AMENDMENT OF THE MILLER ACT

HEARING

BEFORE THE

SUBCOMMITTEE ON ADMINISTRATIVE LAW AND GOVERNMENTAL RELATIONS

OF THE

COMMITTEE ON THE JUDICIARY HOUSE OF REPRESENTATIVES

ONE HUNDREDTH CONGRESS

SECOND SESSION

ON

H.R. 3356

AMENDMENT OF THE MILLER ACT

MAY 12, 1988

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THURSDAY, MAY 12, 1988

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON ADMINISTRATIVE LAW AND
GOVERNMENTAL RELATIONS,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 10:15 a.m., in room 2226, Rayburn House Office Building, Hon. Barney Frank, chairman of the subcommittee, presiding.

Members present: Representatives Frank, Cardin, and Coble.

Staff present: Janet S. Potts, counsel; Roger T. Fleming, associate counsel; Florence T. McGrady and Cindy Beach, legal assistants.

Mr. FRANK. The Subcommittee on Administrative Law and Governmental Relations will come to order. The hearing today is concerning H.R. 3356, a bill which would amend the Miller Act.

(A copy of H.R. 3356 follows:)

I

100TH CONGRESS
1ST SESSION

H. R. 3356

To amend the Miller Act to provide for the inclusion of interest and legal fees in judgments granted on suits by subcontractors based upon payment bonds, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

SEPTEMBER 29, 1987

Mr. FRANK introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To amend the Miller Act to provide for the inclusion of interest and legal fees in judgments granted on suits by subcontractors based upon payment bonds, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. AMENDMENTS TO THE MILLER ACT.

Section 2 of the Act of August 24, 1935 (40 U.S.C. 270b; 49 Stat. 794), is amended—

(1) by inserting after "furnished under this Act" in subsection (a) the following: "(including labor, health and welfare, and other labor benefits for such labor fur-

nished to a subcontractor entitled to payment bond protection)";

(2) by striking out "and who has not been paid" in subsection (a) and inserting in lieu thereof "and (1) who has not been paid in full for a progress payment before the expiration of a period of thirty days after the due date for such payment, or (2) who has not been paid";

(3) by striking out "registered mail" in the last sentence of subsection (a) and inserting in lieu thereof "registered or certified mail";

(4) by inserting after the first sentence of subsection (b) the following new sentence: "The court shall not dismiss any complaint on the ground that it was filed prior to the ninetieth day after the last of the labor was performed, and shall not enter judgment for all or part of any such claim prior to the thirtieth day after a progress payment is due or prior to the ninetieth day after the last of the labor was performed or last of the materials were furnished. A judgment in favor of any such person under this section shall include interest at the rate published by the Secretary of the Treasury pursuant to section 3902(a) of title 31, United States Code (the Prompt Payment Act), from the date on which the payment was due, together with

reasonable legal fees (based upon the time spent and the results accomplished).''; and

(5) by adding at the end of subsection (b) the following: ''No promise or agreement to waive any right under this Act shall be valid if made or entered into prior to the date of accrual of the right to sue on the payment bond, as provided in this section; and payment for all labor and materials furnished in the prosecution of such work shall be conclusively presumed to be due on such date unless an earlier date has been agreed upon by the parties.''.

SEC. 2. EFFECTIVE DATE.

The amendments made by this Act shall not be applicable to any contract entered into prior to the date of the enactment of this Act.

Mr. FRANK. We will now have our first panel, Mr. Corwin, Mr. Barfield and Mr. Sutton. Mr. Corwin, why don't we begin with you.

TESTIMONY OF JOSEPH M. CORWIN, CORWIN & CORWIN, BOSTON; THOMAS J. BARFIELD, VICE CHAIRMAN, GOVERNMENT RELATIONS COMMITTEE, AMERICAN SUBCONTRACTORS ASSOCIATION OF AMERICA; AND LEWIS SUTTON, NATIONAL ASSOCIATION OF MARINE SUB-CONTRACTORS AND DIRECTOR OF OCEANIC MARINE ENTERPRISES, INC.

Mr. CORWIN. Thank you, Mr. Chairman. I am delighted to be here and I am delighted to be sponsoring a bill which was really approved by the Committee on the Judiciary in 1974 and the principal sponsor of that bill was former Congresswoman Barbara Jordan. We all remember her well in her term at Congress and she was the one that was reporting the bill to the House and it appears in House Committee Report——

Mr. FRANK. We do not need that. We will find it.

Mr. CORWIN. OK. What has happened since that time? The whole construction industry, particularly in building, is changing. General contractors are not doing as much work as they used to. We are finding that subcontractors are doing 80 percent and even 90 percent and sometimes, almost 100 percent of the actual construction work. But we have the same problem. The problem is that they are not getting paid on time.

I have presented to counsel a brief which we filed in a case in Massachusetts and one of the things that that has attached to it is a long report showing the slow progress of payments in the whole construction industry. Now, this study was conducted by an impressive number of commercial banks throughout the country and they describe what is happening in the construction business and on page 41(a), we see their report with regard to slow payments by the prime contractor.

Now, I am not going to read that. You people can read that carefully and find out the real story. This is based on fact. The general contractors are not doing a great deal of the work. The subcontractors are the skilled people and yet, when subcontractors are bringing large quantities of materials to the job and when they find that payments are slow, their working capital can be wiped out if they do not get paid their periodic payments on two or three jobs within 30 days.

That is what the bill has. First, it adds an item of protection which is to progress payments. Now, you people are now considering Senate bill 328. Your Committee on Government Operations has made some amendments and the purpose of that bill and the big fight on that bill, which has been between the general contractors and the subcontractors, is the matter of putting in provisions to ensure prompt payment to subcontractors.

But that insurance cannot be guaranteed if we do not have a right of enforcement of the provisions because merely putting them in without that right of enforcement is not going to do the job. That is the purpose of the Miller Act. Our purpose here is to tell you the experience in Massachusetts where we have had similar

legislation since 1972 and the net effect of that legislation is not as the surety bond people claim, an increase in litigation.

It is a sharp decrease in litigation because the principal items before this which prevented payment were number one, general contractors used to say, well, if we can stall this long enough by making claims for delay and back charges, the working capital of the subcontractor will be diminished. He will have to settle for less.

They also would put in a lot of back charges. Now, this brief which I have given you people shows—and also the decision of the Massachusetts Court in the *Manganaro* case, the brief is in the same case—it shows the basis for having legal fees to get payments because in that very case, we had both of those things. We had claims by the general contractor that there were delays which the Court said were not justified. We had claims by the general contractor for back charges which the Court said were not justified.

Now, the Court said, in that case, that payment of legal fees to subcontractors without corresponding payment of legal fees to the other side is perfectly justified is the legislature has found that there is a sound basis for finding slow payments to subcontractors and it feels that this will remedy the situation.

Now, what has happened?

Mr. FRANK. Mr. Corwin, we have a vote. Mr. Coble and I have got to go vote. We will come back, so I will ask you to suspend at this point. You can finish up when we get back. At this point, I do want to note, because you reminded me, our colleague, the gentlewoman from California, Mrs. Boxer, has been very concerned about a similar aspect of this problem—subcontractors who are left unpaid in case of a bankruptcy.

She was going to offer an amendment to the Defense bill that would have amended the law so that the bonds would go to pay off subcontractors who had fully done the work and were stuck by a bankruptcy. She, at the request of the Chairman of the full committee, withdrew that on his assurance that we were going to be seriously considering that this year.

I have written to Mrs. Boxer and told her that and I wanted to note that Mrs. Boxer was very concerned about that and we will be dealing with that aspect of it as a part of it, because it is obviously related.

We will be in a recess for about 15 minutes.

[Recess.]

Mr. FRANK. I apologize. Please continue.

Mr. CORWIN. To answer your question specifically, Congressman, I think it is being addressed to the amount of the bond that is secured by the back bankruptcy——

Mr. FRANK. I did not ask you a question. I made a statement. Just continue.

Mr. CORWIN. All right. Let me try to answer the statement.

Mr. FRANK. There is no need to do that. I did not ask a question. I made a statement. Please continue with your statement.

Mr. CORWIN. OK. Coming back to my statement, the reason, the real reason for putting in legal fees, I have explained to you. The reason for having them cover progress payments, I have already covered.

Mr. FRANK. Do not tell me what you already explained to me. Why don't you pick up where you left off.

Mr. CORWIN. What has been the experience? Our firm—this was put in, in Massachusetts, with a baby Miller Act in 1972. Our legal firm—we are counsel to the subcontractors up there—had tremendous experience which shows that the requirement of legal fees has cut the amount of litigation tremendously, has resulted in payment being made quickly and without these attempts of delay to get a better settlement and without back charges, which have no foundation.

The reason it has resulted is because they know that if they are going to be stuck with legal fees at the end, it is going to cost them money. So, the net result—and we are a firm of 13 lawyers representing primarily subcontractors—has been to cut the number of cases under the baby Miller Act in Massachusetts by more than half. Unfortunately, we have no statistics.

We can only tell you that when a claim comes in and when we tell the contractor or the bonding company that we are going to have to file suit or if we file suit, we find almost all of them settled very promptly because they do not want to get stuck for legal fees and they do not want to get stuck for interest.

Now, the reason we have had such good success is only legal fees and the claim of the bonding company that they are going to have a lot of work in getting notices of claims is just a big bunch of baloney because it is actually for the benefit of the bonding companies, bearing in mind that subcontractors are the ones who are probably furnishing bonds to protect the general contractor.

Therefore, it is to their benefit to have payments made so that they do not have subcontractors who have not been paid. I urge that this is the one solution which will result in a complete reduction of Miller Act cases.

I just want to say a few words about some of the other points in this bill. Number one, the *Bateson* case. What we have is a U.S. Supreme Court case which says that a sprinkler contractor, who had a contract with a subcontractor who had a contract with a general—in other words, he was a third tier—is protected by a Miller Act bond, but the employee benefits of the employees of that same sprinkler contractor are beyond the scope of the Miller Act. That just does not make sense.

If the subcontractor is protected for his payments, certainly the employee benefits which the Supreme Court has said are wages, ought to have equal protection. That is the very first clause in this H.R. 3356.

The second thing is the procedural. We have covered the fact and we have had many cases come in where the fellow makes his claim before the 30 days after the amount is due and the general contractor or the bonding company will file some procedure to get the case dismissed because it is filed prematurely. That does not make sense. This bill says that even if you file prematurely, as long as the court does not give judgment prior to the 30 days for progress payments or prior to the 90 days after the last work is done, that you cannot dismiss the case.

The third thing this does, it prevents contractors from entering into contracts which will result in a waiver, in effect, of payments

rights because what happens is, if they write a contract which says, we are not going to pay you unless and until and that is a condition precedent, we receive payment from the owner. Therefore, that money, in some States, might not become due in time to file the suit under the Miller Act.

They might try to require arbitration in the home State of the general contractor which might be far away from the source or the site of the work. That is unfair. The statute says, bring a Miller Act case in the place where the work is done. They ought to be able to conclude it in that Federal district. We have also wiped out the provision which says registered mail; although I think the courts generally have accepted certified mail.

Those are the things which we believe are important to protect the rights which we feel the Congress is going to improve in whatever version comes out this year on that S. 328 or whatever amendments the House Committee on Government Operations makes in that bill.

One other point—the Government official, Mr. Wright, is right in claiming that interest is not due. In his statement, he says something about there is no privity of contract. That is a complete misconception of the whole purpose. The Miller Act bond itself is a wiping out of the right of privity because you are giving the fellow something that he does not have under his contract. It is payment protection.

Under a bond, the general contractor and the surety are jointly and severally liable for the principal amount of the bond and there is no reason not to have bond protection for payments to the little fellows who are building the buildings.

Thank you.

[The statement of Joseph M. Corwin follows:]

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SUMMARY OF TESTIMONY OF JOSEPH M. CORWIN, COUNSEL
TO AMERICAN SUBCONTRACTORS OF MASSACHUSETTS
IN SUPPORT OF H.R. 3356

Our Association appears to support enactment of H.R. 3356 as a necessary amendment to Miller Act legislation to improve the flow of funds to subcontractors on government construction contracts. Subcontractors are performing more than 80% of the work particularly on building construction contracts. The flow of funds to subcontractors on government construction contracts is particularly slow. Government officials are major offenders and slow payments to prime contractors result in their use of payments for working capital rather than for payments to subcontractors. See "The Flow of Funds Through The Construction Process" to be submitted; see also S. 328 which passed the Senate and is now pending in the House.

Payment of legal fees and interest is a proven method of eliminating spurious backcharges and delaying tactics by prime contractors and surety companies to try to force lower final settlements on subcontractors and suppliers. The Massachusetts baby Miller Act (c. 149, §29) with legal fees and interest 3% above the Federal rediscount rate has been in effect since 1972. Prime contractors and surety companies have abandoned spurious backcharges and delaying tactics. They are paying amounts due, challenging only real "gray area" situations. Litigation under c. 149, §29 has declined by more than 75%. We predict the same decline in Miller Act litigation with passage of H.R. 3356. See Manganaro Drywall Inc. v. White Construction Co., Inc., 372 Mass. 661 and plaintiff's brief to be submitted. The Manganaro case held that payment of legal fees only to subcontractors did not violate equal protection constitutional guarantees. Legal fees were recommended by the General Services Administration in 1973. See Report No. 93-1015 of the 93rd Congress, 2d session to accompany H.R. 11691.

