

105TH CONGRESS
1ST SESSION

H. R. 3032

To amend the Office of Federal Procurement Policy Act and related acts to enhance the payments protections for subcontractors and suppliers on Federal construction projects, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

NOVEMBER 12, 1997

Mrs. MALONEY of New York introduced the following bill; which was referred to the Committee on the Judiciary, and in addition to the Committee on Government Reform and Oversight, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

A BILL

To amend the Office of Federal Procurement Policy Act and related acts to enhance the payments protections for subcontractors and suppliers on Federal construction projects, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Construction Sub-
5 contractors Payment Protection Enhancement Act of
6 1998”.

1 **SEC. 2. ADDITIONAL RESPONSIBILITIES OF THE ADMINIS-**
2 **TRATOR FOR FEDERAL PROCUREMENT POL-**
3 **ICY.**

4 Section 6(d) of the Office of Federal Procurement
5 Policy Act (41 U.S.C. 405(d)) is amended—

6 (1) by redesignating paragraphs (9), (10), (11),
7 (12), and (13), as paragraphs (10), (11), (12), (13),
8 and (14), respectively; and

9 (2) by inserting after paragraph (8) the follow-
10 ing new paragraph:

11 “(9) establishing appropriate Government-wide
12 policies and assuring Government-wide implementa-
13 tion through the Federal Acquisition Regulation of
14 statutes and policies assuring the timely payment of
15 contractors, subcontractors, and suppliers, including
16 chapter 39 of title 31, United States Code (com-
17 monly known as the “Prompt Payment Act”), the
18 Miller Act (40 U.S.C. 270a–270d–1), and section
19 2091 of the Federal Acquisition Streamlining Act of
20 1994 (Pub. Law 103–355; 108 Stat. 3306);”.

21 **SEC. 3. IMPLEMENTATION THROUGH THE GOVERNMENT-**
22 **WIDE PROCUREMENT REGULATIONS.**

23 (a) **PROPOSED REGULATIONS.**—Proposed revisions
24 to the Government-wide Federal Acquisition Regulation to
25 implement the amendments made by this Act shall be pub-
26 lished not later than 120 days after the date of the enact-

1 ment of this Act and provide not less than 60 days for
2 public comment.

3 (b) FINAL REGULATIONS.—Final regulations shall be
4 published not less than 180 days after the date of the en-
5 actment of this Act and shall be effective on the date that
6 is 30 days after the date of publication.

7 **SEC. 4. RELATED AMENDMENTS TO THE MILLER ACT.**

8 (a) IMPROVEMENT OF PAYMENT BOND PROTEC-
9 TION.—Subsection (a)(2) of the first section of the Miller
10 Act (40 U.S.C. 270a(2)) is amended by striking the sec-
11 ond, third, and fourth sentences and inserting in lieu
12 thereof the following new sentence: “The amount of the
13 payment bond shall be equal to the amount of the per-
14 formance bond.”.

15 (b) PAYMENT BOND PROTECTION FOR PROGRESS
16 PAYMENTS.—Section 2(a) of the Miller Act (40 U.S.C.
17 270b(a)) is amended in the first sentence by striking “who
18 has not been paid in full therefor” and inserting in lieu
19 thereof the following: “(1) who has not been paid in full
20 for a progress payment before the expiration of a period
21 of seven days after the due date of the progress payment,
22 or (2) who has not been paid in full for the labor or mate-
23 rial”.

1 (c) EXTENSION OF PAYMENT BOND PROTECTION TO
2 ALL SUBCONTRACTORS AND SUPPLIERS.—Section 2(a) of
3 the Miller Act (40 U.S.C. 270b(a)) is further amended—

4 (1) by striking “performed by him” and insert-
5 ing “performed by the person”;

6 (2) by striking “supplied by him” and inserting
7 in lieu thereof “supplied by the person”; and

8 (3) by striking “him: *Provided, however,*” and
9 all that follows through “within ninety days from”
10 and inserting in lieu thereof “the person. Any person
11 who institutes such a suit shall give notice of such
12 suit to the contractor who furnished such payment
13 bond not later than 90 days after”.

14 (d) PRESERVATION OF PAYMENT BOND PROTEC-
15 TION.—The first section of the Miller Act (40 U.S.C.
16 270a) is further amended by adding at the end the follow-
17 ing new subsection:

18 “(e) No waiver of any protection afforded to a person
19 by a payment bond required by this Act shall be valid un-
20 less the waiver is in writing and is made after the date
21 such person may institute a suit under section 2 with re-
22 spect to such bond.”.

23 (e) MODERNIZATION OF SERVICE OF PAYMENT
24 BOND CLAIMS.—Section 2(a) of the Miller Act (40 U.S.C.
25 270b(a)) is further amended in the sentence beginning

1 with “Such notice” by striking “by mailing” and all that
2 follows through “or his residence” and inserting in lieu
3 thereof “to the contractor at any place the contractor con-
4 ducts business through any delivery service that provides
5 proof of receipt, including the United States Postal Serv-
6 ice, a private express delivery service, or delivery by any
7 form of electronic means,”.

8 (f) ELIMINATION OF DELAYS IN PAYMENT BOND
9 PROTECTION.—Section 2 of the Miller Act (40 U.S.C.
10 270b) is further amended—

11 (1) in the second paragraph, by inserting “(b)”
12 before “Every suit instituted”; and

13 (2) by adding at the end the following new sub-
14 section:

15 “(c) A suit instituted under this section shall not be
16 dismissed on the grounds that it was filed before the expi-
17 ration of a period of ninety days after the date on which
18 the last of the labor was done or performed or material
19 was furnished or supplied if the person who instituted the
20 suit has received from the contractor who furnished the
21 bond a denial in writing that payment is due, in whole
22 or in part.”.

23 (g) DISCOURAGEMENT OF FRIVOLOUS PAYMENT
24 BOND LITIGATION.—Section 2 of the Miller Act is further

1 amended by adding at the end the following new sub-
2 section:

3 “(d)(1) A court may award the prevailing party in
4 a suit instituted under this section court costs, attorneys’
5 fees, and interest, if the court determines that such an
6 award is appropriate and that—

7 “(A) the suit is frivolous or a defense that is
8 asserted in the suit is groundless; or

9 “(B) such an award is needed to preserve the
10 protections of this Act with respect to a small claim,
11 in an amount not exceeding the simplified acquisi-
12 tion threshold (as defined in section 4(11) of the Of-
13 fice of Federal Procurement Policy Act; 41 U.S.C.
14 403(11)).”.

15 “(2) Interest awarded under this subsection shall be
16 calculated for the period beginning on the date the claim
17 is made and ending on the date of payment, using the
18 interest rates applicable to late payment interest penalties
19 pursuant to section 3902 of title 31, United States Code
20 (commonly referred to as the “Prompt Payment Act”).”.

21 (h) ACCOUNTABILITY OF CONTRACTING OFFICERS.—
22 The first section of the Miller Act (40 U.S.C. 270a) is
23 further amended by adding at the end the following new
24 subsection:

1 “(f)(1) The contracting officer for a contract shall be
2 responsible for—

3 “(A) obtaining from the contractor the payment
4 bond required under subsection (a); and

5 “(B) ensuring that the payment bond remains
6 in effect during the administration of the contract.

7 “(2) In any case in which a person brings suit pursu-
8 ant to section 2 and the court determines that the required
9 payment bond is not in effect because the contracting offi-
10 cer has failed to perform the responsibilities required by
11 paragraph (1), upon petition of the person who brought
12 the suit the court may authorize such person to bring suit
13 against the United States for the amount that the person
14 would have sued for under section 2.”.

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