HB

310

REPRESENTATIVE
BEN GRUSSENDORF

P. O. Box 928
SITKA, ALASKA 99835
(907) 747-8458

RULES COMMITTEE
LEGISLATIVE COUNCIL

DISTRICT 3
ELAN COVE
PELICAN
PORT ALEXANDER
SITKA
TENAKEE

Alaska State Legislature

WHILE IN JUNEAU
P.O. Box V
JUNEAU, ALASKA 99811

(907) 465-3824
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House of Representatives
SPEAKER OF THE HOUSE

MEMORANDUM

To: Rep. Dave Donley
Chairman
House Labor & Commerce Committee

From: Rep. Ben Grussendorf
Speaker of the House

Date: February 17, 1988

Subject: House Bill 310

The purpose of House Bill 310 is to make it easier for subcontractors to collect money owed them for work on public construction projects. A number of subcontractors around the state have had great difficulty in this area, either receiving payments in an untimely manner or having payments wrongfully withheld. House Bill 310 would simply require that, prior to the receipt of a second or subsequent progress payment on a public construction project, the prime contractor submit a sworn statement that all subcontractors on the project have been paid what was due them from the previous progress payment.

Although House Bill 310 in its present form does take a step toward solving the problem, I believe the bill can be strengthened. Attached to this memorandum is a proposed substitute for House Bill 310 which I hope will be given consideration for adoption by the Labor & Commerce Committee. The proposed substitute does basically three things:

1. **Section 1** amends the "Little Miller Act", the law which allows those who have contributed labor and materials to a public construction project and who have not been paid to sue against the payment bond posted by the prime contractor. The amendment would make clear that <u>any</u> person who furnishes such labor or materials may sue against the bond. All that is required is that the person have a direct contractual relationship with <u>any</u> subcontractor on the project.

2. **Sections 2, 3 and 4** amend certain parts of the "Miscellaneous Provisions" section of Title 36 (Public Contracts). These amendments relate to sworn statements which must be furnished before prime contractors may receive progress payments on a public construction project, and are more particularly described in the first paragraph of this memorandum. Sections 2, 3 and 4 are basically the same as sections 1, 2 and 3 of HB 310 as introduced.

3. Section 5 requires that any subcontractor on a public construction or public works project give written notice to the prime contractor that the subcontractor has been so engaged. This requirement will make the prime contractor aware of any potential "Little Miller Act" claimants and should help the prime contractor comply with the requirement that he submit sworn statements of payment to subcontractors prior to the receipt of the prime contractor's second or subsequent progress payment.

One of the reasons I introduced House Bill 310 was to put the subject of payments to subcontractors "on the table" for discussion and debate. I am not claiming that the bill or its proposed substitute are the perfect solution, and I expect amendments to be proposed as this bill makes its way through the committee. I will not oppose such amendments if they serve the main purposes of the legislation: the prompt payment of subcontractors for work performed on public construction projects.

STATE OF ALASKA
THE LEGISLATURE

POUCH Y · STATE CAPITOL
JUNEAU, ALASKA 99811
907·465·3800

LEGISLATIVE AFFAIRS AGENCY

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May, 1988

Copies of minutes listed below were originally included in this file. The minutes are available on the STAIRS database CMPR. In order to save space copies of minutes have not been left in the files.

Mary Van Nimwegen

H. JUD.	3-17-88	1:30p.m.
H. JUD.	3-16-88	1:30p.m.

(7)

Date referred: 3/9/88 FURTHER REFERRALS: Finance

DATE: March 17, 1988

The Judiciary Committee has considered HB 310

"An Act relating to payment under public construction contracts."

RECOMMENDS:

[✓] replace with CS HB 310 (JUD) [✓] the same title
[✓] a new title

[ ] attached amendment(s)

[✓] do pass
[ ] do not pass
[ ] no recommendation
[ ] individual recommendations
[ ] additional referral to the _____ Committee

ADOPTS: [ ] _____ letter of intent

ATTACHES NEW FISCAL NOTE(s):

[ ] fiscal impact
[ ] zero fiscal note
[ ] zero with analysis
[ ] same as previous fiscal note published _____
[✓] same as previous zero fiscal note published 3/9/88

SIGNING DO PASS:

SIGNING OTHER RECOMMENDATIONS:

Chairman's signature

Original sponsor: Grussendorf

IN THE HOUSE BY THE JUDICIARY COMMITTEE

CS FOR HOUSE BILL NO. 310 (Judiciary)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FIFTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to public construction and public works contracts."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

* Section 1. AS 36.25.020(b) is amended to read:

(b) However, a person having direct contractual relationships with a subcontractor but no contractual relationship express or implied with the contractor furnishing the payment bond has a right of action on the payment bond upon giving written notice to the contractor within 90 days from the last date on which the person performed labor or furnished material for which the claim is made. The notice must state with substantial accuracy the amount claimed and the name of the person to whom the material was furnished or for whom the labor was performed. The notice shall be served by mailing it by registered mail, postage prepaid, in an envelope addressed to the contractor at a [ANY] place where the contractor maintains an office or conducts business, or the contractor's residence, or in a [ANY] manner in which a peace officer is authorized to serve summons. In this subsection, "subcontractor" includes a subcontractor of another subcontractor, whether or not the other subcontractor has a direct contractual relationship with the contractor.

* Sec. 2. AS 36.25 is amended by adding a new section to read:

Sec. 36.25.023. NOTICE BY CERTAIN PERSONS. (a) A person who contracts other than as an employee to furnish labor or material in the prosecution of a project for which the prime contractor is

required to furnish a payment bond under AS 36.25.010 and who does not have a direct contractual relationship with the prime contractor shall give the prime contractor written notice of the contract within 10 days of entering into the contract.

(b) If a person fails to provide the notice required by (a) of this section and if, in a court action on the payment bond of the prime contractor, the person is subsequently determined to be entitled to a judgment for payment of all or part of the labor or material furnished by the person, the court shall reduce the amount to be awarded to the person by 10 percent. In this subsection, "amount" does not include court costs and attorney fees.

(c) In this section, "prime contractor" means the person who has contracted with the state or political subdivision of the state to perform the project.

* Sec. 3. This Act applies to contracts that are entered into on or after the effective date of this Act.

5-1199X
Bannister
3/16/88

Adopted

Original sponsor: Grussendorf

IN THE HOUSE BY THE JUDICIARY COMMITTEE

CS FOR HOUSE BILL NO. 310 (Judiciary)

IN THE LEGISLATURE OF THE STATE OF ALASKA

FIFTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to public construction and public works contracts."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

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required to furnish a payment bond under AS 36.25.010 and who does not have a direct contractual relationship with the prime contractor shall give the prime contractor written notice of the contract within 10 days of entering into the contract.

(b) If a person fails to provide the notice required by (a) of this section and if, in a court action on the payment bond of the prime contractor, the person is subsequently determined to be entitled to a judgment for payment of all or part of the labor or material furnished by the person, the court shall reduce the amount to be awarded to the person by 10 percent. In this subsection, "amount" does not include court costs and attorney fees.

(c) In this section, "prime contractor" means the person who has contracted with the state or political subdivision of the state to perform the project.

* Sec. 3. This Act applies to contracts that are entered into on or after the effective date of this Act.

5-1199L
Bannister
2/26/88

Original sponsor: Grussendorf

IN THE HOUSE

CS FOR HOUSE BILL NO. 310 ( )

IN THE LEGISLATURE OF THE STATE OF ALASKA

FIFTEENTH LEGISLATURE - SECOND SESSION

A BILL

For an Act entitled: "An Act relating to public construction and public works contracts."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF ALASKA:

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* Sec. 2. AS 36.90 is amended by adding a new section to read:

Sec. 36.90.020. NOTICE BY SUBCONTRACTOR. A person who contracts other than as an employee to furnish services, materials, or equipment for a public construction or public works project shall give the prime

contractor on the project written notice of the contract within 10 days of entering into the contract. In this section, "prime contractor" means the person who has contracted with the state to perform the project.

* Sec. 3. This Act applies to contracts that are entered into on or after the effective date of this Act.

