

Miller Act, 90-Day Notice, Open-Book Accounts - Ramona Equipment Rental v. Candelaria Casualty

Won a victory before the Ninth Circuit last week in a significant published decision. The case is Ramona Equipment Rental v. Carolina Casualty Insurance (No. 12-55156). I represented Ramona Equipment. The appeal was from a case I tried before Judge Marilyn Huff in District Court here in San Diego the summer of 2011. The issue before the Ninth Circuit concerned application of the Miller Act (the payment bond statute for federal works of improvement) ninety-day notice provision to a supplier providing goods/equipment to the federal work of improvement on an open-book account. The ninety-day notice provision (40 U.S.C. section 1331(b)(2)) provides, in pertinent, as follows:

“[a] person having a direct contractual relationship with a subcontractor but no contractual relationship, express or implied, with the contractor furnishing the payment bond may bring a civil action on the payment bond on giving written notice to the contractor within 90 days from the date on which the person did or performed the last of the labor or furnished or supplied the last of the material for which the claim is made”

My client had supplied rental equipment to a subcontractor on a federal construction project on an open book account. The rentals were provided to the worksite over a six-month period of time. The subcontractor did not pay in full. Client gave the required ninety-day notice to the general contractor and filed suit under the Miller Act. The general contractor and the bond surety argued at trial that the ninety-day notice was untimely as to all rental equipment furnished to the project more than ninety days before service of the notice. The District Court disagreed and, relying heavily on Noland Co. v. Allied Contractors, Inc. 273 F.2d 917, 920 (4th Cir. 1959) in the absence of Ninth Circuit authority, concluded that, in light of the open book account, the ninety-day notice covered all rental equipment furnished to the Project.

The Ninth Circuit Court of Appeal, addressing the issue for the first time in today's published opinion, agreed and affirmed the District Court judgment. Citing to Noland and other decisions from the First, Fourth and Fifth Circuits, the Court held that:

"...if all the goods in a series of deliveries by a supplier on an open book account are used on the same government project, the ninety-day notice is timely as to all of the deliveries if it is given within ninety days from the last delivery."

The dissenting opinion noted that *"the ninety-day notice requirement serves to protect the general contractor and its surety."* The majority opinion countered that:

".. the weight of circuit authority recognizes a broader purpose in the Miller Act. In the end, the goal of the notice provision must take a back seat to the purpose of the overall statute, which is to provide recovery for suppliers who have provided materials but not received compensation."

This is a nice win for a good client after a long battle. The case is also significant in that it serves to clarify application of the Miller Act ninety-day notice provision to suppliers of materials and equipment to federal jobs on open-book accounts in a fashion consistent with the overall remedial goals of the Act.

It is a nice victory. Like I always say - Winning is Always Better than Losing!