Defining Labor
How the Miller Act continues to shape the industry
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In the late 1700s, risks of nonpayment caused a shortage of construction workers, particularly in Washington, D.C. In 1791, Thomas Jefferson proposed a mechanic's lien statute to solve the problem. However, because a mechanic's lien cannot attach to public property, the Heard Act was enacted in 1894, which was later replaced by the Miller Act in 1935. Every State now has its own version of the Federal Miller Act, commonly known as "Little" Miller Act statutes. The common goal of all these efforts is to protect payment for persons working on public construction projects.

The Federal Miller Act requires any contractor working on a public project worth more than $100,000 to supply a payment bond "for the protection of all persons supplying labor or materials." If payment is not made within 90 days after the last day of providing labor or materials, then any lawsuit by the claimant against the payment bond surety must be filed within one year of the last day of "labor."

But not all work is "labor." The Federal Court of Appeals for the Fourth Circuit recently held that "labor" must either be physical toil or direct supervision of others physically toiling. U.S. ex rel. Dickson v. Fidelity and Deposit Company of Maryland, 67 F.4th 182 (4th Cir., April 26, 2023).

In this case, the U.S. Dept. of Defense engaged a prime contractor to renovate several staircases at the Pentagon and their accompanying fire suppression systems. The prime engaged the claimant, a professional engineer, as a project manager to directly supervise laborers. When the Government terminated the prime, it also ordered the prime to prepare a materials inventory, which the claimant then prepared for the prime and which was the claimant's last effort for the prime on the Project. The claimant's last day supervising laborers was before his last day preparing the materials inventory. The distinction between these two different types of work determined whether the claim was timely.

More than a year after supervising other laborers on the Project and just shy of a year after the last day preparing the materials inventory, the claimant sought payment from the bond through the Act. The trial court dismissed the claimant's suit holding the supervisory work was not "labor" and found that "any de minimis work by [claimant] was merely incidental to his duty to supervise."

Courts often rely on prior decisions that, although not precedential, are so similar that, practically speaking, they are controlling. In 1915, under the Heard Act, the same Court as in this recent case determined that the act of supervising workers, themselves engaged in bodily toil and physical exertion, qualified as labor. Supervisory work was labor since it often involves a physical component. Mental labor alone, such as clerical or administrative tasks, does not suffice.

In 2023, the same Court relied upon its 1915 ruling interpreting the Heard Act to now interpret the Miller Act because the pertinent language is the same in the two Acts. Here, the Court determined that the claimant's supervisory work was "labor" under the Miller Act, but the preparation of the materials inventory was only thought-work and not "labor," so no payment protection was afforded for the effort to create the inventory despite the Government's express direction to the prime, and to the claimant in turn from the prime, to prepare the inventory.

Regardless of what type of work was done and when, don't wait to pursue your non-payment. Here, since the inventory preparation was not "labor" performed within the one-year deadline to file suit against the bond surety, the lawsuit was untimely since the supervisory work was last performed more than one year before the lawsuit was filed.

For more on the Miller Act, see "New Infrastructure Law Broadens Federal Miller Act Protections" (March 3, 2022) about how the Infrastructure Act broadened Miller Act payment protections and "When Public Policy Preempts Agreed-Upon Contract terms, Does Certainty Suffer?" (May 5, 2021) discussing how pay-if-paid provisions may affect Miller Act claims.

HEAVY CONSTRUCTION LAW

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