



The Surety & Fidelity
Association of America

2008 ANNUAL

STATE LEGISLATIVE REPORT

ON

CONTRACT SURETY

FINAL EDITION

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2008 IN REVIEW

Forty-four states convened in regular session in 2008. Some of the states had a shorter session as it is the second year in a two-year cycle, as well as a presidential election year. For **New Jersey** and **Virginia**, 2008 was the first year of a new two-year session. **Arkansas, Montana, North Dakota, Nevada, Oregon** and **Texas** did not meet in 2008.

Inflation Drives Efforts to Increase State Bond Thresholds in 2008

Most of the state legislation to raise the state bond thresholds this year was based on the increased costs of construction rather than significant problems with small and minority contractors obtaining bonds. Some states sought to increase their bond threshold to \$100,000 to conform to the federal Miller Act. Another current issue in the state legislatures is that there are few claims on bonds under \$100,000 such that the bond is seen as an unnecessary cost of construction that the local taxpayers pay. With revenues dropping from property taxes as real estate prices decrease, state and local contracting entities are looking to accordingly cut expenses. Raising the bond threshold is seen as cutting costs in state and local budgets.

In **Maine**, the primary proponent of a threshold increase was a quasi-public municipal corporation, which used some contractors in its construction projects that could not obtain bonding. Maine HB 1478 increased the state bond threshold from \$100,000 to \$125,000, which is far less than the \$250,000 in the original legislation. Most persuasive was that the original bill would have given Maine one of the highest thresholds in the nation.

California AB 3024 increased its payment bond threshold this year from \$5,000 to \$25,000 after negotiations on a bill that would have increased the payment bond threshold to \$100,000, which is the current requirement for performance bonds. SFAA and AIA opposed this increase on the basis that, if anything, the payment bond threshold be \$25,000, so that California law mirrors the federal Miller Act. The bill was amended so that the payment bond threshold is \$25,000, rather than \$100,000 and enacted. In **Illinois**, the Capital Development Board (CDB) wanted to increase the threshold to match the federal Miller Act. SFAA and AIA state pursued a \$25,000 payment bond threshold similar to the Miller Act. In the negotiations on the bill, the threshold was set at \$50,000 for payment and performance bonds, which passed in SB 1980. A similar effort to conform state law to the federal Miller Act was defeated in **Kentucky**.

Only in **New Hampshire** and **Rhode Island** were problems reported with bonding for emerging contractors. The problems only were in one city in New Hampshire and SFAA and AIA worked to defeat SB 481, which would have raised the threshold from \$25,000 to \$100,000.

Rhode Island HB 8368 would have increased the threshold at which bid bonds are required for construction contracts with the State from \$50,000 to \$150,000 such that contracts between \$50,000 and \$150,000 would have required final bonds, but no bid bonds. SFAA prepared a position statement for the AIA state counsel in opposition to this late session introduction and the AIA was the only witness when the bill was heard in the House. The bill was originally put aside for more study when the bill sponsor heard about SFAA's Model Contractor Development Program (MCDP). SFAA and AIA followed up and met with the bill sponsor, who was very interested in implementing the SFAA MCDP in Rhode Island in the near future, and SFAA will make that happen.

Bad Faith Legislation was Defeated Again in Rhode Island

The bad faith legislation in **Rhode Island** died when the legislature adjourned. SB 2323 and SB 2229 would have allowed any obligee, principal or claimant that is under any fiduciary, performance or payment bond to file a claim against the surety on the bond for wrongfully, and in bad faith, refusing to pay or settle a claim. The bills would have allowed claimants to seek both compensatory and punitive damages, as well as reasonable attorneys' fees and costs of suit. SB 2323 is identical to the bill that was defeated last year. HB 7766 and HB 7981 were the House counterparts to the Senate legislation. SFAA, AIA and CNA Surety testified in both chambers and the bills did not get out of committee. In the past two sessions, the same legislation passed one house of the legislature.

Individual Surety Legislation Also was Defeated

SFAA, AIA and NASBP worked together to alert the many opponents we generated last year to the new individual surety legislation in **Virginia**. The bill was re-introduced this year as HB 187, but failed to get out of committee due to the opposition. **Maryland** HB 312 would have eliminated the September 30, 2009, sunset provision on its individual surety law. It also would have eliminated the requirement that the Board of Public Works issue a report every fiscal year on the impact of the individual surety law, including its impact on small and minority businesses. These were two of the “concessions” that were made for the sureties when the law was enacted in 2006. The AIA state counsel met with the bill sponsor and interested parties, and agreed to an extension of the sunset until 2014 and reports every two years instead of annually. SFAA believes that this is a positive development as the sunset most likely would have been extended in 2009 anyway and there is not much experience with the use of individual sureties in Maryland to date.

Restrictions on Retainage Still are Sought in the States

Much of the retainage legislation this year aimed at limiting or prohibiting retainage after 50% completion. SFAA worked with AIA to defeat this legislation, which included bills in **Alabama, Colorado, Illinois, Nebraska and Rhode Island**. The only major enactment was **California** SB 593, which prohibits Caltrans, the state transportation department, from withholding retainage. The new law contains a five-year sunset so that the legislature can later evaluate the impact of the prohibition on retainage. It also requires Caltrans to report to the legislature any time the lack of retention on a project will compromise the State's best interests.

The Number of PPP Bills Decreased This Year

There was a decrease in the state legislation to permit public private projects (PPPs) after the large spike in bills in 2007. Part of the reason may be that private funding for PPPs from investment banks has diminished in the current economy in the United States. Since PPPs are an overseas model, international funding still may be available. It also is possible that the U.S. House Transportation Committee hearings and report on PPPs may have put a damper on the interest in PPPs among the states. The GAO found that although there are serious concerns with the concept of PPPs in the states, state officials can protect the public interest in PPPs through concession contracts in which they have been able to limit increases in the tolls, address work force issues and implement oversight mechanisms, but states lack a systematic approach to PPP contracts.

Immigration Remains an Issue

SFAA continues to monitor state immigration legislation for its impact on surety. Bills have been introduced in the past that would put the contractor in default and/or make the surety liable to perform if the contractor is found in violation of the immigration provisions or make the general contractor liable for subcontractors' compliance. The full affect of existing laws is not yet being felt because the constitutionality of some of the recently enacted laws is being challenged. SFAA continues to work with other interested parties on immigration legislation, to take a different path on the penalties for contractors that violate the immigration laws. Termination of on-going projects should not be the first choice as a penalty. Termination, with all its costs and delays, does not benefit the public entity and it costs taxpayers more money to complete projects. **Mississippi** is the only state that enacted legislation in which surety bonds may be impacted.

Some Assistance Programs for Small and Emerging Contractors were Added

While 2007 was a watershed year for legislation to enact bond guarantee programs and technical assistance programs, there was a significant amount of legislation this year. **California** AB 2376 creates the Small and Emerging Contractors Bonding Program pursuant to an Executive Order (EO) issued by Governor Schwarzenegger in 2006. **Connecticut** now requires a program to assist minority business enterprises in obtaining performance bonds in Hartford County and **Florida** expanded an existing program. Legislation to create a bond assistance program failed this year in **West Virginia**.

Other New Laws of General Interest to SFAA Members

Iowa enacted HB 2555 which subjects surety and guaranty bond filings to the 30 day deemer provisions in the Iowa rating law. Under prior law, rate filings for inland marine, and for surety and guaranty bonds not covered by a previous filing, were exempt from the 30 day deemer period applicable to all other rate filings. Inland marine and surety filings became effective when filed under prior law. The new law removes this exemption so that surety and guaranty bond filings now are subject to the 30 day waiting period/deemer before they become effective. However, even though prior law provided that a surety filing was effective upon filing, the Commissioner also had the authority to disapprove the filing within 30 days of its submission. The new law eliminated the disapproval period when it subjected surety and guaranty bond filings to the deemer period. The new law also creates a consumer advocate in the Insurance Department. HB 2555 became effective upon enactment.

New Hampshire enacted SB 378 which authorizes the State Supreme Court to establish a business and commercial dispute docket in the superior court. Civil claims related to surety bonds will be assigned to this docket. The new law became effective upon enactment.

2008 ANNUAL STATE LEGISLATIVE REPORT ON CONTRACT SURETY

INTRODUCTION

Because of the diversity of the business of its members, SFAA tracks all state and federal surety and fidelity bond legislation. In reporting legislative developments, however, SFAA's reports are based on the three major lines of business: contract surety, commercial surety and fidelity bonds.

This report contains the 2008 enactments on contract surety. Interested SFAA members can access the reports on commercial surety and fidelity bonds on the SFAA website.

This SFAA Annual State Legislative Report on Contract Surety contains two major parts: one section contains a summary of the 2008 state legislation on SFAA's priority issues for contract surety and the second section is a state-by-state compilation of the 2008 state enactments relating to contract surety.

Summary of State Legislative Activity on SFAA Priority Issues

Little Miller Act Thresholds

--Enactments. **California** AB 3024 increases the payment bond threshold from \$5,000 to \$25,000. As originally drafted, the bill would have increased the payment bond threshold to \$100,000 to conform to the current requirement for performance bonds. **Illinois** SB 1890 increases the state bond threshold from \$5,000 to \$50,000 for state projects, but the threshold remains at \$5,000 for all other public contracting entities. As originally drafted, the bill would have increased the state bond threshold to \$100,000. The Capital Development Board (CDB) wanted to increase the threshold to match the federal Miller Act. At our request, AIA state counsel pursued a \$25,000 payment bond threshold similar to the Miller Act. In the negotiations on the bill, the threshold was set at \$50,000 for payment and performance bonds.

