

## Miller Act Bond Claims Subject to "Pay If Paid". . . Sometimes



The Federal [Miller Act](#) is a great tool that subcontractors and suppliers on Federal projects can use for collection of wrongfully withheld amounts due. However, as a recent federal case from the Eastern District of Virginia points out, the construction contract's terms affect when a subcontractor or supplier can use this great collection tool and how much it can recover.

In [Aarow v Travelers](#) the Court looked at the interaction between a typical termination clause, a "pay when paid" clause, and the Miller Act. The key facts are these. The general contractor on the project at issue, Syska, did not get paid some disputed amounts by the owner and subsequently did not pay Aarow, the plaintiff and a subcontractor on the project. Aarow then refused to continue work and was terminated by Syska who then took over the completion of the work. Aarow sued, seeking damages for the value of its work prior to the termination. Travelers, the surety defended stating that, if Aarow was properly terminated for cause by Syska, then Aarow was not entitled to payment under the contract until such time as the work was completed and accepted by the owner. The termination clauses are set out in the linked opinion.

The Court agreed with Travelers, stating that the pay when paid clause created a situation whereby Aarow could not stop work merely because of a non-payment by Syska attributed to non-payment by the owner. The Court was clear in stating that the Miller Act trumps "pay when paid" in instances where the *only* cause for non-payment is non-payment by an owner. The Court then reasoned that it is the interaction between the termination and "pay when paid" provisions, and not the "pay when paid" clause itself, that exonerated Travelers because it created the default by Aarow due to its refusal to continue work. In short, Aarow was properly terminated for cause because it left the job without justification and therefore Travelers was not liable.

What can we learn from this? 1. A "pay when paid" clause, on its own, does not create a defense to a Miller Act claim; 2. Read every line of a construction contract before you, as a subcontractor, leave a job site and refuse to come back; and 3. The Miller Act does not completely absolve parties to a contract from the terms of that contract.

In sum, the careful reading of your construction documents and the advice of a [construction lawyer](#) *before* making a big decision like leaving a job site can go a long way toward a successful collection action under the [Miller Act](#).

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