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Federal Circuit Confirms Miller Act Applies Even If Omitted from Contract.

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On November 5, 2018, the U.S. Court of Appeals for the Federal Circuit ("Court") confirmed something that many of us in the Federal Government Construction Contracts industry always understood was the law, namely that even where an agency omits the Miller Act bonding provisions contained in the Federal Acquisition Regulations ("FAR") for Federal government contracts, the Miller Act bonding obligations still apply.

The Miller Act, 40 U.S.C. §§3131 *et seq.,* as discussed in FAR Clause 52.228-15, "Performance and Payment Bonds-Construction", mandates that contractors on federal government construction projects valued at over $150,000 provide payment and performance bonds ("P&P Bonds") to assure that the work in question is fully performed and subcontractors and vendors (down to the second level of subcontracting) are paid. This law arose out of the fact that due to sovereign immunity, subcontractors and vendors cannot file mechanic's liens on Federal real property, thus a need to assure payment through a different vehicle, here a payment bond, was necessitated.

In this case, Appellant, K-Con, was awarded two contracts by the U.S. Army for pre-engineered metal buildings. The underlying awards were based upon the Contacting Officer using the General Services Administration's eBuy system, under which neither solicitation included the aforementioned Miller Act provisions. Following award, the Army directed K-Con to provide payment and performance bonds prior to the Army's issuance of the Notices to Proceed ("NTPs"). It was only two years later that K-Con provided these bonds. The NTPs were issued by the Army thereafter. During this time it argued that because the Miller Act provisions were not in the contracts, K-Con was not required to provide bonds. The NTPs were delayed by the Army for this two year period, resulting in material and labor cost increases totaling $116,000. A claim for these additional costs was submitted to, and thereafter denied by, the contracting officer.

On appeal, the Armed Services Board of Contract Appeals ("ASBCA") found that the Miller Act, and the FAR provision enabling it, was incorporated as a matter of law under the *Christian* Doctrine. Created in the 1960s, this doctrine was first articulated in *G.L. Christian & Associates v. United States,* 312 F.3d 418, 424-26 (Ct.Cl. 1963). That doctrine holds that certain regulatory provisions are incorporated into government contracts as a matter of law or public policy even if not explicitly referenced or cited therein. As a result, the ASBCA rejected K-Con's claim for additional monies for the delays.

On further appeal to the Federal Circuit, K-Con raised two arguments, both of which were rejected by the

Court.

First, K-Con argued that because the Contract was let under the GSA eBuy program, the item was a "commercial item" which did not mandate the provision of bonding. Agreeing with the government, the Federal Circuit concluded that if there was any question or ambiguity as to the "type" of contract, it was patent (*i.e.,* open and obvious such that a reasonable bidder should have found it and inquired prior to bidding). As such, K-Con had an affirmative obligation to inquire pre-award as to whether the Miller Act applied. While the Army admitted that if it had used the standard construction contract form the bonding requirement would have been included automatically, that does not matter, as the as-issued solicitation indicated in a number of locations that this was for construction and not mere supplies or services. This was further supported by the fact that the contracts included the Davis-Bacon Act, which mandates the payment of prevailing wages on construction projects. Given the inclusion of these provisions, this created a patent ambiguity. K-Con's failure to inquire and seek clarification pre-award acted as a waiver to this argument.

Secondly, K-Con argued that even if properly considered construction contracts, neither contract explicitly included the Miller Act Clause. The Court then discussed the *Christian* Doctrine, which is well known to government contracts attorneys but not so much contractors. Under this Doctrine, where a regulation exists, the Court can incorporate the clause into the contract as an operation of law (recognizing that regulations have the force and effect of law) where:

1. The clause is mandatory (*e.g.,* a "shall" type of clause); and it
2. "[E]xpresses a significant or deeply ingrained strand of public policy" (such as non-discrimination). *K-Con* at 7-8 (citation omitted).

Applying this two-part analysis to the facts of K-Con's case, and offering broad deference to the ASBCA, the Court held that the Miller Act was mandatory, requiring in the case of Federal construction contracts, that "a person *must furnish* to the Government [payment and performance] bonds…." *Id.* (*citing* 40 U.S.C. §§3131(b)(emphasis in decision)). This mandate was extended to the FAR through FAR 28.102-1, which states that the Miller Act "requires performance and payment bonds for any construction contract exceeding $150,000." *Id.* at 9. As a result, the Court concluded that it was mandatory that the P&P Bonds be provided under the first prong.

The Court then explored the second step, finding that the Miller Act serves a public purpose of providing "security for those who furnish labor and material in the performance of government contracts." *Id.* (citations omitted). As a result, the Court concluded that the Miller Act and related FAR provision "requirements express 'a significant or deeply ingrained strand of public procurement policy.'" *Id*. at 14. As a result, the Court found that K-Con's arguments that the contract were not for construction and that the P&P Bond provisions are incorporated by law under the *Christian* Doctrine and K-Con's appeal was denied in total.

This conclusion is not a surprise to this Author. While the Appellant articulated some colorable

arguments associated with the fact that the contracts were for prefabricated buildings bought under the eBuy Program, making them arguably "commercial items", it has always been this Author's understanding that the Miller Act applied to *all* federal construction contracts, regardless of formation. This would likely extend to those cases where (for whatever reason) the Agency inadvertently excluded the Miller Act Bonding provisions. Under such as circumstance, the *K-Con* decision, will likely require courts (and contractors) to assume that bonding was nonetheless required. Applying the long established *Christian* Doctrine to the Miller Act provides precedent and settles, seemingly once and for all, that even if omitted by accident, Miller Act bonds are required to be provided.

Any contractor pursuing work with the Federal Government (and possibly by extension state or local governments if they follow the *Christian* Doctrine) should carefully review the solicitation and make sure that they understand and verify the bonding requirements (to say nothing of other like provisions). *Any question* or potential question should be submitted to the Agency for clarification prior to bidding. Otherwise, the bidder/offeror carries the risk of having to provide something that it may not have included in its budget.