



**The Surety Association of America**

**ANNUAL STATE LEGISLATIVE REPORT**

**ON**

**CONTRACT SURETY**

**SEPTEMBER 2005**

**The Surety Association of America**  
**1101 Connecticut Avenue, NW, Suite 800**  
**Washington, DC 20036**  
**Telephone: (202) 463-0600 – Fax: (202) 463-0606**  
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## The Year in Review . . .

During 2005, the Surety Association of America (SAA) received and reviewed more than 3,000 bills, and actively tracked 1,200+ bills. SAA staff has been active on a number of key state legislative issues affecting fidelity and surety, as well as coordinating with the American Insurance Association (AIA), the local surety associations and the National Association of Surety Bond Producers (NASBP).

SAA led the charge in opposing **Maryland** S.B. 324. As enacted, the bill would have raised the bond threshold from \$100,000 to \$200,000, although the bill's sponsor originally proposed a \$400,000 threshold. SAA testified in the House hearing on S.B. 324 and requested that SAA members contact legislators in Maryland to urge retention of the existing \$100,000 threshold. This effort produced further compromise, some of which was based on a final SAA effort to draft an amendment; but the bill was enacted with a \$200,000 threshold for state projects. SAA, AIA and NASBP sought and obtained a veto from Governor Ehrlich. Maryland comes back into session in 2006, and any vote to override the veto should come early in the session; but SAA is not expecting that to happen. SAA will work with the sponsor of S.B. 324 to identify and address any problems—actual or perceived—with the availability of bonds for small, minority and emerging contractors.

SAA testified at a **New York** Assembly hearing this April on access to surety bonding on state contracts for small, minority and woman-owned businesses. SAA testimony focused on the critical advantages of surety bonds over waivers or increases in the bond thresholds and how the SAA Contractor Development Program could serve as a model for bonding assistance.

Another significant action in 2005 was the exemption of contract sureties from the **Florida** bad faith law. Congratulations to the Florida Surety Association for using an opportunity to amend S.B. 652 on the House floor and achieve this result. The new law also requires that bond forms used in public construction projects contain references to the required notices and suit limitations in the Florida Code.

In **Texas**, H.B. 2039 waived the sovereign immunity of local governmental entities, permitting them to be sued for breach of contract and solving a problem that has been pending for several years. Like all other states, the Texas law authorizing the creation of local governmental entities authorizes such entities to “sue and be sued.” This generally had been interpreted to constitute a waiver of sovereign immunity -- until one Texas appellate court reversed the case law history and found that there was no waiver of sovereign immunity. This new law clarifies and reaffirms the legislature's intent that, when local governments are given the authority to enter into contracts, they are not immune from suit under those contracts.

The industry won a significant victory in **Washington** when AIA took the lead in successfully amending legislation to exclude surety from any exemptions in the state's existing anti-directed insurance programs law. As introduced, Washington S.B. 6022 would have expanded the exemptions to the existing anti-directed insurance programs law to include any public construction project with an actual or estimated value of the project in excess of \$200 million. This bill passed the Senate; but in the House, an amendment was added to provide that any exemptions do not include surety bonds. The previous law included surety within the narrow

exemptions in which directed insurance programs were permitted, so that this new law both improves the existing law and successfully excludes surety from the expanded exemptions.

Finally, there are several other new laws of note. SAA members who do their own rate and form filings should note that **Oklahoma** repealed its deemer clause this year. This state, however, is not noted as a difficult one for rate and form filings, particularly for commercial lines. **South Carolina** House Bill 308 shortens the time period to bring an action to recover damages arising out of the defective or unsafe conditions of an improvement of real property from 13 to 8 years. This includes actions against sureties or other guarantors.

