

THE SURETY & FIDELITY ASSOCIATION OF AMERICA

MEMORANDUM

TO: Government Affairs Advisory Committee
FROM: Daniel Wanke
RE: Federal and State Regulatory Report—Contract Surety
DATE: November 11, 2009

The following is a report on rules affecting contract surety that were recently proposed or adopted. Regulations summarized in previous reports are marked (♦) for your convenience. The status of these regulations is updated in this report.

FEDERAL

Department Circular 570: Department of the Treasury Financial Management Service—Fiscal Service

The U.S. Department of the Treasury (Department) published revisions to the 2009 edition of *Circular 570*. The Department has terminated the certificates of authority as an acceptable surety on Federal bonds for the following companies: Excelsior Insurance Company; Peerless Indemnity Insurance Company; Consolidated Insurance Company; Indiana Insurance Company; The Netherlands Insurance Company and The Midwestern Indemnity Company. The terminations were effective on October 8, 2009. Bonds already issued and in effect from these companies will be allowed to expire, and bonds that are continuous will not be renewed.

ARKANSAS

♦216.00.09: Lottery Commission Vendor Bonds

PROPOSED: 06/19/2009
ADOPTED: 09/14/2009

The Arkansas Lottery Commission adopted new rules to implement HB 1002/SB 26 (2009), which requires vendors to obtain a performance bond, letter of credit or securities for contracts with the Arkansas Lottery Commission, which will determine the amount required for the bond. The rules detail the procurement process for vendors through a Request for Proposal or a Request for Qualifications process. Solicitations must include any requirements for performance bonds. The rules also provide for protest bonds for challenges to any contract award of a major procurement.

AGENCY CONTACT:

Ernie Passailaigue, Executive Director, Arkansas Lottery Commission, 500 President Clinton Ave, Ste 215, Little Rock, AR 72201, 501-683-2000

FLORIDA

**FAC 14-21.001: Department of Transportation
Bid Guaranties for Construction Contracts**

PROPOSED: 10/23/2009

STATUS:

10/23/2009 Proposed Rule

POSITION: Neutral

The Florida Department of Transportation (DOT) has proposed to repeal the current regulation which requires a bid guaranty on DOT construction contracts in excess of \$150,000. The guaranty must be in an amount equal to 5% of the bid amount. The DOT explains that they view the rule as unnecessary as bid guaranties are addressed in the contract specifications. The current statutory provisions concerning the bid guaranty have not changed, which provide that a guaranty is required for bids on contracts in excess of \$150,000 and that surety bonds are accepted to meet this requirement. The law provides that the guaranty cannot exceed an amount equal to 10% of the preliminary estimate of the cost of the work. Since the statutory mandate for a bid bond remains in place, SFAA is neutral on this rule change.

AGENCY CONTACT:

Deanna R. Hurt, Assistant General Counsel and Clerk of Agency Proceedings, Dept of Transportation, Office of the General Counsel, 605 Suwannee St, Mail Station 58, Tallahassee, FL 32399-0458

LOUISIANA

**◆ LAC 19:II Chapters 1, 5, 9: Office of Business Development
Small and Emerging Business Development Program**

PROPOSED: 09/20/2009

STATUS:

09/20/2009 Proposed Rule

POSITION: Support

The Louisiana Office of Business Development (Office) has proposed amendments to the current regulations for its small and emerging business bonding assistance program. The current program provides surety bond guarantee assistance to all certified active small and emerging construction businesses, and all other certified active non-construction small and emerging businesses in an amount not to exceed the lesser of 25% of the contract amount or \$200,000 on any single project. The proposed rules would allow small and emerging construction businesses with the status of "certified active" or "graduated" in the Small and Emerging Business Development (SEBD) program to be eligible for surety bond guarantee assistance until June 30,

2012, after which only certified active small and emerging businesses will be eligible for the assistance. The Office explains that the extension is needed to "provide bonding assistance to small Louisiana contractors...losing certification due to length of time in the SEBD program, yet are competing to participate in the current high volume of contracts being let for the rebuilding of the gulf coast." The rules had already been adopted on an emergency basis and now are proposed for permanent adoption.

AGENCY CONTACT:

Craig Hartberg, Department of Economic Development, Office of Business Development, P.O. Box 94185, Baton Rouge, LA 70804-9185 or 1051 North Third Street, Baton Rouge, LA 70802

NEW JERSEY

NJAC 16:44-10.1 and 16:44-10.2: Department of Transportation—Division of Procurement Retainage for Construction Contracts

PROPOSED: 09/21/2009

STATUS:

09/21/2009 Proposed Re-adoption with Amendments

POSITION: Neutral

The New Jersey Department of Transportation has proposed to revise its rules for retainage withheld on highway projects to implement the existing law for such withholdings. Current regulations provide that 5% of the partial payments for the first 50% of the total adjusted contract price must be held until substantial completion of the project. For the remaining 50% of the contract price, no retainage is withheld. Instead, the proposed rules would provide that 2% of the partial payments will be withheld until the project reaches substantial completion. Upon substantial completion, only 1% of the partial payments would be withheld. The proposal implements current law exactly, so SFAA did not comment.

AGENCY CONTACT:

Miriam Weeks, Administrative Practice Officer, Department of Transportation, 1035 Parkway Ave, PO Box 600, Trenton, NJ 08625-0600, fax 609-530-3841

OHIO

OAC 127-1-03 and 127-1-04: Minority Development Financing Authority Board Minority Business Bonding Program

PROPOSED: 10/09/2009

STATUS:

10/09/2009 Proposed Rule

POSITION: Neutral

The Ohio Minority Development Financing Authority Board has proposed rules to amend the application process for its minority business bonding program. The proposal would eliminate the current requirement that the minority business submit evidence that two surety companies had

denied it a bond or that the minority business has applied to two surety companies for a bond and has neither received nor been denied a bond 60 days after the application was made. The rule would implement HB 1 (2009), which eliminated this requirement from the law. Since the rule would implement the new law exactly, SFAA did not comment.

AGENCY CONTACT:

Florence Murray, Assistant Chief Legal Counsel, Department of Development, 77 S High St, 29th Floor, Columbus, OH 43215, Florence.Murray@development.ohio.gov, 614-466-5587

OREGON

Department of Justice

Retainage—Attorney General's Model Public Contract

PROPOSED: 11/01/2009

STATUS:

11/01/2009 Proposed Rule Notice

POSITION: Support

The Department of Justice (Department) has proposed to implement legislative changes made to the public contracting laws, including HB 2955 (2009). The new law authorizes public agencies to accept a surety bond or other forms of security in lieu of withholding retainage on a public contract. No regulatory language is available currently. The Department has released only a notice of proposed revisions.

AGENCY CONTACT:

Carol Riches, Dept of Justice, 1162 Court St. NE, Salem, OR 97301, 503-947-4700