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PCI Federal Infrastructure Series:
A Primer on Federal
Miller Act Claims

Meet the Presenter



Maria Panichelli, Esq.

Partner, McCarter & English LLP

www.mccarter.com

mpanichelli@mccarter.com

T: 215.979.3886

@MariaPanichelli

<https://www.linkedin.com/in/mariapanichelli/>

Today's Agenda

- Overview of the Miller Act
- Payment bonds from subcontractor's point of view
- Payment bonds from prime contractor's point of view
- Performance bonds and relationship between the prime contractor/surety and government

THE MILLER ACT

The Miller Act

Federal statute that requires prime contractors on federal construction contracts to furnish payment and performance bonds.

Why?

The Miller Act

Federal statute that requires prime contractors on federal construction contracts to furnish payment and performance bonds.

Applies:

- On all contracts of more than \$150,000
- Awarded for the construction, alteration, or repair of
- Any public building or public work of the Federal Government
 - See 40 U.S.C. § 3131(b); *see also* FAR 28.102-1(a)

The Miller Act (cont'd)

What about construction contracts less than \$150,000?

- For construction contracts greater than \$35,000 that do not exceed \$150,000, alternative payment protections apply.
40 U.S.C. § 3132(a); see FAR 28.102-1(b)(1)

The Miller Act (cont'd)

When does the Miller Act not apply?

- Miller Act does not apply to public construction contracts ***entered into by state and local governmental entities***
 - **But** watch out for state variations of the Miller Act i.e., “Little Miller Acts”
- OCONUS?

Payment Versus Performance Bonds

Each bond serves a different purpose!

Performance Bond: Purpose of a performance bond is to **protect the government**. It is a surety bond issued by an insurance company that guarantees satisfactory performance of the contract in the event the prime contractor fails to perform.

Payment Versus Performance Bonds (cont'd)

Payment Bond: Purpose of a payment bond is to **protect the subcontractors and material suppliers** of the prime contractor from a prime contractor's nonpayment. Acts as a guarantee that the subcontractors and material suppliers will be paid in accordance with their contracts.

The Miller Act and the FAR

- If construction contract exceeds \$150,000, payment and performance bonds is **required**
 - FAR 23.102-1(c)
- If construction contract is greater than \$35,000 but does not exceed \$150,000, contractor shall furnish two or more of the following payment protections (selected by contracting officer):
 - A payment bond
 - An irrevocable letter of credit
 - A tripartite escrow agreement
 - Certificates of deposit
 - Deposit of the types of security listed in FAR 28.204-1 (individual sureties) and 28.204-2 (substitution of assets)

Bond or payment protection required before starting work!

FAR 28.102-2 Amount Required

If the construction contract exceeds \$150,000:

- Performance bond must = 100% of the original contract price
- Payment bond must = 100% of the original contract price

Performance bond must = payment bond!!!

If contract exceeds \$35,000 but does not exceed \$150,000:

- Payment bond (or alternative payment protection) must = 100% of the original contract price

FAR 28.102-2 Original Contract Price

What is the “original contract price”?

- *The award price of the contract*; or, for requirements contracts, the price payable for the estimated total quantity; or, for indefinite-quantity contracts, the price payable for the specified minimum quantity. **Original contract price does not include the price of any options, except those options exercised at the time of contract award.** FAR 28.102-2(a).

FAR 28.102-2 Additional Payment Protections

(d) *Securing additional payment protection.* If the contract price increases, the Government must secure any needed additional protection by directing the contractor to-

- (1) Increase the penal sum of the existing bond;
- (2) Obtain an additional bond; or
- (3) Furnish additional alternative payment protection.

(e) *Reducing amounts.* The contracting officer may reduce the amount of security to support a bond, subject to the conditions of 28.203-3(c) or 28.204(b).

Performance/Payment Bonds **MUST** be adjusted to equal any upward adjustment to contract price!!

