

# *Avoiding Common Payment Pitfalls for Subcontractors: A Primer on Federal Contracting Payment Remedies*

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# Seminar Goals:

1. Understand key contract clauses affecting payment and protecting those rights.
2. Provide effective methods for pursuing payment.
3. Liabilities remaining after final payment.

# Prime Contractor Responsibilities

# *Prompt Pay Act: 31 U.S.C. § 3901*

Prime Contractor's Pay App MUST certify:

1. Work is in accordance with Contract.
2. Subcontractors were paid.
3. Does not intend to hold retainage or backcharge subcontractors.



# *Prompt Pay Act: 31 U.S.C. § 3901*

Not enforceable if:

1. Subcontractor is in default;
2. Subcontractor failed to adequately perform; or
3. Claims or damages.



# *Federal Acquisition Regulation*

<b><u>FAR Number</u></b>	<b><u>Title</u></b>	<b><u>Date</u></b>
52.202-1	DEFINITIONS	JAN 2012
52.203-3	GRATUITIES	APR 1984
52.203-5	COVENANT AGAINST CONTINGENT FEES	APR 1984
52.203-6	RESTRICTIONS ON SUBCONTRACTOR SALES TO THE GOVERNMENT	SEP 2006
52.203-7	ANTI-KICKBACK PROCEDURES	OCT 2010
52.203-8	CANCELLATION, RESCISSION, AND RECOVERY OF FUNDS FOR	JAN 1997

# *Flow Down Clauses*

Read  
The  
Full  
Contract





# *Flow Down Clauses*

1. Mandatory

2. Discretionary





# *Flow Down Clauses - Mandatory*

## Prompt Payment to Subcontractors

FAR 52.232-27:

Contractor shall include in each subcontract ... A payment clause that obligates the Contractor to pay the subcontractor for satisfactory performance ... not later than 7 days from receipt of payment out of such amounts as are paid to the Contractor under this contract.”

# *Flow Down Clauses - Mandatory*

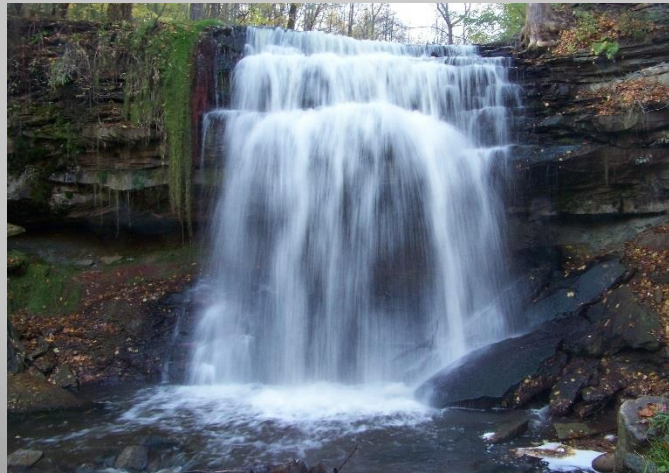
## Prompt Payment to Subcontractors

“An interest penalty that obligates the Contractor to pay to the subcontractor an interest penalty for each payment not made in accordance with the payment clause.”

# *Flow Down Clauses - Mandatory*

## Prompt Payment to Subcontractors

MUST be flowed down to sub-subcontracts and lower tier supplier contracts.



# *Flow Down Clauses - Mandatory*

## Prompt Payment to Subcontractors

Does NOT prevent:

- Withholding retainage
- Backcharges (if prime gives notice to the subcontractor and contracting officer)

# *Pay-if-Paid Clauses*

## Violate the FAR:

Government's payment to Prime Contractor is a condition precedent to Prime Contractor's obligation to pay Subcontractor



# Protecting Subcontractor Rights

## *Release of Claims (Lien Waivers)*

“I was paid, so I will not make a claim against you for the amount I was paid.”



# *Release of Claims (Lien Waivers)*

## Types:

1. Conditional - Release is conditioned on payment
2. Unconditional - Release is effective as soon as form is signed

# *Release of Claims (Lien Waivers)*

Watch Out For:

Waives rights beyond pay app:

Retainage, change orders, extra work



# *Release of Claims (Lien Waivers)*

Specifically identify on the form or attach to the form amounts that subcontract is excepting from the release:

1. Unpaid retention in the amount of \$\_\_\_\_\_;
2. Balance due on unpaid invoices in the amount of \$\_\_\_\_\_; and
3. ANY OTHER AMOUNTS / CLAIMS / CHANGE ORDERS THAT HAVE NOT BEEN PAID



# *Release of Claims (Lien Waivers)*

## Watch Out For:

Date on the form: Only release amounts previously received and clarify the release is provided “upon receipt” of the sum covered by the pay app



“Upon receipt of the sum of \$25,000, together with the receipt of any currently unpaid sums covered by previous releases (lien waivers), SUBCONTRACTOR hereby waives, releases...”

