A LITTLE CONFUSION WITH THE LITTLE MILLER ACT

Construction Law Section

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As many construction attorneys know, the Little Miller Act can be a little confusing. The purpose of Section 255.05 of the Florida Statutes, also known as "Florida's Little Miller Act," is to protect subcontractors, material suppliers and laborers by providing them with an alternative remedy to mechanic's liens on public projects. The Little Miller Act is vital to those downstream parties because they cannot acquire liens on public projects. Additionally, the Act protects the state from defaults by the general contractor in the payment of subcontractors and material suppliers.

However, a confusing situation can arise when a public entity removes portions of a bonded contract and deals with subcontractors directly in order to realize tax-related savings. As an example, the state hires General Contractor, Inc. ("GC") to construct a new courthouse. As part of the contract, each courtroom bench is to be constructed out of Fabergé eggs. GC engages Subcontractor, Inc. ("Sub") to construct and install the benches, with Supplier, Inc. ("Supplier") supplying the eggs. As required by Section 255.05, GC furnishes a payment and performance bond that covers the general contract. Months into the project, the state realizes it could save thousands of dollars by cutting the Sub portion out of the general contract and dealing directly with Sub as the GC would no longer have to pay the sales tax for the eggs and pass that cost along to the state. The state and GC cut the Sub portion from the general contract, and the state and Sub enter into a separate contract for the benches for $250,000. The state, Sub and Supplier continue on, unaware that there is no longer any protection under Section 255.05.

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If Sub does not pay Supplier, and Sub becomes insolvent, neither the state, nor Supplier is afforded the protection of the 255.05 bond. Once the Sub portion was cut out of the general contract, Supplier arguably lost its protection under the bond. Additionally, if the state did not require Sub to furnish a separate 255.05 bond for the work that was cut out of the general contract, the state could be exposed to liability for Sub's default. *Palm Beach County v. Trinity Indus., Inc.*, 661 So. 2d 942, 944 (Fla. 4th DCA 1995). In *Palm Beach,* the court affirmed a summary judgment in favor of a subcontractor against the county as the county failed to ensure that the contractor posted a payment and performance bond. *Id.* at 945. The court, citing *Warren for Use & Benefit of Hughes Supply Co. v. Glens Falls Indem. Co.*, 66 So. 2d 54 (Fla. 1953), held that the Little Miller Act places a corresponding duty on the public agency, as well as the contractor, to see that a bond is posted for the protection of the subcontractors and suppliers before construction commences. *Palm Beach,* 661 So. 2d at 944.

While the *Palm Beach* and *Warren* holdings are not recent, their significance is increasingly relevant. As public entities are looking for ways to save money on construction projects more now than ever, the message to state entities, contractors, and subcontractors alike is that only strict compliance with Florida's Little Miller Act will provide protection.

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