RESA JERREL
DIRECTOR OF GOVERNMENT RELATIONS

ALASKA CHAPTER
ASSOCIATED GENERAL CONTRACTORS

134 N FRANKLIN ST. STE A
JUNEAU, ALASKA 99801
586-1740

HOUSE ~~SENATE~~ AMENDMENT

By _____

To: _____ SENATE BILL No. CSHB 310(L&C)

To: _____ HOUSE BILL No. _____

PAGE: 2 LINE: 4

After the word "project" add the following:

Failure to give notice under this section shall constitute a legal basis for invalidation of an action under AS 36.25.020(b),

A M E N D M E N T

Offered in the HOUSE

TO: CSHB 310 (L&C)

Page 1, line 26, through page 2, line 4:

Delete all material.

Insert a new bill section to read:

"* Sec. 2. AS 36.25 is amended by adding a new section to read:

Sec. 36.25.023. NOTICE BY CERTAIN PERSONS. (a) A person who contracts other than as an employee to furnish labor or material in the prosecution of a project for which the prime contractor is required to furnish a payment bond under AS 36.25.010 and who does not have a direct contractual relationship with the prime contractor shall give the prime contractor written notice of the contract within 10 days of entering into the contract.

(b) If a person fails to provide the notice required by (a) of this section and if, in a court action on the payment bond of the prime contractor, the person is subsequently determined to be entitled to a judgment for payment of all or part of the labor or material furnished by the person, the court shall reduce the amount to be awarded to the person by 10 percent. In this subsection, "amount" does not include court costs and attorney fees.

(c) In this section, "prime contractor" means the person who has contracted with the state or political subdivision of the state to perform the project."

provisions in contract as to care to be exercised or precautions to be taken for protection of third persons. 69 ALR 522.

Effect of payment to subcontractors or materialmen by owner or contractor, or by sureties on contractor's bond, within four months of principal contractor's bankruptcy, as a voidable preference. 70 ALR 983.

Construction of paving contract or contractor's bond in respect of the contractor's obligation as to repairs. 72 ALR 644.

Right as between surety on contractor's bond and assignee of money to become due on contract. 76 ALR 917.

Effect of recitals or provisions of bond to secure performance of contract as an interpretation of the terms of the contract. 76 ALR 941.

Construction and effect of provision in bond purporting to protect contractee in building contract against release of surety. 77 ALR 229.

Claim for medical or hospital services to employees as within coverage of contractor's bond. 81 ALR 1051.

Statutory conditions prescribed for public contractor's bond as part of bond which does not in terms include them. 89 ALR 446.

Necessity of giving obligee notice of claim or action or making it a party to action by laborer, materialman or subcontractor upon bond of contractor for public work. 96 ALR 1185.

Workmen's compensation insurance premiums as within coverage of contractor's bond. 102 ALR 135; 164 ALR 1468.

Loss of profit of subcontractor, laborer, or materialman as within coverage of contractor's bond. 119 ALR 1281.

Money loaned or advanced to contractor as within coverage of bond of building or construction contractor. 127 ALR 974; 164 ALR 782.

Contractor's bond as covering insurance premiums other than workmen's compensation insurance. 129 ALR 1087.

Who is contractor or subcontractor, as distinguished from materialman, for purposes of mechanic's lien, contractor's bond, or other provision or securing compensation under construction contract. 141 ALR 321.

Liability on bid bond for public works. 70 ALR2d 1370.

Responsibility of construction contractor or his bond to contractee for defects or insufficiency of work attributable to plans and specifications furnished by latter, his engineer or architect. 6 ALR3d 1394.

Construction of attorney's fees provision in contractor's bond. 8 ALR3d 1438.

Building contractor's liability, upon bond or other agreement to indemnify owner, for injury to death of third persons resulting from owner's negligence. 27 ALR3d 663.

Liability of builder or subcontractor for insufficiency of building resulting from latent defects in materials used. 61 ALR3d 792.

Liability of subcontractor upon bond or other agreement indemnifying general contractor against liability for damage to person or property. 68 ALR3d 7.

Validity and construction of "no damage" clause with respect to delay in building or construction contract. 74 ALR3d 187.

Construction contract provision excusing delay caused by "severe weather". 85 ALR3d 1085.

Liability of termite or other pest control or inspection contractor for work or representations. 32 ALR4th 682.

What constitutes "public work" within statute relating to contractor's bond. 48 ALR4th 1170.

Sec. 36.25.020. Rights of persons furnishing labor or material. (a) A person who furnishes labor or material in the prosecution of the work provided for in the contract for which a payment bond is furnished under AS 36.25.010 and who is not paid in full before the expiration of 90 days after the last day on which the labor is performed or material is furnished for which the claim is made, may sue on the payment bond for the amount unpaid at the time of the suit.

(b) However, a person having direct contractual relationships with a subcontractor but no contractual relationship express or implied with the contractor furnishing the payment bond has a right of action on the payment bond upon giving written notice to the contractor

within 90 days from the last date on which the person performed labor or furnished material for which the claim is made. The notice must state with substantial accuracy the amount claimed and the name of the person to whom the material was furnished or for whom the labor was performed. The notice shall be served by mailing it by registered mail, postage prepaid, in an envelope addressed to the contractor at any place where the contractor maintains an office or conducts business, or the contractor's residence, or in any manner in which a peace officer is authorized to serve summons.

(c) A suit brought under this section shall be brought in the name of the state or the political subdivision of the state for the use of the person suing in the court with jurisdiction. A suit under this section is subject to AS 08.18.151. A suit may not be started after the expiration of one year after the date of final settlement of the contract. The state or political subdivision of the state is not liable for costs or expenses of the suit. (§ 2 ch 49 SLA 1953; am § 15 ch 142 SLA 1972; am § 58 ch 14 SLA 1987)

Effect of amendments. — The 1987 amendment in subsection (c) substituted "court with jurisdiction" for "superior court" at the end of the first sentence, added the present second sentence, and substituted "A suit may not" for "No suit may" at the beginning of the third sentence.

NOTES TO DECISIONS

Purpose. — The purpose of this section and AS 36.25.010 is to protect persons who furnish labor or material for a state public works project from the risks of nonpayment. In exchange for providing such protection, the state is assured that material and labor will be readily furnished for its projects. State ex rel. White v. Neal & Sons, Sup. Ct. Op. No. 733 (File No. 1364), 489 P.2d 1016 (1971).

Like its federal counterpart, Alaska's statute is designed to protect persons who furnish labor or material for a state public works project from the risks of nonpayment. State ex rel. Palmer Supply Co. v. Walsh & Co., Sup. Ct. Op. No. 1583 (File No. 2816), 575 P.2d 1213 (1978).

This section is substantially similar to 40 U.S.C. § 270a et seq., the "Miller Act." Hyundai Constr. Co. v. Kalmbach, Inc., Sup. Ct. Op. No. 845 (File No. 1604), 502 P.2d 856 (1972).

The purpose of the Little Miller Act is the protection of all persons who supply labor and material in the prosecution of the work provided for in the contract. McGee Steel Co. v. State ex rel. McDonald Indus. Alaska, Inc., Sup. Ct. Op. No. 3091 (File No. S-865), P.2d (1986).

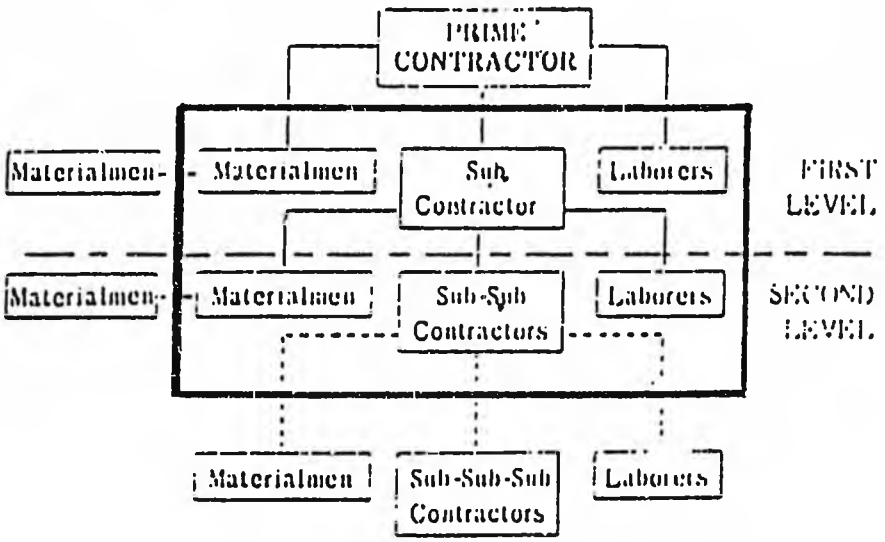
"Final settlement" means that the contract has been completed and that there has been a specific administrative act authorizing payment. Safeco Ins. Co. of Am. v. Honeywell, Inc., Sup. Ct. Op. No. 2460 (File Nos. 5112, 5127), 639 P.2d 996 (1982).

