

CONSTRUCTION INDUSTRY PAYMENT PROTECTION ACT OF
1999

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JULY 30, 1999.—Ordered to be printed
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Mr. BURTON of Indiana, from the Committee on Government
Reform, submitted the following

REPORT

[To accompany 1219]

[Including cost estimate of the Congressional Budget Office]

The Committee on Government Reform, to whom was referred the bill (H.R. 1219) to amend the Office of Federal Procurement Policy Act and the Miller Act, relating to payment protections for persons providing labor and materials for Federal construction projects, having considered the same, report favorably thereon with amendments and recommend that the bill as amended do pass.

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The amendments are as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the “Construction Industry Payment Protection Act of 1999”.

SEC. 2. AMENDMENTS TO THE MILLER ACT.

(a) **ENHANCEMENT OF PAYMENT BOND PROTECTION.**—Subsection (a)(2) of the first section of the Miller Act (40 U.S.C. 270a(a)(2)) is amended by striking the second, third, and fourth sentences and inserting in lieu thereof the following: “The amount of the payment bond shall be equal to the total amount payable by the terms of the contract unless the contracting officer awarding the contract makes 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. In no case shall the amount of the payment bond be less than the amount of the performance bond.”

(b) **MODERNIZATION OF DELIVERY OF NOTICE.**—Section 2(a) of the Miller Act (40 U.S.C. 270b(a)) is amended in the last sentence by striking “mailing the same by registered mail, postage prepaid, in an envelop addressed” and inserting “any means which provides written, third-party verification of delivery.”

(c) **NONWAIVER OF RIGHTS.**—The second section of the Miller Act (40 U.S.C. 270b) is amended by adding at the end the following new subsection:

“(c) Any waiver of the right to sue on the payment bond required by this Act shall be void unless it is in writing, signed by the person whose right is waived, and executed after such person has first furnished labor or material for use in the performance of the contract”.

SEC. 3. IMPLEMENTATION THROUGH THE GOVERNMENT-WIDE PROCUREMENT REGULATIONS.

(a) **PROPOSED REGULATIONS.**—Proposed revisions to the Government-wide Federal Acquisition Regulation to implement the amendments made by this Act shall be published not later than 120 days after the date of the enactment of this Act and provide not less than 60 days for public comment.

(b) **FINAL REGULATIONS.**—Final regulations shall be published not less than 180 days after the date of the enactment of this Act and shall be effective on the date that is 30 days after the date of publication.

Amend the title so as to read:

A bill to amend the Miller Act, relating to payment protections for persons providing labor and materials for Federal construction projects.

I. BACKGROUND AND NEED FOR LEGISLATION**A. PURPOSE FOR THE BILL**

H.R. 1219, the Construction Industry Payment Protection Act of 1999, amends and updates the 1935 Miller Act (40 U.S.C. 270a et seq.). Under the Miller Act, contractors performing work on any Federal Government public works projects costing in excess of \$100,000 are required to provide a payment bond. The payment bond is intended to protect subcontractors and suppliers of materials against the risk of nonpayment when working on Federal construction projects. The Miller Act also requires the prime contractor to provide a performance bond for the protection of the Government.

The purpose of H.R. 1219 is to improve payment bond protections for persons who furnish labor or material for use on Federal construction projects. The bill would achieve this objective in a manner that does not unreasonably increase the financial exposure or other burdens placed on the prime contractor, usually a general contractor, or on the surety bond producers and corporate sureties that provide the Miller Act payment bonds.

The bill makes a number of targeted amendments to the Miller Act. First, the bill would increase the amount of the payment bond from a level that has remained unchanged since the law was enacted in 1935. The bill would require that the amount of the payment bond be equal to the contract price. Second, the bill would modernize the methods by which notices required under the Act

may be transmitted, but with the safeguard of requiring that the methods of notice generate a written third-party confirmation of receipt. Third, the bill would void waivers of Miller Act payment bond protections prior to commencing the work.

B. BACKGROUND

1. Surety Bonding Requirements Under the Miller Act

The 1935 Miller Act requires a contractor who is awarded a Federal construction contract in excess of \$100,000 to furnish two surety bonds to the Government—a performance bond and a payment bond. The 1935 Act authorizes payment bond claimants to file suits in U.S. District Courts and specifies the procedural requirements relating to such suits.