### **Still Pending . . .**

SAA is working with AIA to amend the **Michigan** Builders Trust Fund Act to make it applicable to public works projects on the same basis as it currently applies to private construction projects. While there is no indication in the current law that it does not apply to public projects, the Michigan Supreme Court has held that it does not. The trust fund has been useful in private projects in protecting the interests of labor and materials suppliers, and it should do so for public projects as well. AIA has taken the SAA amendments to the Michigan law and found a bill sponsor. The SAA amendments are in the state legislative process for bill drafting in Michigan; and, if change is achieved, it will likely occur in 2006, the second year of this session.

**New Jersey** A.B. 4161/S.B. 2702 would make a contractor and its sureties liable for excess costs if the State declares the contractor to be in default for failing to pay the prevailing wage. This bill may move in the fall. **New York** (A.B. 4040) has prevailing wage legislation as well, but it has not, and is not, expected to move. In contrast to the New Jersey bill, which seems to make failure to pay the prevailing wage a material default, the New York approach would authorize the recovery of court costs, attorneys' fees and damages and impose civil penalties.

### **Member Feedback is Needed!**

As always, the Surety Association of America welcomes input from its members on its services. As this is our first Annual State Legislative Report, we encourage members to give us feedback on whether this information is useful in the time frame and format in which you received it.

# 2005 Annual State Legislative Report on Contract Surety

## Introduction

Because of the diversity of the business of its members, SAA tracks all state and federal fidelity and surety legislation. In reporting legislative developments, however, SAA has moved to reports based on the three major lines of business—contract surety, commercial surety and fidelity. This report contains the 2005 actions on contract surety. Interested SAA members can access the reports on commercial surety and fidelity on the SAA website.

This SAA Annual State Legislative Report on Contract Surety contains two major parts: one section contains a summary of the 2005 state legislation on SAA's priority issues for contract surety and the second is a state-by-state compilation of all the 2005 state enactments relating to contract surety.

Only six states are still in session in 2005: **Massachusetts, Michigan, New Jersey, Ohio, Oregon, Pennsylvania** and **Wisconsin**. **Illinois** and **New York** will likely re-convene briefly this fall. SAA will update this report with a year-end edition that covers additional state actions and all 2005 federal legislative developments.

## I. Summary of State Legislative Activity on SAA Priority Issues

### A. Little Miller Act Thresholds

Several states had legislation to raise the threshold on public contract bonds. The 2005 legislation indicates that states see the \$100,000 threshold in the federal Miller Act as a target for them, either as a threshold for state projects in general or for specific projects. In practice, the SAA opposes all increases in the thresholds. We actually work to stop them if they are a significant increase, trying to keep state thresholds at \$25,000. The AIA works to oppose any threshold above \$50,000.

#### 1. 2005 Enactments

**Connecticut** S.B. 653 increases the threshold from \$50,000 to \$100,000, and **Connecticut** S.B. 1251 clarifies that the bonding requirements apply to the state and municipalities. This new law deletes references that previously applied bonding requirements to "political subdivisions of the state." **Connecticut** S.B. 948, however, provides that any political subdivision that fails to obtain bonds is liable to any person that the contractor does not pay for labor or materials supplied. Such persons shall have the same rights to sue the state as they should have had against the surety had a bond been obtained. **California** S.B. 1113 repeals an existing requirement that home improvement contractors give notice to the owner that explains mechanics liens and advise the owner to require that the contractor obtain payment and performance bonds. **District of Columbia** L.B. 375 permits the Mayor to make any arrangements deemed appropriate for payment security, terms and conditions for projects under