It is appropriate to look at federal case law interpreting the previously similar Miller Act, (40 U.S.C. § 270a et seq.) ch. 642, § 2, 49 Stat. 793 when interpreting the phrase "final settlement" as used in subsection (c) of this section. Safeco Ins. Co. of Am. v. Honeywell, Inc., Sup. Ct. Op. No. 2460 (File Nos. 5112, 5127), 639 P.2d 996 (1982).

Bonds of contractors for public buildings or works. — See notes under AS 36.25.010

Reliance on valid payment bond. — Persons who furnish labor and materials for the state's projects do so in reliance on the existence of a valid payment bond. State ex rel. White v. Neal & Sons, Sup. Ct. Op. No. 733 (File No. 1364), 489 P.2d 1016 (1971).

Evidence raising presumption that bond was executed. — See State ex rel. White v. Neal & Sons, Sup. Ct. Op. No. 733 (File No. 1364), 489 P.2d 1016 (1971).



AS 36.25.020

EXHIBIT E-9

[434 US 586]

J. W. BATESON COMPANY, INC., et al., Petitioners,

v

UNITED STATES ex rel. BOARD OF TRUSTEES OF THE NATIONAL AUTOMATIC SPRINKLER INDUSTRY PENSION FUND et al.

434 US 586, 55 L Ed 2d 50, 98 S Ct 873

[No. 76–1476]

Argued November 30, 1977. Decided February 22, 1978.

SUMMARY

After a sub-subcontractor on a federal construction project had failed to pay over certain amounts withheld from employees' wages for certain purposes, including payments to certain union trust funds as required by a collective bargaining agreement, the employees' union and the trustees of the funds instituted an action against the prime contractor in the United States District Court for the District of Columbia, seeking recovery under the prime contractor's payment bond that had been posted as required by the Miller Act (40 USCS §§ 270a et seq.). Section 2(a) of the Miller Act (40 USCS § 270b(a)) provides that a person having a direct contractual relationship with a "subcontractor" has a right of action on the prime contractor's payment bond even though he has no contractual relationship with the prime contractor. The District Court granted summary judgment for the plaintiffs, and the United States Court of Appeals for the District of Columbia Circuit affirmed, holding that the sub-subcontractor should be considered to be a "subcontractor" for purposes of payment bond recovery by its employees or their representatives (551 F2d 1284).

On certiorari, the United States Supreme Court reversed. In an opinion by MARSHALL, J., joined by BURGER, Ch. J., and STEWART, WHITE, POWELL, and REHNQUIST, JJ., it was held that (1) under § 2(a) of the Miller Act, the scope of protection of the prime contractor's payment bond extended no further than to sub-subcontractors, (2) the term "subcontractor," as used in the Act, did not encompass a firm that was technically a sub-subcontractor, and (3) thus, while a sub-subcontractor could claim against the prime contractor's payment bond if the subcontractor defaulted in its obligations to the sub-subcontractor, nevertheless, employees of a sub-subcontractor

Briefs of Counsel, p 821, infra.

were not protected under the prime contractor's bond if the sub-subcontractor defaulted in its obligations to its employees, since the employees did not have a contractual relationship with a "subcontractor."

STEVENS, J., joined by BRENNAN, J., dissented, expressing the view that the Miller Act should be construed as protecting every person who supplied labor or material in the prosecution of the work provided for in the prime contract.

BLACKMUN, J., did not participate.

HEADNOTES

Classified to U. S. Supreme Court Digest, Lawyers' Edition

Bonds § 10 — Miller Act — employees of sub-subcontractor — right to recover

1a, 1b. Under § 2(a) of the Miller Act (40 USCS § 270b(a)), which provides that a person having a direct contractual relationship with a "subcontractor" has a right of action on the prime contractor's payment bond even though he has no contractual relationship with the prime contractor, the scope of protection of the prime contractor's payment bond extends no further than to sub-subcontractors; the term "subcontractor," as used in the Act, does not encompass a firm that is technically a sub-subcontractor, and thus, while a sub-subcontractor may claim against the prime contractor's payment bond if the subcontractor defaults in its obligations to the sub-subcontractor, nevertheless employees of a sub-subcontractor are not protected un-

TOTAL CLIENT-SERVICE LIBRARY® REFERENCES

17 Am Jur 2d, Contractors' Bonds §§ 77–92

10 Federal Procedural Forms L Ed, Government Contracts §§ 34:41 et seq.

7 Am Jur Trials 283, Miller Act Litigation

40 USCS §§ 270a et seq.

US L Ed Digest, Bonds § 10

ALR Digests, Bonds §§ 33.5, 35

L Ed Index to Annos, Contractor's Bond

ALR Quick Index, Miller Act

Federal Quick Index, Contractor's Bond

ANNOTATION REFERENCES

Protection under bond given under Miller Act (40 USCS §§ 270a–270e) of one supplying labor or material to one other than the prime contractor or his immediate subcontractor. 79 ALR2d 855.

What constitutes supplying labor and material "in the prosecution of the work" provided for in the primary contract under Miller Act (40 USCS § 270b(a)). 79 ALR2d 843.

der the prime contractor's bond if the sub-subcontractor defaults in its obligations to its employees, since the employees do not have a contractual relationship with a "subcontractor." (Stevens and Brennan, JJ., dissented from this holding.)

Liens § 6 — government property

2. A lien cannot attach to government property.

Bonds § 10 — Miller Act — persons entitled to protection

3. The provision of the Miller Act (40 USCS § 270b(a)) that any person having a direct contractual relationship with a subcontractor, but no contractual relationship with the prime contractor, shall have a right of action upon the prime contractor's payment bond, has the effect of requiring that persons who lack a contractual relationship express or implied with the prime contractor must show a direct contractual relationship with a subcontractor in order to recover on the bond.

Bonds § 10 — Miller Act — subcontractors

4. For purposes of the Miller Act's provisions (40 USCS § 270b(a)) requiring that persons who lack a contractual relationship with the prime contractor must show a direct contractual relationship with a "subcontractor" in order to recover on the prime contractor's bond, a contract with a prime contractor is a prerequisite to being a "subcontractor."

Bonds § 9; Courts § 129 — Miller Act — liberal construction — power of Congress

5. The United States Supreme Court must construe the highly remedial Miller Act (40 USCS §§ 270a et seq.)—which requires government contractors to furnish a payment bond to protect persons supplying labor and materials—liberally in order properly to effectuate the congressional intent to protect those whose labor and materials go into public projects; but this does not justify ignoring plain words of limitation and imposing wholesale liability on such bonds; if the scope of protection afforded by a Miller Act payment bond is to be extended, it is Congress that must make the change.

SYLLABUS BY REPORTER OF DECISIONS

Petitioner prime contractor (Bateson) entered into a Government contract for construction of a hospital addition and posted a payment bond as required by the Miller Act to protect those who have a direct contractual relationship with either the prime contractor or a "subcontractor." Bateson then subcontracted a portion of the work to a firm (Pierce) which in turn subcontracted with another firm (Colquitt) for installation of a sprinkler system. When Colquitt failed to pay over amounts withheld from its employees' wages for union dues, vacation savings, and various union trust funds, as required by a collective-bargaining agreement with respondent union, the union and respondent trustees filed suit against Bateson in the name of the United States for the amount claimed due under the payment bond. The District Court granted summary judgment for respondents, and the Court of Appeals affirmed, holding that although Colquitt was "technically a sub-subcontractor," nevertheless it should be considered a "subcontractor" for purposes of payment bond recovery by its employees or their representatives, since it was performing "an integral and significant part of [Bateson's] contract" with the Government. *Held:* Colquitt's employees were not protected by the Miller Act payment bond, since they did not have a contractual relationship either with Bateson or with Pierce or any other "subcontractor" and since Colquitt cannot be considered a "subcontractor." Clifford F. MacEvoy Co. v United States ex rel. Calvin Tomkins Co. 322 US 102, 88 L Ed 1163, 64 S Ct 890, and F. D. Rich Co. v United States ex rel. Indus-

trial Lumber Co. 417 US 116, 40 L Ed 2d 703, 94 S Ct 2157, distinguished. As confirmed by the Miller Act's legislative history, the word "subcontractor" as used in the Act must be construed as being limited to meaning one who contracts with a prime contractor.
179 US App DC 325, 551 F2d 1284, reversed.