H.R. 3356 will also correct the following situations:

1. Failure to protect labor working for third tier subcontractors protected by the Miller Act bond. See J.W. Bateson Co. v. U.S. ex rel Trustees of Automatic Sprinkler Industry Pension Fund, 434 U.S. 586, 98 S.C. 874 (1978) with Justices Stevens and Brennan dissenting.

2. Give subcontractors and suppliers protection for progress payments overdue for more than thirty days. Late progress payments absorb working capital, force borrowing at high interest rates and can put them out of business.

3. Eliminate provision enabling prime contractors and sureties to get suit dismissed if brought less than 90 days before amounts are due.

4. Bar agreements entered into prior to date of accrual of right to sue, which would waive any rights under the Miller Act. See agreements for late payments beyond Miller Act times for suit and agreements to arbitrate possibly in home state of prime contractor rather than in job area or joiner with several parties not involved in subcontractor claim.

Mr. FRANK. Thank you, Mr. Corwin. Mr. Barfield?

Mr. BARFIELD. Thank you, Mr. Chairman. My name is Thomas J. Barfield and I am here representing the American Subcontractors Association.

As Mr. Corwin just said, the a number one problem of subcontractors today is getting timely payment for work properly performed and all of our surveys, meetings—all the information we have shows that to be the case. Now, subcontractor payment problems in the private sector are addressed through the laws that are in effect in the 50 States.

On Federal public work, because of sovereign immunity, subcontractors are not protected by having a security interest in the property. Congress, back in 1935, recognized that and enacted the Miller Act and at that time——

Mr. FRANK. Mr. Barfield, we all know that. Let's get to this current bill. It is not useful to tell us things that all of us know. Use your time to tell us things that you want us to act on.

Mr. BARFIELD. Let me just say that we do feel that the Miller Act, at that time, did serve a useful purpose and, to a certain extent, still does today.

Mr. FRANK. No, we are not here re-debating the Miller Act. Now, please, I want you all to listen to this.

Mr. BARFIELD. All right. I will get to——

Mr. FRANK. Please, Mr. Barfield, I want you all to listen to this. It is an imposition for you to do that sort of thing. We are trying to make time available as much as possible. Please respond by telling us what you think we ought to do about the piece of legislation. We are not here to debate whether they were right or wrong in 1935. And I do not need everybody to do the same thing. Now, please go ahead.

Mr. BARFIELD. I shall, Representative Frank, and I stand chastised and properly so and we do appreciate that opportunity.

The ASA believes that the Miller Act should be amended in several ways including certain ones that are not already in your Act. We wholeheartedly commend you for the bill, H.R. 3356. We think it goes a long way. We believe it can go even further and what I would like to cover many points concisely and this is really a burden. I came down to Washington and like yourself, I do this voluntarily so I appreciate the chance to make suggestions.

ASA's written statement covers the bulk of it's position. I will not go into that. First of all, ASA recommends that the Miller Act be amended to provide a payment bond at least equal in amount to the performance bond. Now, under the Miller Act, the Government is protected by a performance bond in the amount that the contracting officer deems adequate for protection of the United States. That is normally 100 percent of the contract amount.

Subcontractors, on the other hand, are protected by a payment bond under a tiered formula arrangement. The amount is never more than $2.5 million. That maximum protection for the subcontractor has been obviously very impacted by inflation——

Mr. FRANK. This is history that is relevant. When did that $2.5 million last get adjusted? Does anybody know?

Mr. BARFIELD. To the best of my knowledge——

Mr. FRANK. Never?

Mr. BARFIELD. It goes back—it perhaps goes back as much as 50 years. I cannot answer you directly, but to the best of my knowledge, it goes back to the original date.

Mr. FRANK. All right. We will check that out. It would be very useful.

Mr. BARFIELD. ASA further recommends that the Miller Act be amended to place an affirmative obligation on the Government to assure prime contractor compliance with the Miller Act. What I mean there is that in those instances where the Miller Act bond is not provided by the contractor, the Government has the ability to void the contract, terminate it.

If it elects not to, then the contractor defaults the subcontractor presently has no recourse to collect the money. ASA believes it is wrong for the subcontractor to suffer such a financial loss because of the Government's failure to enforce the Act.

In addition, ASA supports the provision in 3355 that would allow a notice, under the Miller Act, to be sent by certified mail as well as regular mail. As a step further, we suggest that the bill be modified to provide for delivery by any method whereby receipt can be proven. This would allow more flexibility in the light of the many and varied legitimate delivery means available today and will be in the future.

I have in mind via FAX, via courier, via direct delivery for which you get a receipt. What I am saying is that I think we go along entirely with your concept. We would just like to take it that one step further, Congressman.

ASA also has a number of suggestions regarding notice an waiting periods under the Act. We recommend that the Miller Act be amended to end the counter-productive concept of premature notice. The Miller Act does require that subcontractors and suppliers provide written notice to prime contractors within 90 days of the date on which they last performed labor or supplied material.

Some courts have ruled that notice given before the actual final date of work was premature and dismissed the suit. Now, these court rulings do provide prime contractors and their sureties with technical defenses to an otherwise readily recoverable suit and ASA is recommending specifically that the law be amended to require notice not later than 90 days from the date of last labor or supply.

ASA further recommends that the Act be amended to allow waiver of the 90-day period for filing suit provided that the subcontractor has received written denial of his claim by the general contractor.

Currently, a claimant has to wait 90 days after he last performs labor or furnishes material on a project before filing suit. If the prime contractor has previously denied the claim, there is really no reason for the subcontractor to have to wait any longer. Now, while most courts have excused that requirement, it still provides this technical opportunity to assert a defense that has to be overcome.

Finally, ASA recommends that the Act be amended to allow for the filing of suit up to one year after all trades have furnished labor and material on a project. Right now, the Act requires the subcontractor to file suit within one year from his last furnishing

labor and material on the project. This is particularly a serious problem for an early-finishing trade such as an excavation contractor.

He could have his retainage delayed for a matter of years and in such an instance, if he files suit within the first year, the prime contractor and the surety may well assert that the payment is not due yet. He is not due his retainage until after all work on the project is done. If the subcontractor waits beyond that year, he stands to lose all of this rights under the Miller Act. So, he is caught in a dilemma and we urgently suggest that that be addressed.

In closing, I would like to note that the ASA believes that the Miller Act should be amended to eliminate alternative securities as a substitute for corporate bonds and to permit bonds only as issued by companies approved by the U.S. Treasury Department. Treasury already is required to approve surety companies that issue bonds on Federal projects.

However, the Miller Act regulations do allow contractors to post other types of securities in lieu of corporate bonds and these alternatives include individual sureties. The standards for individual sureties no where meet the strict standards of corporate sureties. A contractor using an individual surety alternative may not have even been pre-qualified by an experienced agent, as would be the case with a corporate surety and the liquidity of the security he provides is in no way comparable to a corporate bond.

In a hearing held in August by the Senate Governmental Affairs Committee, Senator Childes suggested that the individual surety problem be addressed administratively rather than legislatively. ASA is working with the OFPP on this and during the March hearing, the OFPP Administrator testified before Senator Childes that it was his goal to have this resolved by the end of the year. We do suggest and urge that you, too, monitor the efforts to assure that these meet the Miller Act aims.

Our written statement does address each of these points in greater detail.

Mr. FRANK. It will be in the record.

Mr. BARFIELD. We ask that it be inserted in the record and I, obviously, will be glad to answer any questions you have.

[The statement of Thomas J. Barfield follows:]

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Statement of

AMERICAN SUBCONTRACTORS ASSOCIATION

to the

SUBCOMMITTEE ON ADMINISTRATIVE LAW AND GOVERNMENTAL RELATIONS

of the

COMMITTEE ON THE JUDICIARY
U.S. HOUSE OF REPRESENTATIVES

on

H.R. 3356
LEGISLATION TO AMEND THE MILLER ACT

May 12, 1988

AMERICAN SUBCONTRACTORS ASSOCIATION, INC.
1004 DUKE STREET, ALEXANDRIA, VA 22314-3512
(703) 684-3450

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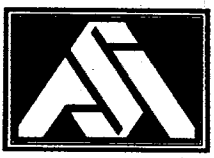


STATEMENT ON
H.R.3356, AMENDMENTS TO THE MILLER ACT

The American Subcontractors Association is a national trade association with more than 7,200 firms representing all major construction trades in 59 chapters.

ASA is the only national organization that speaks exclusively for the interests of construction subcontractors. ASA is dedicated to improving general business conditions for subcontractors through unified and cooperative actions.

Many ASA members perform construction for the Federal Government. Sometimes they serve as prime contractors, contracting directly with the Federal Government. More often, they serve as subcontractors, dealing with the Government only through a prime contractor. In both situations, these specialty trade contractors have a direct and real interest in the Federal Government's construction program, particularly their ability to get paid for work properly performed.

In an ASA survey of subcontractors, the overwhelming majority of subcontractors participating reported that the inability to get paid in a timely manner is their most serious problem. Construction subcontractors are very typical of American businesses: They lay out large sums for materials prior to the start of work. They must promptly pay their labor as required by law. Yet they do not have large capital reserves that would permit long, unexpected, and unnecessary delays in receiving full payment for work properly performed.

For a myriad of reasons, prime contractor default is, perhaps, more common on Federal construction than on private and other public construction. Indeed, subcontractors participating in a March 1987 survey conducted by ASA, reported that they wait an average of 60 days after submitting a request for a progress payment before receiving payment on Federal construction. These same subcontractors wait an average of 120 days after they last perform labor or supply materials to a Federal construction job before receiving payment.

For a big business, a delay in payment may cause some consternation in the bookkeeping department, but business would go on as usual. However, for a small firm, the size of most construction subcontractors, one payment, received late or not at all, might mean the difference between survival and disaster.

AMERICAN SUBCONTRACTORS ASSOCIATION, INC.
1004 DUKE STREET, ALEXANDRIA, VA 22314-3512
(703) 684-3450

Indeed, according to the March 1987 ASA survey, 60 percent of the subcontractors who perform on Federal construction report they have lost money on such projects because of late or non-payment.

The fundamental need of subcontractors who furnish labor and materials to a construction project to be paid has long been recognized. In order to protect subcontractors and suppliers, the various states have enacted lien laws that allow a subcontractor to attach the property being improved and to secure a certain priority of payment, thereby aiding in the collection of sums due for services rendered on private construction projects. However, public property, in effect owned by the people and subject to the legal theory of "sovereign immunity", may not be liened.

Congress recognized this dilemma when it enacted the Miller Act in 1935. In addition to requiring a performance bond to guarantee completion of the project, the Miller Act requires a payment bond to be posted in a penal sum determined by the contract amount with the maximum amount on the payment bond being $2.5 million. The purpose of the Miller Act payment bond is to protect all persons supplying labor and material on United States Government construction projects where lien rights are unavailable.

At the time of enactment and later amendment, the Miller Act was considered good legislation and, up to a point, it has been. However, it has fallen short in many areas. Today, its protections for subcontractors are often more apparent than real.

The construction industry has changed dramatically in the more than 50 years since the Miller Act was enacted. Today, most general contractors perform only a small fraction of the job site construction work. On Federal projects, that percentage is usually no more than 20 percent. Instead, work is subcontracted to firms that specialize in particular fields.

Many subcontractors on Federal work have been forced to operate on borrowed capital, sometimes paying a high rate of interest, while waiting to collect full payment on work completed and accepted. Others have been financially ruined. Yet most subcontractors will not resort to the Miller Act payment bond unless the prime contractor appears to be insolvent. According to ASA's March 1987 survey, only 8.8 percent of subcontractors on Federal construction have filed suit under the Miller Act, despite rampant slow pay and no pay problems.

ASA believes that the Miller Act must be amended in several areas if it is to once again live up to the expectations of Congress. We believe it is time for the Miller Act to be modernized and streamlined so that it once again provides protections for subcontractors and suppliers on Federal construction projects.

H.R.3356, AMENDMENTS TO THE MILLER ACT

ASA strongly supports H.R.3356, amendments to the Miller Act. We believes its provisions will go a long way toward improving the Act's effectiveness in dealing with the problems the Act was designed to address.

Coverage of Progress Payments

ASA supports the provision in H.R.3356 that would extend the protections of the Miller Act payment bond to monthly progress payments (Section 1(2)).

Under the Miller Act, a subcontractor may not file suit under the payment bond until 90 days after the payment is due. A subcontractor has no right under the Miller Act to assure the receipt of periodic progress payments, which are usually made monthly on construction projects. Thus, the Miller Act payment bond is a solution of last resort.

A subcontractor who does not receive a progress payment is put in the untenable position of continuing to work without payment. We believe that H.R.3356 would provide a necessary tool to a subcontractor who has not received a progress payment under the terms of the subcontract and to pursue that payment in a timely manner--before the subcontractor's cash flow has been so severely eroded that he cannot continue to operate.

Notice by Certified Mail.

The Miller Act requires certain subcontractors and suppliers--those that do not have a direct contractual relationship with the prime contractor--to provide written notice to the prime contractor that they intend to institute action under the Miller Act. That notice must be given by "registered mail". Although most courts have excused this requirement when it has been shown that a prime contractor actually received notice, it still may provide the general contractor and its surety with a technical defense to an otherwise recoverable Miller Act suit.