FAR 52.228-15 Performance and Payment Bonds-Construction

Clause applies in construction contracts exceeding \$150,000 that require performance and payment bonds. Contractor must:

- (b) *Amount of required bonds.* Unless the resulting contract price is valued at or below the threshold specified in FAR 28.102-1(a) on the date of award of this contract, the successful offeror shall furnish performance and payment bonds to the Contracting Officer as follows:
 - (1) *Performance bonds* (Standard Form 25). The penal amount of performance bonds at the time of contract award shall be 100 percent of the original contract price.
 - (2) *Payment Bonds* (Standard Form 25A). The penal amount of payment bonds at the time of contract award shall be 100 percent of the original contract price.
 - (3) *Additional bond protection.* (i) The Government may require additional performance and payment bond protection if the contract price is increased. The increase in protection generally will equal 100 percent of the increase in contract price.
 - (ii) The Government may secure the additional protection by directing the Contractor to increase the penal amount of the existing bond or to obtain an additional bond.

FAR 52.228-15 Performance and Payment Bonds-Construction (cont'd)

- (c) *Furnishing executed bonds.* The Contractor shall furnish all executed bonds, including any necessary reinsurance agreements, to the Contracting Officer, within the time period specified in the Bid Guarantee provision of the solicitation, or otherwise specified by the Contracting Officer, but in any event, before starting work.
- (d) *Surety or other security for bonds.* The bonds shall be in the form of firm commitment, supported by corporate sureties whose names appear on the list contained in Treasury Department Circular 570, individual sureties, or by other acceptable security such as postal money order, certified check, cashier's check, irrevocable letter of credit, or, in accordance with Treasury Department regulations, certain bonds or notes of the United States.
- (e) *Notice of subcontractor waiver of protection (40 U.S.C. 3133(c)).* Any waiver of the right to sue on the payment bond is void unless it is in writing, signed by the person whose right is waived, and executed after such person has first furnished labor or material for use in the performance of the contract.

FAR 52.228-13 Alternative Payment Protections

Clause applies in construction contracts when estimated or actual value exceeds \$35,000 but does not exceed \$150,000.

- (a) The Contractor shall submit one of the following payment protections:

(contracting officer insert)

- (b) The amount of the payment protection shall be 100 percent of the contract price.
- (c) The submission of the payment protection is required within *(contracting officer insert)* days of contract award.
- (d) The payment protection shall provide protection for the full contract performance period plus a one-year period.

FAR 52.228-13 Alternative Payment Protections (cont'd)

- (e) Except for escrow agreements and payment bonds, which provide their own protection procedures, the Contracting Officer is authorized to access funds under the payment protection when it has been alleged in writing by a supplier of labor or material that a nonpayment has occurred, and to withhold such funds pending resolution by administrative or judicial proceedings or mutual agreement of the parties.
- (f) When a tripartite escrow agreement is used, the Contractor shall utilize only suppliers of labor and material that signed the escrow agreement.

PAYMENT BONDS & SUBCONTRACTORS

Payment Bond and Subcontractors

Miller Act payment bonds provide **a payment enforcement mechanism** and protection for qualified first and second-tier subcontractors and suppliers

Payment Bond and Subcontractors

Right To Bring a Civil Action.-

- (1) *In general.* Every person that has furnished labor or material in carrying out work provided for in a contract for which a payment bond is furnished under section 3131 of this title...
- (2) *Person having direct contractual relationship with a subcontractor.* A person having a direct contractual relationship with a subcontractor but no contractual relationship, express or implied, with the contractor furnishing the payment bond may bring a civil action on the payment bond...
 - 40 U.S.C. § 3133(b)(1)-(2)

Payment Bond and Subcontractors (cont'd)

Miller Act payment bond applies to the following four groups:

- First-tier subcontractors who contract directly with the prime contractor;
- First-tier material suppliers who contract directly with the prime contractor;
- Second-tier subcontractors who contract directly with the first-tier subcontractor; and
- Second-tier material suppliers who contract directly with the first-tier subcontractor