Marshall, J., delivered the opinion of the Court, in which Burger, C. J., and Stewart, White, Powell, and Rehnquist, JJ., joined. Stevens, J., filed a dissenting opinion, in which Brennan, J., joined. Blackmun, J., took no part in the consideration or decision of the case.

APPEARANCES OF COUNSEL

Jack Rephan argued the cause for petitioners.
Donald J. Capuano argued the cause for respondents.
Briefs of Counsel, p 821, infra.

OPINION OF THE COURT

[434 US 587]

[1a] Mr. Justice **Marshall** delivered the opinion of the Court

Under the Miller Act, 49 Stat 793, as amended, 80 Stat 1139, 40 USC §§ 270a et seq. [40 USCS §§ 270a et seq.], a prime contractor on a federal construction project involving over $2,000 must post a payment bond to protect those who have a direct contractual relationship with either the prime contractor or a "subcontractor." The issue in this case is whether the term "subcontractor," as used in the Act, encompasses a firm that is technically a "sub-subcontractor."

The material facts are not in dispute. Petitioner J. W. Bateson Co. entered into a contract with the United States for construction of an addition to a hospital and provided a payment bond signed by Bateson's president and by representatives of petitioner sureties. Bateson, the prime contractor, subcontracted with Pierce Associates for a portion of the original work, and Pierce in turn subcontracted with Colquitt Sprinkler Co. for the installation of a sprinkler system, one of the items specified in the contract between Bateson and the United States. Under a collective-bargaining agreement with respondent Road Sprinkler Fitters Local Union No. 669, Colquitt was obligated to pay over amounts withheld from employees' wages for union dues and vacation savings, and to contribute to the union's welfare, pension, and educational trust funds. When Colquitt failed to make any of these payments

[434 US 588]

by the end of the union members' employment with the firm, the union and respondent trustees notified Bateson of the amount that they claimed was due them under the payment bond and then filed suit against Bateson in the name of the United States.

The District Court granted summary judgment for respondents, and the Court of Appeals for the District of Columbia Circuit affirmed, 179 US App DC 325, 551 F2d 1284 (1977). The appellate court recognized that Colquitt, which had a contractual relationship with Pierce but not with Bateson, was "technically a sub-subcontractor," but it concluded nevertheless that Colquitt should be considered a "subcontractor" for purposes of payment bond recovery by its employees

or their representatives. Id., at 327, 551 F2d, at 1286.[1] Applying a functional test based on the "substantial-[ity] and importan[ce]" of the relationship between Bateson and Colquitt, the court noted that Colquitt was peforming on the jobsite "an integral and significant part of [Bateson's] contract" with the Government, that the work "was performed over a substantial period of time," that Bateson had access to Colquitt's payroll records, and that Bateson could have protected itself "through bond or otherwise" against Colquitt's default. Ibid.

We granted certiorari, 433 US 907, 53 L Ed 2d 1090, 97 S Ct 2971 (1977), to resolve a conflict between the decision below and the holdings of at least three other Circuits.[2] We now reverse.

[434 US 589]

[2, 3] Like the predecessor Heard Act, Act of Aug. 13, 1894, ch 280, 28 Stat 278, as amended, Act of Feb. 24, 1905, 33 Stat 811, the Miller Act was designed to provide an alternative remedy to the mechanics' liens ordinarily available on private construction projects. F. D. Rich Co. v United States ex rel. Industrial Lumber Co. 417 US 116, 122, 40 L Ed 2d 703, 94 S Ct 2157 (1974). Because "a lien cannot attach to Government property," persons supplying labor or materials on a federal construction project were to be protected by a payment bond. Id., at 121–122, 40 L Ed 2d 703, 94 S Ct 2157. The scope of the Miller Act's protection is limited, however, by a proviso in § 2(a) of the Act that "had no counterpart in the Heard Act." Clifford F. MacEvoy Co. v United States ex rel. Calvin Tomkins Co. 322 US 102, 107, 88 L Ed 1163, 64 S Ct 890 (1944). This proviso has the effect of requiring that persons who lack a "contractual relationship express or implied with the [prime] contractor" show a "direct contractual relationship with a subcontractor" in order to recover on the bond. 40 USC § 270b(a) [40 USCS § 270b(a)];[3] see F. D. Rich Co. v

1. The right of trustees of union trust funds to assert a claim against a Miller Act payment bond on behalf of employees was established in United States ex rel. Sherman v Carter, 353 US 210, 218–220, 1 L Ed 2d 776, 77 S Ct 793 (1957). That case also held that amounts which the employer agreed to contribute to union trust funds could be recovered by the employees or their representatives under the payment bond. See id., at 217–218, 1 L Ed 2d 776, 77 S Ct 793.

2. United States ex rel. Powers Regulator Co. v Hartford Accident & Indemnity Co. 376 F2d 811 (CA1 1967); United States ex rel. W. J. Halloran Steel Erection Co. v Frederick Raff Co. 271 F2d 415 (CA1 1959); Fidelity & Deposit Co. v Harris, 360 F2d 402, 407–409 (CA9 1966); Elmer v United States Fidelity & Guaranty Co. 275 F2d 89 (CA5), cert denied, 363 US 843, 4 L Ed 2d 1727, 80 S Ct 1612 (1960). See also United States ex rel. DuKane Corp. v United States Fidelity & Guaranty Co. 422 F2d 597, 599–600, and n 4 (CA4 1970).

3. Section 2(a) of the Miller Act, as set forth in 40 USC § 270b(a) [40 USCS § 270b(a)], provides in full:

"Every person who has furnished labor or material in the prosecution of the work provided for in [the] contract, in respect of which a payment bond is furnished under section 270a of this title and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: *Provided, however,* That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such

United States ex rel.

[434 US 590]

Industrial Lumber Co., supra, at 122, 40 L Ed 2d 703, 94 S Ct 2157; Clifford F. MacEvoy Co. v United States ex rel. Calvin Tomkins Co., supra, at 107–108, 88 L Ed 1163, 64 S Ct 890. In the instant case it is conceded that Colquitt's employees enjoyed no contractual relationship, "express or implied," with Bateson, and that they did have a "direct contractual relationship" with Colquitt. The question before us, then, is whether Colquitt can be considered a "subcontractor."

[4] As we observed in Clifford F. MacEvoy Co. v United States ex rel. Calvin Tomkins Co., supra, Congress used the word "subcontractor" in the Miller Act in accordance with "usage in the building trades." 322 US, at 108–109, 88 L Ed 1163, 64 S Ct 890; see id., at 110, 88 L Ed 1163, 64 S Ct 890. In the building trades,

> "a subcontractor is one who *performs for and takes from the prime contractor* a specific part of the labor or material requirements of the original contract . . . ." Id., at 109, 88 L Ed 1163, 64 S Ct 890 (emphasis added).

It thus appears that a contract with a prime contractor is a prerequisite to being a "subcontractor."[4]

[434 US 591]

[1b] This interpretation of the Act's language is confirmed by the legislative history, which leaves no room for doubt about Congress' intent. While relatively brief, the authoritative committee reports of both the House of Representatives and the Senate squarely focus on the question at issue here:

> "A sub-subcontractor may avail himself of the protection of the bond by giving written notice to the contractor, but that is as far

person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelop[e] addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States marshal of the district in which the public improvement is situated is authorized by law to serve summons."