Therefore, ASA supports the provision in H.R.3356 that would allow a subcontractor to provide notice by "certified mail" (Section 1(3)). In addition, we recommend that this provision be amended to permit notice by any system of delivery that provides sufficient proof of receipt by the prime contractor.

End "Premature Notice".

The Miller Act requires certain subcontractors and suppliers--those who do not have a direct contractual relationship with the prime contractor--to provide written notice to the prime contractor within 90 days from the date on which they performed the last labor or supplied the last of the material for which their claims are made. Some courts have ruled that notice given before the actual final day of work is premature and therefore dismissed the suit. These court rulings provide the prime contractor and his surety with a technical defense to an otherwise recoverable Miller Act suit.

ASA supports the provision in H.R.3356 that would prohibit a court from dismissing a complaint merely because the notice was filed prematurely (Section 1(4)). ASA suggests, however, that the same result could be achieved in a more simple manner by amending the Act to require notice "not later than 90 days" (rather than "within 90 days") from the date of last furnishing.

Attorneys' Fees and Interest

Many assume that a prime contractor or his surety settles payment claims upon receipt of notice and after investigation of the merits and validity of the claim. However, ASA receives many complaints from unpaid subcontractors that a surety's disclaimer, failure to respond, or other act has demonstrated that it is necessary to resort to actual court action in order to secure the satisfaction of the claim.

In some cases, the claimant is reluctant to initiate litigation because it is clear that the legal and court costs will be so high in proportion to the amount that could be recovered as to constitute an effective legal barrier to the very protection that Congress has statutorily prescribed.

Thus, the payment bond protection afforded by the Miller Act has operated unevenly. For large firms that take on sizable subcontracts and whose claims may be sufficiently large to permit litigation, the bonds offer the protection intended. For those whose claims are small, and who most often are very small firms, the protection is not available from a practical standpoint.

ASA supports the provision in H.R.3356 that would permit an unpaid subcontractor whose claim is valid and who can litigate successfully, to recover interest and the reasonable cost of legal fees (Section 1(4)).

Prohibit Waiver of Rights.

Some agreements between a prime contractor and subcontractor require the subcontractor to waive, directly or indirectly, its rights under the Miller Act. Such subcontract provisions often are designed to protect the prime contractor and his surety by providing them with defenses on a bonded job. Given the uneven negotiating power between a prime contractor and subcontractor, ASA believes that such provisions--which operate to the legal and practical detriment of the subcontractor--should be against public policy.

Therefore, ASA also supports the provision of H.R.3356 that would nullify any contract provision that would directly or indirectly waive a subcontractor's rights under the Miller Act (Section 1(5)).

OTHER PROPOSED AMENDMENTS TO THE MILLER ACT

In addition to the amendments proposed by H.R.3356, ASA believes that a number of other amendments are necessary to modernize and streamline the Miller Act.

Require Treasury-Approved Bonds

ASA proposes that the Miller Act be amended to eliminate alternative securities to corporate bonds and to permit only bonds issued by surety companies approved by the U.S. Treasury Department.

Treasury already is required to approve the surety companies that issue bonds on Federal projects. However, the regulations implementing the Miller Act also allow a contractor to post other types of securities in lieu of a corporate bond. These alternatives include individual sureties.

The standards for individual sureties in no way meet the strict standards for corporate sureties. A contractor who posts such an alternative to a corporate surety bond may not have been "prequalified" by an experienced agent and the liquidity of the "security" is not assured.

In a hearing conducted on August 11, 1987, by the Subcommittee on Federal Spending, Budget & Accounting of the Senate Committee on Governmental Affairs, Senator Lawton Chiles (D-Fla.) suggested that the individual surety problem be addressed administratively rather than legislatively. ASA is working with the Office of Federal Procurement Policy in this regard. On March 25, 1988, OFPP Administrator Robert Bedell again testified before the Senate Subcommittee. He stated that it is his goal to resolve this issue before the end of the year. ASA asks this Subcommittee also to monitor these efforts to assure that the objectives of the Miller Act are met.

Require the Payment Bond Equal the Performance Bond

ASA also recommends that the Miller Act be amended to provide that the payment bond be at least equal to the performance bond.

Under the Miller Act, the Government is protected by a performance bond in an amount the contracting officer "deems adequate for the protection of the United States." That amount is usually 100 percent.

Subcontractors, however, are protected by a payment bond which is only one-half of the contract amount if the contract is less than $1 million; 40 percent of the contract amount if the contract is between $1 million and $5 million; and a $2.5 million maximum if the contract is for more than $5 million. The maximum dollar protection for a subcontractor under the Miller Act has been severely eroded by inflation. In any event, ASA believes that subcontractors deserve protection in an amount equal to that of the Government.

Place an Affirmative Obligation on the Government.

ASA further recommends that the Miller Act be amended to place an affirmative obligation on the Government to assure prime contractor compliance with the Miller Act.

In the event that a Miller Act bond is not posted by the prime contractor, the contract is voidable and can be terminated by the Government at its option. If the Government does not terminate the contract, and the contractor defaults, the subcontractor claimant has no recourse to collect the money it is owed.

ASA believes it is wrong--and an abrogation of congressional intent--for a subcontractor to suffer a financial loss because of the Government's failure to enforce the Miller Act.

Modify the Waiting Period for Filing Suit.

The Miller Act requires a claimant to wait 90 days after he last performs labor or furnishes material on the project before filing suit. Although most courts have excused this requirement, it still may provide a surety with a technical defense to an otherwise recoverable Miller Act suit.

Thus, ASA recommends that the Miller Act be amended to allow waiver of the 90 day waiting period when the subcontractor receives a written denial of his claim from the prime contractor. There is no reason to require a subcontractor to wait 90 days when he knows that payment will not be forthcoming during that period.

Extend the Period for Filing Suit.

The Miller Act requires a subcontractor to file suit within one year from his last date of furnishing labor or material on a project. This is a serious problem, particularly for "early finishing" trades on projects where retainage is withheld.

For example, a subcontractor whose work may be completed during the first few months of a two or three-year project, may have his final payment delayed for several years beyond his completion date. If he files suit within one year, the prime contractor and the surety may defend on the ground that the money is not yet due. If the subcontractor waits beyond the one year, he loses all rights under the Miller Act.

Therefore, ASA recommends that the Miller Act be amended to allow the filing of suit up to one-year after any subcontractor or supplier has furnished labor or material on the project.

SUMMARY

The American Subcontractors Association believes that the 1935 Miller Act must be modernized and streamlined if it is to live up to its original intent--to protect all persons supplying labor and materials on United States Government construction projects.

ASA supports H.R.3356, amendments to the Miller Act. We believe its provisions will go a long way toward improving the Act's effectiveness in dealing with the problems the Act was designed to address. Specifically, ASA supports:

- o Extending of the Act's coverage to progress payments;
- o Allowing notice by certified mail, as well as any other system of delivery that provides sufficient proof of receipt;
- o Ending "premature notice";
- o Permitting attorneys' fees and interest; and
- o Prohibiting the waiver of rights.

ASA believes the Miller Act also must be amended in other areas if it is to once again provide adequate payment protection to subcontractors and suppliers on Federal construction. Such amendments should include:

- o requiring Treasury-approved bonds;
- o requiring the payment bond to equal the performance bond;
- o placing an affirmative obligation on the Government to assure prime contractor compliance with the Act;
- o modifying the waiting period for filing suit under the Act; and
- o extending the period for filing suit under the Act.

ASA asks the members of this Subcommittee to seriously consider the issues raised in this statement and urges prompt action on legislation to amend the Miller Act. ASA's members and resources stand ready to assist in this important endeavor.

Mr. FRANK. Let me ask you—as these questions occur to me. Is there a record of the alternative bonds not being worth anything when people had to go to them?

Mr. BARFIELD. Yes. The history of it has been that that is exactly the case.

Mr. FRANK. If you could you submit some examples of some studies of that, that would help us and we may follow your suggestion and write to the OFPP and ask them to work on it. Mr. Corwin?

Mr. CORWIN. I could answer that a little bit by experience in Massachusetts because we have had some offshore "supposedly bonding companies" selling bonds which are really guaranteed by nothing more than the signature of the contractor himself. It so happens, in Massachusetts that up to now—and there is legislation to correct it—the provisions of the law do not put issuance of surety bonds under the control of the insurance department. So, any person, even——

Mr. FRANK. We cannot solve State problems. We are here to talk about local ones.

Mr. CORWIN. But this company is selling bonds throughout the country as offshore company.

Mr. FRANK. Well, we will probably do a letter to OFPP to join in Senator Chiles' effort. One other question, Mr. Barfield. When you talked about the one-year problem—in other words, you have got somebody who may have been in the job early and the contractor says, well, I have not been paid, I am not going to get paid until the whole job is done so therefore, I cannot pay you everything? Is that what happens?

Mr. BARFIELD. Yes. Contractually, it is not unusual for retainage to be held until the end of a job.

Mr. FRANK. And then argue, well, I will not know whether you did the right thing on the excavation until I put the thing in the hole?

Mr. BARFIELD. Yes.

Mr. FRANK. OK.

Mr. BARFIELD. That the excavation was correct. So, there is reason for it, but——

Mr. FRANK. In other words, you are—and it seems to me reasonable that you are not asking for an earlier payment to be forced, but that if payment is going to be delayed, you do not lose your rights because of that.

Mr. BARFIELD. That is precisely it.

Mr. FRANK. All right. Next we will hear from Mr. Sutton.

Mr. SUTTON. Mr. Chairman, my name is Lewis Sutton. I am a board member of the National Association of Marine Sub-Contractors and Director of Oceanic Marine Enterprises of San Francisco, a marine subcontracting firm.

I appreciate the opportunity you have given us to present our views with respect to needed legislation that should correct an ongoing serious problem. There is no protection for a marine subcontractor who fulfills his obligation to the prime contractor by providing materials and/or services to specification. The prime contractor invoices the Navy Department. They receive their payment and the subcontractor is not paid if the prime contractor files under the bankruptcy law.

If the project was a building on a Navy or other Government land facility, the prime contractor would have to provide a surety bond that would ensure payment to his subcontractors. That is not the case with respect to contracts that involve U.S. Navy vessels and that is not fair or reasonable and that is the crux of the problem.

The essence of working with the Government as the end user is the perception that fair and reasonable will be the criteria of a working relationship. Events have proven otherwise. Here is a lit of shipyards that have filed under the Bankruptcy Act that has cost subcontractors, the majority being small business, many hundreds of thousands of hard-earned dollars.

Coastal Drydock, Brooklyn, New York; Boston Shipyard, Boston, Massachusetts; Newport Offshore, Rhode Island; RMI Corporation, San Diego, California; West Winds, San Francisco, California; Hoboken Shipyard, Hoboken, New Jersey; Horne Brothers, Newport News, Virginia; Northwest Marine, Portland, Oregon; Palau Corporation, San Francisco, California; Whiteys Welding, Richmond, California; and Todd Shipyard Corporation, five locations nationally.

These horror stores are clear evidence that we, the subcontractors, are not being treated fairly and it is only reasonable to assume that Congress will correct this obvious problem. Thank you.

[The statement of Lewis Sutton follows:]

Mr. Chairman, Members of Congress:
My name is Lewis Sutton, I am a board member of the National Association of Marine Sub-Contractors, and Director of Oceanic Marine Enterprises, Inc. of San Francisco, a Marine sub-contracting firm.
I appreciate the opportunity you have given us to present our views with respect to needed legislation that should correct an ongoing serious problem. There is no protection for a Marine Sub-Contractor who fulfills his obligation to the prime contractor, by providing materials and/or services to specification.. The prime contractor invoices the Navy Department, he receives his payment and the sub-contractor is not paid, if the prime contractor files under the Bankruptcy law. If the project was a building on a Navy or other Government land facility, the prime contractor would have to provide a Surety Bond that would insure payment to his sub-contractors. That is not the case with respect to contracts that involve U.S. Navy Vessels. That is not fair or reasonable and that is the crux of the problem. The essence of working with the Government as the end user, is the preception that fair and reasonable will be the criteria of a working relationship. Events have proven otherwise.

Herein is a list of shipyards that have filed under the Bankruptcy Act, that has cost sub-contractors, the majority being small business, many hundreds of thousands of hard earned dollars.

Coastal Drydock, Brooklyn, N.Y.	Hoboken Shipyard, Hoboken, N.J.
Boston Shipyard, Boston, MA	Horne Bros., Newport News, VA
Newport Offshore, R.I.	Northwest Marine, Portland, OR
RMI Corporation, San Diego, CA	Palau Corp., San Francisco, CA
West Winds, San Francisco, CA	Whiteys Welding, Richmond, CA

Todd Shipyard Corporation, 5 Locations, National

These horror stories are clear evidence that we, the sub-contractors, are not being treated fairly and it is only reasonable to assume that Congress will correct this obvious problem.
Thank you for your time and attention.

Mr. FRANK. Thank you. I do not have any particular questions. The testimony covered all this. Let me just ask one general one. The amendments that are pending before the House Government Operations Committee, how would you see this meshing with that?

Mr. CORWIN. I think it only does one thing. It gives the subcontractor a method of enforcing any prompt payment provisions which are put in that Act. Without it and without these corrections of the defects, we might not have the opportunity. For example, progress payments—this is the thing that can put subcontractors into bankruptcy too quickly if we do not give them some weapon to enforce or to threaten a general contractor.