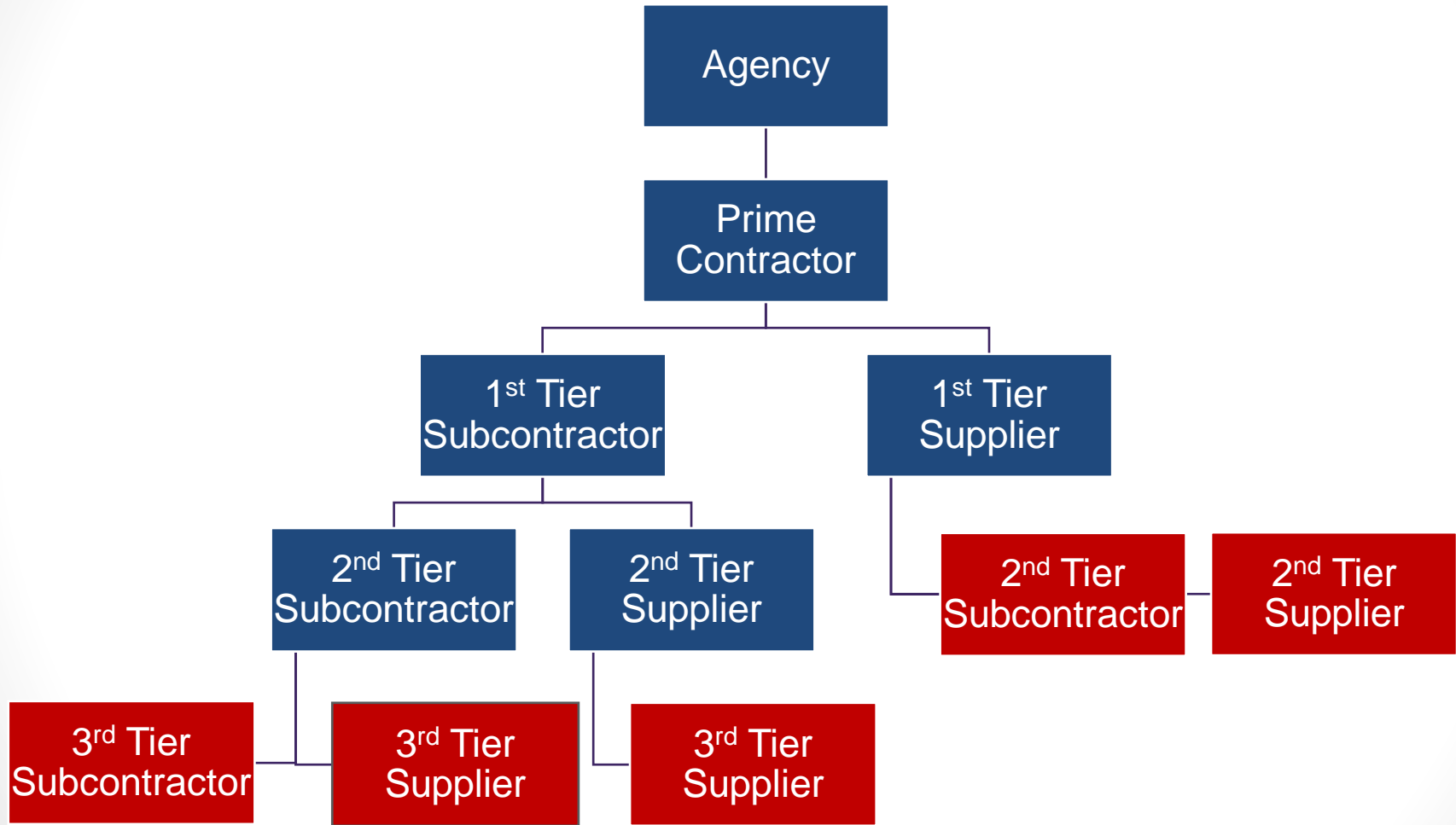
Payment Bond and Subcontractors (cont'd)

What about:

- Second-tier subcontractors/suppliers who contract with the first-tier supplier?
- Lower-tiered subcontractors/suppliers to the subcontractor?