4. The structure of the § 2(a) proviso as it relates to notice lends further support to this view. Under the proviso, those having a claim against a "subcontractor" must give written notice to the prime contractor within 90 days of completing work on the job in order to recover against the payment bond. 40 USC § 270b(a) [40 USCS § 270b(a)]; see n 3, supra. This requirement "permits the prime contractor, after waiting ninety days, safely to pay his subcontractors without fear of additional liability to sub-subcontractors or materialmen." United States ex rel. Munroe-Lang-Stroth, Inc. v Praught, 270 F2d 235, 238 (CA1 1959). The notice provision thus prevents both "double payments" by prime contractors and the alternative of "interminable delay in settlements between contractors and subcontractors." United States ex rel. J. A. Edwards & Co. v Thompson Construction Corp. 273 F2d 873, 875–876 (CA2 1959), cert denied, 362 US 951, 4 L Ed 2d 869, 80 S Ct 864 (1960).

If the term "subcontractor" in the proviso had been meant to include sub-subcontractors like Colquitt, it seems likely that notice would have been required not only to the prime contractor, but also to intermediate subcontractors like Pierce. The prime contractor or his surety, while having initial responsibility for payment of the claimant, would probably in turn either withhold that amount from, or file a claim against, a bond or indemnity furnished by, the intermediate subcontractor. (Here, for example, it appears that Pierce had agreed to indemnify Bateson against such losses. Brief for Petitioners 18 n 15.) Hence notice to the intermediate subcontractor would serve the same purpose as does notice to the prime contractor: prevention of double payments (e.g., Pierce making full payment to Colquitt, then having to indemnify Bateson for amounts owed by Colquitt to its employees) or delayed settlements.

as the bill goes. It is not felt that more remote relationships ought to come within the purview of the bond." HR Rep No. 1263, 74th Cong, 1st Sess, 3 (1935); S Rep No. 1238, 74th Cong, 1st Sess, 2 (1935).

This passage indicates both that Congress understood the difference between "sub-subcontractors" like Colquitt and "subcontractors" like Pierce, and that it intended the scope of protection of a payment bond to extend no further than to sub-subcontractors. See MacEvoy, 322 US, at 107–108, and n 5, 88 L Ed 1163, 64 S Ct 890. There is nothing to the contrary anywhere in the legislative history. Thus, while Colquitt could have claimed

[434 US 592]

against the payment bond had Pierce defaulted in its obligations, the employees of Colquitt were not similarly protected against Colquitt's default, because they did not have a contractual relationship with Pierce or any other "subcontractor."[5]

This view of what was intended in the Miller Act is reinforced by the fact that all reported decisions that have considered the question, except that of the court below and one early District Court decision, have reached the same conclusion.[6] Presumably aware of this well-settled body of law

[434 US 593]

dating back almost 20 years, Congress has never moved to modify the Act's coverage. As a result, all of those concerned with Government projects—prime contractors, sureties, various levels of subcontractors and their employees—have been led to assume that the employees of a sub-subcontractor would not be protected by the Miller Act payment bond and to order their affairs accordingly.[7] In the absence

5. We note that Colquitt's employees also would not have been protected under the mechanic's lien statutes of many States. See supra, at 589, 55 L Ed 2d, at 54. While these statutes have always varied widely, it appears that a large number of States, including some of the most commercially significant States, have restricted mechanics' liens to persons dealing directly with the prime contractor or with a subcontractor who dealt with the prime contractor. See, e.g., Battista v Horton, Myers & Raymond, 76 US App DC 1, 128 F2d 29, 31 (CADC 1942) (District of Columbia mechanic's lien statute); Wynkoop v People, 1 App Div 2d 620, 153 NYS2d 836 (1956), summarily affd, 4 NY2d 892, 150 NE2d 771 (1958) (New York statute restricting mechanics' liens to those "performing labor for or furnishing materials to a contractor [or] his subcontractor"). See generally Note, Mechanics' Liens and Surety Bonds in the Building Trades, 68 Yale LJ 138, 147–148 (1958).

6. See cases cited in n 2, supra; Aetna Ins. Co. v Southern, Waldrip & Harvick, 198 F Supp 505 (ND Cal 1961); United States ex rel. Whitmore Oxygen Co. v Idaho Crane & Rigging Co. 193 F Supp 802 (Idaho 1961); United States ex rel. Jonathan Handy Co. v Deschenes Construction Co. 188 F Supp 270 (Mass 1960); United States ex rel. Newport News Shipbuilding & Dry Dock Co. v Blount Bros. Construction Co. 168 F Supp 407 (Md 1958). Contra, McGregor Architectural Iron Co. v Merritt-Chapman & Scott Corp. 150 F Supp 323 (MD Pa 1957). See also H. Cohen, Public Construction Contracts and the Law § 7.9, p 208 (1961); 8 J. McBride & I. Wachtel, Government Contracts § 49.320[2] (1977); R. Shealey, Law of Government Contracts § 143A, p 187 (3d ed 1938); Forster & DeBenedictis, Construction Contracts in Government Contracts Practice § 14.13, pp 683–684 (1964); Stickells, Bonds of Contractors on Federal Public Works: The Miller Act, 36 BUL Rev 499, 512–516 (1956); Note, supra, n 5, at 164.

7. In the instant case, it appears that all of the affected parties arranged their affairs on the assumption that Colquitt's employees would not be covered by the payment bond. Bateson required an indemnity agreement from Pierce, Brief for Petitioners 18 n 15, doubtless in part to protect Bateson from claims against the payment bond made by those contracting with Pierce. But Pierce did not require a similar agreement from Colquitt, ibid., presumably because Pierce did not think that Colquitt's employees, on Colquitt's

of some clear indication to the contrary, we should not defeat these reasonable expectations, particularly in view of the importance of certainty with regard to bonding practices on Government construction projects. See generally MacEvoy, supra, at 110–111, 88 L Ed 1163, 64 S Ct 890.

In reaching a result contrary to that of other Courts of Appeals, the court below did not address itself either to the legislative history quoted above or to the conflict among the Circuits that its ruling created. Instead, it focused primarily on the substantiality and importance of the relationship between Colquitt and Bateson, see supra, at 588, relying for this approach on our decisions in MacEvoy and F. D. Rich Co. v United States ex rel. Industrial Lumber Co. While those cases did involve the scope of the term "subcontractor" in the § 2(a) proviso, they arose in situations in which the

[434 US 594]

firm at issue, unlike Colquitt, had a direct contractual relationship with the prime contractor. The question in both cases was whether a supplier of materials to the prime contractor could be considered a "subcontractor,"[8] and on this question an absence of dispositive statutory language and legislative history led the Court ultimately to look to "functional" considerations. 417 US, at 123–124, 40 L Ed 2d 703, 94 S Ct 2157; see 322 US, at 110–111, 88 L Ed 1163, 64 S Ct 890. In the instant case, by contrast, the traditional tools of statutory construction provide a definitive answer to the question before us, and hence it would be inappropriate to utilize the approach relied on by the Court of Appeals.

[5] In concluding that the word "subcontractor" must be limited in meaning to one who contracts with a prime contractor, we are not unmindful of our obligation to construe the "highly remedial" Miller Act "liberal[ly] . . . in order properly to effectuate the Congressional intent to protect those whose labor and materials go into public projects." MacEvoy, supra, at 107, 88 L Ed 1163, 64 S Ct 890. As we wrote in MacEvoy, however, "such a salutary policy does not justify ignoring plain words of limitation and imposing wholesale liability on payment bonds. . . . [W]e cannot disregard the limitations on liability which Congress intended to impose and did impose in the proviso of § 2(a)." 322 US, at 107, 88 L Ed 1163, 64 S Ct 890. It was Congress that drew a line between sub-subcontractors and those in "more remote relationships" to the prime contractor. HR Rep No. 1263, supra, at 3; S Rep No. 1238, supra, at 2; MacEvoy, supra, at 108, 88 L Ed 1163, 64 S Ct 890; Rich, 417 US, at 122, 40 L Ed 2d 703, 94 S Ct 2157. If the scope of protection afforded by a Miller Act payment

default, would have recourse against Bateson's payment bond. Finally, the agreement between Colquitt and the union contained a provision, which the union ultimately chose not to enforce, requiring Colquitt to post a bond to guarantee the various payments that it was required to make to the union and its trust funds. App 13; see id., at 49 (affidavit of union trustee).

