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B-217121

December 18, 1984

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The Honorable Sherwood Boehlert
House of Representatives

Dear Mr. Boehlert:

We refer to your letter dated October 29, 1984, in which you inquire about the Miller Act, 40 U.S.C. § 270 (1982), and the protection it affords subcontractors on projects involving federal funds. You specifically ask:

- (1) What type of protection is available for firms that are not parties to a federal contract, but are working on a project that uses federal funds, and
- (2) To what tier of subcontractors does protection under the Miller Act, or any similar law, extend?

Generally speaking, the Miller Act requires that before any contract exceeding \$25,000 in amount for the construction, alteration, or repair of any public building or public work of the United States is awarded to any person or firm, such person or firm shall furnish (1) a performance bond for the protection of the government, and (2) a payment bond for the protection of persons or firms furnishing labor and materials. 40 U.S.C. § 270(a) (1982). The payment bond, which is in the nature of a substitute for mechanic liens not recognizable by the government, is the only protection for non-payment provided by the government for subcontractors.

In the event that a subcontractor furnishing labor and material used in the performance of a government contract is unable to obtain an adjustment of an unpaid account with the contractor or its surety, the subcontractor has the right under section 2 of the Miller Act, 40 U.S.C. § 270b (1982), to enforce collection through a suit under the payment bond after the expiration of 90 days after furnishing the last of the services or supplies, but no later than 1 year after the date on which the last labor or material was furnished.

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As to the tier of subcontractors to which the protection of the Miller Act extends, the court in J.W. Bateson Co., et al. v. United States ex rel. Board of Trustee of the National Automatic Sprinkler Industry Pension Fund et al., 434 U.S. 586 (1978), held that the payment bond is for the protection of those who have a direct contractual relationship with either the prime contractor or a subcontractor. The court found support for its conclusion in a statement in the legislative history of the Miller Act that Congress intended the scope of the protection of the payment bond to extend no further than to sub-subcontractors--in other words, to second-tier subcontractors.

We trust this information is helpful.

Sincerely yours,

Harry R. Van Cleve
Harry R. Van Cleve
General Counsel