NOPE

Payment Bond and Subcontractors (cont'd)



Subcontractor/Supplier Rights to Payment Bond

Right of Person Furnishing Labor or Material to Copy of Bond. The department secretary or agency head of the contracting agency shall **furnish a certified copy of a payment bond and the contract** for which it was given to **any person** applying for a copy who submits an affidavit that the person **has supplied labor or material for work described in the contract and payment for the work has not been made or that the person is being sued on the bond.** The copy is prima facie evidence of the contents, execution, and delivery of the original. Applicants shall pay any fees the department secretary or agency head of the contracting agency fixes to cover the cost of preparing the certified copy

- 40 U.S.C. § 3133(a)

Subcontractor/Supplier Rights to Payment Bond (cont'd)

Right To Bring a Civil Action.-

(1) **In general. Every person that has furnished labor or material** in carrying out work provided for in a contract for which a payment bond is furnished under section 3131 of this title and that **has not been paid in full within 90 days** after the day on which the person did or performed the last of the labor or furnished or supplied the material for which the claim is made **may bring a civil action on the payment bond for the amount unpaid...**

- 40 U.S.C. § 3133(b)(1)

First-tier subcontractors/suppliers can bring suit directly (No Notice Required)

40 U.S.C. § 3133. Rights of Persons Furnishing Labor or Material (cont'd)

Right To Bring a Civil Action.-

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

- 40 U.S.C. § 3133(b)(2)

Lower-tiered subcontractors/suppliers must first give notice to prime contractor.

What is Proper Written Notice for Lower-Tiered Subcontractors/Suppliers?

- * First-tier subcontractors/suppliers can bring suit directly (no notice required)
- * Lower-tiered subcontractors/suppliers must first give notice to prime contractor.

What is Proper Written Notice for Lower-Tiered Subcontractors/Suppliers?

Notice to prime contractor must:

- State with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed
 - 40 U.S.C. § 3133(b)(2)

What is Proper Written Notice for Lower-Tiered Subcontractors/Suppliers?

Serve notice by:

- Any means that provides written, third-party verification of delivery to the contractor at any place the contractor maintains an office or conducts business or at the contractor's residence; or
- Any manner in which the United States marshal of the district in which the public improvement is situated by law may serve summons
 - 40 U.S.C. § 3133(b)(2)(A)-(B)

Miller Act Venue & Statute of Limitations

Venue: A civil action must be brought

- in the name of the United States for the use of the person bringing the action; and
- in the United States District Court for any district in which the contract was to be performed and executed, regardless of the amount in controversy
 - 40 U.S.C. § 3133(b)(3)

Statute of Limitations: An action must be brought **no later than one year after the day on which the last of the labor was performed or material was supplied** by the person bringing the action

- 40 U.S.C. § 3133(b)(4)

Federal Government Liability

Is the government liable for a prime contractor's failure to pay its suppliers and subcontractors?

- **NO!**

- The Government is not liable for the payment of any costs or expenses of any civil action brought under this subsection.
 - 40 U.S.C. § 3133(b)(5)

Waiver of Miller Act Claim

Can a subcontractor/supplier waive its right to a civil action under the Miller act?

- Waiver of right to bring civil action on payment bond **is void unless** waiver is:
 - (1) in writing,
 - (2) signed by person whose right is waived, and
 - (3) executed after person whose right is waived has furnished labor or material for use in the performance of the contract
- 40 U.S.C. § 3133(b)(6)

PAYMENT BONDS & PRIME CONTRACTORS

Payment Bond Requirements for Prime Contractors

Prime Contractor federal construction contracts require one of the following clauses:

- 52.228-15, Performance and Payment Bonds-Construction
 - Insert if resulting construction contract is expected to exceed \$150,000
- 52.228-13, Alternative Payment Protections
 - Insert if resulting construction contract would have an estimated or actual value exceeding \$35,000 but does not exceed \$150,000

FAR 28.102-3

Payment Bond From Prime Contractor's Point of View

Subcontractors and suppliers to a prime contractor can bring a Miller Act action on the payment bond in the following ways:

- Civil action against the prime contractor
- Civil action against the surety on the payment bond (indemnified?)