8. In MacEvoy we held that a firm which had merely supplied materials to the prime contractor could not be considered a "subcontractor." In Rich we concluded that a firm which had contracted with the prime contractor both to install certain items in a housing project and to supply materials for the project was a "subcontractor."

bond is to be extended, it is Congress that must make the change.

[434 US 595]

The judgment of the Court of Appeals is reversed.

Mr. Justice **Blackmun** took no part in the consideration or decision of this case.

SEPARATE OPINION

Mr. Justice **Stevens**, with whom Mr. Justice **Brennan** joins, dissenting.

The Court's narrow reading of the word "subcontractor" creates a system of protection for construction workers that I cannot believe Congress intended. It drives a wedge between employees working side by side on tasks equally vital to "the prosecution of the work." 40 USC § 270a(a)(2) [40 USCS § 270a(a)(2)]. Under the Court's reading, those who work for the general contractor or for a "first-tier" subcontractor are protected by the bond; those who work for other subcontractors are unprotected.

The Court's construction of the statute derives strong support from the statement in the Committee Reports distinguishing between "sub-subcontractors" and "more remote relationships." Nevertheless, I am persuaded that contrary evidence of congressional intent outweighs the isolated statement upon which the Court's decision primarily rests. I shall therefore first explain why I think the Act protects every person who has supplied labor or material in the prosecution of the work provided for in the prime contract. Thereafter, I shall explain why I believe the excerpt from the Committee Reports does not compel a contrary conclusion.

I

The Miller Act, like the Heard Act which preceded it, covers "all persons supplying labor and material in the prosecution of the work provided for in [a federal construction] contract."[1]

[434 US 596]

Unless this language were to be narrowly read to cover only persons supplying labor or materials directly to the general contractor—and no one suggests that such a narrow reading is proper—it plainly identifies "the prosecution of the work" as the proper test of coverage. This Court so read the comparable language in the Heard Act in United States ex rel. Hill v American Surety Co. 200 US 197, 50 L Ed 437, 26 S Ct 168.

In that case the Court recognized that a "liberal interpretation" was needed to further "the manifest purpose of the statute to require that material and labor actually contributed to the construction of the public building shall be paid for and to provide a security to that end." Id., at 203, 50 L Ed 437, 26 S Ct 168.[2]

1. 40 USC § 270a(a)(2) [40 USCS § 270a(a)(2)]. Almost identical language in the Heard Act covered "all persons supplying [a contractor or contractors] labor and materials in the prosecution of the work provided for in [a federal construction] contract." Act of Aug. 13, 1894, ch 280, 28 Stat 278, as amended, 40 USC § 270 (1926 ed) [40 USCS § 270].

2. The purpose of the Act had been explained in the House Report:

"Your committee has fully considered the above bill, and find that there is no law now in existence for the protection of mechanics and material-men in this class of cases, as it is contrary to allow mechanics' or material-men's liens on public buildings or public works, and in many cases person or persons entering into contracts with the United States for the building of public buildings are wholly

The Hill Court therefore allowed recovery to all who supplied labor
[434 US 597]
to the contractor, whether directly or indirectly through a subcontractor.[3]

The question at the heart of this case is whether Congress intended the Miller Act to cut back the coverage of the Heard Act. The fact that there was no significant change in the statutory language identifying the persons protected by the Act is a sufficient reason for concluding that no change in coverage was intended.[4] This conclusion is confirmed by a study of the entire legislative history of the Miller Act.

The Miller Act was primarily designed to speed workmen's recoveries under the Heard Act by correcting procedural flaws in the old Act. Not a word in the legislative history hinted that the coverage of the Heard Act was too broad. To the contrary, the proposed revision was consistently presented as a
[434 US 598]
measure to strengthen the existing rights of laborers on public works.[5] "The most

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insolvent at the time or at the completion of such work, and thereby persons furnishing material or labor are without remedy.

"In all such cases the United States requires the usual penal bond from the contractor or contractors of public buildings or works with good and sufficient security for the protection of the Government, and it seems to the committee that it is nothing more than just that the persons furnishing material or labor for the construction of such work should also be protected in the premises, and that there should be an additional obligation in all such bonds to the effect that the persons furnishing material and labor for the construction of public building or work should have the right to bring suit on said bond . . . ." HR Rep No. 97, 53d Cong, 1st Sess 1 (1893).

This excerpt is significant, not only because it explains the origin of the legislation, but also because the first sentence illustrates the care with which committee reports are sometimes edited. Cf. n 16, infra.

3. "In considering the statute and determining the scope of the bond divergent views have been urged upon the court. Upon the one hand it is insisted that the bond is to be strictly construed and a recovery limited to those who have furnished material or labor directly to the contractor, and upon the other that a more liberal construction be given and a recovery permitted to those who have furnished labor and materials which have been used in the prosecution of the work, whether furnished under the contract directly to the contractor, or to a subcontractor.

. . . . . .

"The courts of this country have generally given to statutes intending to secure to those furnishing labor and supplies for the construction of buildings a liberal interpretation, with a view of effecting their purpose to require payment to those who have contributed by their labor or material to the erection of buildings to be owned and enjoyed by those who profit by the contribution of such labor or materials. . . .

. . . . . .

"Looking to the terms of this statute in its original form, and as amended in 1905, we find the same Congressional purpose to require payment for material and labor which have been furnished for the construction of public works." 200 US, at 202–204, 50 L Ed 437, 26 S Ct 168.

4. In general, the principles that governed the Heard Act also control the Miller Act. See Fleisher Eng. & Constr. Co. v United States ex rel. Hallenbeck, 311 US 15, 18, 85 L Ed 12, 61 S Ct 81.

5. "The purpose sought to be accomplished" by the Act was stated by the Treasury Department, and the statement was adopted by the House Report:

"The major purpose of the bill seems to be to afford greater protection to subcontractors, laborers, and materialmen by shortening the period within which action may be instituted by them against the surety. With this purpose the Treasury Department is fully in accord, as there have been many instances in which several years have elapsed after the performance of the work before a judicial remedy was available under the existing law." HR Rep No. 1263, 74th Cong, 1st Sess, 1–2 (1935) (quoting a letter from the Treasury Department).

radical changes made in the existing law by these bills,". Congressman Miller, the proponent of the Act, explained, "is that we provide in this bill for two bonds; one a performance bond to the Government, and the other a payment bond."[6]

While Congress intended to speed the recoveries of protected workers, it sought to do so within the framework of existing law. Witnesses testifying in support of the Act urged Congress to preserve as much language from the Heard Act as possible, in order that past judicial interpretations would continue to apply under the new Act.[7] Congressman Miller

[434 US 599]

himself noted that the committee was "rather loath to disturb existing law and existing court decisions where we can correct the difficulty without doing so."[8] Thus it is especially significant that the drafters lifted bodily from the Heard Act the coverage provision that had already been construed in Hill.

The historical context in which the statute was enacted confirms this analysis. The Miller Act was passed during the depression of the 1930's. Few construction laborers could then find work except on Government projects. Reform of the Heard Act drew urgency from the ironic discovery that precious construction jobs too often proved worthless when an irresponsible subcontractor was unable to pay his workers. An exchange between Senators Walsh and McCarran about the Miller Act shows the sentiments of the day:

"Mr. WALSH. Mr. President, . . . the investigation conducted by the subcommittee of the Committee on Education and Labor showed a deplorable condition with reference to the way employees on public buildings were defrauded and cheated of their wages, and any measure that will tend to strengthen their rights and help them to secure their compensation is justified.

"Mr. McCARRAN. That is the object of the pending bill . . . ." 79 Cong Rec 13383 (1935).

The language of the Miller Act is

An identical passage appears in the Senate Report, which merely reprints the House Report. S Rep No. 1238, 74th Cong, 1st Sess, 1 (1935). Because there are no substantial differences between them, I shall refer only to the House Report.

6. Hearings on Bonds of Contractors on Public Works before the House Committee on the Judiciary, 74th Cong, 1st Sess, 67 (1935) (hereafter cited as Hearings).