If they do not pay, we are going to sue them and get legal fees, they are going to stall it along and they are not going to suffer very much.

Mr. BARFIELD. I see it pretty much the same way in that it does not change the basic problem. If a contractor has diverted funds to another project and does not have funds available, the fact that interest is owing may be of precious little benefit as Mr. Corwin said, when it comes to trying to negotiate for money that has to be had in order to keep a business alive.

Mr. FRANK. OK. That is all. I hope we are going to be able to move on some of these issues and I appreciate it.

Mr. CORWIN. In answer to your question about the amounts, I think the amounts have been in there since 1935, the original enactment.

Mr. FRANK. That is clearly a strong argument on that alone for some action. Thank you, gentlemen.

We will next hear from the panel from the surety industry. The Administration has submitted a written statement. Let me say, however, OFPP explains that they have had a change in responsible individuals so that they did not have anyone they thought well able to come in person and we were glad to take their statement.

[The statement of Joseph R. Wright, Jr. follows:]

#F13

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

STATEMENT OF JOSEPH R. WRIGHT, JR.

DEPUTY DIRECTOR, OFFICE OF MANAGEMENT AND BUDGET

BEFORE THE

SUBCOMMITTEE ON ADMINISTRATIVE LAW AND GOVERNMENTAL RELATIONS

OF THE

HOUSE COMMITTEE ON THE JUDICIARY

MAY 12, 1988

Mr. Chairman, and Members of the Committee:

Thank you for the opportunity to present the Administration's views on H.R. 3356, "Amendments to the Miller Act". We look forward to working with you in considering these proposed amendments.

The Miller Act requires contractors on any Federal construction contract greater than $25,000 to post two types of bonds: performance bonds and payment bonds. The principal purpose of the performance bond is to protect the government. The performance bond insures that if the contractor does not complete the work the government will receive a penal amount up to 100% of the contract price. The principal purpose of the payment bond, on the other hand, is

to protect the contractor's suppliers and employees. The payment bond is intended to see that the suppliers, who provide material or labor to the contractor, will be paid and that employees will be paid for their labor.

One of the reasons for enactment of the Miller Act was to provide a similar remedy to the mechanics' liens available under state law on private projects, but not on Federal contracts. For private projects, subcontractors and others can place liens on the property being improved to insure their interests are protected. Mechanics' liens may not be attached to Federal property. Accordingly, the Miller Act is essential to protecting suppliers and workmen on Federal projects, by requiring the prime contractor to post a payment bond. Collecting payment either under mechanics' liens or under the bonds required by the Miller Act is an alternative to seeking redress through the courts. This process is often preferred because court proceedings may be drawn out, are sometimes not successful, and are often expensive.

H.R. 3356

H.R. 3356 would amend the Miller Act by allowing unpaid suppliers and laborers to collect prejudgment interest on amounts due them and to recover reasonable legal fees

incurred in making or litigating claims. In addition the bill would:

- extend coverage of the Miller Act to progress payments and provide for the recovery of interest on such payments;

- simplify the procedures for serving written notice to contractors by permitting such notices to be provided by certified mail as well as registered mail;

- prohibit the inclusion of provisions in contracts or agreements that would invalidate a person's right to sue under the Miller Act in certain circumstances; and

- clarify that suits filed under the Miller Act cannot be dismissed solely because they are filed prior to the 90th day after the last date the labor is performed or materials supplied.

We support most of the proposed Miller Act amendments. We are, however, concerned about the provisions of H.R. 3356 that would allow for the recovery of legal fees and for the payment of interest.

INTEREST

I have testified before Congress on several occasions with regard to the payment of interest on contractors' claims. The Administration has been very supportive of prompt payment legislation and of the need to pay interest when we are late in paying our bills. While we believe the same principles should apply to contractors, we have been reluctant in the past to intercede in the privity of contract relationship that exists between prime contractors and subcontractors by mandating the use of specific contract provisions. This "privity of contract" issue, particularly with regard to payment provisions, has now been overcome in proposed amendments to the Prompt Payment Act. These amendments were passed by the Senate last October as S. 328. S. 328 is now pending in the House Government Operations Committee, and it provides that prime contractors must specify payment terms and conditions in all subcontracts and that interest must be paid on all amounts not paid in accordance with the specified terms and conditions. Our preference would be to continue to address payment and interest problems within the context of the Prompt Payment Act. We believe that the Senate-passed amendments substantially remove the need to include interest payment provisions in H.R. 3356.

ATTORNEYS FEES

At present, the Miller Act neither precludes nor requires the award of attorneys' fees. H.R. 3356 would require the award of reasonable attorneys' fees to the successful claimant. This amendment would alter a 1974 decision by the Supreme Court which allowed the recovery of attorneys' fees only when the "opponent acted in bad faith, vexatiously, wantonly, or for oppressive reasons, or where a successful litigant has conferred a substantial benefit on a class of persons and the court's shifting of fees operates to spread the cost proportionately among the members of the benefited class." F.D. Rich Co, Inc. v. United States ex rel. Industrial Lumber Co., 417 U.S. 116 (1974) at 129-30.

Prior to this 1974 decision, attorneys' fees had been awarded under the Miller Act according to state law. This practice was specifically overruled by Rich because of the difficulties in interpreting state law, and in selecting the state law to be applied when a contract was performed in more than one state.

We find no reason at the present time to recommend to the Committee that the decision in Rich be overturned. Moreover the availability of attorney fees may provide a

disincentive for the settlement of cases, particularly in view of the broadening of Section 1(2) to include persons who have either not been paid or not been paid in full for progress payments within 30 days of the due date of such payment. In addition the provisions of H.R. 3356 are unfair to successful defendants. The provisions now provide that only plaintiffs may recover reasonable legal fees.

CONCLUSION

In conclusion, Mr. Chairman, we generally support H.R. 3356, i.e., except for the provisions pertinent to the recovery of legal fees and the payment of interest. We believe the interest payment provisions are duplicative of measures now contained in S. 328, the Prompt Payment Act Amendments of 1988, and are therefore not required. The budgetary impact of allowing plaintiffs to recover reasonable legal fees are, at best, difficult to assess. Most of the information we have is anecdotal. There is a sparsity of empirical data on the potential impact of this provision and we would urge both the subcontracting community and the surety industry to collect better data so that proposed amendments can be assessed on a better basis in the future.

Mr. FRANK. Mr. Provost, we will begin with you

TESTIMONY OF LLOYD PROVOST, PRESIDENT, THE SURETY ASSOCIATION OF AMERICA AND JOHN J. CURTIN, JR., CHAIRMAN, GOVERNMENT AFFAIRS COMMITTEE, NATIONAL ASSOCIATION OF SURETY BOND PRODUCERS

Mr. PROVOST. Mr. Chairman, my name is Lloyd Provost and I am President of the Surety Association of America, which is the trade association for the surety companies. Our member companies provide almost all of the bid performance and payment bonds required of contractors throughout the United States.

The Miller Act is the fundamental law of the United States pertaining to the bonding of contractors. Not only is it applicable to all Federal construction, but it is also the basis for similar laws enacted by all of the States which also require contractors on public works to file performance and payment bonds.

As a result, the Surety Association is vitally interested in the proposed changes in the Miller Act. Quite frankly, Mr. Chairman, we do not see the need for any change in the Miller Act at this time. The law has been effective for more than 50 years with only two minor modifications having been made during that period. It is the heart of the open competition bid-bond-build system under which most of America's infrastructure has been constructed.

It has been tested countless times in the courts and a substantial body of law has been built up around it. As a result, we believe that before any change is made to the Miller Act, long and careful consideration must be given to the impact those changes might have on the Government, the taxpayers, the construction community—both general and subcontractors—the sureties, the lending institutions, design professionals, and all others that take part in the public construction process.

We realize that there are some who would like to see the Miller Act amended in ways that would benefit them and the bill before us today represents one such proposal. Let me comment on the changes it would make and our reaction to them.

I believe the first amendment is intended to extend coverage of the payment bonds to fringe benefits for labor furnished to eligible subcontractors. The language proposed to accomplish this is confusing and conceivably could be construed to open up the payment bond to an additional tier of claimants. Such claimants would be so far removed from the prime contractor, that it is unfair to burden him or her and their sureties with these claims.

The second amendment would extend the coverage of the payment bond to progress payments which are more than 30 days overdue. Such an amendment is unworkable and could involve the sureties and the courts in a tremendous amount of unnecessary litigation where payment is properly delayed because of disputes or non-payment by the owner. Actually, in light of the prompt pay legislation which has been passed by the Senate and is currently before this House, we believe this amendment is unneeded.

The third amendment would permit the required notices to the sureties to be sent by certified mail in lieu of registered mail. We have no objections to this. However, we understand most courts

have indicated certified mail is sufficient and thus question the need to amend the Act just to cover this point.

The fourth amendment would prohibit the dismissal of claims because of premature notice. This would enable a subcontractor to bring suit against a contractor and/or a surety during the 90-day period prior to sending notice of the claim and receiving a denial to it. Such a provision would encourage the filing of suits. This amendment also provides that interest and attorneys fees shall be included in any judgment for a claimant. This is a one-sided provision favoring claimants which invites frivolous and uncalled for suits.

The fifth amendment would invalidate waivers of rights under this Act under certain circumstances. While we recognize the reasons behind this proposal, we are not certain that this is a proper area for legislation.

To sum up, we are not aware of any ground swell for Miller Act changes and believe the ones proposed in H.R. 3356 are unnecessary. Should such a ground swell actually develop, the Surety Association stands ready to work with other interested construction groups to arrive at changes acceptable to all. At this time the old adage, "If it ain't broke, don't fix it" seems to fit the Miller Act to a tee.

Thank you for allowing me to testify.

[The statement of Lloyd Provost follows:]

#14

STATEMENT OF LLOYD PROVOST BEFORE THE SUBCOMMITTEE
ON ADMINISTRATIVE LAW AND GOVERNMENTAL RELATIONS
COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES - MARCH 31, 1988

MR. CHAIRMAN, MEMBERS OF THE COMMITTEE. MY NAME IS LLOYD PROVOST AND I AM PRESIDENT OF THE SURETY ASSOCIATION OF AMERICA, WHICH IS A TRADE ASSOCIATION OF MORE THAN 550 COMPANIES WRITING FIDELITY AND SURETY BONDS. OUR MEMBER COMPANIES PROVIDE ALMOST ALL OF THE BID, PERFORMANCE AND PAYMENT BONDS REQUIRED OF CONTRACTORS THROUGHOUT THE UNITED STATES.

THE MILLER ACT IS THE FUNDAMENTAL LAW OF THE UNITED STATES PERTAINING TO THE BONDING OF CONTRACTORS. NOT ONLY IS THE MILLER ACT APPLICABLE TO ALL FEDERAL CONSTRUCTION, BUT ALSO IT IS THE BASIS FOR SIMILAR LAWS ENACTED BY ALL OF THE 50 STATES WHICH ALSO REQUIRE BONDS OF CONTRACTORS ON PUBLIC WORK WITHIN THEIR BORDERS. AS A RESULT, THE SURETY ASSOCIATION IS VITALLY INTERESTED IN ANY PROPOSED CHANGES IN THE MILLER ACT.

QUITE FRANKLY, MR. CHAIRMAN, WE DO NOT SEE THE NEED FOR ANY CHANGE IN THE MILLER ACT AT THIS TIME. THE LAW HAS BEEN EFFECTIVE FOR MORE THAN FIFTY YEARS WITH TWO MINOR MODIFICATIONS HAVING BEEN MADE DURING THAT PERIOD. IT IS THE HEART OF THE OPEN COMPETITION - BID - BOND - BUILD - SYSTEM UNDER WHICH MOST OF AMERICA'S INFRASTRUCTURE HAS BEEN CONSTRUCTED. IT HAS BEEN TESTED COUNTLESS TIMES IN THE COURTS AND A SUBSTANTIAL BODY OF LAW HAS BEEN BUILT UP AROUND IT. AS A RESULT, WE BELIEVE THAT BEFORE ANY CHANGE IS MADE TO THE MILLER ACT, LONG AND CAREFUL CONSIDERATION MUST BE GIVEN TO THE IMPACT THOSE CHANGES MIGHT HAVE ON THE GOVERNMENT, THE AMERICAN TAXPAYERS, THE CONSTRUCTION COMMUNITY, THE SURETIES, LENDING INSTITUTIONS, DESIGN PROFESSIONALS AND ALL OTHERS THAT TAKE PART IN THE PUBLIC CONSTRUCTION PROCESS.

WE REALIZE THERE ARE SOME THAT WOULD LIKE TO SEE THE MILLER ACT AMENDED IN WAYS THAT IT WOULD BENEFIT THEM AND THE BILL BEFORE US TODAY REPRESENTS ONE SUCH PROPOSAL. LET ME COMMENT ON THE CHANGES IT WOULD MAKE AND OUR REACTION TO THEM.

I BELIEVE THE FIRST AMENDMENT IS INTENDED TO EXTEND COVERAGE OF THE PAYMENT BOND TO FRINGE BENEFITS FOR LABOR FURNISHED TO AN ELIGIBLE SUBCONTRACTOR. THE LANGUAGE PROPOSED TO ACCOMPLISH THIS IS CONFUSING AND CONCEIVABLY COULD BE CONSTRUED TO OPEN UP THE PAYMENT BOND TO AN ADDITIONAL TIER OF CLAIMANTS. SUCH CLAIMANTS WOULD BE SO FAR REMOVED FROM THE PRIME CONTRACTOR THAT IT IS UNFAIR TO BURDEN THEM AND THEIR SURETIES WITH THESE CLAIMS.