A surety bond is a promise to be liable for the debt, default or failure of another. Contract surety bonds are three-party instruments in which one party (the surety) guarantees or promises a second party (the project owner) the successful performance of a contract by a third party (the prime contractor). The Federal Government also uses surety bonds on construction projects as a way to pre-qualify prospective construction firms. A surety's underwriting process consists of an extensive pre-qualification process in order to guarantee to the project owner that the principal will fulfill the terms of the contract. Before issuing a bond, a surety will evaluate a contractor firm's ability to perform the job for which the bond is being sought. A surety will evaluate a contractor's past performance, including its financial and management capabilities and its payment of subcontractors and suppliers.

The performance bond protects the Government in the event the prime contractor fails to perform its obligations under the contract. The performance bond assures that the contractor will complete the job and satisfy other obligations under the construction contract. The Miller Act gives the Federal contracting officer the discretion to specify the dollar amount of the performance bond. The government-wide Federal Acquisition Regulation (FAR), calls for a performance bond to be 100 percent of the award value of the construction contract, "unless the contracting officer determines that a lesser amount would be adequate for the protection of the Government."

The payment bond assures that certain suppliers of labor and materials on the project will be paid subject to restrictions and limitations imposed by statute, the contract or the bond. Coverage under the Miller Act extends to those persons in a direct contractual relationship with the prime contractor, and to those who have a direct contractual relationship with a first-tier subcontractor, but have no relationship with the prime contractor.

The Miller Act also sets a payment bond amount as follows: 50 percent of the contract price if the award price is not more than \$1 million; 40 percent of the contract price if the award price is more than \$1 million but not more than \$5 million; or \$2.5 million, if the award price of the contract exceeds \$5 million. While these amounts may have been appropriate in 1935, in some cases they no longer provide subcontractors with adequate protection. The \$2.5 million payment bond amount could deprive some subcontrac-

tors and suppliers on large Federal construction projects of payment protection.

Bonds are priced on the basis of a percentage of the contract amount. Market conditions and prevailing industry practices set the percentage. A single premium is typically charged for both the performance bond and the payment bond. A separate premium is charged for a payment bond when one is provided without an attendant performance bond. It is the Committee's understanding that an increase in the size of the Miller Act payment bond, beyond the current amount, will not increase costs to the Federal Government. Surety bond premiums are calculated based on the contract amount. A significant portion of a surety company's total cost involves the underwriting costs. An increase or decrease to the payment bond penalty does not significantly affect the underwriting process and, consequently, the underwriting cost.

2. Enhancement of payment bond protection

H.R. 1219 would increase the amount of the payment bond to the total amount payable under the terms of the construction contract, unless the Federal department or agency contracting officer makes a written determination, supported by specific findings, that a payment bond in that amount is impractical. If the contracting officer finds that it would be impractical to set the payment bond in an amount that is equal to the contract price, the contracting officer can set a different amount; however in no case can the payment bond be less than the performance bond. It is the Committee's expectation that the revisions to the Federal Acquisition Regulation, implementing this legislation, will require that a contracting officer's written determinations supported by specific findings, be made part of the contract file relating to the construction procurement.

Even if there were no performance bonds the contracting officer must be certain to specify a payment bond amount sufficient to fully protect the aggregate dollar value of the performance expected to be undertaken by all covered subcontractors and their direct suppliers.

3. Methods of providing notice under the Miller Act

H.R. 1219 includes a provision that would modernize the Miller Act's requirements for the methods of providing notice to the prime contractor of the intent of a claimant not in privity with the prime contractor to seek payment from the prime contractor's bond. The Miller Act currently allows a notice to be sent by the U.S. Postal Service's registered mail service. H.R. 1219 would permit notice by any means, including registered mail and private delivery service that provides written third-party verification of delivery. Anticipating the expansion of electronic commerce, the proposed amendment would accord recognition of a notice provided by electronic means, if such electronic method can provide written third-party verification of receipt.

4. Waivers

The bill also specifies workable limitations on the conditions under which the Act's payment protections could be waived by an

intended beneficiary of those protections. The bill would require that any waiver must be in writing and may be made only after a subcontractor or supplier has first furnished labor or materials for use in performance of the contract. This provision is designed to eliminate waivers from subcontractors or suppliers prior to their commencing work on a project. At the same time, the bill would preserve the right of a subcontractor or supplier to waive its Miller Act right under the payment bond once it has commenced performance under the contract.

This bill does not void subcontract provisions requiring arbitration or other alternative methods of resolving disputes. Such provisions would remain enforceable with a claimant's Miller Act rights preserved by a timely suit that can be stayed pending the outcome of the subcontract dispute resolution procedure. The bill respects the freedom of the parties to the subcontract to specify means to resolve their disputes and the exclusive jurisdiction of the district court to decide issues arising under the Miller Act.

