

Miller Act Suit Stayed until CDA Remedies Exhausted

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A federal district court in Washington recently rejected a subcontractor's motion for reconsideration of a previously granted motion to stay in a Miller Act lawsuit (the Miller Act governs prime contractor bond requirements on federal projects and sets forth remedies against the bond for subcontractors, vendors, and suppliers on such projects). In *United States of America, for the use and benefit of Ballard Marine Construction, LLC, v. Nova Group Inc., et al.*, the prime contractor, Nova Group, moved to stay Ballard Marine's Miller Act lawsuit until Ballard Marine and Nova Group exhausted the Contract Disputes Act (CDA) resolution process.

The parties' subcontract required Ballard Marine to await resolution of the CDA process and a determination by the government of the amount to which Ballard Marine and Nova Group may be entitled before pursuing Nova Group or its sureties separately. The district court granted Nova Group's motion, and Ballard Marine moved for reconsideration and clarification as to whether the stay extended through the contracting officer's final decision or through the exhaustion of the CDA appeals process.

Ballard Marine argued that the latter view of the stay was unfair because the appeals process could take years to fully resolve, and it was more appropriate to extend the stay only until the Navy's contracting officer issued its final decision on Ballard Marine's claim. Nova Group countered by arguing that the report and recommendation granting the motion to stay was already clear that the stay extended through the CDA appeals process.

Further, Nova Group argued that until the CDA appeals process was exhausted, no determination could be made as to the amount due under the subcontract. Nova Group persuasively argued that the Miller Act was not intended to "bypass the [CDA] process under which monetary entitlement is quantified." According to Nova Group, the government's determination of entitlement was a prerequisite to Ballard Marine's pursuit of any claims. Nova Group also offered evidence that it had been pursuing Ballard Marine's claim diligently and disputed the assertion that the CDA appeals process would take many years to resolve. The district court agreed with Nova Group and denied the motion for reconsideration.

Lessons from *Ballard Marine Construction*

Contractors and subcontractors should be cognizant of the dispute requirements in their subcontracts. Subcontracts on federal projects often contain clauses incorporating prime contract requirements or provisions requiring adherence to and exhaustion of the CDA process prior to pursuit of a prime contractor on pass-through claims. These provisions should feature prominently in internal company assessments about recovery options/exposure and potential litigation timelines.

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National Law Review, Volume XI, Number 342

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