THE SECOND AMENDMENT WOULD EXTEND THE COVERAGE OF THE PAYMENT BOND TO PROGRESS PAYMENTS WHICH ARE MORE THAN 30 DAYS OVERDUE. SUCH AN AMENDMENT IS UNWORKABLE AND COULD INVOLVE THE SURETIES AND THE COURTS IN A TREMENDOUS AMOUNT OF UNNECESSARY LITIGATION WHERE PAYMENT IS PROPERLY DELAYED BECAUSE OF DISPUTES OR NON-PAYMENT BY THE OWNER. ACTUALLY, IN LIGHT OF THE PROMPT PAYMENT LEGISLATION WHICH HAS BEEN PASSED BY THE SENATE AND IS CURRENTLY BEFORE THIS HOUSE, WE BELIEVE THIS AMENDMENT IS UNNEEDED.

THE THIRD AMENDMENT WOULD PERMIT THE REQUIRED NOTICES TO THE SURETIES TO BE SENT BY CERTIFIED MAIL IN LIEU OF REGISTERED MAIL. WE HAVE NO OBJECTIONS TO THIS. HOWEVER, WE UNDERSTAND MOST COURTS HAVE INDICATED CERTIFIED MAIL IS SUFFICIENT AND THUS QUESTION THE NEED TO AMEND THE ACT TO COVER THIS POINT.

THE FOURTH AMENDMENT WOULD PROHIBIT THE DISMISSAL OF CLAIMS BECAUSE OF PREMATURE NOTICE. THIS WOULD ENABLE A SUBCONTRACTOR TO BRING SUITS AGAINST A CONTRACTOR AND/OR SURETY DURING THE 90 DAY PERIOD PRIOR TO SENDING NOTICE OF THE CLAIM AND RECEIVING A DENIAL OF IT. SUCH A PROVISION WOULD ENCOURAGE THE FILING OF SUITS. THIS AMENDMENT ALSO PROVIDES THAT INTEREST AND ATTORNEYS FEES SHALL BE INCLUDED IN ANY JUDGMENT FOR A CLAIMANT. THIS IS A ONE-SIDED PROVISION FAVORING CLAIMANTS WHICH INVITES FRIVOLOUS AND UNCALLED FOR SUITS.

THE FIFTH AMENDMENT WOULD INVALIDATE WAIVERS OF RIGHTS UNDER THIS ACT UNDER CERTAIN CIRCUMSTANCES. WHILE WE RECOGNIZE THE REASONS BEHIND THIS PROPOSAL, WE ARE NOT CERTAIN THIS IS A PROPER AREA FOR LEGISLATION.

TO SUM UP: WE ARE NOT AWARE OF ANY GROUND SWELL FOR MILLER ACT CHANGES AND BELIEVE THE ONES PROPOSED IN H.R. 3356 ARE UNNECESSARY. SHOULD SUCH A GROUND SWELL ACTUALLY DEVELOP, THE SURETY ASSOCIATION STANDS READY TO WORK WITH OTHER INTERESTED CONSTRUCTION GROUPS TO ARRIVE AT CHANGES ACCEPTABLE TO ALL. AT THIS TIME THE OLD ADAGE, "IF IT AIN'T BROKE, DON'T FIX IT" SEEMS TO FIT THE MILLER ACT TO A TEE.

THANK YOU FOR ALLOWING ME TO TESTIFY AND I WOULD BE HAPPY TO ANSWER ANY QUESTIONS.

Mr. FRANK. Thank you. We will take Mr. Curtin and then I will have a couple of questions.

Mr. CURTIN. Mr. Chairman, my name is Jack Curtin and I am here representing the National Association of Surety Bond Producers. I am also the President of the Curtin Insurance Agency in Cambridge, Massachusetts. I will skip my introductory remarks and beg your indulgence in the sense that I am going to agree with much of what Mr. Provost has already said; however, my rationale may be a bit different. As one who is closer, I think, to the problem than the President of the Surety Association of America, I think that perspective may be useful to the committee.

To amend this law in any manner that would extend the intended obligations of the original laws interpreted would cause a disruption of the underwriting principles of surety and would extend the liability to the surety's indemnitors, which are its principals and more often than not, to their individual owners who have also agreed to hold the surety harmless from loss.

Therefore, I must state that while we have agreed with other contracting groups that certain technical corrections to the Miller Act may be warranted, few of them are embodied in this bill. Hopefully, alternative legislation embodying those technical corrections may be forthcoming in the foreseeable future, but this particular bill in front of us today is not the proper vehicle in our judgment, nor is its timing propitious in relationship to the prompt pay debate that is going on in this and other corridors of the Congress.

Whatever version of the prompt pay legislation passes the Congress will alter the contractual relationship and the business practices between the Government, general contractors and subcontractors. Who holds the money, for what reason, for how long and under what terms it will be released will affect how we handle claims against payment bonds. We would, therefore, like to study those terms more fully before discussing, in depth, the ramifications of any bill to change the Miller Act.

For the record, I would like to take issue with what appears to be the fundamental thrust of H.R. 3356, which is to include attorneys fees and interest payments in judgments rendered on suits brought against payment bonds. In our view, the inclusion of attorneys fees is a serious extension of a surety's liability and would have the effect of extending the hunting season of an already predatory legal paternity.

Proponents of the inclusion of legal fees claim it will result in a more expeditious handling or settlement of surety claims. I would dispute that contention because I believe first and foremost that most sureties are conscientious about the payment of claims, particularly those arising out of payment bonds.

However, the committee must be made aware that a plethora of claims for payment are brought because funds are withheld for cause. Until the veracity of the claim can be verified, the surety will not advance funds because once paid, recovery of those funds would be extremely difficult if subsequent investigation revealed that they were dispersed prematurely or wrongfully.

To an extent, we are also at the mercy of our principal. If he can demonstrate to us that the funds are being withheld for good reason, we are virtually prohibited from volunteering them without

substantial damage to our subrogation rights against our principal. The process of making this determination can take a good amount of time and it may increase the fees due to the claimant's attorney artificially. This, we submit, is unfair.

Fairness may suggest a quid pro quo argument, however, wherein a surety is liable for attorneys fees if it renders a frivolous defense; conversely, a surety should be entitled to fees if faced with a frivolous suit.

The other major components of this bill that concern us greatly is the extension of payment bond liability to include labor or fringe benefits payable to subcontractors and to their employees' unions. NASBP's counsel advises that the surety's responsibility for fringe benefits of the employees of subcontractors is arguable. It is not known whether or not they are interpreted judicially as a component of wages and that in the absence of judicial precedent, it will be preferable to leave that issue to the courts.

To explicitly extend payment bond coverage to subcontractors' fringe benefits would undoubtedly place an undue burden on the general contractor and a surety to ascertain that such payments have been made periodically and on a timely basis. Conceivably, this could mandate that the general contractor be given audit rights over subcontractor payments as part of their contractual relationship.

We are of the opinion that none of the parties would welcome such contract relationships or requirements. Absent such a clause, the burden for filing a claim would rest with the unions which, unless they uncharacteristically track such payments by subcontractors on a basis other than annually, would be unlikely to give timely notice of a deficiency. This would further prejudice the general contractor who may have advanced funds to a subcontractor with no practical way of knowing if union fringe benefits were received when due.

The final item in H.R. 3356 that presents a problem for us is the proposed change which makes sureties responsible for items unpaid after 30 days. That clause would effectively put us in the collection agency business and would cause us to be flooded with notices and suits for any amounts unpaid conceivably, 31 days after they were due.

The expense of such a scenario would be monumental and the money and effort would be wasted as would our time following up and making sure every requisition or every contract let under the Miller Act was paid. I submit that there are not enough hours in the day for us to accomplish that feat.

The remaining provisions of H.R. 3356 fall into the category of technical corrections that I alluded to in the part that I did not tell you about. Allowing notice by registered mail in addition to certified mail and protecting a subcontractor from coercive waivers of his Miller Act rights are definitely changes with which we can readily agree.

The problem, however, in this particular bill as a vehicle for accomplishing that with which we agree and its timing in relationship to the changes that will be forthcoming as a result of prompt pay. That with which we disagree in this bill, we disagree with rather vehemently.

[The statement of John J. Curtin, Jr. follows:]

#1

SUMMARY OF THE STATEMENT OF THE
NATIONAL ASSOCIATION OF SURETY BOND PRODUCERS
BEFORE THE
SUBCOMMITTEE ON ADMINISTRATIVE LAW AND GOVERNMENTAL RELATIONS
OF THE COMMITTEE ON THE JUDICIARY
U. S. HOUSE OF REPRESENTATIVES
ON H.R. 3356, A BILL TO AMEND THE MILLER ACT
MARCH 31, 1988

The National Association of Surety Bond Producers is an organization of agencies and brokerages that specialize in providing surety bonding and insurance programs to construction contractors.

The Miller Act is very important to NASBP's members because it is the foundation upon which rests the requirement for performance and payment bonds on federal projects. While there are certain technical amendments to the Miller Act that NASBP could support, we are opposed to H.R.3356.

Extending payment bond coverage to health, welfare and other fringe benefits would undo years of court decisions and interpretations of what the Miller Act payment bond covers, and would place an undue burden on the general contractor and his surety to ascertain that such payments have been made on a timely basis.

Making the surety responsible for individual progress payments turns the surety into a collection agency, and would cause the surety to be flooded with notices and suits for any amounts unpaid thirty-one days after they were due.

The inclusion of legal fees would have the effect of extending the hunting season of an already predatory legal fraternity, and could only be agreed to if it worked both ways: a surety is liable for legal fees if it renders a frivolous defense, and is entitled to collect legal fees if faced with a frivolous suit.

NASBP agrees that potential claimants under Miller Act bonds should not be forced in advance to give up their payment bond rights, and that required notices should be allowed to be sent by either registered or certified mail.

In NASBP's opinion, consideration of any changes to the Miller Act should await final passage of prompt pay legislation now before Congress which, in whatever version it is finally passed, will alter the contractual relationship and business practices between government, general contractors and subcontractors.

STATEMENT OF THE

NATIONAL ASSOCIATION OF SURETY BOND PRODUCERS

BEFORE THE

SUBCOMMITTEE ON ADMINISTRATIVE LAW

AND GOVERNMENTAL RELATIONS

OF THE

COMMITTEE ON THE JUDICIARY

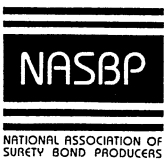
U. S. HOUSE OF REPRESENTATIVES

ON

H.R. 3356

A BILL TO AMEND THE MILLER ACT

MARCH 31, 1988



My name is John J. Curtin, Jr. and I appear before you in my capacity as chairman of the government affairs committee and immediate past president of the National Association of Surety Bond Producers. By way of reference and in order to give you a sense of my perspective, I am currently the vice chairman of the Smaller Business Association of New England, a group with which Mr. Frank, the sponsor of this legislation is familiar, and I am chairman of the National Construction Industry Council and president of the Francis H. Curtin Insurance Agency, in Cambridge, Massachusetts.

The NASBP is an organization of agencies and brokerages that specialize in providing corporate surety bonding for Construction Contractors. We estimate that our 630 member firms are responsible for 60 to 70 % of all contract bonds written on U. S. government projects as well as on other public and private construction. We also have strong relationships with many of the leading construction trade associations, so we are well aware of their concerns.

At the outset, let me acknowledge that the Miller Act is what instituted bonding on federal projects. We believe that the Miller Act has served the taxpayers well and has provided substantial protection from general contractor defaults. If you look at the surety losses of the past four years and recognize that, in paying out something on the order of 1 billion 500 million dollars, we have prevented that loss from having to be absorbed by the taxpayers, subcontractors, sub-subcontractors and suppliers. In this day of deep federal budget deficits, we are proud of the service we have provided in mitigating what could have been a serious additional monetary drain on the federal treasury.

To those of us in the surety business, the Miller Act is the equivalent of the Bible or the Koran. It is our governing document much as the Constitution is yours. In that sense, the Miller Act defines our responsibilities and has been refined over the years through interpretation by the courts. We are comfortable with the judicial alterations made to the Miller Act because their scope has been focused within the narrow parameters of the law's intent. We are deeply concerned, however, when the Miller Act is opened to public alteration and exposed to change for political or social reasons.

Surety is a unique discipline and, because it is something done by insurance companies, it is often construed as having as its premise insurance principles and related analysis, as well as being subject to actuarial prediction as to the probability of loss. Surety is earned not bought. Its value to the government is based on that concept in that it is the job of the surety to prequalify contractors on government projects as to their ability to perform their contractual obligations and pay their bills. When sureties are wrong, they fulfill their stated obligations and mitigate loss to those to whom they have agreed to be responsible within the framework of a well stated law, carefully drawn documents, and well considered interpretations of both. To amend this law in any manner that would extend the intended obligations of the original law as interpreted would cause a disruption of the underwriting principles of surety and extend that liability to the surety's indemnitors which are its principals, and more often that not their individual owners who have also agreed to hold the surety harmless from loss.

