

CONTRACTOR ALERT

Contractor Alert is a joint publication by this Contractor and the Law Offices of Richard M. Sissman, Esquire, located at 1485 Chain Bridge Road, Suite 105, McLean, VA 22101. This newsletter is designed to give general information on the matters covered. Space limitation prevents exhaustive treatment or analysis of this topic. This newsletter is not intended to substitute for advice on specific legal problems. If you are interested in receiving a complimentary issue or to be placed on our mailing list, contact Richard M. Sissman, Esquire. We welcome and appreciate your suggestions for future article topics.

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CASE LAW UPDATES FOR MARYLAND LITTLE MILLER ACT MATTERS

□ MD Code, State Finance and Procurement, □ 17-108 codifies the Maryland □ Little Miller Act□, patterned after the Federal Miller act codified at 40 USC □ 270(a) et seq. Set forth below are recent annotations that reference the Little Miller Act.

o Neither letter from general contractor to subcontractor nor arrangement which it evidenced created express or implied contractual relationship between supplier and general contractor so as to permit direct action against general contractor on third-party beneficiary basis or to excuse statutory requirement of notice as prerequisite to claim under "Little Miller Act." Noland Co. v. Armco, Inc., 1982, 445 A.2d 1079, 52.

o When legislature patterned Little Miller Act after federal Miller Act; it intended to import federal judicial interpretation restricting class of persons who may claim under statute to persons who contract directly with contractor, subcontractor, or sub-subcontractor, notwithstanding argument that provision was merely notice provision and covered persons who supply materials to materialmen as well. Code, State Finance and Procurement, □ 17-108(a), (b)(1); Miller Act, □ 2(a), > 40 U.S.C.A. □ 270b(a). > Atlantic Sea-Con, Ltd. v. Robert Dann Co., 1990, 582 A.2d 981, 321 Md. 275. States K 101

o Portion of Little Miller Act which provides "that any person having direct contractual relationship with subcontractor of contractor, or with any sub-subcontractor of contractor but no contractual relationship expressed or implied with contractor shall have right of action upon payment bond" is standing requirement that restricts protection of payment bond to those who supply materials or labor to primary contractor, its subcontractor, or its sub-subcontractor;

relationship of supplier of labor or materials to mere materialmen is too remote to collect under principal contractor's bond. Code, State Finance and Procurement, □ 17-108. Atlantic Sea-Con, Ltd. v. Robert Dann Co., 1990, 582 A.2d 981, 321 Md. 275. States K 101

o Notice of nonpayment

Delivery by supplier to subcontractor of materials that are used to correct work defectively done, or to replace a defective product, or to cure an omitted performance on a public work bonded under the Maryland Little Miller Act is not per se disqualified from constituting the event triggering the running of the time limit for supplier's notice of nonpayment to prime contractor; moreover, decisions of Court of Appeals under mechanics' lien statute, determining whether course of dealing between supplier's subcontractor constitutes a single contract so that notice relates back to all prior sales and deliveries in the series, are highly relevant precedent for the same issue under the Maryland Little Miller Act. Code, State Finance and Procurement, □ 17-108(b)(1); Code, Real Property, □ 9-104. > Insurance Co. of North America v. Genstar Stone Products Co., 1995, 656 A.2d 1232, 338 Md. 161. Public Contracts K 60

o Under undisputed material facts evidenced by supplier's invoices, course of dealing between supplier and subcontractor had to be viewed as a single contract, so that supplier's notice of nonpayment to prime contractor on school construction contract related back over entire contract, notwithstanding subcontractor's contention, based on per se application of the "repair rule," that final deliveries could not be considered as trigger for running of time limit for notice because

subcontractor used materials in making repairs. Code, State Finance and Procurement, ¶ 17-108(b)(1). > Insurance Co. of North America v. Genstar Stone Products Co., 1995, 656 A.2d 1232, 338 Md. 161. Schools K 81(2)

o Date from which 90 days for giving notice of nonpayment under the "Little Miller Act" begins to run is the date the last work necessary to complete the contract was performed or the date the last materials necessary to complete the contract were furnished. > Code, Real Property, ¶ 9-113(c). > Stauffer Const. Co., Inc. v. Tate Engineering, Inc., 1979, 407 A.2d 1191, 44 Md.App. 240, certiorari denied 286 Md. 753. Public Contracts K 60

o Notice of nonpayment given by a subcontractor's subcontractor under the "Little Miller Act" was timely, for purposes of recovery on payment bond, though it was given more than 90 days after date of invoice for full contract sum, where the contract was indivisible, the work was substantially, but not totally, completed before notice was given, and a further delivery of materials was made to the job after the date of the notice. > Code, Real Property, ¶ 9-113(c). Stauffer Const. Co., Inc. v. Tate Engineering, Inc., 1979, 407 A.2d 1191, 44 Md.App. 240

o Subcontractor or materialmen

For purposes of Little Miller Act, "subcontractor" is one who performs for and takes from prime contractors specific part of labor or material requirements of original contract, and "sub-subcontractor" is one who performs for and takes from subcontractor specific part of labor or material requirements of subcontract. Code, State Finance and Procurement, ¶ 17-108.

o Where facts are not in dispute, court must engage in legal analysis in reaching conclusion as to whether party is subcontractor or materialmen under Little Miller Act. Code, State Finance and Procurement, ¶ 17-108. > Atlantic Sea-Con, Ltd. v. Robert Dann Co., 1990, 582 A.2d 981, 321 Md. 275.

o Trial court properly concluded that company which supplied contractor with riprap necessary for state

contract was materialman rather than subcontractor, so that company which furnished labor to riprap supplier was not entitled to protection of Little Miller Act; supplier did nothing other than furnish contractor with riprap necessary for project, supplier did not furnish subcontractor's performance bond or filed certified copies of its payroll as required by subcontractors under contract, supplier was not included in contractor's list of subcontractors as required by state, supplier's relationship with contractor arose from purchase order, and supplier did not perform any work at job site. Code, State Finance and Procurement, ¶ 17-108.; Atlantic Sea-Con, Ltd. v. Robert Dann Co., 1990, 582 A.2d 981, 321 Md. 275. Bridges K 20(2.1)

o Joint check agreement, under which general contractor for construction project agreed to pay subcontractor with joint checks made payable to subcontractor and supplier, did not operate to extinguish supplier's right to recover from general contractor's surety, pursuant to state Little Miller Act, requiring general contractor to post payment bond in any construction contract awarded by state which exceed \$50,000 to make certain persons providing building materials are paid. Code, State Finance and Procurement, §§ 13-501, > 17-101 to > 17-110. > Allied Bldg. Products Corp. v. United Pacific Ins. Co., 1988, 549 A.2d 1163, 77 Md.App. 220. States K 101

o Joint check agreement, standing alone, will not waive supplier's right to recover from contractor's surety pursuant to state Little Miller Act, requiring general contractor to post payment bond in construction contract awarded by state exceeding \$50,000. > Code, State Finance and Procurement, §§ 17-101 to > 17-110. > Allied Bldg. Products Corp. v. United Pacific Ins. Co., 1988, 549 A.2d 1163, 77 Md.App. 220. States K 101

If you should have any questions on this issue please contact Mr. Sissman at his website at www.contractoralert.com or by phone at (703) 903-9646 or (301) 762-0402.