

Miller Act

In the United States, the law requiring contract surety bonds on federal construction projects is known as the Miller Act (40 U.S.C. §§ 3131-3134). The Miller Act is implemented through the Federal Acquisition Regulations (FAR) at 48 CFR Subpart 28.1. This law requires a contractor on a federal project to post two bonds: a performance bond and a labor and material payment bond. A corporate surety company issuing these bonds must be listed as a qualified surety on the [Treasury List](#), which the U.S. Department of the Treasury issues each year.

The Miller Act, as implemented by the FAR, provides that, before a contract that exceeds \$150,000^[1] for the construction, alteration, or repair of any building or public work of the United States is awarded to any person, that person shall furnish the federal government with the following:

1. A performance bond in an amount that the contracting officer regards as adequate for the protection of the federal government. The FAR establishes an amount of 100% of the contract price as the rule. An exception to this rule requires a specific determination by the contracting officer that a lesser amount provides adequate protection.
2. A separate payment bond is required for the protection of suppliers of labor and materials. The amount of the payment bond must be equal to the total amount payable by the terms of the contract. The FAR establishes an amount of 100% of the contract price as the rule. A deviation from this rule requires the contracting officer to make a written determination supported by specific findings that a payment bond in that amount is impractical, in which case the amount of the payment bond shall be set by the contracting officer. The amount of the payment bond may not be less than the amount of the performance bond.

Payment security also must be provided when the contract is in excess of \$30,000. Such security may be a payment bond or other forms of financial security.

The Miller Act payment bond covers subcontractors and suppliers of material who have direct contracts with the prime contractor. These are called first-tier claimants. The payment bond also covers subcontractors and material suppliers that have contracts with a subcontractor. These claimants are called second-tier claimants. Many states in the U.S. have adapted the Miller Act for use at the state level. These state statutes may be referred to as “Little Miller Acts.”

Miller Act Statute

TITLE 40. PUBLIC BUILDINGS, PROPERTY, AND WORKS

§ 3131. Bonds of contractors of public buildings or works

(a) Definition – In this subchapter, the term “contractor” means a person awarded a contract described in subsection (b).

(b) Type of bonds required – Before any contract of more than \$100,000 is awarded for the construction, alteration, or repair of any public building or public work of the Federal Government, a person must furnish to the Government the following bonds, which become binding when the contract is awarded:

(1) Performance bond – A performance bond with a surety satisfactory to the officer awarding the contract, and in an amount the officer considers adequate, for the protection of the Government.

(2) Payment bond – A payment bond with a surety satisfactory to the officer for the protection of all persons supplying labor and material in carrying out the work provided for in the contract for the use of each person. The amount of the payment bond shall equal the total amount payable by the terms of the contract unless the officer awarding the contract determines, in a writing supported by specific findings, that a payment bond in that amount is impractical, in which case the contracting officer shall set the amount of the payment bond. The amount of the payment bond shall not be less than the amount of the performance bond.

(c) Coverage for taxes in performance bond.

(1) In general – Every performance bond required under this section specifically shall provide coverage for taxes the Government imposes which are collected, deducted, or withheld from wages the contractor pays in carrying out the contract with respect to which the bond is furnished.

(2) Notice – The Government shall give the surety on the bond written notice, with respect to any unpaid taxes attributable to any period, within 90 days after the date when the contractor files a return for the period, except that notice must be given no later than 180 days from the date when a return for the period was required to be filed under the Internal Revenue Code of 1986
(26 U.S.C. 1 et seq.).

(3) Civil action – The Government may not bring a civil action on the bond for the taxes–

(A) unless notice is given as provided in this subsection; and

(B) more than one year after the day on which notice is given.

(d) Waiver of bonds for contracts performed in foreign countries – A contracting officer may waive the requirement of a performance bond and payment bond for work under a contract that is to be performed in a foreign country if the officer finds that it is impracticable for the contractor to furnish the bonds.

(e) Authority to require additional bonds – This section does not limit the authority of a contracting officer to require a performance bond or other security in addition to those, or in cases other than those specified in subsection (b).

