



For more information,  
please contact:  
Larry LeClair  
Assistant Director  
State & Federal Relations  
at 202-464-1217 or  
lleclair@nasbp.org

## Reforms Needed in the Federal Acquisition Regulation (FAR) to Engender Consistency and Transparency of Contracting Officer Decisions to Reduce or to Waive Miller Act Bond Requirements

### Background:

- Payment and performance bonds on federal construction projects are statutorily required under the Miller Act (40 USCA §3131 et seq). The Miller Act requires that, before any contract exceeding \$100,000 is awarded for the construction, alteration or repair of any public building or public work of the United States, the construction contractor must furnish a performance and a payment bond to the contracting agency. Enacted in 1935, the Miller Act ensures that vital federal construction projects are completed, subcontractors and suppliers are paid, and taxpayer funds are protected.
- The Miller Act sets forth appropriate, limited circumstances under which statutory bond requirements can be reduced or waived:
  - The Act permits reduction of the payment bond to less than 100% of the contract amount when the contracting officer determines in writing supported by “specific findings” that the amount of the payment bond is “impractical,” in which case the contracting officer can set the amount of the payment bond.
  - The Act permits the contracting officer to waive bond requirements on federal projects to be performed in foreign countries, when the contracting officer has determined that the bond is “impracticable for the contractor” for that project.
- In recent years, instances have arisen where performance and payment bonds have been waived on overseas federal construction projects that appear not to comport with the spirit or the letter of the Miller Act exceptions.

### NASBP Message:

- While the Miller Act articulates the standards when payment bond requirements may be reduced on federal construction projects or when performance and payment bond requirements may be waived on overseas federal construction projects, little or no regulatory guidance has been promulgated interpreting those standards, so that they are understood and uniformly applied throughout the federal government.
- Making such decisions transparent would place interested parties, such as bidders and subcontractors and suppliers, in better position to evaluate and to account for the higher risks of performing work on federal construction projects with reduced or waived bond requirements.

NASBP GovRel  
Position Brief  
Vol I No 4  
page 1 of 2





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- The following issues should be considered by contracting officers with respect to Miller Act bond requirements:
  - Courts consistently find that the Miller Act should be construed and applied liberally to affect its remedial purpose—i.e. to protect the contracting agency from contractor nonperformance and to ensure subcontractors and suppliers are paid for their labor and materials, since subcontractors and suppliers on federal projects rely on the payment bond as their singular payment remedy in the event the prime contractor becomes insolvent or fails to pay.
  - NASBP does not believe that contracting officers have met the standard of “impracticable for the contractor” when deciding to waive bond requirements on overseas construction projects where contractors already have demonstrated their ability to provide payment/performance bonds during the RFP process.
- The terms “specific findings,” “impractical” and “impracticable” are not defined in the Miller Act. Contracting officers should be given specific regulatory guidance on the meaning of these terms in the context of the Miller Act and in light of its remedial purpose.
- Contracting officers need to demonstrate their due diligence in making determinations to reduce or to waive Miller Act bond requirements. Moreover, such determinations should be transparent and be made available to interested parties.
- There are press reports and documented cases where bond requirements were waived by contracting officers for overseas construction projects, where construction problems occurred, subcontractors and suppliers were left unpaid, and the Federal Government was left with no recourse (see, e.g., *In re KI Liquidation, Inc. v. Interchange Bank*, 2008 WL 5109369 (D.N.J.)).
- With a declining economy, now more than ever decisions to reduce or to waive bond requirements per Miller Act exceptions should be written, transparent, and available for review by interested parties.

### Who is the National Association of Surety Bond Producers (NASBP)?

Established in 1942, NASBP (<http://www.nasbp.org>) is a national organization of professional surety bond producers and brokers, representing over 5,000 personnel who specialize in surety bonding, issuing bid, performance, and payment bonds for the Nation’s construction projects. Bond producers bring value to the contractor-surety relationship, and surety bonds bring value to the Nation’s construction projects. Bond producers virtually touch every contractor bidding or proposing on public works projects.

NASBP GovRel  
Position Brief  
Vol I No 4  
page 2 of 2