7. One witness told the Committee:
"The Heard Act has been on the statute books since 1905. Its predecessor had been in effect since August 1894. Now, in that forty-odd years the surety companies and the public generally have spent hundreds of thousands of dollars in finding out just what that act means. As I say, it has been called to the attention of courts hundreds of times and the decisions rendered have cost us lots of money and I do not think there is any other statute on the books that has been so thoroughly analyzed and construed. You might say every clause or every word has been examined by some court, some place, some time. We all know it and it is unusual now for any controversy to arise over the fundamental part of the law. The only controversy in the Heard Act suit is whether the claimant has a good claim or whether he has not." Id., at 49–50.

Another witness concurred in this statement. Id., at 59.

8. Id., at 102. Congressman Miller went on to state that he would have preferred simply to amend the Heard Act, but that he was eventually persuaded that a more thorough revision was necessary. Ibid.

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entirely consistent with the obvious legislative intent to preserve the substantive protections of the Heard Act. The Miller Act extends coverage

[434 US 600]

to "all persons supplying labor and material in the prosecution of the work provided for in [the] contract . . . ."[9] This coverage is comparable to that afforded by many state mechanic's lien statutes. See generally Note, Mechanics' Liens and Surety Bonds in the Building Trades, 68 Yale LJ 138 (1958). The purpose of both the Heard Act and the Miller Act was to protect persons supplying labor or materials for federal construction projects, which are not subject to state mechanic's liens.[10] Giving an ordinary meaning to the language used by both Acts will achieve that purpose.

The proviso to § 2(a) of the Miller Act, which requires persons having a direct relationship with a subcontractor to give written notice of his claim to the prime contractor, does not narrow the coverage of the statute. It merely requires persons covered by the bond to give the required notice in order to preserve their protection.[11]

[434 US 601]

It is true, of course, that it would be anomalous to require that notice be given by employees of first-tier subcontractors but not by employees of second-tier subcontractors.[12] Clifford F. MacEvoy Co. v United States ex rel. Calvin Tomkins Co. 322 US 102, 108, 88 L Ed 1163, 64 S Ct 890. But that anomaly is entirely avoided if the term "subcontractor" is read to refer to any person or firm that has contracted to do any part of the work provided for in the prime contract, whether that person has dealt directly with the prime contractor or

9. 40 USC § 270a(a)(2) [40 USCS § 270a(a)(2)]. Cf. United States ex rel. Hill v American Surety Co. 200 US 197, 204, 50 L Ed 437, 26 S Ct 168:

"[A]ll persons supplying the contractor with labor or materials in the prosecution of the work provided for in the contract are to be protected. The source of the labor or material is not indicated or circumscribed. It is only required to be 'supplied' to the contractor in the prosecution of the work provided for. How supplied is not stated, and could only be known as the work advanced and the labor and material are furnished.

"If a construction is given to the bond so limiting the obligation incurred as to permit only those to recover who have contracted directly with the principal, it may happen that the material and labor which have contributed to the structure will not be paid for, owing to the default of subcontractors and the manifest purpose of the statute to require compensation to those who have supplied such labor or material will be defeated."

10. "As against the United States, no lien can be provided upon its public buildings or grounds, and it was the purpose of this act to substitute the obligation of a bond for the security which might otherwise be obtained by attaching a lien to the property of an individual." Id., at 203, 50 L Ed 437, 26 S Ct 168.

11. The proviso states:

"Provided, however, That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made . . . ." 40 USC § 270b(a) [40 USCS § 270b(a)].

12. Such an anomaly is produced by a narrow reading of the proviso to encompass only persons dealing with "first-tier" subcontractors. Under the narrow reading, those dealing with first-tier subcontractors must give notice, while those dealing with second-tier subcontractors need not. The Court avoids this anomaly by cutting back on the *coverage* provision. Rather than letting the tail wag the dog, it is more sensible to read the notice provision broadly, to match the breadth of the coverage provision.

with another subcontractor. In the common usage of the construction trades, the term "subcontractor" does not include ordinary laborers or materialmen. Id., at 109, 88 L Ed 1163, 64 S Ct 890. But the term is often used to describe subordinate contractors who have accepted contractual responsibility for a portion of the work covered by the basic contract, no matter how many subcontractors lie between the general contractor and the subcontractor who actually does the work.[13]

[434 US 602]

State courts, which have more occasion to deal with construction contracts than we do, recognize that a generic use of the term subcontractor is entirely proper. For example, Colorado's construction bond law protects persons furnishing labor or materials to a "contractor, or his subcontractor." Despite the personal pronoun, the Colorado Supreme Court has held that the bond covers those who deal with a "second-tier" subcontractor, saying:

> "To construe the term 'sub-contractor' so as to exclude a 'sub-subcontractor' from the protection granted by the contractor's bond statute would require us to ignore the purpose of the statute. Since the benefits of our mechanic's lien act do not apply to projects constructed by governmental agencies, a remedy similar to our mechanic's lien statute was provided by the legislature for the protection of those furnishing supplies or material for such projects. . . . The statute stands in lieu of the mechanic's lien statute, and is designed to protect those who supply labor and materials for public works." South-Way Constr. Co. v Adams City Serv. 169 Colo 513, 516–517, 458 P2d 250, 251 (1969).

Other courts have taken a similar approach. See, e.g., Nash Eng. Co. v Marcy Realty Corp. 222 Ind 396, 54 NE2d 263 (1944); Bumb v Petersmith Controls, Inc. 377 F2d 817 (CA9 1967) (remote subcontractor is protected "subcontractor" under California law); Hey Kiley Man, Inc. v Azalea Gardens Apts. 333 So 2d 48, 50–51 (Fla App 1976). See also Note, 45 Harv L Rev 1236, 1238–1239 (1932) (using "subcontractor" generically in noting a trend favoring bond coverage for "remote subcontractors").

Thus, if we consider the language of the statute, its broad purpose to provide protection comparable to that afforded by state mechanic's lien laws on private contracts, and its specific

[434 US 603]

purpose to provide protection for laborers performing work on federal projects, we must conclude that employees of a "sub-subcontrac-

13. The Court relies on a quotation from Clifford F. MacEvoy Co. v United States ex rel. Calvin Tomkins Co. 322 US 102, 88 L Ed 1163, 64 S Ct 890, declaring that "a subcontractor is one who performs for and takes from the prime contractor a specific part of the labor or material requirements of the original contract, thus excluding ordinary laborers and materialmen." Id., at 109, 88 L Ed 1163, 64 S Ct 890. The Court italicizes the dictum and omits the holding. Ante, at 590, 55 L Ed 2d, at 55. I agree with the holding; ordinary laborers and materialmen who do not deal with the prime contractor or a subcontractor do not supply labor or materials "in the prosecution of the work." Cf. MacEvoy, supra, at 107, 88 L Ed 1163, 64 S Ct 890 (leaving question open). The dictum is unfortunately worded, but it does not contradict my view. Ultimately, a second-tier subcontractor who takes a portion of the contract takes it "from the prime contractor," although he takes it indirectly.

tor" who actually perform work on the job are protected.

II

The contrary argument rests almost entirely[14] on a statement in the Committee Reports that draws a distinction

[434 US 604]

between a "sub-subcontractor" and "more remote relationships."[15] I believe the significance of that statement has been overemphasized.

Those who have participated in the making of legislative history know that congressional reports sometimes contain statements that are merely intended to summarize portions of the hearings or to answer testimony expressing specific concerns about a bill. For this reason, the hearings should be examined in order to understand the excerpt on which the Court relies. In three days of testimony, the coverage of the Act was mentioned only briefly. A witness for a surety company raised the specter of remote materialmen seeking to recover as "subcontractors," an idea Congressman Miller quickly rejected:

"Colonel PROCTOR. . . . [If] it will cover everybody all the way down the line *whether the work goes into the job or not* you have

14. It has been argued that Congress was unwilling to impose liability on sureties for a long chain of relationships. But this argument ignores the control that sureties and general contractors have over their subcontractors. They may refuse to deal with subcontractors who do not indemnify them against remote claims. They may even require a bond from each subcontractor. In fact, because the general contractor is liable, even under the Court's view, for claims against subcontractors in the first tier, indemnity agreements between general contractors and their subcontractors are common today. One was required in the present case. Ante, at 593 n 7, 55 L Ed 2d, at 56–57. My reading of the statute would simply lead cautious subcontractors to demand similar guarantees from their subcontractors.

There is no reason to fear that sureties' liability will grow beyond their control or their ability to estimate. The cost of the entire project provides a basis for estimating the aggregate contingent liability.

