Exempt the Miller Act from periodic threshold increases

The Federal Miller Act (40 U.S.C. §§ 3131-3134)—The protection for our nation's infrastructure projects

For nearly a hundred years, the federal government has statutorily required general contractors to furnish surety bonds on federal contracts. The Miller Act currently requires all general contractors on federal construction projects over $150,000 to furnish surety bonds to protect the government's use of taxpayer funds (performance bonds) and to ensure payments to subcontractors, and suppliers (payment bonds). Because subcontractors and suppliers cannot lien public property, the Miller Act payment bond provides their only source of payment protection.

Furthermore, subcontractors and suppliers often are small businesses on federal projects, and the risk of non-payment can be catastrophic to their businesses. The performance bond protects federal taxpayers by ensuring completion of the construction contract for the agreed contract price. In the event of a default by the general contractor, the surety steps in to complete the construction contract or hires a new contractor to complete the contract, saving taxpayers and the public purse from the considerable costs of re-letting the project and stopping and restarting. If this threshold increases, more small business subcontractors and suppliers on public projects will be put at risk of nonpayment if a general contractor cannot fulfil its contractual obligations.

Inflation adjustments of acquisition-related dollar thresholds (41 USC §1908)

Unfortunately, Congress swept up the Miller Act bond protections in a provision included in the Fiscal Year 2005 National Defense Authorization Act (NDAA), which called for inflationary indexing of all federal acquisition-related dollar thresholds in accordance with 41 USC §1908. As a result, the Miller Act bond protections are treated as the same as procurement thresholds and ignore the decades-old federal legal precedent that the Miller Act is a remedial statute protecting the rights of the government and payments to subcontractors and suppliers on federal projects. Interestingly, in the same legislation, Congress recognized that certain protections should not be subject to this inflationary adjustment scheme. Specifically, Davis Bacon Act protections were excluded from periodic inflationary adjustments to protect the payment of wages to laborers on federal projects.

The same basis that provides the exception for the Davis Bacon Act from periodic inflationary adjustments, preserving appropriate payments, should be applied to the Miller Act bond protections. Regularly increasing the Miller Act bond threshold exposes smaller businesses, working as subcontractors and suppliers, to loss of payment protections on federal construction projects. Further, U.S. taxpayers should not have their tax dollars utilized for government construction projects placed at risk by the absence of performance bonds due to a rote inflationary adjustment.

Impact of not exempting the Miller Act from Title 41 inflation adjustments

The Miller Act was enacted as a protective remedial statute, but any increase in the contract price threshold exposes workers, suppliers, and taxpayer dollars to unnecessary risk. For each increase of the Miller Act bond threshold by a $50,000 increment, **it is estimated by the Surety & Fidelity Association of America that approximately 1,700 federal construction contracts per year worth an estimated $300M dollars will be exposed to unnecessary risk. Please think about the numbers of subcontractors and suppliers, many of which will be classified as small businesses, which will not have payment protections on such projects.**

<u>The Solution</u>

Congresswoman Nydia Velazquez (D-NY) and Congressman Byron Donalds (R-FL) have introduced, H.R. 2949 that provides a bipartisan, commonsense solution to fix this problem. This legislation would make clear that the Miller Act would not be subject to indexing under Title 41.

<u>Benefits of this solution</u>

- **Surety Bonds offer protections and benefits far beyond their nominal costs**. Bonding typically only adds 1% to 3% to projects costs and provides 200% performance and payment coverage protection. Further, since surety companies make sure only qualified general contractors bid on federal construction contracts, the added costs deliver benefits in terms of risk management and the quality of contractors that are attracted to compete for federal construction projects.
- In the event a general contractor is unable to complete its obligations to both subcontractors and the public owner, a surety company is able to step in to complete the contract and to ensure that subcontractors and suppliers are paid.

Organizations who support H.R. 2949 include Members of the Construction Industry Procurement Coalition (CIPC) which include the following:

American Council of Engineering Companies
Associated General Contractors of America
American Society of Civil Engineers
American Subcontractors Association
Design-Build Institute of America
Independent Electrical Contractors
International Institute of Building Enclosure Consultants
National Association of Surety Bond Producers
National Electrical Contractors Association
National Society of Professional Surveyors
Sheet Metal & Air Conditioning Contractors National Association
The Surety & Fidelity Association of America
U.S. Geospatial Executives Organization
Women Construction Owners & Executives

Other Supporting Organizations

American Property Casualty Insurance Association (APCIA)