Maine HB 1478 increases the state bond threshold from \$100,000 to \$125,000. As originally drafted, the bill would have increased the threshold from \$100,000 to \$250,000. The new law also gives the State discretion to accept letters of credit (LOCs) in lieu of surety bonds. **Virginia** SB 358 enacts a management agreement for the Virginia Commonwealth University that contains a \$1 million threshold for payment and performance bonds on University construction projects. The University can set the bond amount for transportation projects. If approved by the college's general counsel, or his/her equivalent, a bidder may furnish a personal bond, property bond or bank or savings institution's letter of credit on certain designated funds in the face amount required for the bid, payment and performance bond. Approval of such alternate security shall be granted only upon a determination that the alternative form of security affords protection to the college equivalent to a corporate surety bond. **Virginia** HB 1390 grants similar authority to any public college and university in Virginia.

In **New York**, significant changes to the Wicks Act were enacted in the state budget bill, as well some changes to bonding thresholds. In public projects, the Wicks Act requires that separate contracts be competitively bid and awarded to a minimum of four general contractors for general construction, plumbing, electrical and heating and ventilation. SB 6807 significantly increased the Wicks Act thresholds. Current law specifies that over a certain dollar amount, separate bidding specifications are required for the following trades: 1) plumbing and gas fitting; 2) steam heating, hot water heating, ventilating and air conditioning (HVAC); and 3) electric wiring and standard illuminating fixtures. The bill increased the threshold from costs exceeding \$50,000 for the State (Section 135 of the State Finance Law), and its political subdivisions and their districts (Sections 101 and 120-w of the General Municipal Law) to costs exceeding \$3 million for the Counties of the Bronx, Kings, New York, Queens and Richmond, to \$1.5 million for the Counties of Nassau, Suffolk and Westchester, and to \$500,000 for all other counties in the State for the construction, erection, reconstruction or alteration of a building. The same thresholds will apply for public housing buildings (Section 151-a of the Public Housing Law); for the

acquisition, lease, construction, reconstruction, rehabilitation, or improvement of a school (Section 458 of the Education Law) and for combined occupancy structures (Section 482 of the Education Law); and the Dormitory Authority's projects for financing and construction dormitories (Section 9, Ch. 892 of the Laws of 1971). The bill also increased the Wicks Act threshold for the construction, reconstruction, rehabilitation, or improvement of buildings for a solid waste recovery and management facility in the City of New York from \$50,000 to \$3 million (Section 4 of Chapter 560 of the Laws of 1980).

For medical buildings, however, SB 6807 increased the Wicks Act thresholds and the payment bond thresholds in the Public Authorities Law for New York Health Care Corporations. For the Westchester County Health Care Corporation (Section 3303) and for the Nassau County Health Care Corporation (Section 3402), the new law provides that the Wicks Law and the payment bond threshold is \$1.5 million, not including the costs of medical equipment and devices. Prior law set the thresholds at \$75,000, not including the costs of medical equipment and devices. Similarly, the bill increased the Wicks Act and payment bond thresholds for the Clifton-Fine Health Care Corporation (Section 3603) and for the Erie County Health Care Corporation (Section 3628) from \$75,000 to \$500,000, not including the costs of medical equipment and devices.

Vermont SB 365 changes the conditions under which an application may be approved from any school district for state construction aid to construct or make extensive additions to an existing school. The new law provides that if the total estimated cost of the project is less than \$50,000, no performance bond or irrevocable letter of credit shall be required. The current state bond threshold in Vermont is \$100,000.

--Defeated. **Kentucky** HB 481 would have increased the state bond threshold at which payment and performance bonds are required for construction contracts from \$40,000 to \$100,000. The bill also would raise the threshold for bonds on contracts for goods and services from \$40,000 to \$100,000. **New Hampshire** SB 481 would have raised the state bond threshold from \$25,000 to \$100,000. **Rhode Island** SB 2243 would have increased the state bond threshold on Department of Transportation (DOT) and Department of Administration contracts for public construction contracts from \$50,000 to \$200,000. **Rhode Island** HB 8368 would have increased the threshold at which bid bonds are required for construction contracts with the State from \$50,000 to \$150,000. The threshold for payment and performance bonds is \$50,000 such that contracts between \$50,000 and \$150,000 would have required final bonds, but no bid bonds.

Some states considered legislation to change the bonding thresholds for specific kind of projects. None of this legislation was enacted. **California** SB 1665 would have created the Prison Health Care Construction Program (Program). The Program's administrator would have been authorized to use any method to secure the completion of a project and the payment of trade contractors, material suppliers, and other parties contracting to provide goods or services to the project. The administrator could require payment and performance bonds, default insurance, letters of credit, or escrow accounts for any project within the Program. **Connecticut** HB 5778 would have created a \$50,000 bonding threshold for special projects for historic preservation. The state bond threshold is \$100,000. **Georgia** HB 1200 would have exempted from the public works construction law projects owned by development authorities that are not funded with public funds. Development authorities are created by law to promote trade, commerce, industry or employment opportunities. **Louisiana** HB 1086 would have consolidated the ports of several parishes and created the Lower Mississippi River Port Authority (Authority). The bill provided

that a performance bond would be required on the contracts that the Authority's Board lets, but the bond amount would have been 50% of the contract amount.

In related legislation, **New Mexico** HB 173 would have repealed the requirement that subcontractors provide payment and performance bonds when their contract exceeds \$125,000. As enacted in 2005, bonds were required from subcontractors with contracts in excess of \$50,000. Last year, the subcontractors tried to repeal the bond requirement, but in the end, the bond threshold was raised to \$125,000. HB 173 was another attempt to repeal the bond requirement.

Individual Surety

Virginia HB 187 reintroduced the individual surety legislation that SFAA, AIA and NASBP worked together to defeat last year. SFAA, AIA and NASBP alerted the many opponents we generated last year on this same bill. AIA met with the Chair of the Committee to which the individual surety bills were assigned and received assurances early on in the session that this bill would not move, and it did not. The bill missed the crossover date and died.

Maryland HB 312 would have eliminated the September 30, 2009, sunset provision on its individual surety law. It also would eliminate the requirement that the Board of Public Works issue a report every fiscal year on the impact of the individual surety law, including its impact on small and minority businesses. These were two of the “concessions” that were made for the sureties when the law was enacted in 2006. The AIA state counsel met with the bill sponsor, along with other bill proponents and opponents, and agreed to a compromise that the sunset would be extended for 5 years until 2014 and that reports would be required every two years instead of annually. SFAA believes that this is a positive development as the sunset most likely would have been extended in 2009 and there is not much experience with the use of individual sureties in Maryland to date.

Bad Faith

The bad faith legislation in **Rhode Island** died when the legislature adjourned. SB 2323 and SB 2229 would have allowed any obligee, principal or claimant that is under any fiduciary, performance or payment bond to file a claim against the surety on the bond for wrongfully, and in bad faith, refusing to pay or settle a claim. The bills would have allowed claimants to seek both compensatory and punitive damages, as well as reasonable attorneys' fees and costs of suit. SB 2323 is identical to the bill that was defeated last year. SB 2229 would have extended the application of the bill to fiduciary bonds, as well as payment and performance bonds. HB 7766 and HB 7981 were the House counterparts to the Senate legislation. The bills were heard in committee in both chambers, and SFAA, AIA and CNA Surety testified in both chambers and the bills did not get out of committee. In the past two sessions, the same legislation passed one house of the legislature.

Retainage

--Enactments. **California** SB 593 prohibits Caltrans from withholding retainage in its progress payments. The new law contains a five-year sunset so that the legislature can later evaluate the impact of the prohibition on retainage. It also requires Caltrans to report to the legislature any time the lack of retention on a project will compromise the State's best interests. **Maryland** limits retainage in private construction contracts to an amount not in excess of 5% in any contract in excess of \$250,000. **Tennessee** HB 3105 revises the threshold at which retainage must be placed in a separate escrow account for all contracts for the improvement of real

property. The threshold is \$500,000, and under prior law, it was based on either the prime contract or the subcontract price. Under the new law, the threshold is based only on the prime contract price.

--Defeated. Alabama HB 291 would have provided that retainage could not exceed 5% until 50% completion, after which no additional retainage would have been permitted. **Colorado** HB 1306 would have capped retainage at 5% of the calculated value of the completed work. No retainage could be withheld after 50% of the work had been performed on the contract. **Illinois** HB 2920 would have capped retainage on all construction contracts at 5% of the payments that contractors and subcontractors earn. Further, the bill would have capped retainage at 2.5% after completion of 50% of the work under contract. **Illinois** HB 4794 would have capped retainage at 5% of the payments to contractors and subcontractors for contracts for goods and services. The bill also would have prohibited retainage from being withheld on projects if a payment bond had been furnished pursuant to the Illinois Construction Bond Act. **Michigan** HB 6175 would have changed the existing retainage law, which provides that not more than 10% retainage can be withheld until the project is 50% complete. When the project reaches 94% completion, the contractor can request the release of the remaining retainage if he or she provides a letter of credit equal to the amount of the retained sums. The bill would have capped retainage at not more than 5%, which could be withheld until the project reaches 90% completion. At that point, not more than 1% of the value of all work in place could be withheld. **Nebraska** LB 1073 would have permitted owners to withhold a "reasonable" amount of retainage from the contractor. The retainage withheld could not have exceeded 125% of the estimated costs to complete the work remaining on the contract. **Rhode Island** SB 2554/HB 7610 would have eliminated the \$500,000 threshold for withholding retainage. The bill also would have provided that 5% of the contract price shall be withheld until the project reaches 50% completion.

Bonding on Mega Construction Projects

--Defeated. Washington SB 5208 died when it failed to pass before the legislature adjourned for 2008. As drafted in 2007, SB 5208 would have permitted the Department of Transportation (DOT) to fix the amount of the bond in projects in excess of \$80 million, except that the bond cannot be less than \$80 million and must protect 100% of the state's exposure to loss. The bill passed the Senate and was left in the House Transportation Committee last year. The bill failed to move this year.