the Housing Production Trust Fund Act, which develops mixed-income housing and mixed-use projects for the District. **Kentucky** S.B. 49 raises the threshold from \$25,000 to \$40,000. **Louisiana** S.B. 46 raises the current threshold for performance bonds in contracts with the New Orleans Sewage and Water Board from \$50,000 to \$100,000. **Maryland** S.B. 324 raises the threshold from \$100,000 to \$200,000 for state projects but retained the \$100,000 threshold for projects of all other public entities. SAA, AIA and NASBP obtained a veto from the Maryland Governor. The Assembly reconvenes in January 2006, and any vote to override a veto usually comes early in the session. **Nevada** S.B. 467 increases the threshold for payment and performance bonds on public projects from \$35,000 to \$100,000. The new law also states that nothing shall prohibit the state from requiring bonds on any contract. **New Mexico** Senate Bill 814 requires subcontractors to post payment and performance bonds on any public project if the subcontractor's contract is in excess of \$50,000. **New York** S.B. 4058 requires performance bonds on state highway projects, although it eliminates retainage. The Governor vetoed **New York** H.B. 8699, which would have required payment and performance bonds in reconstruction of school building in Syracuse. **Oregon** S.B. 477 is a unique new law. It requires contractors and subcontractors on public projects to file a new, one-time \$30,000 public works bond to assure that they will pay wage claims of workers ordered by the state Bureau of Labor and Industries. The new law increases the threshold from \$25,000 to \$50,000 for public works projects to require that contractors pay the prevailing wage. Separate bonds are not needed for each project, and the new bond is in addition to any other bonds. The surety is not liable for more than the penal sum, and the surety may cancel the bond with 30 days notice. Disadvantaged, minority, women or emerging small businesses are given a one-year exemption from posting this bond. **Oregon** H.B. 2214 creates a \$100,000 threshold for payment and performance bonds on state projects and a \$50,000 threshold for highway projects. **Pennsylvania** House Resolution 391 directs the Joint State Government Commission to study the ways in which Pennsylvania's procurement code may be changed to allow citizens, universities and businesses to make unsolicited proposals to Pennsylvania state agencies, boards and commissions. A report is due on November 30, 2005. **Texas** H.B. 2702 authorizes the Department of Transportation to set the amount of payment and performance bonds at a lower amount if it is impracticable for a private entity to provide a bond for the full contract amount in a comprehensive development agreement. In addition to or instead of payment and performance bonds, the state DOT may allow alternative forms of security. **Texas** H.B. 467 removes a requirement that political subdivisions, that are economically distressed and applying for financial assistance on water projects, require contractors on the project to post a performance bond equal to 100% of the contract.

## **2. Status of Other 2005 Threshold Legislation**

*a. Still Pending --* **California** H.B. 316 would require private home improvement contracts to contain a notice, in close proximity to the signatures, that the owner has the right to require the contract to have a payment and performance bond. *Engrossed*; **New Jersey** S.B. 1543 repeals a provision that bids from subcontractors show evidence of performance security in contracts with state colleges in excess of \$26,200. (*In Committee*) H.B. 4161 would hold a contractor and its sureties liable for any "excess cost" resulting from the failure to pay the prevailing wage on any construction project of the state. (*In Committee*)

In addition, a whole string of bills have been introduced recently in **Pennsylvania** to raise the threshold for requiring bonds from \$10,000 to \$25,000 for specific political subdivisions or

building authorities. The bond threshold would be adjusted yearly thereafter, based on changes to the Consumer Price Index (CPI). These bills include H.B. 1854, 1855, 1856, 1857, 1859, 1871 and 1872. H.B. 1860 is similar, but it raises the bond threshold from \$4,000 to \$10,000 on projects of the public school construction authority.

**b. Carryover -- Iowa** H.B. 449/S.B. 1219 would amend numerous thresholds in the public contract law and would raise the bond thresholds from \$25,000 to \$100,000. **Iowa** S.S.B. 1199 would amend state law regarding the state board of regents and institutions under its control. The bill would exclude the board of regents from the definition of “municipalities” under the public contract law so that it would be released from compliance with public contract law. The bill also would increase from \$25,000 to \$100,000 the threshold at which the board of regents must advertise for bids on construction projects and would reduce the retainage that must be held in any project. **Kansas** H.B. 2186 would raise the threshold from \$10,000 to \$100,000. **Minnesota** S. 697 would eliminate performance bonds when a contract is between two public bodies. **Oklahoma** S.B. 558/H.B. 1770, which originally would have raised the limit from \$25,000 to \$100,000, was amended to \$50,000. **South Carolina** H.B. 3653 would define a “historically underutilized business” and provide a budget for the General Services Division to establish a program to help HUBs obtain surety bonds, including contracting for the implementation of the program. **Washington** H.B. 1138/S.B. 5249 would permit state agencies to waive bonds and retainage on contracts under \$200,000, in which case the State assumes liability for payment for amounts due from the general contractor, if not paid. (*Passed the House*)