Therefore, I must state as candidly as I can that while we have agreed with other contracting groups that certain technical corrections to the Miller Act may be warranted, few of them are embodied in this bill. Hopefully, alternative legislation embodying those technical corrections may be forthcoming in the foreseeable future, but this particular bill in front of us today is not the proper vehicle, in our judgement, nor is its timing propitious in relation to the prompt pay debate that is going on in other corridors of the Congress. Whatever version of prompt pay legislation passes the Congress will alter the contractual relationship and business practices between the government, general contractors and subcontractors. Who holds the money, for what reason, for how long and under what terms it will be released will affect how we handle claims against payment bonds. We would, therefore, like to study those terms fully before discussing the ramifications of any bill to change the Miller Act.

For the record, I would like to take issue with what appears to be the fundamental thrust of H.R.3356 which is to include attorneys fees and interest payments in judgements rendered on suits brought against payment bonds. In our view, the inclusion of attorneys fees is a serious extension of a surety's liability and would have the effect of extending the hunting season of an already predatory legal fraternity. Proponents of the inclusion of legal fees claim it will result in a more expeditious handling or settlement of surety claims. I would dispute that contention because I believe, first and foremost, that most sureties are conscientious about the payment of claims, particularly those arising on payment bonds.

However, the committee must be made aware that a plethora of claims for payment are brought because funds are withheld for cause. Until the veracity of the claim can be verified, the surety will not advance funds because, once paid, recovery of those funds would be extremely difficult if subsequent investigation revealed that they were disbursed prematurely or wrongfully. To an extent, we are also at the mercy of our principal. If he can demonstrate to us that the funds are being withheld for good reason we are virtually prohibited from volunteering them without substantial damage to our subrogation rights against our principal. The process of making this determination can take a good amount of time and it may increase the fees due the claimant's attorney artificially. This we submit is unfair.

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To explicitly expand payment bond coverage to subcontractor fringe benefits would undoubtedly place an undue burden on the general contractor and his surety to ascertain that such payments have been made periodically and on a timely basis. Conceivably, this could mandate that the general contractor be given audit rights over subcontractor payments as part of their contractual relationship. We are of the opinion that none of the parties would welcome such contract requirements. Absent such a clause, the burden for filing a claim would rest with the unions which, unless they uncharacteristically tracked such payments by subcontractors on a basis other than annually, would be unlikely to give timely notice of a deficiency. This would further prejudice the general contractor who may have advanced funds to a subcontractor with no practical way of knowing if union fringe benefits were received when due.

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The remaining provisions of H.R.3356 fall into the category of technical corrections I alluded to earlier. Allowing notice by registered mail in addition to certified mail, and protecting a subcontractor from coercive waivers of his Miller Act rights are definitely changes with which we can readily agree. The problem, however, is this particular bill as a vehicle for accomplishing that with which we can agree, and its timing in relationship to the changes that will be forthcoming as a result of prompt pay. That with which we disagree in this bill we disagree with vehemently. The extension of liability to include legal fees, the inclusion of subcontractor fringe benefits, and being made a collection agency are things we can not countenance and which we must oppose with all our strength.

We would hope that the subcommittee would see the merit in our argument and await legislation that will be more reflective of the true interests of the surety community and the construction industry it serves.

Mr. FRANK. Thank you. The Chair only has a couple of questions. One, with regard to the liability for fringe benefits, you said it should be better left to the courts.

Mr. CURTIN. Well, Mr. Corwin, for whom I have the highest regard, recited the *Bateson* case.

Mr. FRANK. I said, why would it be better leaving it to the courts? If there is a public policy question, why shouldn't Congress decide one way or the other? I do not understand your procedural preference for the courts over a legislative decision one way or the other.

Mr. CURTIN. It is considered to be not there now.

Mr. FRANK. Mr. Curtin, I understand that. I am not stupid.

Mr. CURTIN. I know you are not.

Mr. FRANK. I have a question. I understand that it is not there now and I understand we have the *Bateson* decision. We have a question. It is open. You said it would be better left to the courts than to Congress. Why? Why is it better that that be decided—because what the courts would be doing, as I understand it in this case, would be trying to figure out what Congress meant a few years ago?

That is, the courts would be trying to guess legislative intent. Why is it not better for Congress to decide what it now means than for the court to guess what Congress used to mean?

Mr. CURTIN. Simply put, the courts have not agreed to it, up to this point, since 1935.

Mr. FRANK. I know that.

Mr. CURTIN. We believe that it is a serious, practical problem.

Mr. FRANK. If you do not want the change, say that. What you said was that it would be better left to the courts than to Congress.

Mr. CURTIN. Because the courts have not done it to date, we do not think it is there and that is the basis on which we underwrite bonds.

Mr. FRANK. OK. You do not have an procedural preference for the courts over Congress?

Mr. CURTIN. No.

Mr. FRANK. You think the courts would come out your way and Congress might not so you would rather leave it that way? Fine. Say that. I just think people ought not to make procedural arguments when they mean substantive because there really would not be an argument for leaving it to courts versus Congress.

Mr. CURTIN. I am trying to, but I do not think I speak as quickly as you do.

Mr. FRANK. No, I am talking about your prepared statement. You do not really care who decides it. Perfectly legitimately, like most of us, you want it decided where you think you will get the right decision. I think that is fine, but I just wanted to make that clear because there is this problem that comes up from time to time. People say, you should leave it to the courts. When you are talking about the Constitution, I think that is right. When you are talking about legislative intent, less so.

Let me ask you one question. Suppose we made this a two-way street? Suppose there were also some requirements that frivolous claims, the people bringing them had to pay your legal fees and we

made it more of a two-way street? How would you feel about it then?

Mr. CURTIN. I think we both indicated that we would not have a major problem with that.

Mr. FRANK. All right. Last question. Let me just—and I apologize—we have another vote, but I think we have gotten through this. Mr. Barfield mentioned, for instance, the $2.5 million figure that was originally put in the Act and has not been changed in 50 years. Is there not an argument for changing that just because of the passage of time in terms of the number of contracts? This is on the performance payment ratio.

Mr. CURTIN. Lloyd and I may differ on that, but from the agent's perspective representing the interests, in my case primarily of subcontractors, and since we charge the Government on the basis of 100 percent of the contract, I have never seen any logic to not having a 100 percent payment bond.

Mr. FRANK. In other words, the Government is paying you——

Mr. CURTIN. They are paying for it anyway.

Mr. FRANK. —more than it is getting?

Mr. CURTIN. Right.

Mr. FRANK. Mr. Provost?

Mr. PROVOST. This was the subject of a GAO report where they recommended that the payment bond be increased. The only thing that has happened right now is that the industry's capacity has dropped a little because of adverse experience. So, I would not like to see it go to 100 percent, but maybe 50 percent.

Mr. FRANK. But you certainly agree that it is a policy matter that the $2.5 million should go up?

Mr. PROVOST. Probably.

Mr. FRANK. And your argument for not going into 100 percent would be capacity, but in terms of public policy logic, is there any logic to less than 100 percent?

Mr. PROVOST. Not really, no. It is given in other jurisdictions.

Mr. FRANK. OK. I thank you. I understand that some parts I expect some disagreement, but those things have been clarified and I appreciate it. I think you have given us some common ground in some areas where they may be some disagreement. Thank you.

[The information from the Air Force on H.R. 3685 follows:]

U.S. Department of Justice

Office of Legislative and Intergovernmental Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

May 11, 1988

RECEIVED

MAY 11 1988

GENERAL COUNSEL

Honorable Peter W. Rodino, Jr.
Chairman, Committee on the Judiciary
United States House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This letter is in response to your request for the views of the Department of Justice regarding H.R. 3356, a bill to amend the Miller Act to provide for the inclusion of interest and legal fees in judgments granted on suits by subcontractors based upon payment bonds. H.R. 3356 would amend section 270b of the Miller Act, 40 U.S.C. § 270b. That section establishes the rights of persons furnishing labor or material to government contractors who sue for payment on the contractor's surety bond. Most of the proposed amendments to the text of the current statute are technical in nature, and we have no objection to them.

However, we would oppose enactment of two of the proposed amendments discussed below. Section 1(4) specifically recognizes the successful plaintiff's right to recover prejudgment interest, from the date on which payment was due until judgment. That provision also allows the successful plaintiff to recover reasonable attorneys' fees.

These two amendments would represent significant substantive changes in the law, because attorneys' fees are not presently recoverable in Miller Act cases and prejudgment interest is available only in states where such interest is recoverable in actions involving private construction projects. Allowing suppliers to recover interest from the time the cause of action accrues goes beyond the general purpose of the Miller Act, i.e., providing a remedy to suppliers of contractors on government projects equal to that available under state law to suppliers on private projects, and is not justified by that rationale to the extent that it will allow greater recoveries on government projects in those states in which prejudgment interest would not otherwise be recoverable. Prejudgment interest should

only be recoverable to the extent allowed by the law of the state whose law governs the interpretation of the contract.

The provision for attorneys' fees is also unwise as it will often result in recoveries beyond that obtainable through enforcement of a mechanic's lien in the state courts in actions involving private construction projects. Moreover, allowance of attorneys' fees will discourage settlement of suits and will undoubtedly result in additional costs being passed along to the government as built-in costs for public works.

The current law governing the recovery of both prejudgment interest and attorneys' fees in Miller Act cases and the policy implications of changing the present law are discussed below.

I. PREJUDGMENT INTEREST

The Miller Act has traditionally been viewed as an act designed to provide suppliers to federal contractors the same protection that would be available to them in dealing with private contractors. "The Miller Act itself reflects the Nation's interest in seeing that mechanics and materialmen engaged in work for the national government are protected at least as well as are those engaged in private work whom the state protects." Transamerica Ins. Co. v. Red Top Metal Co., 384 F.2d 752, 756 (5th Cir. 1967). In particular, the provisions of section 270b are intended to create a federal remedy analogous to the mechanics' liens commonly available under state law. United States v. Gerbus Bros. Const. Co., 57 F.R.D. 206, 208 (E.D. Ky. 1972); United States ex rel. Chevron Asphalt Co. v. Maryland Cas. Co., 316 F. Supp. 750, 752 (E.D. Cal. 1970). The necessity for this special remedy against contractors on federal projects derives, of course, from the fact that state liens may not attach to federal property. United States v. Munsey Trust Co., 332 U.S. 234, 241 (1947).

Under established case law, prejudgment interest may be recovered as an element of damage under the Miller Act, at least where the relevant state law which governs the contract would permit prejudgment interest. As the Second Circuit has recently summarized the law, "No statute or regulation governs the award of interest on a judgment based on a Miller Act bond, and therefore the entry of prejudgment interest is committed to the sound discretion of the district court." United States v. Seaboard Surety Co., 817 F.2d 956, 965 (2d Cir. 1987). The amount of prejudgment interest to be awarded is a question of federal law, but, because the Miller Act is silent on the issue, state law is generally incorporated as providing the appropriate measure of recovery. United States ex rel. Canion v. Randall, 817 F.2d 1188, 1193 (5th Cir. 1987).

Because the proposed bill would allow some suppliers to recover prejudgment interest in states where such damages are not traditionally allowed, we believe that the bill unwisely departs from the Miller Act's original goal of providing the government supplier with a remedy equal to that available on private sector construction projects. However, even apart from the legislative purposes of the Miller Act, we would not in any event support the recovery of prejudgment interest in this circumstance.

II. ATTORNEYS' FEES

Until 1974, most courts resolved the question of whether attorneys' fees may be recovered in a subcontractor's Miller Act suit by referring to the law of the relevant state. Although the attorneys' fees, where recoverable, were considered an element of the supplier's federally-created right of action, it was the general rule that, in the absence of a specific provision in the Act relating to attorneys' fees, the court looked to state law "for content with which to fill the substantive statutory gap." United States Fidelity & Guar. v. Hendry Corp., 391 F.2d 13, 20 (5th Cir.), cert. denied, 393 U.S. 978 (1968). Although this inevitably led to different results depending on the state whose law governed the interpretation of the contract, the methodology did serve to make the supplier's recovery under the Miller Act equal in theory to the recovery that it could have expected through the enforcement of its common law lien on property owned by private parties. See, e.g., Transamerica Ins. Co. v. Red Top Metal Co., 384 F.2d 752 (5th Cir. 1967) (Florida law applied to provide for recovery of attorneys' fees); Hendry, 391 F.2d 13 (Texas law applied to deny recovery of attorneys' fees).

The Supreme Court abandoned this deference to state rules regarding the award of attorneys' fees in F.D. Rich Co., Inc. v. United States ex rel. Industrial Lumber Co., 417 U.S. 116 (1974). Citing the difficulties inherent in determining state law on this issue, the Court stated that, "We think it better to extricate the federal courts from the morass of trying to divine a 'state policy' as to the award of attorneys' fees in suits on construction bonds." 417 U.S. at 128. The common law exceptions to the rule prohibiting recovery of attorneys' fees are still recognized, and Rich viewed their continued availability as a reason justifying the Court's holding against the general recoverability of attorneys' fees. 417 U.S. at 129-30. Thus, "attorneys' fees may be awarded to a successful party when his opponent has acted in bad faith, vexatiously, wantonly, or for oppressive reasons, or where a successful litigant has conferred a substantial benefit on a class of persons and the court's shifting of fees operates to spread the cost proportionately among the members of the benefited class." Id. Since Rich, the federal courts have no longer applied the rule that state law,

through incorporation into federal law, governs the award of attorneys' fees. See, e.g., United States ex rel. Micro-King Co. v. Community Science Technology, Inc., 574 F.2d 1292, 1294 n.1 (5th Cir. 1978). Thus, in the absence of any statutory basis in the Miller Act, attorneys' fees are under current law not generally available.

