

SFAA comments on House Bill 1 – July 2009

The Ohio Senate amended HB 1, the state budget bill, in the eleventh hour to include provisions to permit minority businesses to do public projects without being required to provide bid or final bonds right before the bill went to conference committee. SFAA worked with an industry group to defeat the bond waivers. When it became very unlikely that we would be able to get the bond waivers out of the budget bill, we worked to amend them with an industry group, consisting of Cincinnati Insurance Company, Great America, Liberty Mutual, Westfield, the AIA, PCI, NASBP, Ohio Insurance Institute, and the Ohio Surety Federation. SFAA drafted amendments that were aimed at lowering the amount of the bond waivers, eliminating the perpetual nature of the bond waivers, and requiring minority contractors to successfully complete a bond education or technical assistance program before undertaking any project without bonding. Most of our amendments were included in the final bill that went to the Governor's desk for signature.

As passed, HB 1 would permit small and emerging contractors to do four state or local construction projects without bonding. The first project without bonding in a State project may be up to \$25,000, after which a contractor can obtain a contract of up to \$50,000 without providing the bonds required by law. The third contract without bonding is for a project up to \$100,000, and the fourth is for a project of up to \$300,000. The size of the unbonded projects for local governmental entities are \$25,000, \$50,000, \$100,000 and \$200,000. We had the bill clarified so that the contractor has to successfully complete one unbonded job in order to be awarded another one. In order to get another unbonded contract, the state or local government must accept the previous unbonded contract as completed, and all subcontractors and suppliers must be paid. As originally introduced, HB 1 would have permitted five unbonded projects, and the maximum unbonded job would have been \$600,000, after which all subsequent public work under that amount could be done without bonding.

SFAA's amendments regarding bonding educational programs were also included in the final bill. Contractors must be participating in a contractor assistance program for the first two unbonded projects and must have successfully completed such a program in order to obtain the last two unbonded projects. We also were successful in defeating efforts to make the bond waivers permanent. In the end, provisions were added to the bill to permit contractors to repeat the bond waiver process one more time if the contractor completes the fourth unbonded job and cannot obtain a bond for a project of \$400,000 or less on a state project or \$300,000 or less for a local government project. The contractor must show rejection by two sureties in order to repeat the bond waiver process. The bill sponsors included the \$400,000 and \$300,000 amounts so that small and emerging contractors could not apply for bonding levels in the millions of dollars, and easily obtain rejections from two sureties such that they could start over in the bond waiver program. Finally, SFAA's amendment requiring annual reports to the legislature on the bond waivers and contractor assistance programs also is included. The annual reports must contain recommendations as to whether the bond waiver and contractor assistance programs should be continued. In the process of drafting amendments, the bill sponsors also had the bill amended so that it applies to all small and emerging contractors and not just minority contractors.

On Monday, the Ohio House and Senate passed the version of HB 1 that came out of conference committee and sent the bill to the Governor, who is expected to sign it this week. The legislature failed to finish the budget by the June 30 deadline and has passed two week-long continuing resolutions to keep the state government going while the legislature debated the budget bill. The House and Senate also approved another continuing resolution that will go into effect tomorrow if the Governor does not sign the bill tomorrow. The Governor may want more time to review the 3,000 page document. Legislators have been struggling over the last two weeks to eliminate a \$3.2 billion budget deficit in Ohio. We've attached the only copy we have at this point of the bond waiver provisions in HB 1. They are contained in two documents. The first document is HB 1 as originally introduced. The second document

is the amendments that were made to the original bill. The two have to be read in tandem to get the final result.

Once all the dust settles, this new and limited bond waiver program will have to be implemented in the Ohio state and local procurement procedures. Throughout this process, we have received questions and comments from a number of SFAA members as to how these provisions will work out in practice. The following are some of the comments that we've received:

-- Section 143.54 of the Ohio procurement law requires any bidder on a state or local public improvement project to provide a "bid guaranty." The bid guaranty can be in the form of a bid bond, certified check, cashier's check or letter of credit and must be in an amount of 10% of the bid. HB 1 says that small and emerging contractors cannot be required to provide a bid bond. It does not say that they do not have to provide a bid guaranty. In fact, 153.54 requires (shall) state and local entities to obtain a bid guaranty. Must they now require small and emerging contractors to provide checks and letters of credit? Do they now have the authority to waive any kind of bid guaranty—or just the bid bond? The surety would give a bid bond to a qualified contractor for free. All the other options will have some cost to the contractor. So qualified contractors will be bidding on a job with a free bid bond and small and emerging contractors will be bidding on the same job with the more costly options of checks and LOCs? In the alternative, will state and local government have to let contracts for which some of the bidders have to provide bid security and others do not?

-- How many jobs can a small and emerging contractor bid in order to get that first unbonded job? It should be the case that the contractor can have only one open bid at a time since the state or local government will not know if it will turn into the winning bid until the bidding process is over. If awarded the job, then the contractor must successfully complete the job before a second job can be bid without a surety bond. Under the amendments, a contractor could bid on an unlimited number of contracts in order to get one.

--Who will keep track of how many times a small and emerging contractor bids to obtain a contract, and who will know if the contractor is on their first, second, third or twentieth contract without bonds? The bond waivers are not a "program" that the Department of Development "administers." Contractors are not going to be applying to the Department for a bond waiver, but rather bidding without bonds to various state and local entities. What mechanism exists to detect and prevent a contractor from doing four unbonded jobs and then starting all over under a different company name and/or a change in ownership? The Ohio General Services Administration may have to assume this function. Also, Ohio's bidding law is similar to the Wicks Act in New York in that public projects can be let as separate contracts for each of the major trade groups on the job. That is, there can be multiple general contractors on some jobs. This may involve a lot of tracking, and resources will be needed to create new monitoring functions.

--If contractors are bidding on a job without bonds against other bonded contractors, who is going to assure that the unbonded contractors are qualified? Suppose a school district gets six small contractors bidding without bonds on a \$150,000 project. In the absence of the surety, who will review those contractors to see if they can complete the job and when in the process will such qualification be done? Will the school district have to review all six of them in the bidding process or can the school district wait and just review the low bidder—and then go through the time and expense of re-letting the job if the low bidder turns out not to be qualified?

--Letting a job in which the bids of small and emerging contractors do not have to include bid and final bonds, and in which the bids of other contractors must include bonding, may well increase bid protests in Ohio. Under the Ohio procurement laws, the state is required to accept the "lowest responsible and responsive bidder." For the State's political subdivisions, it's the "lowest and best" bidder. What if an unbonded small contractor is the low bidder. Do the public contracting entities in Ohio have enough authority under the statutory standards of "responsible and responsive" bidders and "best" bidders to award the contract to a bonded contractor? HB 1 may turn Ohio's procurement process into a contentious and litigious one.

We will keep our members advised on developments with bond waivers in Ohio.