

## Seventh Circuit Rules “Too Much Notice” of a Payment Bond Claim is No Notice at All Under the Miller Act

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While courts throughout the nation give liberal construction to the Miller Act, 40 USC § 3131 *et seq.*, with regard to its remedial provisions; in contrast, courts have continually determined that the notice provisions and requirements of the Miller Act are stringent requirements compelling strict compliance therewith in order to properly bring a claim against a Bond.<sup>i</sup> In [\*A&C Construction & Installation, Co., WLL v. Zurich American Ins. Co., et al.\*](#), No. 19-3325 (7th Cir. June 30, 2020), the Seventh Circuit confirmed this long-standing precedent in affirming a U.S. District Court for the Northern District of Illinois decision granting summary judgment in favor of the defendants/sureties holding that the plaintiff/sub-subcontractor had missed its Miller Act notice requirement deadlines thereby eliminating its ability to bring a cause of action on a payment bond. Notably, the sub-subcontractor provided notice of its claim well before 90-days from its last date of work.

### The Miller Act and its Notice Requirements

Section 3133 of the Miller Act provides the requirements for which contractors, subcontractors, and sub-subcontractors must follow in order to bring a civil action on a payment bond. Notably for sub-subcontractors, Section 3133 also provides for two express timing requirements in which claimants must meet in order to maintain and bring an action on a payment bond under the Miller Act: (1) notice of its payment bond claim within 90 days to the prime contractor, and (2) a one-year limitation period in which a lawsuit must be brought.

Specifically, with regard to the notice requirement, in order to bring a civil action on the payment bond, a sub-subcontractor/material supplier must give “written notice to the contractor within 90 days from the date on which the person did or performed the last of the labor or furnished or supplied the last of the material for which the claim is made.”<sup>ii</sup> Thus, the sub-subcontractor must first notify the prime contractor of its claim within 90 days of work last being performed or material last being furnished including, among other things, indicating the amount being claimed. Likewise, after notice of such a claim and if payment it still not made to the claimant, a time limitation of one-year exists in which the claimant can bring a cause of action. In relevant part, the Miller Act states, “[a]n action . . . must be brought no later than one year after the day on which the last of the labor was performed or material was supplied by the person bringing the action.”<sup>iii</sup>

While the statutes are relatively clear and unambiguous, issues often arise relating to a gluttony of different things such as what constitutes “last” performance of work, whether the content of the notice was sufficient, and whether the notice was timely – this latter concern was at issue in *A&C Construction*.

## Case Background

This matter revolved around a federal construction project calling for the construction of two billets in the Blatchford-Preston Complex at Al-Udeid Air Base in Qatar (the “Project”). AMEC Foster Wheeler Environment & Infrastructure, Inc. (“AMEC”) entered into a contract with the Army Corps of Engineers to serve as the prime contractor on the Project. As part of this contractual agreement, and in accordance with the Miller Act, AMEC, as principal, and Zurich American Insurance Company and The Insurance Company of the State of Pennsylvania (the “Sureties”) executed and delivered a payment bond for the Project (the “Payment Bond”). Thereafter, AMEC subcontracted certain mechanical work to Black Cat Engineering & Construction (“Black Cat”) who subsequently subcontracted with Plaintiff, A&C Construction & Installation, WLL (“A&C”).

After beginning work on the Project, the relationship between Black Cat and A&C deteriorated to a point where Black Cat eventually terminated A&C in late 2015. That said, A&C last performed actual work on the Project on May 16, 2016. However, A&C allegedly continued to provide work and equipment on the Project on account of its equipment remaining on the Project site for Black Cat’s use as well as A&C providing supervision of one of its own subcontractors through the Project’s completion date of February 28, 2017. Notwithstanding this last date of work – February 28, 2017 – A&C had previously provided its Miller Act notice to the appropriate parties on August 16, 2016 alleging that, as of that date, it was owed \$8,449,710. Thereafter, A&C filed its lawsuit in the Northern District of Illinois on June 7, 2017 for recovery of damages under the Payment Bond.

## Northern District of Illinois Decision

After filing suit, the Sureties moved for summary judgment arguing that A&C was barred from bringing a Miller Act claim because A&C failed to give written notice within ninety days and failed to file suit within one year of the last provision of work or material for which the claim was made. Specifically, the Sureties argued, among other things, that (1) the time between A&C last date of performance – the Sureties argued that such a date was May 16, 2016 – and the date upon which the notice was served – August 16, 2016 – totaled 91 days and thus was untimely; (2) the lawsuit was filed on June 7, 2017 – one year and 22 days after May 16, 2016, and (3) to the extent the District Court were to agree that A&C continued providing equipment and/or work through February 28, 2017, A&C’s August 16, 2016 notice was not within 90-days of February 28, 2017. A&C responded to the Sureties’ motion arguing that the lawsuit was timely due to the last date of work/furnishing of equipment being February 28, 2017. Moreover, A&C argued that even though the August 16, 2016 notice was served well more than 90-days prior to the last provision of work, it placed AMEC on notice of A&C’s claim of unpaid labor and materials. Thus, in essence, A&C argued that it provided “too much notice” with regard to its claims.