# Effectively Pursuing Payment

# *Effectively Pursuing Payment*

## Tools:

1. Contact Government
2. Pass-Through Claim
3. Payment Bond Claim

# *Effectively Pursuing Payment*

## Contact the Government

FAR 32.112-1: Authorizes the CO to:

1. Encourage the prime to make timely payment; or
2. Reduce or suspend payments to the prime.





# Effectively Pursuing Payment Pass-Through Claims



# Effectively Pursuing Payment Pass-Through Claims

Severin Doctrine: Prime MUST be responsible to the subcontractor for payment



## *Pass-Through Claims*

### Liquidating (Sponsor) Agreement:

- Prime pursues claim on sub's behalf
- Prime will be liable to sub to same extent government is liable to prime

# *Liquidating Agreements*

## Key Terms for Subcontractors:

1. Right to recover from prime for amounts not recovered from government
2. Right to participate in settlement negotiations



# *Liquidating Agreements*

## Other Terms:

- Allocation of costs and fees
- Allocation of recovery
- Indemnity
- False claims certification



# Effectively Pursuing Payment

## Payment Bond Claims



# Effectively Pursuing Payment

What is a bond?

Examples:

1. Performance Bond
2. Payment Bond

# Effectively Pursuing Payment

## Miller Act Payment Bonds

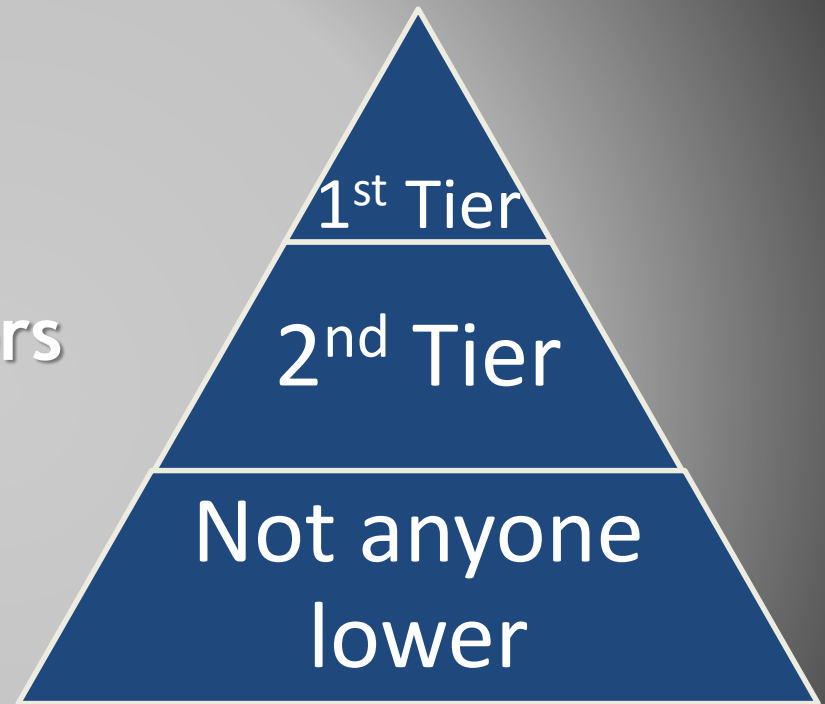
Federal projects > \$100,000

# Who is a “Claimant” under a Miller Act Payment Bond?

First tier subcontractors  
and suppliers

Second tier subcontractors  
and suppliers

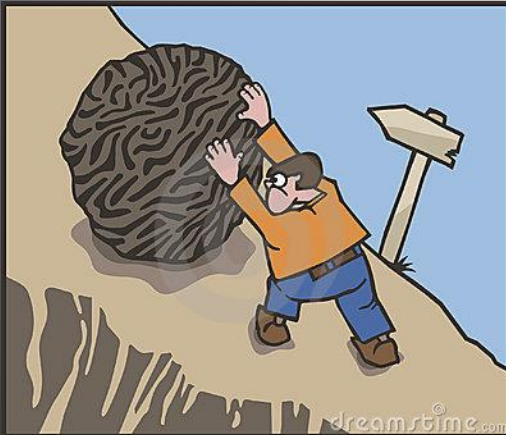
NOT any lower tiered  
subcontractors and  
suppliers.