5. Construction task order contracts

The Committee notes that Federal departments and agencies are making use of task-order type contracts. Such contracts, also referred to as "task and delivery order contracts" or "indefinite delivery/indefinite quantity contracts," may be awarded to a single prime contractor or to multiple prime contractors, as determined by regulatory requirements or the business judgment of the contracting officer. When such a task-order type contract is used to provide construction-type services, such as maintenance of real property, the Committee believes that the amount of the payment bond should be determined by the amount of each task order made, rather than by the potential total value of the contract. Otherwise, construction contractors would be required to tie-up valuable bonding capacity based only on an expectation that the buying agency will place orders above any contractually-specified minimum order value, or that the same contractor would win each competition for each separate task order.

II. LEGISLATIVE HEARING AND COMMITTEE ACTIONS

H.R. 1219, the "Construction Industry Payment Protection Act of 1999," was introduced on March 23, 1999, by Representative Carolyn Maloney (NY) and was co-sponsored by Representative Stephen Horn (CA), Chairman of the Subcommittee on Government Management, Information, and Technology. The bill was also co-sponsored by Representative George Gekas (PA), Chairman of the Subcommittee on Commercial and Administrative Law, Committee on the Judiciary. The bill was referred to the Committee on the Judiciary and the Committee on Government Reform. The bill was considered by the Government Management Subcommittee on May 13, 1999, and passed unanimously by voice vote. An amendment in the nature of a substitute was offered by Representative Maloney and was adopted unanimously by a voice vote. Representative Maloney's amendment deleted Section 1 of the introduced version of the bill. The bill was considered by the Committee on Government Reform on May 19, 1999, and passed by a voice vote.

III. COMMITTEE HEARING AND WRITTEN TESTIMONY

No hearings were held specifically on H.R. 1219 during the 106th Congress. The Committee relied on the extensive record generated during the second session of the 105th Congress with respect to predecessor legislation, H.R. 3032, the "Construction Subcontractors Payment Protection Enhancement Act of 1998." The Committee had the benefit of the administration's views on the bill, provided in the form of a letter from the Administrator for Federal Procurement Policy, Office of Management and Budget, on May 17, 1999. H.R. 1219 contains proposals to amend the Miller Act that address the concerns of a variety of associations representing essentially every segment of the construction and surety industries.

The Committee received the views from the following organizations, each of which expressed support for the bill: The Air Conditioning Contractors Association, American Insurance Association, American Subcontractors Association, Associated General Contractors of America, Mechanical Contractors Association of America, National Association of Plumbing-Heating-Cooling Contractors, National Association of Surety Bond Producers, National Electrical Contractors Association, Painting and Decorating Contractors of America, Sheet Metal and Air Conditioning Contractors National Association, Surety Association of America, American Fire Sprinkler Association, Architectural Woodwork Institute, Association of the Wall and Ceiling Industries—International, Automatic Fire Alarm Association, Independent Electrical Contractors, Mason Contractors Association of America, National Association of Credit Management, National Ground Water Association, National Insulation Association, and the World Floor Covering Association.

The Subcommittee on Government Management, Information, and Technology and the Subcommittee on Commercial and Administrative Law of the Committee on the Judiciary held a joint hearing on H.R. 3032, the "Construction Subcontractors Payment Protection Enhancement Act of 1998," on September 11, 1998. Testimony was received from representatives of the American Subcontractors Association, the Associated General Contractors of America, and the Surety Association of America. The subcommittees also heard from two subcontractors with direct experiences relating to the need to modernize the Miller Act. The Honorable Deidre A. Lee, Administrator for Federal Procurement Policy, testified on behalf of the Administration.

Mr. Robert E. Lee, the President of Lee Masonry in Nashville, Tennessee, testified on behalf of the American Subcontractors Association. Mr. Lee supported H.R. 3032 and testified about the need to modernize the Miller Act, including the provision for providing notice of Miller Act lawsuits. Mr. Fred Levinson, president of Levinson & Santoro Electric Corporation, testified in support of the bill and the need to update the Miller Act. Ms. Micki Weaver, the owner of Weaver Glass in Harrisburg, Pennsylvania, testified that neither the bond cost nor the construction cost would increase if the amount of the payment bond were increased. According to Ms. Weaver, bond prices are based on the value of the contract and the rating of the general contractor. Ms. Weaver expressed concern

that specialty subcontractors were not bidding on Federal jobs because of the lack of payment protection.