The present bill would allow attorneys' fees in every Miller Act suit brought by a supplier regardless of whether attorneys' fees would be available to similarly-situated subcontractors in the private sector. Thus, the bill restores the availability of attorneys' fees in those jurisdictions that allow attorneys' fees, but it provides for a substantially greater recovery in those jurisdictions where attorneys' fees cannot be recovered by suppliers in the private sector. This decision to expand the scope of the section 270b remedy raises a number of issues which are discussed below.

Insofar as H.R. 3356 does establish a national standard for compensation it answers one of the criticisms of the Supreme Court in Rich. In that case, the Court noted that many federal contracts involve construction in more than one state, and often the parties to Miller Act litigation have little or no contact, other than the contract itself, with the state in which the federal project is located. The Court concluded that, "The reasonable expectations of such potential litigants are better served by a rule of uniform national application." 417 U.S. at 127. Such a national standard, the Court reasoned, would also avoid inherent difficulties in interpreting state policy which is not always clearly expressed. Id., at 127-28. Therefore, the Court in Rich established a national standard: attorneys' fees cannot be awarded as damages in Miller Act suits no matter what state the action is brought in. The present bill would establish a different national standard, substituting universal recoverability for the existing rule. We believe that such a change in the law is not desirable.

1. Attorneys' Fees Are Not Needed To Protect The Rights Of Commercial Litigants.

Among the policy reasons sometimes advanced for awarding attorneys' fees, the importance of ensuring the availability of private litigation to enforce important public policies (the "private attorney general" rationale) is often argued. But the Supreme Court in Rich was most impressed with the fact that Miller Act suits are purely suits for the recovery of amounts due: "Miller Act suits are plain and simple commercial litigation." 417 U.S. at 130. Thus it thought that the private attorney general doctrine had no place in such litigation. This fact should also weigh in the legislative decision whether or not to provide for the recovery of attorneys' fees.

It can reasonably be presumed that most commercial suppliers of labor and materials to a contractor or subcontractor base their bid upon a variety of factors including the potential cost of obtaining payment through enforcement of a mechanic's lien, in the private sector, or through a suit on the surety bond on government projects. In short, the plaintiff in a Miller Act suit is a businessman who has from the outset of his relationship with the defendant had reason to foresee the possibility of eventually enforcing through litigation his right to payment. This is sharply contrasted with the typical situation of litigants whose right to attorneys' fees has been previously recognized by federal statute. Those litigants, such as plaintiffs under 42 U.S.C. § 1988, could not reasonably anticipate the need to resort to litigation before the occurrence of the actual breach of the statutory duty. That is an essential aspect of the difference between commercial litigation and actions asserting damage to personal or civil rights. Where the suit involves "everyday commercial litigation" as under the Miller Act, the attorneys' fees are simply costs of doing business; they are not unforeseen elements of damage necessary to the plaintiff's recovery of full compensation for his loss. 417 U.S. at 131.

2. The Availability of Attorneys' Fees Will Provide A Disincentive For the Settlement of Cases.

There are many rules and principles of law to encourage the settlement, rather than trial, of civil litigation, see, e.g., Fed. R. Civ. P. 68, and the public interest in this practice is well-established: "[P]arties to litigation and the public as a whole have an interest -- often an overriding one -- in settlement rather than exhaustion of protracted court proceedings." Delta Airlines, Inc. v. August, 450 U.S. 346, 363 (1981) (Powell, J., dissenting).

The mere availability of attorneys' fees to the prevailing plaintiff, particularly where, as here, they are not available to the defendant, provides a strong incentive for the litigant to try strong cases which, in other circumstances, could be quickly settled. See Marek v. Chesny, 473 U.S. 1 (1985). This in turn inevitably contributes to a sharp increase in the cost of litigation. Given the commercial nature of Miller Act suits, it can be reasonably expected that these increased costs of litigation will eventually be passed on to the taxpayer in the form of higher costs for government projects.

It should be noted in this context that the amendment made by section 1(2) of H.R. 3356 will enlarge the scope of the Miller Act remedy to include additional cases particularly suitable for settlement. Section 1(2) broadens the definition of a claimant under the statute from one "who has not been paid" to one who has either "not been paid" or "who has not been paid

in full for a progress payment before the expiration of a period of thirty days after the due date for such payment." Since section 270b suits will now include substantial litigation over whether progress payments are owing from the contractor to the supplier, it is foreseeable that many close questions of compliance with the performance standards of the contract will be litigated under the Miller Act.

Non-payment of progress payments on construction projects typically arises where the defendant has at least a colorable claim to justify the failure to pay the supplier. The non-payment may be occasioned by the supplier's failure to meet its contractual obligations. Such a dispute is particularly susceptible to settlement among the parties, and there is no basis for presuming the justice of the supplier's position by allowing only the supplier, and not the contractor should it be the prevailing party, to recover its attorneys' fees.

CONCLUSION

For the reasons expressed above, we do not oppose any of the administrative changes which would be made by H.R. 3356, but do oppose its provisions allowing the recovery of prejudgment interest and attorneys' fees by successful plaintiffs in Miller Act cases.

The Office of Management and Budget has advised this Department that there is no objection to the submission of this letter from the standpoint of the Administration's program.

Sincerely,

Jack E. Perkins for

Thomas M. Boyd
Acting Assistant Attorney General

Mr. FRANK. The hearing is adjourned.

[Whereupon, at 12:05 p.m., the subcommittee was adjourned, subject to the call of the Chair.]

ADDITIONAL MATERIAL

Summary of Statement by Charles A. Orem, President and Chief Executive Officer, Bird-Johnson Company for the Subcommittee on Administrative Law and Governmental Relations of the Judiciary Committee of the U.S. House of Representatives, 18 May 1988

Bird-Johnson Company, a major supplier of propeller systems for U.S. Navy ships has recently become a victim of the financial instability of a shipbuilding yard to which Bird-Johnson is a subcontractor.

In 1985, Bird-Johnson was awarded a contract to supply controllable pitch propeller systems for a class of U.S. Navy auxiliary vessels.

For reasons unknown to Bird-Johnson, the selected yard has exhibited an invoice payments pattern which has placed a substantial financial burden on Bird-Johnson. In the early stages of the contract the yard averaged over 100 days time-of-payment on invoices totalling over $3 million. From September 1987 through April 1988, the yard did not pay invoices submitted by Bird-Johnson. (Other subcontractors experienced the same problem.) Bird-Johnson attempted to resolve the problem working with both the yard and the Navy without success for over six months. Bird-Johnson filed suit against the yard to recover amounts due and owing plus interest and legal fees. As of late March 1988, the yard owed Bird-Johnson over $1.8 million in invoices with an average age of 149 days. In mid-to-late April, the bulk of the past due amounts was paid after the yard and the Navy reached some special arrangement. However, accumulated interest and legal fees by Bird-Johnson exceed $150,000.

Bird-Johnson believes that the circumstances in this case are very similar to those which motivated the introduction of H.R. 3356. Consequently, Bird-Johnson proposes the extension of the provisions of the Miller Act to cover subcontractors performing on government shipbuilding contracts in U.S. shipyards and endorses the enactment of H.R. 3356 to cover legal fees and interest on judgments granted on suits by subcontractors.

STATEMENT

BY

CHARLES A. OREM
PRESIDENT AND CHIEF EXECUTIVE OFFICER
BIRD-JOHNSON COMPANY

FOR THE

SUBCOMMITTEE ON ADMINISTRATIVE LAW
AND GOVERNMENTAL RELATIONS
OF THE
U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY

IN SUPPORT OF H.R. 3356

MAY 18, 1988

Bird-Johnson Company is a major supplier of ships' propeller systems for the U.S. Navy. We have facilities in Massachusetts, Mississippi, and Washington state where we employ a total of over 300 people.

This statement is submitted in support of H.R. 3356, the bill introduced by Congressman Frank to amend the Miller Act for the inclusion of interest and legal fees in judgments granted on suits by subcontractors based upon payment bonds and for related purposes.

As a supplier to the U.S. Navy for over 30 years Bird-Johnson has grown and prospered because of our ability to supply high-quality propeller systems to the Navy and to shipbuilding yards at competitive price levels. For the majority of the past 30 years, as both a prime contractor to the Navy and a subcontractor to shipyards, we have experienced fair and equitable application of federal procurement regulations in an environment which supported the best interests of the U.S. taxpayer and supported a "level playing field" for subcontractors.

Recently, however, for a combination of reasons, this environment has changed. DOD-industry relations have become adversarial, federal acquisition regulations have imposed almost punitive restraints on the shipbuilding industry and its subcontractor infrastructure, and Congressional pressure for competition has motivated DOD procurement officials to pursue "low price at any cost."

It is the last aspect of the current DOD procurement environment which motivates this statement. What follows is a classic illustration of the problem.

In the 1984-85 time frame, the U.S. Navy solicited quotations from several shipyards for construction of additional ships in a class of auxiliary vessels. Several yards responded to the request for quotations and, it is my understanding, the award was made to the low bidder.

I do not know what the shipyard's actual financial health was at that time, but I do know that, in the maritime community, some doubt existed about the strength of their financial position.

Nevertheless, upon receipt of its Navy award, the yard solicited quotations from subcontractors for all of the machinery and equipment for the ships. Because the vessels are non-combatant ships, the yard was permitted to solicit quotes from foreign as well as domestic sources. Included among their prospective propeller system subcontractors were

two foreign manufacturers, who worked through U.S. agents. We believe that these foreign firms were accustomed to receiving some government support in the form of preferential tax treatment, direct subsidies, or favored supplier considerations. Consequently, our pricing was influenced by an awareness that foreign companies could enjoy a possible foreign-government-supported cost advantage. We were apprehensive, however, over the financial viability of the yard. Nonetheless, with the collapse of commercial domestic shipbuilding, the prospective contract was "the only game in town." And, a very important factor in protecting our employment and skill levels.

With these factors in mind, we concluded that our probability of being cost-competitive would be improved by procuring certain components from foreign sources. (Of course, at that time we were not anticipating the precipitous decline in the value of the dollar and the substantial consequent increase in the cost of foreign goods.) Finally, in the hope that we could achieve a competitive position vis-a-vis our foreign competitors, our pricing level was set at what amounted to a breakeven or zero profit level.

Fortunately--we thought at that time--our price was competitive, and we were awarded the contract for the two ships plus spare parts, with options for two additional ships and special tooling. For 18 months, activity on the contract proceeded normally. Then in mid-1987, for reasons unknown to me, the yard reported that it was having financial and cash flow problems and, began to become in arrears in payments to certain of its subcontractors.

For the eight-month period from September 1987 through April 1988, the yard took an average of over 100 days to pay our invoices. At the extreme, over $1.8 million of invoices, with an average age of over 150 days, were unpaid. During that period we progressively escalated our efforts to be paid, moving up to the Chairman of the yard's Board of Directors and the Assistant Secretary of the Navy for Shipbuilding and Logistics. We notified the yard that they were in breach of contract, and we filed suit against them for recovery of amounts due and owing plus appropriate interest and legal fees.

For over four months, none of these actions relieved the financial burden imposed on Bird-Johnson by the yard's inability to pay. Finally, apparently as a result of Congressional enquiry, the Navy and the yard formulated a mechanism for addressing the yard's inability, or

unwillingness, to pay legitimate invoices and, in mid-April, we received the first of two payments against our invoices. The second payment was received in late April. Thus, after over nine months of business and legal representations to both the Navy and the yard, our legitimate invoices for costs incurred were paid. However, no compensation is anticipated for the nearly $150,000 in legal fees and constructive interest on receivables past due for 45 days or more.

These are substantial sums of money for a relatively small company like Bird-Johnson to be owed. In fact, the total exceeds our net profit for FY87.

The purpose of this statement is not to elicit sympathy for my company. Rather it is to highlight the problems inherent in a procurement policy which mandates "low price at any cost" and to recommend that some consideration be given to protecting the financial health of subcontractors who supply to shipyards whose financial structure is either weak or unsound.

Firstly, in the cited case, the Navy award to a newly reconstituted shipyard, considered by some to be of questionable financial strength, was on a low-price basis; apparently without an in-depth evaluation by the Navy of the yard's ability to perform against the contract. Recent events have underscored the dubious merit of this process. And, of course, many supporting subcontractors have suffered financial hardships which will probably never be fully compensated.

Bird-Johnson's experience during the last several months dramatizes the dollar and delay damage to the United States and the financial damage which can be visited upon any and all subcontractors when a prime contractor to a federal government agency fails to make prompt payments to its subcontractors. This financial damage clearly includes the time value of the subcontractor's delayed money, as reflected in interest and legal fees which have to be incurred in obtaining, and collecting upon, judgments against prime contractors. Accordingly, it is certainly appropriate and long overdue to amend the Miller Act.

Further, it is timely and appropriate to take a logical and corollary step -- to permit the operation of the Miller Act to the U.S. Navy's shipbuilding industry where it is clearly and equally needed and which is so similar to the construction and public works industries presently covered by that Act that non-coverage should no longer be tolerated.