Bond Guarantee and Technical Assistance Programs

--Enactments. California AB 2376 creates the Small and Emerging Contractors Bonding Program pursuant to an Executive Order (EO) issued by Governor Schwarzenegger in 2006. The new law requires the Department of Transportation (DOT) to work in consultation with the Office of Small Business Advocate to establish a Small and Emerging Contractor Technical Assistance Program by June 1, 2009, to provide training and technical assistance to small contractors to improve their ability to obtain the surety bonds and liability insurance necessary to qualify for public works construction projects. The new law outlines the types of information that the training would have to provide. The new law also seeks to strengthen the businesses to assist in their qualification for surety bond guarantees from the U.S. Small Business Administration. **Connecticut** HB 5800 requires the Metropolitan District Commission for Hartford County to establish a program to assist minority business enterprises in obtaining performance bonds. **Florida** HB 889/SB 1734 increases from three to five the number of projects for which performance and payment bonds may be waived for small businesses that are awarded construction contracts. Current law permits the bond requirements to be waived on projects with

a value estimated at \$200,000 to \$500,000. The bill also extends the sunset date from September 30, 2009, to September 30, 2011. The **Michigan** budget bill for 2009, HB 5808, continues the Department of Transportation (DOT) program of assistance for small, minority- and women-owned businesses, which includes surety bonding.

--Dead for 2008. **West Virginia** HB 2510 would have created the Targeted Minority Economic Development Fund (Fund). The bill would have allowed the Fund to be used to encourage small business start-up and expansion, as well as providing funding to assist minority vendors to meet bid bonding requirements.

Other Key Contract Surety Issues Addressed in 2008

Public Private Projects (PPPs)

--Enactments. **West Virginia** HB 4476 authorizes PPPs for transportation facilities. The bill provides that the comprehensive agreement would have to provide for performance and payment bonds on the construction portion of the project for qualifying transportation facility. The bill would allow the Division of Highways to determine the form and amount for the bonds that would be satisfactory.

--Defeated. **Arizona** SB1507 would have permitted PPPs in transportation projects. The DOT would have been authorized to require its private partner to obtain performance and payment bonds or an alternative form of security. The bill specifically stated that the bond may be less than 100% of the value of the contract and that the DOT would have been able to determine the level of bonding required to adequately protect the State. **California** SB 61, as introduced, would have authorized the Department of Transportation (Caltrans) and regional transportation agencies to enter into public private partnerships. The agreement could have required performance and payment bonds, parent company guarantees, letters of credit or other acceptable forms of security, but it also would have authorized security in an amount less than 100% of the contract price. **California** SB 1350 would have authorized the Los Angeles County Metropolitan Transportation Authority (Metro) to work with the Caltrans to determine whether to use a design-build entity or a public-private partnership to build a connector tunnel to close the gap between Interstate 710 and Interstate 210 in Los Angeles County. The design-build entity would have been required to obtain sufficient bonding and errors and omissions insurance coverage for all design and architectural services provided in the contract. **Hawaii** HB 2782/SB 3181 would have permitted the Department of Transportation (DOT) to enter into PPPs for toll facilities, which would include all highways, bridges, tunnels and streets, and other related DOT projects. The DOT would have been authorized to require a private partner to provide performance and payment bonds, parent company guarantees, letters of credit, and/or other acceptable forms of security. The amount of the bond could be less than 100% of the value of the contract, based upon the DOT's determination of what is required to adequately protect the State, which would be done on a facility by facility basis. **Illinois** SB 378 would have authorized public-private partnerships for transportation projects. The bill required a public-private agreement that included provisions for performance and payment bonds or other suitable performance security. The transportation agency would have determined the acceptable security, which included bonds, letters of credit, United States bonds and notes, parent guarantees, and cash. The transportation agency would have determined the amount of security necessary to protect the transportation agency and payment bond beneficiaries who have a direct contractual relationship with the contractor, or a subcontractor of the contractor to supply labor or material. **Pennsylvania** HB

2593 would have authorized the Pennsylvania Turnpike Commission (Commission) and the DOT to enter into agreements with a private entity for a public-private partnership (PPP) for the Pennsylvania Turnpike. The PPP agreement would have required the private entity to maintain insurance, bonds or letters of credit in amounts that the DOT found acceptable. **Pennsylvania** HB 555 would have authorized public-private partnerships for the construction of any transportation facility. **Tennessee** HB 1205/SB 347 would have authorized PPPs for certain transportation facilities. The public entity would have been able to determine the forms and amounts for performance and payment bonds as a part of the comprehensive agreement. HB 2862/SB 3288 were similar bills in Tennessee. HB 2768/SB 3718 also were similar, but these bills would have authorized a PPP for a specific major bridge project crossing the Mississippi River. These bills provided for a minority owned business participation plan on the bridge project.

Immigration Issues

--Enactments. **Mississippi** SB 2988 requires that employers in Mississippi must hire only legal citizens of the United States or legal aliens. All Mississippi employers will be required to use a federal pilot program, E-Verify, to determine whether newly employed workers are legal U.S. residents. For contracts entered into after July 1, 2008, no contractor or subcontractor may enter into a contract with a public entity unless the contractor or subcontractor registers and participates in E-Verify to verify the status of all newly hired employees. Any employer that complies with the requirements of this new law shall be held harmless by the Mississippi Department of Employment Security unless the employer was directly involved in the creation of false documents or knowingly and willingly accepted false documents from an employee.

Any employer violating the provisions of the law can have its public contracts cancelled, become ineligible for any state or public contract for up to three years and have its licenses and permits suspended for up to one year. The contractor or employer shall be liable for any additional costs incurred by a public entity because of cancellation of a contract or the loss of any license or permit to do business.

Mississippi considered SB 2005 in special session, but it was not enacted. SB 2005 would have amended the new immigration law and it would have been an improvement over the new law that is now in place even though it did not contain all the changes that the SFAA wanted.

More work needs to be done on this new immigration law in the 2009 session. The onerous penalty provisions, described above, remain in SB 2005 and could be imposed for a single violation. SFAA has previously suggested that the law be amended so that contractors that knowingly violated the law could be barred from obtaining additional public contracts for one year. Essentially, this would give such contractors one year to get their house in order and to come into compliance before they can bid for more state government work. It also would not be a mandatory debarment. We believe that this is a reasonable punishment, aimed at the violator. After a pattern or practice of violations, or a second knowing violation, a one to three years debarment would be mandatory.

--Defeated. **Arizona** HB 2341 would have removed the mandatory requirement in the existing law that requires employers to verify employment eligibility and would have required employee verification from any employer that knowingly or intentionally employed an undocumented worker. **South Carolina** SB 392 would have required all public employers to participate in the federal work authorization program, as well as contractors and subcontractors entering into

contracts with such public employers. **Virginia** HB 90 would have required employers to register and participate in the federal Electronic Work Verification Program or a similar electronic verification of work authorization program that the U.S. Department of Homeland Security operates to verify the information of newly hired employees. Any business that violated this requirement would have been debarred from a public contract for one year. The contract entered into with a public entity, under which the violation arose, would have been terminated immediately.

Additional Contract Surety Issues Addressed in 2008

Bid Bond Issues

--Enactments. Tennessee SB 4170 requires a protest bond in order to stay or protest the award of a contract. The amount of the bond is 5% of the lowest bid evaluated. The bond is payable to the State. If the lowest bid evaluated was less than \$1 million, small and minority businesses may petition for an exemption from the bonding requirement.

--Dead for 2008. Rhode Island HB 8368 would have increased the threshold at which bid bonds are required for construction contracts with the State from \$50,000 to \$150,000. The threshold for payment and performance bonds is \$50,000 such that contracts between \$50,000 and \$150,000 would have required final bonds, but no bid bonds.

Other Payment and Performance Bond Issues

--Enactments. Arizona SB 1289 creates flood protection districts controlled by a Board of Directors (Board) for the purpose of constructing flood protection facilities. Payment and performance bonds would be required. SB 1289 sets forth the process for claims under the performance bond. If the Board holds the contractor in default and makes a demand on the performance bond, the surety has 60 days from the written notice to act. Otherwise, the Board may re-let the contract. If the costs of completing exceed the monies available for payment, the board may make a demand on the surety for the difference. Service of process may be served at the surety's principal office in the State, on its attorney-in-fact or on the insurance commissioner if there is no office or attorney-in-fact. The Board's demand cannot exceed the penal sum of the bond.

Illinois SB 1890, as originally drafted, also would have required the surety, within 15 days after notice to the surety that the principal is in default, to state whether it would complete the project or pay the completion costs. These provisions were introduced at the request of the CDB and they are similar to a proposal that SFAA worked on with the CDB several years ago. The CDB originally wanted a response within 10 days so that the 15 working day response time is an improvement, but 15 working days still may not be enough time for the surety to decide its course of action on some projects. SFAA worked with the CDB on amendments such that the surety would be required to indicate its course of action within 15 days or advise the procuring entity that it needed more time. If the surety elects to complete the work within 15 working days with a completing contractor that is not prepared to commence performance, or if the surety advises that it needs more time, the State or any political subdivision may continue the work. Unless otherwise agreed to by the procuring agency, in no case may the surety take more than 30 working days to advise on the course of action it intends to take.

New York SB 7180 requires municipalities to require payment bonds any time a permit is issued for a project that is subject to the State's prevailing wage law. The local contractors associations' sought, but did not obtain, a veto from the Governor on this bill. A few years ago, labor pursued amendments to the New York prevailing wage law so that it now applies not only to contracts and subcontracts, but also to "leases, grants, bonds, covenants or other agreements." The contractors saw this change as being misread to apply the prevailing wage law to many projects traditionally considered "private." SB 7180 creates even more problems from the perspective of the contractors. There are many kinds of permits issued in New York, such as for building, highways and environmental projects that SB 7180 further muddies the law and may be misread to extend the prevailing wage law to traditionally private projects.