§ 3132. Alternatives to payment bonds provided by Federal Acquisition Regulation

(a) In general – The Federal Acquisition Regulation shall provide alternatives to payment bonds as payment protections for suppliers of labor and materials under contracts referred to in section 3131(a) of this title that are more than \$35,000 and not more than \$150,000.

(b) Responsibilities of contracting officer – The contracting officer for a contract shall–

(1) select, from among the payment protections provided for in the Federal Acquisition Regulation pursuant to subsection (a), one or more payment protections which the offeror awarded the contract is to submit to the Federal Government for the protection of suppliers of labor and materials for the contract; and

(2) specify in the solicitation of offers for the contract the payment protections selected.

§ 3133. Rights of persons furnishing labor or material

(a) Right of person furnishing labor or material to copy of bond – The department secretary or agency head of the contracting agency shall furnish a certified copy of a payment bond and the contract for which it was given to any person applying for a copy who submits an affidavit that the person has supplied labor or material for work described in the contract and payment for the work has not been made or that the person is being sued on the bond. The copy is prima facie evidence of the contents, execution, and delivery of the original. Applicants shall pay any fees the department secretary or agency head of the contracting agency fixes to cover the cost of preparing the certified copy.

(b) Right to bring a civil action

(1) In general – Every person that has furnished labor or material in carrying out work provided for in a contract for which a payment bond is furnished under section 3131 of this title and that has not been paid in full within 90 days after the day on which the person did or performed the last of the labor or furnished or supplied the material for which the claim is made may bring a civil action on the payment bond for the amount unpaid at the time the civil action is brought and may prosecute the action to final execution and judgment for the amount due.

(2) Person having direct contractual relationship with a subcontractor – A person having a direct contractual relationship with a subcontractor but no contractual relationship, express or implied, with the contractor furnishing the payment bond may bring a civil action on the payment bond on giving 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. The action

must state with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. The notice shall be served—

(A) by any means that provides written, third-party verification of delivery to the contractor at any place the contractor maintains an office or conducts business or at the contractor's residence; or

(B) in any manner in which the United States marshal of the district in which the public improvement is situated by law may serve summons.

(3) Venue—A civil action brought under this subsection must be brought—

(A) in the name of the United States for the use of the person bringing the action; and

(B) in the United States District Court for any district in which the contract was to be performed and executed, regardless of the amount in controversy.

(4) Period in which action must be brought— An action brought under this subsection 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.

(5) Liability of Federal Government— The Government is not liable for the payment of any costs or expenses of any civil action brought under this subsection.

(c) Waiver of right to civil action— A waiver of the right to bring a civil action on a payment bond required under this subchapter is void unless the waiver is—

(1) in writing;

(2) signed by the person whose right is waived; and

(3) executed after the person whose right is waived has furnished labor or material for use in the performance of the contract.

§ 3134. Waivers for certain contracts

(a) Military— The Secretary of the Army, the Secretary of the Navy, the Secretary of the Air Force, or the Secretary of Transportation may waive this subchapter with respect to cost-plus-a-fixed fee and other cost-type contracts for the construction, alteration, or repair of any public building or public work of the Federal Government and with respect to contracts for manufacturing, producing, furnishing, constructing, altering, repairing, processing, or assembling vessels, aircraft, munitions, materiel, or supplies for the Army, Navy, Air Force, or Coast Guard, respectively, regardless of the terms of the contracts as to payment or title.

(b) Transportation –The Secretary of Transportation may waive this subchapter with respect to contracts for the construction, alteration, or repair of vessels when the contract is made under sections 1535 and 1536 of title 31, or subtitle V of title 46, or the Merchant Ship Sales Act of 1946 (50 App. U.S.C. 1735 et seq.), regardless of the terms of the contracts as to payment or title.

Federal Acquisition Regulation

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48 CFR 28.102 Performance and Payment Bonds and Alternative Payment Protections for Construction Contracts.

28.102–1 General.

(a) The Miller Act (40 U.S.C. 3131 et seq.) requires performance and payment bonds for any construction contract exceeding \$150,000, except that this requirement may be waived (1) by the contracting officer for as much of the work as is to be performed in a foreign country upon finding that it is impracticable for the contractor to furnish such bond, or (2) as otherwise authorized by the Miller Act or other law.