Since the early years of the Republic, subcontractors which provided services, labor and materials for private construction projects have been protected against nonpayment for their work by state statutes establishing so-called "mechanics liens." However, federal construction contractors do not have the same remedy; because of the federal government's sovereign immunity a mechanics lien cannot be asserted against U.S. property.

In 1894 Congress passed the Heard Act (the Miller Act's predecessor) in order to protect the suppliers of labor and materials to government construction contractors who had no recourse because they could not assert a lien against property owned by the United States. The Heard Act recognized a moral duty on the part of the government to protect the suppliers of labor and materials for a public work against dishonest or reckless prime contractors. Because of certain legal deficiences in the Heard Act, Congress in 1935 repealed the Heard Act and adopted the Miller Act in its place.

The Miller Act (40 U.S.C. Sect. 270) applies only to federal construction contracts over $25,000 for the construction, alteration or repair of any "public building or public work" of the United States. Miller Act coverage means that the prime contractor must furnish both a performance bond and a payment bond to protect both the federal government and the subcontractor respectively. Whether ship construction and repair contracts were to be covered by the federal law was initially a subject of legal dispute, but it was finally resolved that they were covered. However, during World War II the Congress passed a special exception to the Miller Act (40 U.S.C. Sect. 270e) providing that the Secretary of the Navy could waive the applicability of the Act with respect to the construction of vessels for the Army, Navy, Air Force and Coast Guard, regardless of the terms of the contract as to payment or title. This provision has remained on the statute books ever since irrespective of the fact that we have not been in a state of war, and the Secretary of the Navy's waiver is continuing.

Therefore, notwithstanding the extensive similarity betweeen construction of a ship and building a public building, Navy shipbuilding subcontractors are not covered and subcontractors to the country's shipyards have the protection of neither the state mechanics lien nor Miller Act coverage. They are caught in the middle without effective remedy. Equity and logic demand that this situation be corrected.

Accordingly, and in view of the evidence presented above, it is strongly recommended that:

1. The World War II provision permitting waiver of the Miller Act by the Secretary of the Navy be deleted.

2. The provisions of the Miller Act be explicitly extended to cover the construction of vessels for the Army, Navy, Air Force, and Coast Guard.

3. The Miller Act be amended to include interest and legal fees in judgments granted on suits by subcontractors based upon payment bonds and for related purposes. H.R. 3356 will redress this wrong.

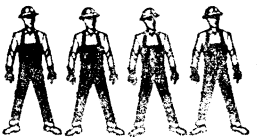
I appreciate the opportunity to express my views to the Subcommittee.

AMERICAN SUBCONTRACTORS
OF MASSACHUSETTS

Affiliated with
NATIONAL AMERICAN SUBCONTRACTORS ASSOCIATION (ASA)

One Washington Mall, Boston, Massachusetts 02108
742-3420

A NON-PROFIT ORGANIZATION FOR THE
BETTERMENT OF THE CONSTRUCTION INDUSTRY



May 25, 1988

Attorney Janet Potts
House Committee on
the Judiciary
Room 2137
Rayburn House Office Building
Washington, DC 20515

RE: H.R. 3356

In reply to your May 19 memo, I have read my testimony and I am satisfied to have it go into the record as is. Thank you very much for giving me the opportunity.

I do want to urge Congressman Frank to retain the language in the bill reading "together with reasonable legal fees (based upon the time spent and the results accomplished)". That language is the heart of the bill. It is the language which will result in prompt payment and a marked decrease in the number of Miller Act suits which actually go beyond initial filing of a complaint and answer. Remember, the filing of a complaint and answer is not very important in eliminating litigation. It is the subsequent proceedings which cause all the extra costs and delays.

The language in H.R. 3356 leaves it to the Court to decide on allocation of legal fees based upon the time spent by the attorney and based upon the results accomplished. Remember, general contractors have a strong weapon - they can just hold back payment. Subcontractors have no such weapon. Obviously, no subcontractor wants to terminate or even suspend. Therefore, the weapon needed is to have legal fees imposed if there is no basis for withholding payment. That will be up to the Court by the language in the bill.

As far as the above is concerned, I do not wish to eliminate the possibility of the Court imposing on either side, legal fees in the case of false or spurious claims. I hope the Congressman was referring to that kind of a situation when he mentioned the possibility of including legal fees for both parties. The false or sperious provision should be in addition to the reasonable legal fee provision now in the bill.

JOSEPH M. CORWIN
EXECUTIVE SECRETARY AND COUNSEL

Of course, our Association agrees with American Subcontractor Association's position expressed by Mr. Barfield with respect to amending the act in the following respects:

1. Require a 100% payment bond. Remember the fee charged by the surety companies is the same whether the bond is a 100% bond or a 50% bond.

2. Eliminate the maximum requirements for payment bond now in the law. These were inserted in 1935 and have remained unchanged. They are totally unrealistic in the light of the present day price levels and construction costs. In fact, they are completely out of line because of the fact that the agencies are requiring a 100% performance bond and the surety companies write the 100% payment bond without any additional costs.

3. Finally, there should be a mandatory requirement for the use of a surety company bond. The Treasury List of such company should be the guideline - perhaps modified by the provisions of the pending S. 2256 now being considered by the Senate.

Thank you very much for your consideration of our testimony and all the items set forth in this letter. We hope the Congressmen will be able to put through relief which has been pending since former Congresswoman Barbara Jordan was unable to get similar legislation passed in 1974.

JOSEPH M. CORWIN/tan

cc: Ms. E. Colette Nelson

Washington Office

June 3, 1988

Ms. Jennifer Ihlo
Subcommittee on Administrative Law
and Governmental Relations
Committee on the Judiciary
U.S. House of Representatives
Rayburn Building, Room B-351A
Washington, D.C. 20515

Dear Ms. Ihlo:

Here is the demographic information on demonstrators arrested incident to the demonstration at Lawrence Livermore National Laboratory June 20-25, 1983 which we were asked to supply for the record during yesterday's hearing on H.R. 3711.

Thank you for your help in relaxing the usual deadlines and for finding my mistake in time to let me fix it.

If there is additional information I can track down and provide, please call me at 737-9696.

Sincerely,

Kenneth W. Wade
Washington Representative

KWW/cjm
Enclosure: Residence Listing of Arrestees
cc(w/enc): Deborah Grimes

440 First Street, N.W. • Suite 502 • Washington, D.C. 20001 • (202) 737-9696

ATTACHMENT "B"

LAWRENCE LIVERMORE NATIONAL LABORATORY DEMONSTRATION
(JUNE 20-25, 1983)

RESIDENCE LISTING OF ARRESTEES

DURING THE PERIOD JUNE 20-25, 1983, A TOTAL OF 1,062 INDIVIDUALS, 988 ADULTS AND 74 JUVENILES, WERE ARRESTED BY ASSIGNED LAW ENFORCEMENT AGENCIES FOR LAW VIOLATIONS COMMITTED IN CONJUNCTION WITH LAWRENCE LIVERMORE NATIONAL LABORATORY DEMONSTRATIONS.

OF THE 1,062 ARRESTEES, 372 INDIVIDUALS, COMPRISING OF 329 ADULTS AND 43 JUVENILES, WERE IDENTIFIED AS RESIDENTS OF ALAMEDA COUNTY.

A TOTAL OF 650 INDIVIDUALS, CONSISTING OF 621 ADULTS AND 29 JUVENILES, WERE IDENTIFIED AS OUT-OF-COUNTY, OUT-OF-STATE, AND IN ONE INSTANCE, FOREIGN, RESIDENTS.

RESIDENCE COULD NOT BE DETERMINED IN REFERENCE TO 40 ARRESTEES.

THE FOLLOWING CONSTITUTES A BREAKDOWN OF ALAMEDA COUNTY ARRESTEES BY CITY AND/OR UNINCORPORATED AREA, WITH DUBLIN, EMERYVILLE, LIVERMORE, PLEASANTON, AND UNION CITY EXCEPTIONS NOTED:

CITY/AREA	ADULTS	JUVENILES
ALAMEDA	1	
ALBANY	4	1
BERKELEY	202	35
CASTRO VALLEY	1	1
FREMONT	1	
HAYWARD	9	
NEWARK	1	
OAKLAND	101	5
PIEDMONT	4	
SAN LEANDRO	5	
SAN LORENZO		1
TOTAL:	329	43

CALIFORNIA (OUT OF COUNTY)	ADULTS	JUVENILES
ALAMO	2	
ALBION	3	
APTOS	1	
ARCADIA	6	
ARCATA		1
ATHERTON	1	
AUBURN	1	
BAYSIDE	1	
BEL AIRE	1	

RESIDENCE LISTING OF ARRESTEES
PAGE TWO

ATTACHMENT "B"
(CONTINUED)

CALIFORNIA (OUT OF COUNTY)	ADULTS	JUVENILES
BENECIA	2	
BEN LOMOND	2	
BOLINAS	8	
BIONIDO	1	
BOONEVILLE	2	
BOULDER CREEK	1	
BOYES HOT SPRINGS	2	
BYRON	1	
CAMARILLO	1	
CAMPBELL	1	
CANTONVILLE	2	
CARMEL	7	
CASPER	1	
CAZADERO	6	
CHICO	10	
CLAYTON		1
CLOVIS	1	
COLUMBIA	1	
CONCORD	1	
CORTE MADERA	3	
COTATI	7	
COVELO	1	
DALY CITY	2	
DAVIS	11	
DEL RAY OAKS	1	
EL CERRITO	2	
EL GRANADA	1	
EL SOBRANTE	2	
EL VERANO	1	
EUREKA	1	
FAIRFAX	2	
FELTON	1	
FORESTVILLE	4	
FOREST KNOLLS	2	
FORT BRAGG	2	2
FREESTONE	2	
FRESNO	2	
FRIANT	1	
GARBERVILLE	14	4
GLEN ALLEN	1	
GRASS VALLEY	2	
GRATON	2	
GREENBRAE	1	
GUOLOLO	1	
GRATON		1
HEALDSBURG	2	
HILLSBURG	2	
HONEY DEW	1	

RESIDENCE LISTING OF ARRESTEES
PAGE THREE

ATTACHMENT "B"
(CONTINUED)

CALIFORNIA (OUT OF COUNTY)	ADULTS	JUVENILES
HUMBOLDT		1
KENSINGTON	11	
KENTFIELD	1	
LAFAYETTE	3	
LAGUNITAS	1	
LA PUENTE	1	
LAVERINE	1	
LITTLE RIVER	1	
LOMA MAR	2	
LOS ANGELES	1	
LOS ALTOS	3	
LOS GATOS	3	
LOS MOLINAS	1	
MANTECA	1	
MARTINEZ	1	
MENDOCINO	5	1
MENLO PARK	3	1
MILL VALLEY	11	
MIRANDA	1	3
MONTE VISTA	2	
MONTEREY	1	
MOKELUMNE HILLS	1	
MORAGA	1	
MOUNTAIN VIEW	1	
NAPA	4	
NAVARRO	2	
NEVADA CITY	3	
N. SAN JUAN	1	
NOVATO	1	
OCCIDENTAL	3	
OJAI	1	
OREGON HOUSE	2	
ORINDA	1	
PACIFIC GROVE	2	
PACIFICA	4	
PALO ALTO	16	2
PENGROVE	4	
PETALUMA	10	
PHILO	7	
PINOLE	1	
PLACERVILLE	1	
PLEASANT HILL	9	1
POINT ARENA	1	
REDDING	3	
REDWAY	8	3
REDWOOD CITY	4	3
REDWOOD VALLEY	2	
RICHMOND	3	

RESIDENCE LISTING OF ARRESTEES
PAGE FOUR

ATTACHMENT "B"
(CONTINUED)

CALIFORNIA (OUT OF COUNTY)	ADULTS	JUVENILES
ROHNERT PARK	3	
ROSS	1	
SACRAMENTO	6	
SAN ANSELMO	2	
SAN FRANCISCO	172	2
SAN JOSE	14	
SAN LUIS OBISPO	1	
SAN MATEO	2	
SAN RAFAEL	3	
SANTA CLARA	1	
SANTA CRUZ	22	
SANTA ROSA	18	
SARATOGA	3	
SAUSALITO	3	
SCOTTS VALLEY	1	
SEBASTOPOL	18	
SIGNAL HILL	1	
SONOMA	6	
SOQUEL	2	
SOUTH LAGUNA	1	
STANFORD	1	1
STOCKTON	4	
TIBURON	1	
TULARE	1	
UKIAH	7	
VALLECITOS	1	
WALNUT CREEK	3	
WATSONVILLE	2	
WEIMAR	1	
WHITE HORN		1
WILLITS	15	
WINDSOR	1	
WOODLAND HILLS	2	
TOTAL:	609	28

OUT OF STATE	ADULTS	JUVENILES
TAMPA, FLORIDA	1	
PARK FOREST, ILLINOIS	1	
MINNEAPOLIS, MINNESOTA	1	
TEANECK, NEW JERSEY	2	
ASHLAND, OREGON	1	
CORVALLIS, OREGON	2	
MEDFORD, OREGON		1
PORTLAND, OREGON	1	
CLYDE, TEXAS	1	
YAKIMA, WASHINGTON	1	
TOTAL:	11	1

RESIDENCE LISTING OF ARRESTEES
PAGE FIVE

ATTACHMENT "B"
(CONTINUED)

OUT OF COUNTRY	ADULTS	JUVENILES
MANILA, P.I.	1	
TOTAL:	1	0