give the surety on the bond written notice, with respect to any unpaid taxes attributable to any period, within 90 days after the date when the contractor files a return for the period, except that notice must be given no later than 180 days from the date when a return for the period was required to be filed under the Internal Revenue Code of 1986 (26 U.S.C. 1 et seq.).

(3) Civil action.--The Government may not bring a civil action on the bond for the taxes--

(A) unless notice is given as provided in this subsection; and

(B) more than one year after the day on which notice is given.

(d) Waiver of bonds for contracts performed in foreign countries.--A contracting officer may waive the requirement of a performance bond and payment bond for work under a contract that is to be performed in a foreign country if the officer finds that it is impracticable for the contractor to furnish the bonds.

(e) Authority to require additional bonds.--This section does not limit the authority of a contracting officer to require a performance bond or other security in addition to those, or in cases other than the cases, specified in subsection (b).

§ 3132. Alternatives to payment bonds provided by Federal Acquisition Regulation

(a) **In general.**--The Federal Acquisition Regulation shall provide alternatives to payment bonds as payment protections for suppliers of labor and materials under contracts referred to in section 3131(a) of this title that are more than \$25,000 and not more than \$100,000.

(b) **Responsibilities of contracting officer.**--The contracting officer for a contract shall--

(1) select, from among the payment protections provided for in the Federal Acquisition Regulation pursuant to subsection (a), one or more payment protections which the offer or awarded the contract is to submit to the Federal Government for the protection of suppliers of labor and materials for the contract; and

(2) specify in the solicitation of offers for the contract the payment protections selected.

§ 3133. Rights of persons furnishing labor or material

(a) **Right of person furnishing labor or material to copy of bond.**--The department secretary or agency head of the contracting agency shall furnish a certified copy of a payment bond and the contract for which it was given to any person applying for a copy who submits 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. The copy is prima facie evidence of the contents, execution, and delivery of the original. Applicants shall pay any fees the department secretary or agency head of the contracting agency fixes to cover the cost of preparing the certified copy.

(b) **Right to bring a civil action.**--

(1) **In general.**--Every person that has furnished labor or material in carrying out work provided for in a contract for which a payment bond is furnished under section 3131 of this title and that has not been paid in full within 90 days after the day on which the person did or performed the last of the labor or furnished or supplied the material for which the claim is made may bring a civil action on the payment bond for the amount unpaid at the time the civil action is brought and may prosecute the action to final execution and judgment for the amount due.

(2) **Person having direct contractual relationship with a subcontractor.**--A person having a direct contractual relationship with a subcontractor but no contractual relationship, express or implied, with the contractor furnishing the payment bond may bring a civil action on the payment bond on giving written notice to the contractor within 90 days from the date on which the person did or performed the

last of the labor or furnished or supplied the last of the material for which the claim is made. The action must state with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. The notice shall be served--

(A) by any means that provides written, third-party verification of delivery to the contractor at any place the contractor maintains an office or conducts business or at the contractor's residence; or

(B) in any manner in which the United States marshal of the district in which the public improvement is situated by law may serve summons.

(3) Venue.--A civil action brought under this subsection must be brought--

(A) in the name of the United States for the use of the person bringing the action; and

(B) 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.

(4) Period in which action must be brought.--An action brought under this subsection 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.

(5) Liability of Federal Government.--The Government is not liable for the payment of any costs or expenses of any civil action brought under this subsection.

(c) Waiver of right to civil action.--A waiver of the right to bring a civil action on a payment bond required under this subchapter is void unless the waiver is--

(1) in writing;

(2) signed by the person whose right is waived; and

(3) executed after the person whose right is waived has furnished labor or material for use in the performance of the contract.

§ 3134. Waivers for certain contracts

(a) Military.--The Secretary of the Army, the Secretary of the Navy, the Secretary of the Air Force, or the Secretary of Transportation may waive this subchapter with respect to cost-plus-a-fixed fee and other cost-type contracts for the construction, alteration, or repair of any public building or public work of the Federal Government and with respect to contracts for manufacturing, producing, furnishing, constructing, altering, repairing, processing, or assembling vessels, aircraft, munitions, materiel, or supplies for the Army, Navy, Air Force, or Coast Guard, respectively, regardless of the terms of the contracts as to payment or title.

(b) Transportation.--The Secretary of Transportation may waive this subchapter with respect to contracts for the construction, alteration, or repair of vessels when the contract is made under sections 1535 and 1536 of title 31, or subtitle V of title 46, or the Merchant Ship Sales Act of 1946 (50 App. U.S.C. 1735 et seq.), regardless of the terms of the contracts as to payment or title.