What options are there for the prime contractor?

Subcontractor Claim Pass-Through Provisions

Prime contractor may include subcontractor claim pass-through provision in the subcontract:

- When subcontractor non-payment due to government's nonpayment, provision serves to bring subcontractor claims against the government. Pass-through claims made by subcontractor against the government are presented by the prime contractor, acting as a "pass-through".
 - Shields the prime contractor from liability by limiting the subcontractor's recovery to the amount the government actually pays
- Such pass-through provisions can take time for the government to evaluate whether it will pay on the claim
- Miller Act statute of limitation is one year. Pass-through provision does not stop the statute of limitation (independent from one-another)
- Therefore subcontractors/suppliers may wish to commence both a Miller Act civil action and pass-through claim as alternate means of relief

Staying of Miller Act Claim

What if the prime contractor has a claim against the government, under the Contract Disputes Act:

- May the prime contractor stay a Miller Act civil action until its claim against the government is resolved?
- How effective is the inclusion of a subcontractor claim pass-through provision in the subcontractor in staying a Miller Act civil action while an upstream Contract Disputes Act claim is pending?

IT DEPENDS!!!

Staying of Miller Act Claim if there is a dispute under the CDA for prime

U.S. v. Zurich American Ins. Co., 99 F.Supp.3d 543 (E.D. Pa. 2015)

- United States and subcontractor filed suit, under Miller Act, against prime contractor and its surety, seeking to recover against surety bond for additional work subcontractor performed on construction project for Department of Veterans Affairs (VA) and for which contractor was pursuing additional payment from VA relating to subcontractor's claims and other claims in administrative dispute resolution process set out in contract with VA. Contractor and surety moved to dismiss Miller Act claim.
- Contract Disputes Act's (CDA's) dispute resolution provisions, incorporated into subcontract, cannot serve as a waiver of subcontractor's Miller Act rights. 40 U.S.C. § 3133(c) only allows waiver after a subcontractor has furnished labor or material for use in performance of contract.
- Court held that CDA did not stay subcontractor's right to recover from payment bond on completion of prime's CDA process. CDA process determines VA's liability to prime. It doesn't provide jurisdiction over what prime must pay subcontractor.

Staying of Miller Act Claim if there is a dispute under the CDA for prime

U.S., for the use and benefit of Ballard Marine Constr., LLC, v. Nova Grp. Inc., et al., 2021 WL 3174799 (W.D. Wa. 2021)

- Motion granted to stay subcontractor's Miller Act claim pending resolution of prime contractor's upstream CDA claim, consistent with prime contract and subcontract, granted. The parties' subcontract required Ballard Marine to await resolution of the CDA process and a determination by the government of the amount to which Ballard Marine and Nova Group may be entitled before pursuing Nova Group or its sureties separately

U.S. v. Dick/Morganti, 2007 WL 3231717 (N.D. Ca. 2007)

- Subcontract clause required that subcontractor agrees to stay any action filed by subcontractor until dispute between prime and government exhausted
- Motion to stay granted. Court held that prohibition at 40 U.S.C. § 3133(c) not intended to apply to stays which merely postpone a subcontractor's Miller Act right to sue.

Staying of Miller Act Claim if there is a dispute under the CDA for prime

What about arbitration clauses in subcontract agreement?

- *U.S. v. Int'l Fid. Ins. Co.*, 232 F. Supp 3d 1193 (S.D. Ala. 2017)
 - U.S. and subcontractor brought action under Miller Act and state law against general contractor and surety to recover amounts due under subcontracts to furnish labor and material on two federal construction contracts. Defendants moved to compel arbitration and stay judicial proceedings.
 - Subcontracts included an arbitration provision that in event of dispute arising between contractor and subcontractor, contractor may elect to settle by arbitration.
 - Waiver of right at 40 U.S.C. § 3133(c) does not unambiguously forbid arbitration of Miller Act claims. Miller Act's legislative history stated the Act does not void subcontract provisions requiring arbitration or other alternative methods for resolving dispute.