--Dead for 2008. Kansas HB 2794 would have required the performance bond pay for taxes, unemployment insurance and other obligations of contractors and subcontractors to the State of Kansas in their capacity as employers in the State. **Kansas** SB 603 would have capped the amount of the lien that a supplier may claim under a payment bond at \$15,000, unless a preliminary notice is filed and sent to the original contractor who obtained the bond within 20 days of furnishing labor, equipment, materials or supplies to the original contractor or the subcontractor. **Michigan** HB 6173 would have required performance and payment bonds for construction managers. Existing law requires such bonds in an amount not less than 25% of the contract price, on public building and public works construction projects that exceed \$50,000. The bill would have specified that the bonds could not exceed 100% of the contract amount. The bill also would have extended the payment bond's protection to those furnishing supplies and equipment. Existing law provides that the payment bond protects those furnishing labor and materials. **New York** AB 9638/SB 6694 would have prohibited any agreement relating to the construction, alteration, repair or maintenance of a building from requiring subcontractors and materialmen to exhaust all their remedies prior to filing a claim and/or commencing an action on a payment bond.

Indemnity Agreements in Construction Contracts

--Enactments. Kansas SB 379 applies to any construction contract, motor carrier transportation contract, dealer agreement or franchise agreement. The new law makes indemnification clauses, contained in such contracts or collateral to them, void against public policy and unenforceable. The new law also specifically states that it shall not be construed to invalidate any insurance contract or construction bond.

--Dead for 2008. Iowa Senate Study Bill 3223 would have made void and unenforceable any provisions in construction contracts that require one party to indemnify the other party for the negligence of the indemnitee. This could have created a loophole for owners to put the indemnification in the bond. **Missouri** SB 1077 would have prohibited indemnification clauses in any contract or agreement for public or private construction work. The bill also stated that this prohibition does not apply to construction bonds, which could have created a loophole that public owners could use to put indemnification clauses in the bond.

Massachusetts SB 1855 would make any provision for or in connection with a construction contract void and unenforceable if it requires one party to indemnify the other party for injury to person or damage to property to a greater extent than the proportion of the injury or damage is caused by the indemnitor. SFAA did not think that this bill impacted the surety bond as it is limited to personal injury and property damage.

Prevailing Wages

--Enactments. **California** SB 1352 allows a contractor, subcontractor, or the surety to deposit the full amount of a civil wage and penalty assessment that the Department of Industrial Relation will hold in escrow while a wage claim is pending review under the hearing process provided for in existing law. If such a deposit is made, then there is no further liability for liquidated damages because the deposit will be distributed for paying the wage claim. The deposit is not mandatory.

--Dead for 2008. **Illinois** HB 5734 would have increased the penalties on any contractor or subcontractor not meeting the current requirements for "responsible bidders." The penalty for failure to comply with any of the responsible bidder requirements would have been a 20% penalty and an additional 2% punitive penalty of the total contract bid, disbarment from bidding on state contracts for two years, or both of these.

Electronic Bidding

--Enactments. **Louisiana** HB 610 permits electronic bidding at the local level, and would provide for alternatives to electronic bidding, including options for political subdivisions where internet access is not available. **Missouri** SB 930 authorizes the State Highways and Transportation Commission (Commission) to receive bids and bid bonds electronically via the Internet for any contract for construction, maintenance, repair, or improvement of any bridge or highway on the state highway system. The Commission has the discretion to accept both paper and electronic submissions, and is allowed to require electronic submissions exclusively. Of note, the new law also authorizes the Commission to accept an annual bid bond for its construction and maintenance projects.

Set Asides for Small Businesses

--Enactments. **Michigan** SB 751 increases the participation goal for qualified service disabled veterans from 3% to 5% in state contracts for construction, goods and services. Of note, current law defines qualified disabled veterans and provides a 10% bidding preference.

--Vetoed. **California** AB 1942 would have terminated contracts if the contractor had fraudulently obtained a preference as a service disabled veteran. The contractor could be debarred from obtaining state contracts which would apply to construction contracts.

--Dead for 2008. **Maryland** SB 648 would have established participation goals in state contract awards for service disabled veteran businesses. **New York** SB 4218 would have created a minimum participation goal of 3% for awards of state contracts to service disabled veteran owned businesses and would permit state agencies to set aside contracts for such veterans. **Pennsylvania** HB 62 would require each department entering into contracts on behalf of the Commonwealth to have an annual statewide participation goal of 5% of the overall dollar amount of contracts annually for service-disabled veteran-owned businesses. **Rhode Island** SB 2651 would have included women-owned business enterprises in existing state procurement rules that require that specified enterprises be awarded a minimum of ten percent (10%) of the dollar value of the entire project. **Wisconsin** AB 811 would have expanded an existing law that requires 5% of all contracts with the State to be awarded to minority-owned businesses. The existing law also gives a 5% bidding preference to such firms, which the bill would have extended to businesses owned by a person with a disability. Further, the bill would have created a 5% set-aside for women- and veteran-owned businesses and a 25% set aside for small businesses on contracts with state agencies.

Bid Preferences

There still are a number of bills being introduced that would grant bid preferences based on some public policy objective, such as contractors that provide health insurance benefits or that do work in areas of high unemployment. Much of this legislation is not being enacted.

--Enactments. **Michigan** HB 5639 gives Michigan-based firms a 10% preference on contracts with public schools.

--Carryover. Several bills in **New Jersey** would authorize bid preferences. AB 1198 would permit counties and municipalities to establish a 10% preference for local contractors. AB 3446/SB 2410 would permit state agencies to establish preferences for New Jersey contractors in state-financed transportation projects.

--Dead for 2008. **California** AB 396 would have required public entities awarding a public works contract to give a 2.5% bid preference to a bidder and its subcontractors with employee health care payments that are 6.5% of the aggregate Social Security wages paid to employees in California. **Hawaii** SB 2108 would have granted a preference to bidders who pledge to employ persons with disabilities in contracts for goods, services and construction of less than \$500,000. Such persons hired would have to remain employed for the duration of the contract. The preference was an amount equal to the percentage of the employer's work force that are persons with disabilities, but not to exceed 5%. **New York** AB 8442 would have required all state public contracting entities to grant a preference to contractors that provides its employees with employer-sponsored health insurance.

Bid Shopping

--Enacted. **New York** SB 6807, the state budget bill, included provisions prohibiting bid shopping in any public contract not subject to the Wicks Act. Contractors no longer can substitute subcontractors without the approval of the public owner. The new law requires that the names of the subcontractors have to be made public when the low bidder is announced, as would any future change of subcontractor and agreed upon amount to be paid..

--Defeated. **Colorado** HB 1323 would outline the State's pre-qualification standards for contractors. The bill also contains a provision requiring a list of subcontractors, who would have to be used unless written permission had been obtained for a substitution. Subcontractors also would be required to pre-qualify according to certain standards. A contractor's violation of the bid shopping prohibition would be considered a material breach of the contract. The State would be able to take any retainage that had been withheld as liquidated damages, as well as any other monetary and injunctive reliefs that the applicable laws provide.

Illinois SB 1176 would have prohibited the termination of any subcontractor identified in a bid proposal in a construction contract in excess of \$250,000 once the contract had been entered into with the Capital Development Board unless the Board gave written consent for the termination.

West Virginia HB 4626 would have required all bidders on a public construction contract to submit a copy of all licensing certificates for the general contractors and subcontractors that will be used on a project to the contracting public entity within two hours of the close of bids. Failure to do so would result in a bid's disqualification. The bill also would have required written approval from the owner or his or her representative before any subcontractor substitution would

be permitted. The bill would have prohibited substitutions unless it was shown to be an advantage to the owner.

Other

--Dead for 2008. **Maine** LD 591 would have required that contractors on a public works project (\$10,000 or more) be able to show that their workers have completed OSHA safety courses. The penalties for non-compliance may have subjected the contractor to (1) removing employees from the work site if he/she lacks OSHA training documentation or (2) cancellation of the contract.

LOOKING AHEAD TO 2009

All the states will be in session in 2009. Virtually every state will convene sometime in January. Alabama, Nevada and Oklahoma will start in February, and Florida and Louisiana have the late spring starts in March and April, respectively. For many states, this will be the start of a new two-year session. For New Jersey and Virginia, this is the second year of a two-year session that began in 2008.

Key Changes in the State Political Landscape for 2009

Voters in the November 2008 elections changed the landscape in the states, where the big story was party control of state houses. The Democrats gained control of both chambers in four states: Delaware, Nevada, New York and Wisconsin. The Republicans gained control of both chambers in two states: Oklahoma and Tennessee. The Democrats now control both houses in 27 states, while the Republicans control both houses in 15 states. This represents the fewest number of states with politically divided legislatures in over 20 years. In 7 states, the two chambers are dominated by opposing political parties: Alaska, Indiana, Kentucky, Ohio, Michigan, Pennsylvania and Virginia. In Montana, the Republicans gained a 3 vote majority in the Senate, and the House is tied 50-50. Nebraska is a unicameral and non-partisan legislature.

There were 11 gubernatorial elections this year. The Democrats gained one office in Missouri so that they now control the governor's mansion in 29 states to 21 for the Republicans. Factoring in the governorships, the Democrats control the legislature and the governor's mansion in 17 states, the Republicans control 8, and 24 states have a divided government.

Of note, the New Hampshire Senate became the first state legislative chamber in history in which the majority of members are women. As a result of the recent elections, women hold 13 of the 24 seats.

Party control of the state chambers and the governor's office are particularly important this year because the state legislative and congressional districts are redrawn every ten years according to the U.S. census and redistricting will be done in 2010. In addition, the party in control can appoint new legislative leaders so that the insurance industry may be looking at several new insurance committee chairs in the states in 2009.