Mr. Andrew Stephenson, a partner at the law firm of Holland & Knight, represented the Associated General Contractors. Mr. Stephenson testified in opposition to the provision of H.R. 3032 that requires general contractors to extend payment bond protections to all levels of subcontractors and suppliers. Ms. Lynn M. Schubert, president of the Surety Association of America, also representing the American Insurance Association and the National Association of Surety Bond Producers, testified in support of subcontractor payment provisions. Ms. Schubert also objected to certain provisions of the bill including the extension of payment bond protection to all levels of subcontractors and suppliers and a change to the American Rule governing the award of attorneys fees.

IV. EXPLANATION OF THE BILL

A. OVERVIEW

H.R. 1219, the Construction Industry Payment Protection Act of 1999, includes provisions that seek to modernize the 1935 Miller Act.

B. SECTION-BY-SECTION ANALYSIS

Section 1. Short title

The Act shall be known as the “Construction Industry Payment Protection Act of 1999.”

Section 2. Amendments to the Miller Act

This Section makes the following amendments to the Miller Act:

(a) requires a general contractor to furnish a payment bond in an amount equal to the total value of the contract, unless the contracting officer makes a written determination that a payment bond in that amount is impractical;

(b) permits notification of payment bond claims by any means that provides for written third-party verification of delivery. Current law specifies notification only by registered United States mail; and

(c) provides that a waiver of the right to sue on the payment bond is void, unless such waiver is in writing and is executed after the work on the contract is commenced.

Section 3: Implementation through the governmentwide procurement regulations

This Section requires that proposed regulations regarding implementation of the provisions of this Act be published not later than 120 days after enactment. The bill provides not less than 60 days for public comment on these proposed regulations and requires that final regulations be published not less than 180 days after enactment of this Act.

V. COMMITTEE OVERSIGHT FINDINGS

Pursuant to rule XIII, clause 3(c)(1), of the Rules of the House of Representatives, the results and findings for those oversight ac-

tivities are incorporated in the recommendations found in the bill and in this report.

VI. BUDGET ANALYSIS AND PROTECTIONS

Clause 3(c)(2) of rule XIII, of the Rules of the House of Representatives, is inapplicable because the bill does not provide new budget authority, new spending authority, new credit authority, or an increase or decrease in revenues or tax expenditures.

VII. COST ESTIMATE OF THE CONGRESSIONAL BUDGET OFFICE

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, June 9, 1999.

Hon. DAN BURTON,
*Chairman, Committee on Government Reform,
House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 1219, the Construction Industry Payment Protection Act of 1999.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is John R. Righter.

Sincerely,

BARRY B. ANDERSON
(For Dan L. Crippen, Director).

Enclosure.

H.R. 1219—Construction Industry Payment Protection Act of 1999

H.R. 1219 would make several amendments to the Miller Act of 1935, which governs the bonding requirements for federal construction projects. CBO estimates that enacting the bill would not have any significant impact on the federal budget. The bill would (1) require that a general contractor of a project generally obtain a payment bond in an amount that is equal to the total value of the federal contract, (2) permit subcontractors to notify contractors of an intent to sue by means other than registered mail, and (3) require that any waiver of a subcontractor's right to sue on a payment bond be in writing, signed, and executed after the subcontractor has furnished labor or materials for use in the project. The Office of Management and Budget would have 180 days to develop and publish final regulations for implementing the bill's provisions.

The Miller Act requires that general contractors of federal projects provide both a performance bond and a payment bond. A performance bond is a guarantee to the government that the contractor will complete a contract within its time frame and conditions. The amount of the performance bond is generally equal to the price of the contract. A payment bond is a guarantee to subcontractors and suppliers that they will be paid for work they perform properly under the contract. With some exceptions, the amount of a payment bond for a federal project cannot exceed \$2.5 million. The Administration, however, has proposed a rule that would lift that ceiling and instead require contractors to provide payment bonds in amounts that are equal to 40 percent of the

value of any contract that exceeds \$6.25 million (Federal Register, December 29, 1998).

CBO estimates that implementing H.R. 1219 would not significantly affect the costs of federal construction, because the surety industry, which issues the payment and performance bonds, generally charges one premium for both bonds. As such, the surety premium—including the cost for issuing the payment bond—for a federal project is already calculated based on the higher contract price. Because it appears the Administration will adopt its proposed rule on payment bonds, it is even less likely that implementing the bill would appreciably affect such costs. To the extent that implementing H.R. 1219 would increase bonding costs for federal projects, CBO expects that contractors would pass through such costs to the federal government. However, by reducing the risks of nonpayment for subcontractors, H.R. 1219 could also result in some savings if subcontractors were to reduce any risk-related premiums currently charged for working on federal projects. CBO, however, has no basis for estimating the amount of such potential savings.