(b)(1) Pursuant to 40 U.S.C. 3132, for construction contracts greater than \$30,000, but not greater than \$150,000, the contracting officer shall select two or more of the following payment protections, giving particular consideration to inclusion of an irrevocable letter of credit as one of the selected alternatives:

(i) A payment bond.

(ii) An irrevocable letter of credit (ILC).

(iii) A tripartite escrow agreement. The prime contractor establishes an escrow account in a federally insured financial institution and enters into a tripartite escrow agreement with the financial institution, as escrow agent, and all of the suppliers of labor and material. The escrow agreement shall establish the terms of payment under the contract and of resolution of disputes among the parties. The Government makes payments to the contractor's escrow account, and the escrow agent distributes the payments in accordance with the agreement, or triggers the disputes resolution procedures if required.

(iv) Certificates of deposit. The contractor deposits certificates of deposit from a federally insured financial institution with the contracting officer, in an acceptable form, executable by the contracting officer.

(v) A deposit of the types of security listed in 28.204–1 and 28.204–2.

(2) The contractor shall submit to the Government one of the payment protections selected by the contracting officer.

(c) The contractor shall furnish all bonds or alternative payment protection, including any necessary reinsurance agreements, before receiving a notice to proceed with the work or being allowed to start work.

28.102-2 Amount required.

(a) Definition. As used in this subsection—

Original contract price means the award price of the contract; or, for requirements contracts, the price payable for the estimated total quantity; or, for indefinite-quantity contracts, the price payable for the specified minimum quantity. Original contract price does not include the price of any options, except those options exercised at the time of contract award.

(b) Contracts exceeding \$150,000 (Miller Act).

(1) Performance bonds. Unless the contracting officer determines that a lesser amount is adequate for the protection of the Government, the penal amount of performance bonds must equal—

(i) 100 percent of the original contract price; and

(ii) If the contract price increases, an additional amount equal to 100 percent of the increase.

(2) Payment bonds.

(i) Unless the contracting officer makes a written determination supported by specific findings that a payment bond in this amount is impractical, the amount of the payment bond must equal—

(A) 100 percent of the original contract price; and

(B) If the contract price increases, an additional amount equal to 100 percent of the increase.

(ii) The amount of the payment bond must be no less than the amount of the performance bond.

(c) Contracts exceeding \$30,000 but not exceeding \$150,000. Unless the contracting officer determines that a lesser amount is adequate for the protection of the Government, the penal amount of the payment bond or the amount of alternative payment protection must equal—

(1) 100 percent of the original contract price; and

(2) If the contract price increases, an additional amount equal to 100 percent of the increase.

(d) Securing additional payment protection. If the contract price increases, the Government must secure any needed additional protection by directing the contractor to—

(1) Increase the penal sum of the existing bond;

(2) Obtain an additional bond; or

(3) Furnish additional alternative payment protection.

(e) Reducing amounts. The contracting officer may reduce the amount of security to support a bond, subject to the conditions of 28.203–5(c) or 28.204(b).

28.102–3 Contract Clauses.

(a) Insert a clause substantially the same as the clause at 52.228–15, Performance and Payment Bonds–Construction, in solicitations and contracts for construction that contain a requirement for performance and payment bonds if the resultant contract is expected to exceed \$150,000. The contracting officer may revise paragraphs (b)(1) and/or (b)(2) of the clause to establish a lower percentage in accordance with 28.102–2(b). If the provision at 52.228–1 is not included in the solicitation, the contracting officer must set a period of time for return of executed bonds.

(b) Insert the clause at 52.228–13, Alternative Payment Protections, in solicitations and contracts for construction, when the estimated or actual value exceeds \$30,000 but does not exceed \$150,000. Complete the clause by specifying the payment protections selected (see 28.102–1(b)(1)) and the deadline for submission. The contracting officer may revise paragraph (b) of the clause to establish a lower percentage in accordance with 28.102–2(c).

[1] The National Defense Authorization Act for Fiscal Year 2005 established a requirement that all federal acquisition thresholds be reviewed every five years for inflation. The threshold for bond requirements under the Miller Act was increased to \$150,000 as a result of this law.