State Voters Support Infrastructure Spending

There were 32 ballot initiatives on the agendas of several states in the November elections, most of which asked voters to approve issuance of bonds to fund state transportation projects, and in some cases, asking for increased taxes for the projects. Other ballot initiatives called for building schools, libraries and hospitals. According to the National Conference of State Legislators,

voters approved over \$12 billion in spending, which is over 80% of the total dollars proposed in ballot initiatives. California had the largest ballot initiative in which voters approved \$9.95 billion in a bond issue to develop a high speed rail system between San Francisco and Los Angeles. In Washington, voters approved a half-cent sales tax increase to develop a commuter train service.

Additional Insurance and Surety Issues Expected in the State Legislatures in 2009

The changes in the composition of some of the state legislatures in the November 2008 Presidential elections and the economy both will have an impact on the state legislative agendas. Like the opposition of some in Congress to the industry's use of information from credit reports, bans or restrictions on the use of credit scores are expected in many states in which the Democrats have gained control of both chambers of the legislature. This legislation has been limited primarily to personal lines insurance to date.

The following are some additional issues that we anticipate in the state legislatures in 2009, which have either been generated or gotten new life from the current political and economic situation:

Antitrust—The Florida Senate Banking and Insurance Committee is studying the repeal of the insurance industry's immunity under the Florida antitrust statute. The new incoming Senate President initiated this issue late last year. Application of the state antitrust laws to the insurance industry and to advisory and statistical organizations, such as SFAA, is largely uncharted waters. There is little case law or enforcement of state antitrust laws against the industry, largely due to state exemptions that mirror the federal McCarran Act.

Bad Faith—The trial bar is expected to push bad faith legislation in Florida, Idaho, Louisiana, Michigan, Minnesota, Oregon and Washington. SFAA will review all bills for application to surety and fidelity. The other states in which there are ongoing issues with the trial bar that could produce bad faith or other anti-tort reform measures are: California, Colorado, Illinois, Nevada, New York, New Jersey and Pennsylvania.

Prompt Pay--With the amount of new construction expected to decline in 2009, insolvencies of contractors and subcontractors, particularly the latter, are expected to increase. Critical to the survival of many small contractors will be prompt payment from public owners and general contractors. We expect the subcontractors to push prompt pay legislation in the states.

Regulation of Credit Default Swaps (CDS)—Given the role that credit default swaps played in the meltdown on Wall Street, some state insurance regulators may attempt to regulate CDSs as insurance, or specifically as surety or financial guarantee, depending on the definitions and other licensing, capital and financial regulations in their insurance code. A CDS is a contract under which the seller promises the buyer to pay upon the occurrence of a credit event, usually a failure to pay, at a specific entity.

The Missouri Insurance Department recently issued a bulletin stating that it will regulate certain CDSs as surety as of January 1, 2009, although the Department will use discretion in its enforcement authority to the extent any comprehensive federal regulatory scheme is developed for CDSs. Sellers of such CDSs must be licensed in Missouri, comply with the capitalization requirements and submit to financial and market conduct regulation as insurers.

The key will be New York because New York law generally has governed regarding the regulation of surety and financial guarantees, due to the extraterritorial statute, the Appleton Law. While New York originally stated that it would seek to regulate CDSs as insurance in some manner, in more recent testimony in Congress, the Department said that it would wait to see what progress federal regulators make on addressing these unregulated products. The New York legislature will conduct a hearing on CDSs in early December. There was legislation introduced in Congress late this year to require every swap and derivative to be traded on a regulated exchange. Some of the federal banking and securities regulators have said that they are working on a clearinghouse for these transactions so that all the appropriate regulators will have information needed to monitor and decrease the risk in these transactions.

Other Key Issues on the State Legislative Agendas

The National Conference of State Legislators (NCSL) recently released the top nine issues that state legislators expect to dominate the 2009 state legislative agendas. All are related in some way to the current recession in the U.S. economy:

--State Budgets. The number one issue that most states will face in 2009 is budget deficits. Nearly 40 states will be looking at a shortfall in revenues in 2009 that will have to be addressed. The NCSL estimates that the states collectively will face a \$97 billion budget gap in the next 18 to 24 months.

--Transportation and Infrastructure. Infrastructure is in need of repairs and modernization at a time when revenues for this are disappearing. States may once again look to PPPs, despite the increased cost of capital for these private investors, as well as increased taxes and federal aid. Many states are bringing shovel-ready projects to Congress in the hope that Congress will provide funding in an economic stimulus package in early 2009 or through the agency appropriations process later in the year.

--The Costs of Higher Education. At the same time, with the availability of student loans and other financial aid decreasing, state colleges and universities are raising tuition. States are looking to help students for whom college is increasingly unaffordable.

--Health Care Costs. States are looking for federal aid to fund the increasing costs of Medicaid and other programs designed to help the uninsured. As unemployment increases, the Medicaid rolls will increase.

--Clean Energy and Alternatives. Some state legislators see renewable energy as encouraging local job growth and economic development.

--Sentencing and Corrections. The growth of the state prison populations also is straining state budgets. States are looking at cost-effective correction options.

--Home Mortgages. States want to help residents avoid foreclosures and obtain home loans. In this context, states are moving toward regulation of foreclosure consultants to protect consumers. Some of this legislation involves licensure and bonding.

--Working Families. States want to give families incentives to save and invest so that they will have the needed assets in the future for college tuition, home ownership and retirement. Families are increasingly in debt and have little or shrinking net worth.

--Unemployment. With unemployment rates on the rise, state programs face shortfalls from increasing claims for unemployment and other benefits, as well as demands to extend the time periods for receiving aid from the state.

2008 STATE ENACTMENTS ON CONTRACT SURETY

ALABAMA

HB 442: Bid Bond

INTRODUCED: 02/14/2008

ENACTED: 05/16/2008

HB 442 gives state agencies the discretion to require a bid bond on contracts for services, equipment or material if the requirement applies to all bidders and if bonding is available for the services, equipment or materials. Under existing law, bid bonds are mandatory. The new law does not apply to public construction contracts. The new law became effective upon enactment.

ALASKA

No Contract Surety Enactments in 2008

ARIZONA

HB 2474: Mechanics and Materialmen Liens

INTRODUCED: 01/17/2008

ENACTED: 04/28/2008

HB 2474 changes the current law concerning the discharge of a mechanic's lien and the bonds that can be posted for such discharge. Under existing law, bonds for the release of a lien must be in the amount of 150% of the claim and construction lender or any original contractor or subcontractor can post such a bond. The law has been clarified so that funds withheld in connection with any stop notice issued on the construction project shall be released upon the recording and service of the surety bond discharging the lien. The law also provides that a person filing a stop notice with the lien can post a surety bond (bonded stop notice). If a stop notice is to be bonded under current law, it must be in the amount of 125% percent of the claim. The new law increases this amount to 150%.

Further, the construction lender or any original contractor or subcontractor can post a bond if any of these parties disputes a stop notice or bonded stop notice. The amount required for this release bond would be increased from 125% to 150% of the claim. The new law provides that a bond furnished for the release of the lien also may serve as the surety bond for release of the stop notice on the project. Funds withheld in connection with the stop notice also have to be released in this case upon the furnishing of a bond. The new law became effective on October 10, 2008.

SB 1289: Performance Bonds—Claims Process

INTRODUCED: 01/30/2008

ENACTED: 04/28/2008

SB 1289 creates flood protection districts (District) and a Board of Directors for each District (Board) for the purposes of constructing flood protection facilities. Payment and performance bonds are required for any construction under the new law. The new law specifies the process for claims against the performance bond. If the board holds the contractor in default and makes a demand on the contractor's surety to perform under the performance bond, the surety has 60 days from the written notice to act. Otherwise the board may re-let the contract. If the costs of completion exceed the monies available for payment, the board shall make a demand on the defaulting contractor's surety for payment of the difference within 20 days after mailing the notice. Service of process may be served on the surety at its principal office in the State, on its

attorney-in-fact or on the insurance commissioner if there is no office or attorney in fact. The demand cannot exceed the penal sum of the bond and monies from the bond shall be used to pay the added costs of completing the work. The new law became effective on October 10, 2008.

ARKANSAS

Not in Session for 2008

CALIFORNIA

AB 387: Design-Build for Transit Contracts

INTRODUCED: 02/15/2007

ENACTED: 07/22/2008

AB 387 provides that there is not a cost threshold for the use of a design-build firm on a transit project when the contract is for the acquisition and installation of technology applications or surveillance equipment designed to enhance safety, disaster preparedness, and homeland security efforts. Currently, there is a cost threshold of \$25 million for rail transit projects and \$2.5 million for non-rail transit projects. Existing law requires performance and payment bonds. The new law became effective on January 1, 2009.

AB 642: Design-Build Entities for Counties, Cities and Special Districts

INTRODUCED: 02/21/2007

ENACTED: 09/26/2008

AB 642 expands existing law, which authorizes only certain counties to use design-build firms on contracts exceeding \$2.5 million. The new law authorizes all cities and counties to use design-build firms and reduces the cost threshold to \$1 million. Originally, the bill would have left the existing cost threshold in place. Further, the cost threshold does not apply to any city in the Counties of Solano and Yolo, or to the Cities of Stanton and Victorville before January 1, 2011, so that there is no such threshold for these counties for using a design-build firm. The new law authorizes the use of design-build firms for local wastewater treatment facilities, local solid waste facilities, and local water recycling facilities. Prior law excluded water resource and wastewater facilities from using design build firms. The new law prohibits design-build firms from constructing bridges and the bill contains a statement of legislative intent to that effect. Highways and public rail transit are excluded under existing law as well as payment and performance bonds. The new law became effective on January 1, 2009.

