



Securing Your Tomorrow

## NCS INSIGHT

# PAVING THE WAY FOR ECONOMIC RECOVERY: HOW THE MILLER ACT CAN HELP THE CONSTRUCTION INDUSTRY SECURE RECEIVABLES

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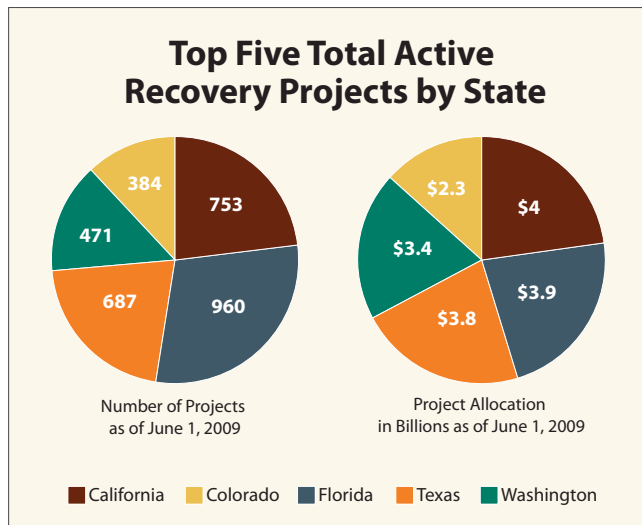
With the passage of President Barack Obama’s \$787 billion American Recovery and Reinvestment Act (ARRA) by Congress on February 13, 2009, material suppliers can expect future tax relief and an opportunity to participate in an unprecedented investment in improving America’s aging infrastructure.

Approximately 35 percent of the ARRA funds will go to tax cuts in 2009 with the remainder earmarked for spending in 2009-2010. According to analysis by the Congressional Business Office, nearly 75 percent of the money will be spent in the next 18 months.

President Obama’s domestic agenda pledges to improve roads, bridges, railways, sewers and electric grids. Highway construction is the single largest line item. “To build a 21<sup>st</sup> century economy, we must engage contractors across the nation to create jobs rebuilding our crumbling roads and bridges [and] modernizing public buildings...” said Recovery.org.

ARRA infrastructure money is currently allocated this way:

- \$30 billion for highway construction
- \$31 billion to modernize federal and other public infrastructure
- \$19 billion for clean water, flood central, and environmental restoration investments
- \$10 billion for transit and rail



Source: Recovery.org.

### What does all this mean for the material supplier?

“In addition to the stimulus legislation money, Congress has approved about \$40 billion in work through normal highway funding for such projects as bridge construction, water works, electric grid and federal building renovations,” said John McClelland, vice president of government affairs of the American Rental Association, in *Light & Medium Truck Magazine*.

With so many federal dollars available it is critical to understand how to secure your accounts receivable. The road to new construction projects is promising, provided that you can avoid the “potholes” along the way.

## **THE MILLER ACT**

Understanding The Miller Act can make all the difference in securing your rights as a material and/or service supplier to a project funded by ARRA monies.

### **What is the Miller Act?**

Starting in 1874, through the Heard Act, the United States government required security from contractors furnishing to federal or other U.S. government projects. The Heard Act was replaced in 1935 by The Miller Act, which requires prime contractors on federal projects to submit a payment bond to ensure payment for materials and services. Instead of filing a mechanic's lien against a project, your right of recovery would be against the surety on the payment bond. The surety must be listed on the Treasury List and approved by the U.S. Department of the Treasury.

**The payment bond must be obtained by the prime contractor prior to being awarded a federal construction contract exceeding \$100,000.** To ensure the project you are working on is protected by The Miller Act, a copy of the payment bond should be requested at the beginning of the project.

### **What if the total original contract is for \$100,000 or less?**

If the federal construction contract is for more than \$25,000 and up to \$100,000, the contracting officer and prime contractor must agree to a payment protection of:

- 1) A payment bond;
- 2) An irrevocable letter of credit;
- 3) A tripartite escrow agreement (a federally insured financial institution distributes payments); or
- 4) A certificate of deposit.

### **Who is covered under The Miller Act?**

All those who provide labor or materials used in the prosecution of the work, to the prime contractor or a first-tier subcontractor, are covered. Note: Those providing only materials to a material supplier are **not** protected by The Miller Act. Those furnishing to a second-tier subcontractor are also too far removed to have rights under The Miller Act.



### **How is a Claim Made?**

No preliminary notice is required at the start of a federal project. However, a non-statutory notice is recommended so that the prime contractor knows you will be protecting your rights. **Those furnishing to a subcontractor must serve their bond claim within 90 days from last furnishing materials or services.**

In *Pepper Burns Insulation, Inc. v. Artco Corp.*, it was upheld that the prime contractor must **receive** the claim by the deadline. If payment does not result from the notice of bond claim, a suit to enforce the bond claim must be filed within **one year** from when materials or services were last furnished.

**Alert!**

There are instances where a Miller Act payment bond may not be available. The bonding requirements on a federal project may be waived by the contracting officer in certain circumstances. The contract may be considered a supply contract rather than a construction contract. The federal government may also be funding a project where the fee owner is a private or a public entity.

**PUBLIC PROJECTS – THE “LITTLE MILLER ACT”**

**What if the state contracts for a project using federal stimulus funds?**

The good news is that laws requiring payment bonds are in place to protect your rights on public construction projects contracted by a state, city, county, municipality, school district, etc. Various state legislatures have somewhat mirrored The Miller Act statute and have created their own “Little Miller Acts,” providing the statutes for publicly owned construction contracts. Again, it is recommended you obtain a copy of the payment bond when first contracting for the project.

**Be aware!**

While the federal Miller Act applies to all U.S. Government construction contracts regardless of where the project is located, **the bond claim requirements for public projects vary by the state in which the project is located.** The requirements for making a claim on public projects vary by state as to:

- The threshold specified by statute as to when a project must be bonded;
- Who is covered under the payment bond;
- Whether or not a preliminary notice is required;
- The time frames for the preliminary notice, a bond claim or suit; *and*
- Statutory requirements for the notice or bond claim.

According to *Cement Americas*, Chief Economist Ken Simonson stated in the next two years (stimulus) funding would account for 650,000 construction jobs and 300,000 positions in related fields including equipment and material supply. If you participate in one or more of these projects, protect yourself by obtaining a copy of The Miller Act payment bonds or the “Little Miller Act” payment bonds. **REMEMBER: Those furnishing to a subcontractor must serve their bond claim within 90 days from last furnishing materials or services.** Following these guidelines will help you stay on the right road to getting paid. ■

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