Notwithstanding A&C’s arguments, the District Court granted the Sureties’ Motion for Summary Judgment relying, in part, on a strict view of the Miller Act’s time provisions. Specifically, with regard to the May 16, 2016 date being the date in which A&C last provided labor or materials, the Court noted that even if the notice provided on August 16, 2016 was timely, A&C failed to file its

lawsuit within one year of the May 16, 2016 date. That said, the Court noted that even if it were to consider February 28, 2017 as the last date of work, A&C would have needed to provide notice within 90-days of that date (by May 29, 2017), which A&C failed to do. Thereafter, in analyzing A&C's final argument – “too much notice” – the District Court noted that while AMEC may have been on notice of potential claims, the August 16, 2016 notice did not meet the strictly construed limitation period and notice deadline under the Miller Act which constitute conditions precedent.

### Seventh Circuit Decision

After the district court ruled in favor of the Sureties, finding that A&C had failed to comply with the Miller Act's timing requirements as to both notice and filing of the lawsuit, A&C appealed the ruling to the Seventh Circuit, arguing, in relevant part, that its August 16, 2016 notice was timely given that it performed work through February 28, 2017 and that the lawsuit filed on June 7, 2017 was also timely. In relevant part, A&C relied on its “too much notice” argument.

The Seventh Circuit initially began its germane discussion noting that the Sureties and A&C disputed the correct date of the last work performed. However, in doing so, the Court also mentioned that such a determination was not necessary for the appeal, as it could assume (just as the District Court had done) that A&C's last date of performance of work for purposes of the claim was February 28, 2017. Following this assumption, the Court then stated that there was no dispute as to when A&C served its Miller Act notice – August 16, 2016. Accordingly, in taking a strict view of the “unambiguous” nature of the timing of the notice requirement, the Court enforced such requirement as written, and the notice therefore, needed to have been given “within 90 days” of the assumed last date of work of February 28, 2017. As such, given that the August 16, 2016 notice was not technically within 90 days of the February 28, 2017 date, the Court disregarded A&C's “too much notice” argument and found that A&C had failed to timely serve its Miller Act notice, and thus, could not maintain an action against the Sureties on the Payment Bond.

In its conclusion, the Seventh Circuit stated:

The Miller Act aims to protect subcontractors on federal construction projects against nonpayment, but nonetheless demands strict compliance with certain conditions precedent to the right to recover . . . [In this case] we are left with a straightforward question of whether A&C provided its required Miller Act notice within ninety days of the date it claimed for its last day of recoverable work. A&C did not and therefore cannot sue on the payment bond . . .

As such, the Court affirmed the summary judgment holding of the District Court making particular reference to the necessary strict compliance with the Miller Act's timing requirements relating to notice.

## Conclusion

While it is generally understood that courts throughout the country are to liberally construe the Miller Act so as to protect those whose labor and materials go into public projects, this case makes clear the utmost importance of one of the exceptions to the general rule of liberal construction – the notice and limitations provisions under the Miller Act – which are strictly construed conditions precedent. Notably, this case dealt with a relatively peculiar issue where the contractor, in theory, provided “too much notice” in that it served its notice more than 90-days prior to the date in which it last performed labor and furnished material to the Project. Notwithstanding the prior notice, the Court was unpersuaded by A&C’s “too much notice” argument and found that the contractor’s failure to strictly comply with the notice condition precedent of the Miller Act barred its claims against the Sureties on the Payment Bond.

Accordingly, the key concepts to take away from this ruling are two-fold. For contractors, while it is important to provide notice under the Miller Act when payments are not received, contractors must still comply with the Miller Act’s unambiguous requirements by providing subsequent notice within 90-days of it last performing work or furnishing materials to the Project. For sureties, when a notice is received, it is prudent (as it always is) to obtain precise information as to the date in which the claimant last performed work and/or furnished material as well as the date of the notice, and if such notice date is not within the 90-day timeframe, sureties may be able to take a strict view of the Miller Act provisions and deny any such claim as being untimely.

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<sup>i</sup> See *United States ex rel. Sherman v. Carter*, 353 U.S. 210, 216, 77 S.Ct. 793, 796-97, 1 L.Ed.2d 776 (1957); See also *United States ex rel. General Dynamics Corp. v. Home Indem. Co.*, 489 F.2d 1004, 1005 (7th Cir. 1973); *United States ex rel. Honeywell v. A & L Mechanical Contractors*, 677 F.2d 383, 386 (4th Cir. 1982); *United States ex rel. John D. Ahern Co., Inc. v. J.F. White Contracting Co.*, 649 F.2d 29, 31 (1st Cir. 1981); *Pepper Burns Insulation, Inc. v. Artco Corp.*, 970 F.2d 1340, 1343 (4th Cir. 1992).

<sup>ii</sup> 40 U.S.C. § 3133(b)(2).

<sup>iii</sup> 40 U.S.C. § 3133(b)(4).