AB 2376: Bond Assistance Program—Small and Emerging Contractors

INTRODUCED: 02/21/2008

ENACTED: 09/27/2008

AB 2376 creates the Small and Emerging Contractors Bonding Program pursuant to an Executive Order (EO) issued by Governor Schwarzenegger in 2006. The new law requires the Department of Transportation (DOT) to work in consultation with the Office of Small Business Advocate to establish a Small and Emerging Contractor Technical Assistance Program by June 1, 2009, to provide training and technical assistance to small contractors to improve their ability to obtain the surety bonds and liability insurance necessary to qualify for public works construction projects. The new law outlines the types of information that the training would have to provide. The new law also seeks to strengthen the businesses to assist in their qualification for surety bond guarantees from the U.S. Small Business Administration. The new law became effective on January 1, 2009.

AB 2559: Performance Bonds—Concession Contracts**INTRODUCED:** 02/22/2008**ENACTED:** 07/10/2008

AB 2559 authorizes the Department of Parks and Recreation to enter into a concession contract for 50 years if the concession contract is for the construction, development, and operation of multiple-unit lodging facilities that exceeds \$1.5 million in capital improvements to begin operation. Existing law requires a performance bond for the Department's concession contracts. The new law became effective on January 1, 2009.

AB 3024: Payment Bond Threshold**INTRODUCED:** 02/22/2008**ENACTED:** 07/08/2008

AB 3024 increases the threshold for a payment bond on a state construction project to conform to the current requirements for performance bonds. The threshold for the payment bonds on state projects currently is \$5,000, and \$25,000 for all other public projects. The bill would have increased the payment bond threshold to the current \$100,000 threshold for the performance bond, which the Director of Finance adjusts every two years to reflect the percentage change in the California Construction Index. SFAA opposed this increase in the state bond threshold and alerted the local surety associations and the AIA. We believe that the payment bond protection for state projects should be set at \$25,000, so that California law is consistent for all public projects and it mirrors the federal Miller Act. The bill was amended to increase the threshold to \$25,000 instead of \$100,000 so that under the new law, payment bonds are required on state construction contracts exceeding \$25,000. The new law became effective on January 1, 2009.

SB 593: Retainage**INTRODUCED:** 02/22/2007**ENACTED:** 09/26/2008

SB 593 is a carryover bill from 2007. As originally drafted, the bill would have exempted the Department of Transportation (Caltrans) from the 5% retainage requirement in the law. The bill was amended several times in the Senate but the final version that passed the Senate prohibited Caltrans from withholding retainage in its progress payments. In the Assembly, however, additional amendments were added to limit the bill to Caltrans transportation projects as Caltrans lets other non-transportation contracts. SB 593 also was amended to include a five-year sunset so that the legislature can later evaluate the impact of the prohibition on retainage. Finally, the bill as enacted requires that Caltrans report to the legislature any time the lack of retention on a project will compromise the State's best interests.

Caltrans is one of the state DOTs that does not withhold retainage on road projects for which there is federal funding in order to comply with the Federal Highway Administration regulations in 49 CFR Part 26.29, which contain the retainage procedures that states have to follow in order to retain federal highway funding. The states have three options to meet the federal mandate of eliminating delays in payments in public projects: 1) eliminate retainage in contracts with the prime and subcontractors; 2) eliminate retainage in the contract with the prime and require the prime to pay subcontractors within 30 days of satisfactory completion of work or 3) hold retainage from the prime and require incremental acceptance of completed work and release of retainage. To date, the state DOTs including Caltrans, have chosen the path of least resistance and eliminated retainage on highway projects in which federal funds are involved. SB 593 was

intended to extend Caltran's policy of eliminating retainage to all Caltrans projects. The new law became effective on January 1, 2009.

SB 1352: Prevailing Wage Rate Penalty Assessments

INTRODUCED: 02/20/2008

ENACTED: 09/27/2008

SB 1352 allows a contractor, subcontractor, or the surety to deposit the full amount of a civil wage and penalty assessment that the Department of Industrial Relations will hold in escrow while a wage claim is pending review under the hearing process provided for in existing law. If such a deposit is made, then there is no further liability for liquidated damages because the deposit will be distributed for paying the wage claim. The deposit is not mandatory.

The bill would have changed the review process in a way that would have been onerous to sureties. The bill provided that the contractor or the surety could have created an escrow account within five days from the date of the filing and place into the escrow account an amount of the wages covered by the assessment. The deposit could have been in the form of cash, a letter of credit, a "payment bond" or negotiable securities. If no escrow account was created, the contractor or surety would be responsible for damages in the amount of the wages that remain unpaid. SFAA opposed this version of the bill and worked with the AIA and the local surety association to amend the bill. The new law "becomes operative on January 1, 2007," according to the text of the enacted bill.

SB 1699: Health Care Districts—Design-Build

INTRODUCED: 02/22/2008

ENACTED: 09/27/2008

SB 1699 allows health care districts letting public contracts to use design-build firms. The new law implements the State's existing procedures for design-build, including performance and payment bonds, as well as retainage. The new law became effective on January 1, 2009.

COLORADO

No Contract Surety Enactments in 2008

CONNECTICUT

HB 5800: Metropolitan District Commission—Bond Assistance Programs

INTRODUCED: 02/28/2008

ENACTED: 06/12/2008

HB 5800 provides for Hartford County's Metropolitan District Commission to have a program to assist minority business enterprises in obtaining performance bonds. The new law became effective on October 1, 2008.

DELAWARE

No Contract Surety Enactments in 2008

DISTRICT OF COLUMBIA

No Contract Surety Enactments in 2008

FLORIDA

HB 889: Bonds for Small Businesses

INTRODUCED: 03/04/2008

ENACTED: 06/10/2008

HB 889 increased from three to five the number of projects for which performance and payment bonds may be waived for small businesses that are awarded construction contracts. Current law permits the bond requirements to be waived on projects with a value estimated at \$200,000 to \$500,000. The bill also extended the sunset date from September 30, 2009 to September 30, 2011. The new law became effective upon enactment.

HB 7135: Performance Bonds—Energy Savings Contracts

INTRODUCED: 04/15/2008

ENACTED: 06/25/2008

HB 7135 requires a 100% public construction bond for guaranteed water and wastewater performance savings contracts. Existing law requires such a bond for guaranteed energy performance savings contracts. The bond serves to guarantee faithful performance of the contract as required under the State's Little Miller Act (FSA §255.05). The new law became effective on July 1, 2008.

GEORGIA

No Contract Surety Enactments in 2008

HAWAII

No Contract Surety Enactments in 2008

IDAHO

No Contract Surety Enactments in 2008

ILLINOIS

SB 1890: Bond Threshold

INTRODUCED: 01/10/2008

ENACTED: 12/15/2008

SB 1890 increases the state bond threshold from \$5,000 to \$50,000 for state projects, but the threshold remains at \$5,000 for all other public contracting entities. As originally drafted, the bill would have increased the state bond threshold to \$100,000. The Capital Development Board (CDB) wanted to increase the threshold to match the federal Miller Act. At our request, AIA state counsel pursued a \$25,000 payment bond threshold similar to the Miller Act. In the negotiations on the bill, the threshold was set at \$50,000 for payment and performance bonds.

SB 1890, as originally drafted, also would have required the surety, within 15 days after notice to the surety that the principal is in default, to state whether it would complete the project or pay the completion costs. These provisions were introduced at the request of the CDB and they are similar to a proposal that SFAA worked on with the CDB several years ago. The CDB originally wanted a response within 10 days so that the 15 working day response time is an improvement, but 15 working days still may not be enough time for the surety to decide its course of action on some projects. SFAA worked with the CDB on amendments such that the surety would be required to indicate its course of action within 15 days or advise the procuring entity that it needed more time. If the surety elects to complete the work within 15 working days with a completing contractor that is not prepared to commence performance, or if the surety advises that it needs more time, the State or any political subdivision may continue the work. Unless otherwise agreed to by the procuring agency, in no case may the surety take more than 30 working days to advise on the course of action it intends to take. The new law became effective upon enactment.

INDIANA

No Contract Surety Enactments in 2008

IOWA

No Contract Surety Enactments in 2008

KANSAS

SB 379: Indemnity Provisions in Construction Contracts

INTRODUCED: 03/12/2007

ENACTED: 05/09/2008

SB 379 amended current law to void indemnification provisions in construction contracts if the indemnitor must indemnify the indemnitee for the indemnitee's negligence or intentional acts or omissions. This could be misread to void the indemnity agreement between the surety and contractor. If a surety's payment under a surety bond is an "intentional act," the contractor could argue that the surety is seeking indemnity for its own intentional act. The current law and SB 379 were not intended to render the indemnity agreement between a surety and contractor void. Existing law prohibits the shifting of tort liability in construction contracts and other agreements. SFAA sought clarification in the bill to avoid any such unintended consequences. The bill was amended in the House and it addressed some but not all of SFAA's concerns.

The bill went to a conference committee and was enacted as reported from the conference. As enacted, the new law applies to construction contracts, motor carrier transportation contracts, dealer agreements and franchise agreements. An indemnification in any such contract is void and unenforceable if the indemnitor must indemnify the promisee for the promisee's negligence or intentional acts or omissions.

The new law specifically states that it shall not be construed to affect or impair the validity of any insurance contract, construction bond, or other agreement lawfully issued by an insurance or bonding company. The new law became effective upon enactment.

SB 485: Design-Build Contracts

INTRODUCED: 01/28/2008

ENACTED: 05/13/2008

SB 485 is the County Alternative Project Delivery Building Construction Procurement Act. The new law authorizes design-build and construction managers at-risk for public construction projects. For such projects, the RFP has to contain the requirements for performance bonds, payment bonds and insurance, as well as any available ratings for the bonds or insurance. Firms bidding on projects also are required to submit a statement on the bonding capacity of the firm and demonstrate that it is capable of obtaining a public works bond as required under the State's bonding threshold law. The new law became effective upon enactment.