**c. Defeated -- Nevada** A.B. 238 would have allowed a lessee constructing improvements on leased land to enter into an agreement with a contractor to provide alternative security, in which case the required bonds would not have to be provided. The bill applied to projects in excess of \$1 million. (*Dead*)

## **B. Retainage**

This is a perennial legislative issue for SAA. SAA supports the judicious use of retainage in private and public construction projects. SAA opposes any bill in which the retainage will be reduced to less than 5% and works to oppose reductions to amounts above 5%. There were several common features to the 2005 state legislation:

- There were a number of bills introduced to reduce retainage from 10% to 5%, which may be the first step toward coming back to eliminate retainage altogether;
- Another trend was a focus on time and conditions under which retainage must be released, with most focusing on reducing or releasing retainage when a project was 50% completed;
- There also was an increase in the number of bills introduced to reduce or eliminate retainage in private construction contracts. SAA believes that the terms of a private construction contract should not be the subject of regulation.

### **1. 2005 Enactments**

**California** A.B. 1329 permits any city in Solano and Yolo counties to enter into design-build contracts. Adequate bonding would be required in these contracts, but retainage would be

limited to no more than 5%. **Florida** H.B. 509 restricts retainage for state agencies and local governments. The new law permits the state and local governments to retain 10% of payments until the project is 50% completed and 5% thereafter. A municipality with a population of 25,000 or fewer may withhold retainage in an amount not to exceed 10% until the project is completed. For the last half of the project, the contractor may elect to withhold more than 5% from its subcontractors, with written notice. When the project is 50% completed, the contractor can request a local governmental entity to pay out half of the retainage. The retainage limits do not apply to federally funded projects or any project of \$200,000 or less. **Montana** S.B. 286 reduces the amount of retainage permitted in both private and public construction contracts from 10% to 5% and provides that retainage must be released on substantial completion of the project. **New York** S.B. 4058/H.B. 8450 eliminates retainage provisions in the New York highway law, but would require payment and performance bonds. **Oregon** S.B. 477 requires that the state retain 25% until the general contractor submits the required certified payroll statements and requires a contractor to retain the same amount on first-tier subcontractors until the certified payroll statements are submitted. **South Carolina** S.B. 365 reduces retainage on public projects from 5% to 3.5%. **Kansas** S.B. 33 and **Nevada** S.B. 300 regulate private construction contracts and limit retainage to no more than 10% of the contract. As noted above, **Montana** S.B. 286 reduced retainage in private contracts from 10% to 5%.

## 2. Status of Other 2005 Retainage Legislation

*a. Still Pending--California* A.B. 245 would add Orange County to the list of counties that are permitted to enter into design-build contracts for projects greater than \$10 million. In such contracts, retainage may not exceed 5% if payment and performance bonds are in place. If enacted, the same authority that exists for seven other counties would sunset. (*Passed Assembly; remains in committee in the Senate;*) A.B. 1460 would establish procedures for the release of retainage on public works in subdivisions. The public entity would have 45 days upon written notice from the sub-divider to review and comment or approve the work. (*Engrossed*); A.B. 1511 is similar to A.B. 1329 only in that it would specify what counties could enter into design-build contracts for building projects in excess of \$2.5 million. Retainage would be limited to 5%. (*Engrossed*); A.B. 1622 would prohibit retainage of more than 10% on private contracts until 50% completion, after which retainage could be no more than 5%. Within 45 days after completion, retainage would have to be released to the contractor or subcontractor with interest. (*Engrossed*); S.B. 920 would permit a contractor to hold no more than 5% retainage and would require the contractor to pay retainage within seven days of completion on federally funded Department of Transportation contracts. Retainage is permitted only if the contractor requires bonds from the subcontractor and the bonds are not provided. (*Held in committee*).

