

# CONTRACTOR ALERT

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## THE MILLER ACT AND LITTLE MILLER ACT OF VIRGINIA ARE NOT CONTROLLING OVER THE WASHINGTON METROPOLITAN AIRPORT AUTHORITY'S CONSTRUCTION PROJECTS

If you are a contractor or subcontractor that has been or will be working upon Dulles or Reagan National Airport for construction related services, beware that payment and performance bonds will not be covered by either the Federal Miller Act or the Virginia Little Miller Act. This point is critical especially from a timing perspective under the Little Miller Act since the Virginia Act provides 180 day notice provision instead of the Miller Act and private bond provisions of 90 day notice provision.

The Metropolitan Washington Airport Authority (MWAA) by Federal and Virginia Law provides that MWAA the agency's independence from the Commonwealth of Virginia by specifically exempting the MWAA from compliance with the VPPA requirements, which include those of the Little Miller Act. Va Code §51.-174 provides that "In light of the multi jurisdictional nature of the Authority, an exemption is hereby provided to the Authority from the provisions of the Virginia Public Procurement Act." Va. Code § 5.1-174 . The clear language of the Virginia MWAA statute is dispositive of the question of whether the MWAA must comply with the Little Miller Act's requirements of notice.

If the project carries any bonding, the terms of the notice will be set forth in the contractual terms of the bond itself. Usually, that notice provision will be that a subcontractor who does not have contractual privity with the bond's principal, must provide written notice within ninety (90) days and not the extended 180 days provided by the Little Miller Act.

In the Matter of USA for Use of Blumental Kahn v. American Home Assurance Co., 219 F. Supp 2<sup>nd</sup> 710 (ED Va 2002), the Court held that neither the Federal Miller Act nor Virginia's Little Miller Act was binding upon the parties since the MWAA is multi jurisdictional.

The Court continued in its analysis that " [t]his statutory scheme is further evidence that the General Assembly intended the MWAA to be governed not by the VPPA [Virginia Procurement Act] but by its own regulations. It is noteworthy that the MWAA, pursuant to its rulemaking authority, has adopted procedures governing its construction contracts, which, like the Miller Act, require a prime contractor on state projects to furnish a payment and performance bond as a condition of being awarded the contract." Id. fn 14 To ensure that subcontractors would be protected the MWAA Contracting Policies and Procedures Manual requires the posting of payment and performance bonds. The amount of the contract from the principal on the bond, in order to have the protection of a bond, must exceed \$100,000.00.

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