# What is a “Claim” under a Miller Act Payment Bond?

## Claim:

- Substantial work
- Adds value
- Labor (physical toil)



## NOT a Claim:

- Remedial or corrective work (punch list)
- Warranty work
- Project management
- Project administration
- Contract administration

# When to make a Claim against a Miller Act Payment Bond?

## First Tier Subcontractors and Suppliers:

- 90 days after the date on which last performed labor or supplied materials

## Second Tier Subcontractors and Suppliers:

- Must give written notice to the prime contractor within 90 days from when the last date on which last performed labor or supplied materials

# Required Notice for Second Tier Claimants:

- Provide notice to prime within 90 days from last labor or materials
- Must include:
  1. Amount claimed; AND
  2. Name of party to whom material furnished or for whom labor was performed
- Serve notice with delivery confirmation (i.e. FedEx, certified mail) or via U.S. Marshal



# How to make a claim on a Miller Act Payment Bond:

- Ask for copy of bond
- May also be online (for larger projects)
- If prime or government does not provide it, provide department secretary or agency head with an affidavit

**AFFIDAVIT OF JOHN DOE**

I, John Doe, hereby verify under oath that I am over 18 years of age, of sound mental capacity, and am competent to give this Affidavit.

1. This affidavit is based on my personal knowledge and belief.
2. I am the President of ABC Subcontractor which supplied labor and materials for the work in the Federal Government Contract Project, and payment for that work has not been made.

**FURTHER YOUR AFFIANT SAYETH NOT.**

The undersigned hereby certifies under penalty of perjury that the foregoing is true and correct.

\_\_\_\_\_  
John Doe  
President, ABC Subcontractor

Commonwealth of Virginia     )  
County of \_\_\_\_\_ ) to wit:

Subscribed, sworn, and acknowledged, before the undersigned Notary Public this \_\_\_\_ day of April, 2017.

\_\_\_\_\_  
Notary Public

My Commission Expires: \_\_\_\_\_  
Notary Registration No. \_\_\_\_\_

# How to make a claim on a Miller Act Payment Bond:

Read  
The  
Full  
Bond



# How to make a claim on a Miller Act Payment Bond:

- Follow instructions on the bond for where to send the claim
- Draft a claim letter or email to the surety



# Claim Letter to Surety:

Please be advised that Subcontractor furnished Labor and Materials to Prime Contractor for the Project, and has not been paid for those labor and materials.

The total amount of the labor and materials supplied by Subcontractor is \$100,000, of which \$50,000 remains unpaid. The labor and materials were furnished to the Project between November 1, 2016 and January 1, 2017. Enclosed is a copy of the Subcontract, a copy of the outstanding payment applications, and a copy of the Payment Bond.

# How to make a claim on a Miller Act Payment Bond:

- Can also call the surety and give a “heads up” that making a claim
- Respond to any requests for further information or documentation from surety
- If asked, complete the surety’s Proof of Claim form

# What to do if surety does not pay:

- File lawsuit against surety and prime contractor (cannot sue government)
- Lawsuit **MUST** be filed no later than ONE YEAR after the day on which the last of the labor was performed or material supplied





# Key Dates for Payment Bond Claims:

- First Tier Subcontractors/Suppliers: 90 days after the date on which last performed or provided materials
- Second Tier Subcontractors/Suppliers: Written notice to prime within 90 days from when last performed labor or provided materials
- Lawsuit against bond/surety: No later than one (1) year from date which last performed labor or provided materials

# Liabilities After Final Payment

# Liabilities After Final Payment

## Government's Acceptance of Work and Inspection of Construction

FAR 52.246-12



# Government's Inspection of Work

For the “sole benefit” of the government and does not:

1. Relieve the contractor of responsibility for damage or loss before acceptance; or
2. Constitute or imply acceptance

**Government's Acceptance of Work**  
Acceptance is final and conclusive  
except for:

1. Latent Defects
2. Fraud or gross mistake
3. Rights under any warranties or guarantee

# Questions?

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