Promoting the growth, prosperity and participation of Hispanic Commercial Contractors in commercial and government procurement contracts through education, training and guidance.

WMATA and FTA VIOLATE SUBCONTRACTOR LIEN RIGHTS
January 31, 2022

To the members and supporters of the Alliance for Hispanic Commercial Contractors (AHCC), please be advised that subcontractors, especially disadvantaged/minority firms, may want to re-consider your pricing or your decision to pursue work at the Washington Metropolitan Area Transit Authority (WMATA) for the following reasons.

WMATA was created by the U.S. Congress as an interstate compact between Washington D.C., State of Maryland, and the Commonwealth of Virginia. It receives its funding from local governments, fares, and the federal government through the Federal Transit Authority, an agency within and governed by the U.S. Department of Transportation. The U.S. Government, State of Maryland, Commonwealth of Virginia, and the DC Government all adhere to the Miller Act – A U.S. statute that supersedes regulation. Regulation cannot make substantive changes to the law. While WMATA requires a 100% performance bond from their prime contractors, they cap the payment bond at $2.5 million!

The Miller Act (Little Miller Act for states) requires that on government funded projects a 100% performance and payment bond be required on projects that exceed $100,000.00. Prior to the 1980s, the payment bond was capped at $2.5 million, no matter the size of the project. The law was amended in the 1980s by the advocacy efforts of the Surety Fidelity Association of America, the National Association of Surety Bond Producers, the American Subcontractors Association, and various other trade organizations to be 100% of the contract value to preserve the lien rights of any subcontractor. Since you cannot lien government property, filing a lien or suit on a Prime Contractor's payment bond is the only recourse for a subcontractor to secure their risk and get paid for work performed.

In Maryland, it is void against public policy for a contract to waive your lien rights, yet Maryland is a member of this interstate compact. Maryland in the 1990s made the Maryland Stadium Authority accountable. So why not WMATA? Until then MSA did not follow COMAR (Procurement Code of Maryland), and sole sourced its projects and required no MBE participation. In Maryland, today, no procurement authority rules supreme. So, why should WMATA and FTA be allowed to be arbitrary with lien right laws? No "Authority" should with a stroke of a pen, negate laws and codified regulations.

A payment bond can protect you from paid if and paid when clauses present in your subcontract agreement. If you are not receiving payment per your contractual terms, not receiving funding on approved change orders, not getting compensated for extended overhead due to delays, you can file a suit against the payment bond. (Most attorneys say it's best if you only sue the surety.) If you're a first-tier sub, you have one year to file suit. If a 2nd tier, you have only 90 days to file suit. ALWAYS protect yourself by requesting a copy of the primes' payment bond information prior to signing the subcontract agreement. With payment bond claims, it is first come, first serve.

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WMATA replied to our query. See below:

"The FTA (the grantee for this project) has stated in **Circular FTA 4220.1F** that 'if the recipient's bonding policies result in such "excessive bonding" that it would violate the Common Grant Rules as restrictive of competition. FTA will not provide Federal assistance for those procurements.' In order for WMATA not to be demoded as having excessing bonding policies, we have incorporated their suggested bonding levels into our procurement policies. Please see below.

WMATA's Procurement Policy Manual – Chapter 14-5 PERFORMANCE AND PAYMENT BONDS

(b) Amounts Required.

• Payment Bonds. A payment bond may be required when a performance bond is required. Payment bonds adequate to protect the Authority and FTA's interests are as follows: (1) Fifty percent of the contract price if the construction contract price is not more than $1,000,000; (2) Forty percent of the contract price if the contract price is more than $1,000,000 and not more than $5,000,000; or (3) When the contract price is more than $5,000,000, the payment bond shall be $2,500,000. When a contract price is increased, the Authority may require an addition to the payment bond in an amount adequate to protect suppliers of labor and material. *(Clearly, they have not done so.)*

• Performance Bonds. A performance bond shall be executed on the part of the contractor for 100% of the contract price unless the Contracting Officer determines that a lesser amount would be adequate for the protection of the Authority. In making this determination, the Contracting Officer should consider the adequacy of other appropriate forms of risk management available for the procurement, such as warranties, guarantees, insurance and indemnities."

AHCC finds this to be dangerously expensive ignorance on the part of WMATA and FTA. The subcontractors who become aware of this payment bond cap should respond by driving up their numbers to pad the blows of forfeited lien rights. WMATA and FTA's stance on capping the payment bond is a statement of privilege that feeds the unrest of our country today. It just bodes of systemic inefficiency that protects those in the position of power from having any accountability and provides a license to be less than prudent.

Subcontractors to PYC and to Kiewit, as well any other prime on a WMATA project, require 100% payment bonds from their subcontractors. So, what is good for the goose is not good for the gander. This language played out during the testimony that led to the passage of the Subcontractors Equal Access to Bond Act of 2013. This law mandates that the prime can only flow down to subcontractors the bond provisions the State of Maryland requires of the prime. With the states enacting new laws to protect subcontractors from onerous contract language and with the enactment of the Miller Act that protects lien rights, why is WMATA and the FTA not in line?

According to WMATA, only the payment bond is affected by "excessive bonding" rule, but not the performance bond? Further, sureties assess bond premium on the performance bond. The payment bond is free. (Sureties charge on all sums flowing through the contract). Primes, the size of PYC and Kiewit, most likely have the cheapest preferred bond rates in town. There is no excessive rate play at that level. Where is the accountability of WMATA? With a high requirement of MBE participation, don't they care about the risk the MBEs are absorbing?

We need to find that advocacy from the 1980s and change this practice of the "excessive bonding" rule. It's an impediment to free commerce. It appears that systemic racism, even in the form of economic discrimination, can be subtle, hidden in the weeds of procurement. And, this one needs to get yanked. As one AHCC supporter states: "When you lower the standard of excellence in policy and management performance by insulating large companies from their rightful accountability, you normalize-even institutionalize-inefficiency and unfair business practices."

I hope that the subcontractor community embraces change here and exercises your civil rights to protect your lien rights.