KENTUCKY

No Contract Surety Enactments in 2008

LOUISIANA

HB 610: Electronic Bidding

INTRODUCED: 03/31/2008

ENACTED: 06/30/2008

HB 610 revises the existing law for electronic bidding to provide alternatives, including options for political subdivisions where internet access is not available. The new law became effective on August 15, 2008.

SB 780: Performance Bonds

INTRODUCED: 04/22/2008

ENACTED: 07/02/2008

SB 780 creates the Louisiana International Deep Water Gulf Transfer Terminal Authority (Authority) with regulatory authority over offshore and onshore terminal facilities. The new law provides that in the construction of such facilities, the Authority may require performance bonds. The new law became effective on August 15, 2008.

MAINE

HB 1478: State Bond Threshold

INTRODUCED: 01/02/2008

ENACTED: 03/18/2008

HB 1478, as originally drafted, would have increased the threshold at which performance and payment bonds are required for public works projects, including highways, from \$100,000 to \$250,000. As enacted, the new law increases the threshold to \$125,000 and it allows the State discretion to accept letters of credit (LOCs) in lieu of surety bonds. Further, the new law requires that the bond include the name of and contact information of the surety that issued the bond on its face. Also, actions on performance and payment bonds must be brought in the county in this State where the construction, alteration or repair of the public building or other public improvement or public work is located.

The main proponent of the legislation was Ecomaine, a quasi-public waste management company, owned and operated by 21 municipalities in southern Maine. They testified that their construction projects are highly technical and require contractors with special expertise in electrical power plants. Ecomaine is familiar with these contractors and believes it should be permitted to decide whether bonding is needed and to accept a letter of credit as alternative security.

SFAA and AIA both testified at the hearing on the bill and participated in the executive work session. This was not a small and minority contractor issue, but rather a question of whether the bond threshold needed to be adjusted to reflect increased costs of inflation. Most persuasive to the legislators was the information we provided that showed the bill would have given Maine one of the highest state bond thresholds. Ecomaine offered an increase to \$150,000 as an alternative, and in the end, the bill was amended to increase the threshold from \$100,000 to \$125,000 and to permit LOCs as an alternative form of security. The new law becomes effective on June 29, 2008, 90 days after adjournment.

MARYLAND

HB 312: Individual Surety Law Revisions

INTRODUCED: 01/24/2008

ENACTED: 04/24/2008

HB 312 changes the 2006 Maryland Individual Surety law. As originally drafted, the bill would have repealed the sunset date, which was September 30, 2009. It was amended so that the law now will sunset on September 30, 2014. The original bill also would have eliminated the law's reporting requirements for the Board of Public Works' Procurement Advisor (Advisor) regarding the implementation of the law during the immediately preceding fiscal year. This report must include information on the impact of the law on small businesses and minority business enterprises. Of note, the bill was amended to eliminate the requirement for individual sureties to attach the federal GSA Standard Form 28, Affidavit of Individual Surety to the bid security. Instead, the new law requires an affidavit in the form that Board of Public Works has approved. The new law becomes effective on October 1, 2008.

SB 313: Retainage

INTRODUCED: 01/28/2008

ENACTED: 05/13/2008

SB 313 establishes a \$250,000 threshold on construction contracts for withholding retainage and it would cap retainage at 5% of the payments. Contractors are prohibited from withholding more retainage from subcontractors than the owner has withheld. Similarly, subcontractors cannot withhold from their subcontractors more retainage funds than the contractor has withheld from them. Additional amounts may be withheld however, if the contractor's or subcontractor's performance of the contract provided reasonable grounds for withholding more funds. The new law becomes effective on October 1, 2008.

MASSACUSETTS

HB 4430: Performance Bonds

INTRODUCED: 12/12/2007

ENACTED: 06/20/2008

HB 4430 authorizes the Conservation Commission of the Town of Shirley to require performance bonds in connection with contracts for labor and services related to the Longley Acres Conservation Area. The new law became effective upon enactment.

HB 5039: Co-Sureties

INTRODUCED: 07/30/2008

LINE ITEM: 08/08/2008

HB 5039 allows for co-sureties for performance and payment bonds for transportation construction projects. The new law provides that the sureties participating in the arrangement will be jointly and severally liable. SFAA worked with the LSA in Massachusetts on these provisions to amend the bill to track the federal requirements for co-surety agreements, which we believe would be preferable to joint and several liability. At the federal level, each surety is liable for its agreed share of the guarantee made when the bond is issued.

In practice however, SFAA believes that although the new law in Massachusetts requires joint and several liability, the co-sureties could use private contracts to address the handling of any claims and the division of liability. Otherwise, if one surety were to go under in a co-surety

agreement without such a contract, the other surety would remain liable for the entire bond amount, which could be greater than its underwriting limitation as a single surety company, especially in the case of a mega-project.

SFAA tracked these co-surety provisions in a number of bills throughout the 2007-2008 sessions, and HB 5039 was the latest iteration of this issue, wrapping the provisions into a transportation appropriations bill. The Governor's line item veto did not affect the co-surety provisions in the bill. The bill was declared an emergency measure, which allowed it to become effective upon enactment.

MICHIGAN

HB 5639: Contract Preferences

INTRODUCED: 01/17/2008

ENACTED: 01/13/2009

HB 5639 gives Michigan-based firms a 10% contracting preference on contracts with public schools, school districts, and school district boards. The new law became effective upon enactment.

HB 5808: Small and Emerging Contractors

INTRODUCED: 02/26/2008

LINE ITEM: 09/27/2008

HB 5808 continues a program of the Department of Transportation (DOT) to increase the use of women- and minority-owned businesses for state and local road construction projects. The new law requires at a minimum that the program must consist of education and outreach efforts to these businesses to inform them of DOT competitive bidding requirements and processes. Of note, the DOT will be conducting an assessment of the availability of surety to women- and minority-owned businesses. The new law instructs the DOT to report to the House and Senate Appropriations Subcommittees on Transportation, and the House and Senate fiscal agencies of its progress each year by September 30th. The line item veto of this bill did not impact the surety provisions. The new law became effective upon enactment.

SB 751: Veterans Contract Preference

INTRODUCED: 09/06/2007

ENACTED: 05/21/2008

SB 751 increases the participation goal for qualified disabled veterans from 3% to 5% for contracts with the Department of Management and Budget for construction, goods and services. Current law defines "qualified disabled veteran" as a business entity that is 51% or more owned by one or more veterans with a service-connected disability. Of note, the law also currently gives such veterans a 10% bidding preference. The new law became effective upon enactment.

MINNESOTA

No Contract Surety Enactments in 2008

MISSISSIPPI

SB 2988: Immigration

INTRODUCED: 01/14/2008

ENACTED: 03/17/2008

SB 2988 is a new immigration law. Under the new law, employers in Mississippi must hire only legal citizens of the United States or legal aliens. All Mississippi employers will be required to

use a federal pilot program, e-Verify, to determine whether newly employed workers are legal U.S. residents.

For contracts entered into after July 1, 2008, no contractor or subcontractor may enter into a contract with a public entity unless the contractor or subcontractor registers and participates in e-Verify to verify the status of all newly hired employees. Any employer that complies with the requirements of this new law shall be held harmless by the Mississippi Department of Employment Security unless the employer was directly involved in the creation of false documents or knowingly and willingly accepted false documents from an employee.

Any employer violating the provisions of the law can have its public contracts cancelled, become ineligible for any state or public contract for up to three years and have its licenses and permits suspended for up to one year. The contractor or employer shall be liable for any additional costs incurred by a public entity because of cancellation of a contract or the loss of any license or permit to do business.

The new law contains time periods under which employers have to use e-Verify. The largest employers, with over 250 employees, will have to be in compliance by July 1, 2008. Smaller employers are given until 2009 and 2010, respectively, to comply.

In signing the bill, the Governor stated that the legislation still needed some technical corrections, which won't be done this session. For example, a "contractor" is not defined, but a "subcontractor" is defined as a subcontractor, contract employee, staffing agency or any contractor, regardless of its tier. The new law also permits the Department of Employment Security, State Tax Commission, Secretary of State, Department of Human Services and the Attorney General to seek penalties. How those agencies will coordinate in this effort is unclear.

One of SFAA's main concerns with the new law is that it seems to permit cancellation of all outstanding contracts of a contractor who violates the law in connection with one of its public contracts. SFAA drafted amendments to the bill to include more reasonable penalties, such as debarment for a year after an opportunity to correct the problem. We do not think that it is in the State's interest to cancel all the jobs of a contractor that is financially sound and doing the work on time.

While there are many problems with the new law, the main focus, from the surety perspective, is to prevent a financially sound contractor from being terminated from a job for violation of the immigration laws. The SFAA and local surety association amendment provides that, instead of termination, the State may make the employer/contractor ineligible for future contract awards for up to three years if the employer/contractor violates the law.

The local surety and construction industries have been working together to seek amendments to SB 2988, the new immigration law in Mississippi, before the law goes into effect and is enforced. The AIA local counsel and CNA Surety also were involved in this effort. The amendments, suggested by SFAA and others, have been agreed to by the Governor's office and are scheduled to be considered in the special session that has now been called in Mississippi.

From a surety perspective, we think that the re-draft is a significant improvement over the law that was enacted. Our major concern is that contractors could be terminated from on-going projects if a violation of the immigration law is discovered. The revised draft: 1) provides that a

contractor may be ineligible for future state or public projects upon the first violation, and eliminates the current penalty of potential cancellation of the contractor's public contracts; 2) deletes the provision that the contractor is liable for any additional costs because of cancellation of contracts or suspension of licenses or permits; 3) provides for loss of licenses or permits for one to three years for a second violation of this law; 4) states that no contractor or subcontractor shall be liable for the violations by a lower-tier subcontractor, materialman, supplier or laborer, and contains revised definitions of "contractor" and "subcontractor;" and 5) provides that no penalty can be imposed without notice and a hearing and coordinates the enforcement of the law among the state agencies.

