

## APPENDIX D- SUMMARY OF STEPS NECESSARY TO PERFECT A FEDERAL PUBLIC WORKS CLAIM

### USE THIS INFORMATION WITH CAUTION

**This summary contains general information only, and must not be construed as legal advice, or take the place of competent legal counsel.** Its purpose is to provide general – not specific – information on some of the steps and precautions that must be taken, so that a bond claim may be valid and may be enforced, if necessary. The bonding laws are complicated, and the procedures and follow-through on the preparation of any bond claim should be carefully checked. Always check to see whether statutes may have been amended and to see if there is any new relevant case law- thus, the general information contained in this summary may be dated.

#### 1. Pre-claim Notice

**NONE**

#### 2. The Claim

Action	Who	When
<b>Notice of the Claim</b> must be provided to the contractor that provided the bond. 40 U.S.C. §3133	A person having a direct contractual relationship with a Subcontractor (one who contracts with the Prime Contractor) but no contract relationship, express or implied, with the Prime Contractor.	Within 90 days after last performance of labor, delivery of materials, or rental of equipment for which the claim is made.

#### 3. Post-claim Notice

**NONE**

#### 4. Action

Action	Who	When
<b>File lawsuit.</b> 40 U.S.C. §3133	All Claimants.	Not later than 1 year from last performance of labor, delivery of materials, or rental of equipment. Not based on the notice of claim date.

#### 5. Parties Protected by a Miller Act Bond

**Federal Government**

**Prime Contractor**

First-Tier Supplier		First-Tier Subcontractor	
Supplier	Subcontractor	<b>2<sup>nd</sup>-Tier Supplier*</b>	<b>2<sup>nd</sup>-Tier Subcontractor*</b>
		Supplier or Subcontractor	Supplier or Subcontractor

**ONLY THE PARTIES ABOVE IN GREY ARE PROTECTED BY A FEDERAL MILLER ACT PAYMENT BOND. THOSE IN WHITE ARE NOT PROTECTED.**

\* Written notice of claim is required

#### Federal Notes:

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1. If you do not have a direct contractual relationship with the prime contractor, but you subcontracted with a subcontractor who has a direct contractual relationship with the prime contractor, you must give written notice to the contractor within ninety (90) days from the date you last performed labor or furnished material or services for which your claim is made. See above chart and *J.W.Bateson Company, Inc v. United States Board of Trustees of National Automatic Sprinkler Industry Pension Fund*, 434 U.S. 586 (1978).
2. You should also consider giving notice to the contracting officer for the Federal agency in charge of the project and to the surety (the bonding company), doing so may expedite resolution.
3. Some public works contracts (both State and Federal) are divided into sections. While working on one large project, you may be working under more than one prime contract and, thus, may need to provide more than one notice. Some projects that may appear to be a "State Project" may actually be a federal project. Parties should confirm the type of bond before bidding the project.
4. Notice under the Miller Act can be given by any means that allows independent third-party verification.
5. Make certain that the notice is actually received before the time period expires. The time period may not be extended if the last day falls on a Saturday, Sunday, or other legal holiday. Consider using a "substantial" last day of performance for purposes of calculating the deadline for giving notice and filing suit. Confirm such date used for calculating deadlines is onsite work or material used onsite that can be established through claimant's records (e.g., a "will call" delivery typically means a delivery by a supplier at its place of business, not a delivery at the project site). Also, account for office closures, and other challenges to delivery of notices (e.g., weather).
6. The Federal Miller Act only requires bonds for projects exceeding \$100,000 (40 U.S.C. §3131. Certain projects are exempt from requiring a bond (40 USC §3134). A contracting officer may require alternative security for certain contracts. 40 U.S.C. §3132; see also FAR 28.102-1 (specifying payment protections for projects between \$35,000 up to \$150,000).
7. The Federal Miller Act permits waivers of a party's rights to assert a bond claim only if the waiver is: (a) in writing; (b) signed by the person waiving his/her rights; and (c) executed after the person has first furnished labor or materials for the project. 40 U.S.C. §3133(c).

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### **IMPORTANT NOTICES**

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