Because enacting the bill would not affect direct spending or receipts, pay-as-you-go procedures would not apply. H.R. 1219 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would impose no costs on the budgets of state, local, or tribal governments.

The CBO staff contact is John R. Righter. This estimate was approved by Paul N. Van de Water, Assistant Director for Budget Analysis.

VIII. STATEMENT OF CONSTITUTIONAL AUTHORITY

Pursuant to rule XIII, clause 3(d)(1), the Committee finds that clauses 14 and 18 of Article I, Section 8 of the U.S. Constitution grant Congress the power to enact this law.

IX. COMMITTEE RECOMMENDATION

On May 19, 1999, a quorum being present, the Committee ordered the bill favorably reported to the House for consideration by voice vote.

X. CONGRESSIONAL ACCOUNTABILITY ACT; PUBLIC LAW 104-1

The Committee finds that the legislation does not relate to the terms and conditions of employment or access to public services or accommodations within the meaning of section 102(B)(3) of the Congressional Accountability Act (P.L. 104-1).

XI. UNFUNDED MANDATES REFORM ACT; PUBLIC LAW 104-4, SECTION 423

The Committee finds that the legislation does not impose any Federal mandates within the meaning of section 423 of the Unfunded Mandates Reform Act (P.L. 104-4).

XII. FEDERAL ADVISORY COMMITTEE ACT (5 U.S.C. APP.) SECTION
5(b)

The Committee finds that the legislation does not establish or authorize establishment of an advisory committee within the definition of 5 U.S.C. App., Section 5(b).

COMMITTEE CORRESPONDENCE

HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
Washington, DC, June 18, 1999.

Hon. DENNIS HASTERT,
The Speaker, House of Representatives,
Washington, DC.

DEAR MR. SPEAKER: I understand that the Government Reform Committee desires to take H.R. 1219, the "Construction Industry Payment Protection Act," to the floor without this committee reporting the bill. The bill contains certain matters within the Rule X jurisdiction of the Judiciary Committee which were the basis of your referral of the bill to us. Such matters include amendments to the Miller Act made by section 3 and procedural rules for promulgating revisions to the Federal Acquisition Regulation established by section 4.

In the interest of moving this non-controversial bill forward expeditiously, I will agree to the Judiciary Committee being discharged from further consideration of H.R. 1219. However, this should not be construed as a relinquishment of the Committee's Rule X jurisdiction as to the matters addressed by the bill or any further amendments relating to it. I also request that the Committee's rights to have our Members named to any conference committee on the bill or any similar bill be protected.

Sincerely,

HENRY J. HYDE, *Chairman.*

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

THE MILLER ACT

That (a) before any contract for the construction, alteration, or repair of any public building or public work of the United States is awarded to any person, such person shall furnish to the United States the following bonds, which shall become binding upon the award of the contract to such person, who is hereinafter designated as "contractor":

(1) A performance bond with a surety or sureties satisfactory to the officer awarding such contract, and in such amount as he shall deem adequate, for the protection of the United States.

(2) A payment bond with a surety or sureties satisfactory to such officer for the protection of all persons supplying labor and material

in the prosecution of the work provided for in said contract for the use of each such person. [Whenever the total amount payable by the terms of the contract shall be not more than \$1,000,000 the said payment bond shall be in a sum of one-half the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than \$1,000,000 and not more than \$5,000,000, the said payment bond shall be in a sum of 40 per centum of the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than \$5,000,000 the said payment bond shall be in the sum of \$2,500,000.] *The amount of the payment bond shall be equal to the total amount payable by the terms of the contract unless the contracting officer awarding the contract makes 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. In no case shall the amount of the payment bond be less than the amount of the performance bond.*

SEC. 2. (a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under this Act and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: *Provided, however,* That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating 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. Such notice shall be served by [mailing the same by registered mail, postage prepaid, in an envelop addressed] *any means which provides written, third-party verification of delivery* to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States marshal of the district in which the public improvement is situated is authorized by law to serve summons.

* * * * *

(c) Any waiver of the right to sue on the payment bond required by this Act shall be void unless it is in writing, signed by the person

whose right is waived, and executed after such person has first furnished labor or material for use in the performance of the contract.

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