Even if this new law was amended in special session, it is not perfect, but it would be significantly improved from the law that the Governor signed and that went into effect on July 1, 2008.

MISSOURI

SB 930: Electronic Bids and Annual Bid Bonds

INTRODUCED: 01/10/2008

ENACTED: 07/03/2008

SB 930, as introduced, did not impact bonding, but it was substituted in committee in the House to permit electronic bidding and use of an annual bid bond. The new law authorizes the State Highways and Transportation Commission (Commission) to receive bids and bid bonds electronically via the Internet for any contract for construction, maintenance, repair, or improvement of any bridge or highway on the state highway system. The Commission has the discretion to accept both paper and electronic submissions, but the new law also allows the Commission to require electronic submissions exclusively. The law outlines the minimum standards for establishing such a program.

The new law authorizes the Commission to accept an annual bid bond for its construction and maintenance projects. The law became effective on August 16, 2008.

MONTANA

Not in Session for 2008

NEBRASKA

No Contract Surety Enactments in 2008

NEVADA

Not in Session for 2008

NEW HAMPSHIRE

No Contract Surety Enactments in 2008

NEW JERSEY

No Contract Surety Enactments in 2008

NEW MEXICO

No Contract Surety Enactments in 2008

NEW YORK

AB 9998: Performance and Payment Bonds

INTRODUCED: 02/12/2008

ENACTED: 02/19/2008

AB 9998 requires performance and payment bonds for construction contracts let by the Franchise Oversight Board in connection with racing associations. The bonds must comply with the existing provisions of section 103-F of the general municipal law. The new law became effective upon enactment.

SB 6807: Wicks Law Thresholds

INTRODUCED: 01/22/2008

ENACTED: 04/23/2008

In enacting its budget for 2009 in SB 6807, the New York Legislature made some changes in the public procurement and labor laws that may impact bonding when it enacted SB 6807. These include new provisions regarding bonding in project labor agreements, amendments to the Wicks Law and prohibitions on bid shopping. The bill also reduced the number of days a contractor has to make payments to the subcontractor from 15 to seven calendar days after the public owner makes a payment to the contractor. The new law became effective on July 1, 2008. The law will apply to all contracts advertised or solicited for bid on or after the effective date under the provisions of any law requiring contracts to be let pursuant to provisions of law that the bill amended. For our full analysis, SFAA members may visit the Government Relations page in the members section of the SFAA website at www.surety.org for a detailed memo on the procurement provisions in the 2009 New York budget bill.

SB 7180: Payment Bonds

INTRODUCED: 03/17/2008

ENACTED: 09/25/2008

SB 7180 requires municipalities to require payment bonds any time a permit is issued for a project that is subject to the State's prevailing wage law. The local contractors associations' sought, but did not obtain, a veto from the Governor on this bill. A few years ago, labor pursued amendments to the New York prevailing wage law so that it now applies not only to contracts and subcontracts, but also to "leases, grants, bonds, covenants or other agreements." The contractors were concerned that this change could be misread to apply the prevailing wage law to many projects traditionally considered "private." SB 7180 creates even more problems from the perspective of the contractors. There are many kinds of permits issued in New York, such as for building, highways and environmental projects that SB 7180 further muddies the law and may be misread to extend the prevailing wage law to traditionally private projects. The new law became effective upon enactment.

NORTH CAROLINA

No Contract Surety Enactments in 2008

NORTH DAKOTA

Not in Session for 2008

OHIO

No Contract Surety Enactments in 2008

OKLAHOMA

HB 3325: Bid Bonds

INTRODUCED: 02/04/2008

ENACTED: 04/29/2008

HB 3325 allows the Director of the Department of Central Services (Director) to adopt rules so that alternative security may be accepted in connection with purchasing contracts. Prior law authorized the Director to adopt rules which must include a bond requirement. The new law became effective on November 1, 2008.

OREGON

Not in Session for 2008

PENNSYLVANIA

No Contract Surety Enactments in 2008

RHODE ISLAND

HB 7765: Mechanics' Lien

INTRODUCED: 02/26/2008

ENACTED: 07/04/2008

HB 7765 creates a new retainage lien. The notice of retainage lien will be effective as to any unpaid retainage that the contractor or subcontractor had earned for private construction. Existing law in Rhode Island already establishes the requirements for notice of intention to file any kind of lien. The notice has to be filed within 200 days of doing the work, and then there is a time period for filing and perfecting the lien. Since the notice provisions are not being amended, the new retainage lien is subject to the existing notice and filing period. What is different about the new retainage lien is the effective date of the notice. For all other liens, the effective date under existing law is 200 days from the filing. For the new retainage lien, this new law establishes an effective date that starts from the commencement of work. SFAA believes that this is acceptable since this is when the withholding of retainage begins. The bill became law without the Governor's signature and became effective upon enactment.

SOUTH CAROLINA

SB 282: Infrastructure Facilities

INTRODUCED: 01/17/2007

ENACTED: 02/04/2008

SB 282 authorizes the following project delivery methods on public construction contracts: design-bid-build; construction management at-risk; operations and maintenance; design-build; design-build-operate-maintain; and design-build-finance-operate-maintain. The new law provides that for the purpose of performance and payment bonds, the contract price would not include the cost of operation, maintenance, and finance. Existing law does not exclude such items from the contract price. In the case of a construction manager-at-risk contract, the solicitation could provide that bonds or security would not be required during the project's pre-construction or design phase, if the construction did not commence until the performance bond and the payment bond are submitted. The new law became effective upon enactment and applies to all solicitations issued on or after January 1, 2008.

SOUTH DAKOTA

No Contract Surety Enactments in 2008

TENNESSEE

HB 3105: Retainage

INTRODUCED: 01/17/2008

ENACTED: 04/24/2008

HB 3105 revises the threshold at which retainage must be placed in a separate escrow account for all contracts for the improvement of real property. The threshold is \$500,000, and under prior law, it was based on either the prime contract or the subcontract price. Under the new law, the threshold is based only on the prime contract price. The new law becomes effective on July 1, 2008.

SB 4170: Protest Bonds

INTRODUCED: 02/01/2008

ENACTED: 04/01/2008

SB 4170 provides that a protest bond is required to stay or protest the award of a contract. The bond must be in an amount equal to 5% of the lowest bid evaluated. The bond must be acceptable and payable to the State. If the lowest evaluated bid is less than \$1,000,000, a minority or small business protesting party may submit a written petition for exemption from the protest bond requirement. The new law became effective on July 1, 2008.

TEXAS

Not in Session for 2008

UTAH

No Contract Surety Enactments in 2008

VERMONT

SB 365: Performance Bonds—School Construction

INTRODUCED: 03/11/2008

ENACTED: 06/09/2008

SB 365 provides that a performance bond or letter of credit would not be required on contracts under \$25,000 for a school district to obtain approval for state funding on a school construction project. The new law became effective upon enactment.

VIRGINIA

HB 1390/SB 442: Bond Threshold—Public Institutions of Higher Education

INTRODUCED: 01/09/2008

ENACTED: 04/11/2008

HB 1390/SB 442 permits any institution of public education in Virginia to be granted additional operating authority in information technology, procurement and capital projects. Under the new law, the colleges would have to get payment and performance bonds for any construction project in excess of \$1 million and were permitted to obtain bonding for amounts less than that. Further, the new law requires the surety companies writing these bonds to be on the U.S. Treasury Department's list of acceptable sureties, Circular 570. Retainage has been set at 5%. SFAA, AIA and the local surety associations worked in opposition to these bills, but we expected that they would be hard to defeat given their similarity to previous legislation that passed last year for Virginia Polytechnic Institute and State University, the University of Virginia and the College of William and Mary. The bills also were included in the Governor's package. The new law became effective on July 1, 2008.

SB 358/HB 1124 is identical, except that it applies only to the Virginia Commonwealth University (VCU). The new law for VCU takes effect retroactively to January 1, 2008 and will expire on January 1, 2012.

SB 706: Bid and Performance Bonds

INTRODUCED: 01/16/2008

ENACTED: 03/11/2008

SB 706 changes the current bid and performance security requirements for construction contracts of the Hampton Roads Sanitation District (District). Currently a bid bond and a performance bond or other security is required at the District Commission's discretion, in an amount that the Commission determines. Instead, the District's contracts now are subjected to the Virginia Public-Private Education Facilities and Infrastructure Act of 2002 and any subsequent changes to procurement laws. The new law allows the District to enter into PPPs, requiring maintenance, performance and payment bonds, or letters of credit for the project. The bonds must be in the forms and amounts that the responsible public entity finds satisfactory. The bonds must comply with the State's Little Miller Act. SFAA believes this is an improvement on current law as it brings the District's procurement processes in line with the State bond threshold requirements, which provide that performance and payment bonds from licensed surety companies for the total contract amount must be submitted. The new law became effective on July 1, 2008.

WASHINGTON

No Contract Surety Enactments in 2008

WEST VIRGINIA

HB 4476: Public Private Partnerships (PPP)

INTRODUCED: 02/02/2008

ENACTED: 04/01/2008

HB 4476 authorizes PPPs for transportation facilities. The new law provides that the comprehensive agreement must provide for performance and payment bonds on the construction portion of the project for qualifying transportation facility. The law allows the Division of Highways to determine the form and amount for the bonds that would be satisfactory. The new law became effective on June 10, 2008.

WISCONSIN

No Contract Surety Enactments in 2008

WYOMING

SB 11: Subdivision Bonds

INTRODUCED: 02/11/2008

ENACTED: 03/12/2008

SB 11 authorizes counties to subdivide parcels of land. The new law authorizes the county board to require the applicant for a subdivision permit to provide a performance bond, letter of credit or other sufficient financial commitment, or cash, in escrow. The bond or other security would have to assure that any facilities proposed or represented to be part of the subdivision will be completed. The new law became effective on June 7, 2008.