



ACCNJ LEGAL & INSURANCE UPDATE

Federal Court Excludes Project Manager's Work from Miller Act Protections

Subcontractors and suppliers working on a federal project do not have typical lien protections. Instead, the Miller Act (or the "Act") provides these parties with a mechanism for ensuring they receive payments by requiring the general contractor to obtain a payment bond for "labor and material" provided by qualifying claimants.

There are three elements in a Miller Act claim: (1) the claimant must have furnished "labor or material" to the federal project, (2) the claimant was not paid within 90 days of the last day he/she provided "labor or materials," and (3) the suit was filed within one year of the last day upon which labor or materials were provided. The plaintiff's claim will not get off the ground unless it furnished "labor or material." So how is "labor" defined for purposes of the Act, and does supervisory work fall within the definition? The Miller Act itself does not define "labor." Nevertheless, courts have interpreted the term as only applying to "physical toil or manual labor." Supervisory work is generally not recoverable unless the supervisor also performs manual labor. Clerical or administrative tasks will not constitute manual labor and the fact that a task is performed on the work site does not alone deem it recoverable.

In Dickson v. Forney Enterprises, Inc., 1:20-CV-129, 2021 WL 1536574 (E.D. Va. Apr. 19, 2021), a Federal District Court in the Eastern District of Virginia was asked to determine whether a construction manager's responsibilities fell within the Act's purview. The Plaintiff managed the repair and upgrade of a staircase at the Pentagon from November 2015 to February 2019. Responsibilities largely consisted of supervisory work and included coordinating deliveries, inspecting materials, and performing field measurements. Some of these activities took place at the jobsite, which the Plaintiff relied as a primary justification for treating the Plaintiff's claims as being covered by the Miller Act.

The Dickson Court disagreed. The Court held that the project manager's minor physical exertion at the jobsite did not make him a Miller Act claimant. In the Court's eyes, accepting the Plaintiff's position would render the labor requirement meaningless. Any subcontractor (i.e., an accountant or engineer) could become a claimant by merely drafting paperwork on-site or performing de minimis physical work that was merely incidental to a supervisory duty. The Dickson Court was unwilling to take such an expansive interpretation.

The Dickson Holding will have the largest impact in the Eastern District of Virginia. However, other federal courts could find the decision persuasive and limit a person's ability to claim Miller Act protections for a supervisory role. Contractors and project managers should be aware of the important limitations the holding establishes for supervisory work and its eligibility for Miller Act protections.

AGC of America's Guide for Federal Contractors Subject to Vaccine Requirements

On October 1, 2021, AGC of America distributed a memorandum ("Memo") that guides federal contractors through the new vaccine requirements implemented under President Biden's COVID-19 Action Plan. The Memo recaps the rules and [guidelines distributed by the Safer Federal Workplace Task Force](#) ("Task Force") on September 24. The Memo is a good starting point for any member contractor trying to understand its obligations for current and upcoming federal projects. Members are encouraged to also review the Task Force's guidelines in its entirety, as well as the [FAQs](#) published by the Task Force.

AGC's Memo can be found: [HERE](#)

DOL Releases Davis-Bacon Conformance Request Guide

The US Department of Labor, Wage and Hour Division published a new resource for stakeholders in the construction contracting community: the [Davis-Bacon Wage Determination Conformance Request Guide](#) (the "Guide").

The Guide details the information and construction types contained in wage determinations and provides additional clarity regarding the limited circumstances in which contractors and contracting agencies may need to request a new class of laborer or mechanic be added to a published wage determination for a specific contract. The Guide also contains other useful resources to help construction contractors and contracting agencies comply with the requirements of the Davis-Bacon and Related Acts.

ACCNJ'S LEGAL & INSURANCE WEBINAR SERIES

Upcoming installments of ACCNJ's Legal and Insurance Webinar Series include:

- **Design Build PART 1 – October 6, 2021 (10:30am)** – A review of New Jersey's expansion of permissible design-build contracts through the Design-Build Construction Services Procurement Act of 2021
- **Design Build PART 2 – October 14, 2021 (11:30am)** – Practical considerations for contractors when using the design-build delivery system.
- **COVID Vaccine Memorandum of Understanding ("MOU")** – (DATE TBD) – ACCNJ will be hosting a webinar that will discuss the vaccine MOU being entered into with the various construction trades with whom ACCNJ negotiates with. The session will cover the material terms of the MOU, as well as best practices for implementing a mandatory vaccination policy under the MOU.

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