PERFORMANCE BONDS & PRIME'S/GOVT'S RELATIONSHIPS

Miller Act Between the Prime and the Government

How does the Miller Act protect the government?

- Performance bond prime contractor must obtain protects the federal government in case the prime is unable to finish the construction project
- If prime contractor defaults in the performance of its work or is terminated for default, the government may require the surety on the performance bond to step in and take over the prime's obligations under the contract
- Miller Act performance bonds requires sureties to guarantee that a contract will be completed in the event of the prime contractor's default and that the government will not have to pay more than the contract price.
 - The surety has the option of either completing performance of the contract itself or assuming liability for the government's excess costs in completing the contract.
 - 40 U.S.C. § 3131(b)(2).

Miller Act Between the Prime and the Government (cont'd)

Federal government is the primary beneficiary of a performance bond:

- As a general rule, subcontractors and suppliers of the prime are not third party beneficiaries eligible to recover under a performance bond
- The district court held that subcontractor which had furnished and paid for labor and material upon government construction contract covered by Miller Act was not entitled to recover on contractor's Miller Act performance bond for cost of such labor and material which had not been paid to him under theory that subcontractor was third-party beneficiary of the performance bond. We are also satisfied that the plaintiff has failed to establish that it is equitably subrogated to the rights of the United States to enforce the performance bond. Plaintiff has paid no debt that the United States is obligated to pay.
- Performance bond did not intend supplier or labor and material to be a beneficiary
 - *U.S. for Use and Benefit of James E. Simon Co. v. Ardelt-Horn Constr. Co.*, 316 F. Supp. 254 (D. Nebraska 1970) affirmed 446 F.2d 820 (8th Cir. 1971)

Miller Act Between the Prime and the Government (cont'd)

What rights does a surety have if it takes control over finishing contract prime contractor defaulted on?

- Miller Act performance bond requires the surety to “guarantee that a contract will be completed in the event of the prime contractor’s default and that the government will not have to pay more than the contract price... [by] either completing performance of the contract itself or of assuming liability for the government’s excess cost in completing the contract.”
- If surety decides to take over contract performance the surety succeeds to the contractual rights of both the defaulted contractor and the government under the doctrine of equitable subrogation.
- A surety that completes a defaulted contract under a performance bond does have a right to withheld contract funds free from claims of set-off by the government for debts of the contractor. However, that right extends only to the unexpended contract balance and does not include liquidated damages to which the government is entitled.
 - *U.S. Sur. Co. v. U.S.*, 83 Fed. Cl. 306, 310-311 (2008)

Miller Act Between the Prime and the Government (cont'd)

Payment bond sureties may rely on privity of contract between government and prime contractor to sue the government. However...

- If prime contractor defaults, surety on payment bond may be able to seek compensation from government as it steps into the shoes of the prime contractor and asserts the prime contractor's contract claim
- However, if the prime contractor was alleged to have defaulted in performance, government doesn't need to consider sureties interest on payment bond until surety notifies contractor is in default
- In order to assert the doctrine of equitable subrogation and hold government liable for reimbursement based on improper disbursement of earned progress payments that are within the discretion government that it believes of the contracting officer, a payment bond surety must notify the government that the contractor is or is close to being in default.
- Surety may have no recourse against government but may need to seek relief against the prime contractor

• *Capitol Indem. Corp. v. U.S.*, 71 Fed. Cl. 98 (2006)

QUESTIONS?

Contact Information



Maria Panichelli, Esq.

Partner, McCarter & English LLP

www.mccarter.com

mpanichelli@mccarter.com

T: 215.979.3886

@MariaPanichelli

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