In addition, the Court suggests that the Miller Act would have required laborers to give notice to intermediate subcontractors as well as the general contractor if a more generous reading of the statute had been contemplated. Ante, at 590–591, n 4, 55 L Ed 2d, at 55. But the drafters were understandably worried that many unwary workers would forfeit their protection if complicated notice requirements were imposed. Indeed, the Treasury Department opposed *any* notice requirement for just this reason:

"[O]ver nine-tenths of your laborers and the material men doing business on a small scale that were not in constant touch with their lawyers would not know of the requirement, and they would wake up to find that their period had expired within which to give such notice, and they would be barred." Hearings 99–100. See also id., at 103, 30–31, and 36–37. Requiring notice to the surety as well as to the general contractor would have protected sureties from deceitful general contractors, and a requirement of this nature was suggested to the Committee. Id., at 63. The Committee rejected that suggestion. Forcing the laborer to notify several parties is an added burden that increases the danger of lost claims. Congress could have concluded that a single notice requirement was all that should be imposed on workers and small businessemen.

As a practical matter, no prejudice is likely to flow from this omission. If the bond is held to cover claims against remote subcontractors, proximate subcontractors will no doubt be required to indemnify the general contractor. In return for the indemnity, these subcontractors will no doubt demand that the general contractor promptly transmit any statutory notice he receives.

15. "A sub-subcontractor may avail himself of the protection of the bond by giving written notice to the contractor, but that is as far as the bill goes. It is not felt that more remote relationships ought to come within the purview of the bond." HR Rep No. 1263, 74th Cong, 1st Sess, 3 (1935).

an insurance policy and not a surety. For example, if it will cover the labor of the quarryman that strips the quarry, that he is a subcontractor to the man that cuts the stone, that he is a subcontractor with the man that lays the stone and he is a subcontractor with the general contractor, you have a situation there that is an insurance policy and not a bond.

[434 US 605]

"Mr. MILLER. We are not figuring in going into all the subcontractors." Hearings 61–62 (emphasis added).

This colloquy was concerned with the danger that the term "subcontractor" might be used loosely to describe the suppliers or employees of materialmen. It was that danger that I believe the Committee Report was intended to forestall. Obviously, suppliers or employees of materialmen do not provide "work [that] goes into the job." They are not considered "subcontractors" under the most common usage in the construction trades, as this Court recognized when it construed the Miller Act to bar the claims of remote materialmen and their employees. Clifford F. MacEvoy Co. v United States ex rel. Calvin Tomkins Co. 322 US 102, 88 L Ed 1163, 64 S Ct 890.

It is the "remote relationship" of persons like the quarryman and the stonecutter mentioned in the hearings that I believe the author of the Committee Report intended to exclude from the statute. Since the wording of the statute is itself adequate to effectuate this intent, there is no reason to give further effect to the unnecessarily broad language used by the author of the Committee Report to allay the narrow concern identified in the Committee hearings.[16] If Congress had intended to do more than allay that concern—if it had intended to cut back on the coverage of the Heard Act—I am convinced that it would have used *statutory* language to accomplish its purpose.[17]

[434 US 606]

In sum, while I cannot unequivocally assert that my explanation of the statement in the Committee Report is correct, the apparent genesis of the statement casts sufficient doubt on its intended purpose to prevent it from overriding what I regard as compelling evidence of a contrary congressional intent.

I respectfully dissent.

16. As is demonstrated by the legislative history of the Heard Act, see n 2, supra, a committee report is not edited as carefully as the bill itself.

17. Unlike the Court, I would not put great weight on the industry's longstanding "assumption" about the law. Ante, at 592–593, and n 7, 55 L Ed 2d, at 56–57. For many years after passage of the Miller Act, no court ratified this assumption, and the cases since the mid-1950's have been divided. The Court notes three Circuits that have supported the industry's view and one that has attacked it. Ante, at 588–589, n 2, 55 L Ed 2d, at 54. It finds a similar pattern among the District Courts: four in favor and one opposed. Ante, at 592 n 6, 55 L Ed 2d, at 56. The preponderance of authority supports the industry, but the cases hardly justify a claim that the law was "well-settled" or certain before today. The fact that this case is before us argues to the contrary, for this Court seldom grants certiorari to decide "well-settled" questions.

STATE OF ALASKA
1988 LEGISLATIVE SESSION

BILL VERSION: HB 310
PUBLISH DATE: 5/12/87

REQUEST: **FISCAL NOTE**

Revision Date:
Title: An Act relating to payment under public construction contracts.
Sponsor: Grussendorf
Requestor:

Agency Affected: DOT&PF
BRU: Engineering & Operations
Components:

EXPENDITURES/REVENUES: (THOUSANDS OF DOLLARS)

OPERATING	FY 88	FY 89	FY 90	FY 91	FY 92	FY 93
PERSONAL SERVICES	0	0	0	0	0	0
TRAVEL	0	0	0	0	0	0
CONTRACTURAL	0	0	0	0	0	0
SUPPLIES	0	0	0	0	0	0
EQUIPMENT	0	0	0	0	0	0
LAND & STRUCTURES	0	0	0	0	0	0
GRANTS, CLAIMS	0	0	0	0	0	0
MISCELLANEOUS	0	0	0	0	0	0
TOTAL OPERATING	0	0	0	0	0	0
CAPITAL	0	0	0	0	0	0
REVENUE	0	0	0	0	0	0

FUNDING: (THOUSANDS OF DOLLARS)

GENERAL FUND	0	0	0	0	0	0
FEDERAL FUNDS	0	0	0	0	0	0
OTHER	0	0	0	0	0	0
TOTAL	0	0	0	0	0	0

POSITIONS:

FULL-TIME	0	0	0	0	0	0
PART-TIME	0	0	0	0	0	0
TEMPORARY	0	0	0	0	0	0

ANALYSIS: (Attach a separate page if necessary)

Current construction contract language used by DOT&PF requires payment by the (prime) contractor to all subcontractors within 7 days following receipt of payment. As this bill is currently written no additional fiscal impacts during construction administration are anticipated except where a fraudulent statement is made under paragraph (f). Should the department be involved in litigation surrounding fraudulent statements that may be made, litigation and damage costs may arise. As these costs are both speculative and not subject to accurate estimation no fiscal impact is portrayed.

Prepared by: Rod Wilson, Design Manager II
Division: Engineering and Operations Standards

Phone: 465-2951
Date: February 16, 1988

Approved by Commissioner: [signature]
Agency: Department of Transportation and Public Facilities

Date: 2/17/88

Distribution (by preparer):
Legislative Finance
Legislative Sponsor
Requestor
Office of Management and Budget
Impacted Agency(ies)

The department recommends that paragraph (f) be reworded as follows: "...until the contractor provides a sworn statement that the subcontractors of the contractor have been paid for the subcontractors' work under the contract and that work performed by the contractor under the contract has been ~~inspected and approved for compliance~~ completed in accordance with the contract."

The rational for this change is that in nearly every instance the responsibility for inspection and approval lies with the Contracting Agency and not with the contractor. We believe it is in the best interest of the state that the sworn statement include acknowledgement that the work for which payment is requested is in conformity with the contract.

HOUSE COMMITTEE REPORT

(7)

Date referred: 5/12/87

FURTHER REFERRALS: Judiciary
Finance

DATE: 3/8/88

The Labor & Commerce Committee has considered HB 310
"An Act relating to payment under public construction contracts."

RECOMMENDS:

[X] replace with CSHB 310 (L+C)
[ ] the same title
[X] a new title
[ ] attached amendment(s)

- [X] do pass
- [ ] do not pass
- [ ] no recommendation
- [ ] individual recommendations
- [ ] additional referral to the ______ Committee

ADOPTS: [ ] ______ letter of intent

ATTACHES NEW FISCAL NOTE(s):

[ ] fiscal impact
[ ] zero fiscal note
[X] zero with analysis

[ ] same as previous fiscal note published ______
[ ] same as previous zero fiscal note published ______

SIGNING DO PASS:

Dave Donley
Ellis
Davidson
[illegible]
Niilo Koponen

SIGNING OTHER RECOMMENDATIONS:

W Furnace No rec Bill need work
[illegible] WDREC

Dave Donley
Chairman's signature