**Pennsylvania** H.B. 652 would reduce retainage on public projects to 6% or less until half of the work is completed. Under the current law, retainage is 10%. The bill also would reduce the retainage that can be held after the project is 50% completed from 5% to 3%. (*Filed*) H.B. 1514 would increase, from 50% to 80%, the amount of retainage that must be returned to contractors when a project is 50% completed. After a project is 50% completed, retainage cannot be more than 2%. (*Introduced*) H.B. 1878 would provide that a construction code or municipal code official may not issue a certificate of occupancy until the owner certifies that all retainage for contractors, subcontractors and materials suppliers have been released.

**b. Carryover--Iowa** S.S.B. 1199 would reduce substantially the retainage that must be held in construction projects under the control of the state board of regents. Payments may be made without retainage until the project is 95% completed. Thereafter, contractors can demand release of any retainage held. **New York** A.B. 2721/S.B. 2547 would require retainage on private contracts to be held in an escrow account and would subject the owner to payment of 1% interest if retainage is not released at the appropriate time. *(Advanced to third reading)* **New York** S.B. 2549/A.B. 6035 would require that the retainage would have to be reduced by 50% and 50% of the retainage would have to be released when 50% of the public project is completed. *(Referred to Committee)* A.B. 6600/S.B. 3161 would permit retainage at 20% if payment and performance bonds were waived. *(In committee)* **Oklahoma** H.B. 1748 would remove a provision allowing retainage from a prime contractor on a public works project. Retainage from subcontractors would continue to be allowed. **Washington** H.B. 1138/S.B. 5249 would allow the government to waive retainage and payment and performance bonds on small works projects, which are construction projects under \$200,000. *(Passed the House)*

In addition, there are a number of bills pending in **New York**, each applicable to one specific project, which would require 5% retainage if payment and performance bonds were in place and 10% if there were no bonds. These bills are A.B. 40/S.B. 89, A.B. 42/S.B. 91, A.B. 1021, A.B. 6196, S.B. 3068, S.B. 3072, S.B. 4415 and A.B. 8144.

**c. Defeated--Arkansas** S.B. 555 would have reduced retainage from 10% to 5%. *(Dead)* **Connecticut** H.B. 6520 started off as a bill that would have required claimants for payment of retainage to serve notice of the claim on the surety company with 180 days of the applicable payment date. If the surety did not respond within 90 days, either by paying or providing notice of dispute, the surety would have waived its defenses to the entire claim. The provisions on the loss of surety defenses were removed in the legislative process, but provisions reducing retainage from 10% to 5% were reported favorably in committee. *(Dead)* **California** A.B. 341 would have increased, from 150% of the disputed amount, the retainage that could be held on public and private contracts. *(Enacted, but returned from the Governor per Assembly request and sent to the Senate, where the bill was substituted for a bill dealing with delivery of county health care programs.)* **Indiana** H.B. 1399 would have enacted some provisions on retainage on public works projects, including a public works mediator to resolve disputes. *(Dead)* **Maine** S.B. 503 would have allowed retainage at 5%. *(Voted not to Pass; Dead)* **Maryland** H.B. 188 would have limited retainage to 5% on private construction contracts over \$250,000. *(Dead)* **New Hampshire** H.B. 33 would have required the commissioner of administrative services to develop retainage rules for all state construction contracts. This was changed to a study bill and defeated. *(Dead)*

## **C. Owner-Controlled Insurance Programs**

### **1. 2005 Enactments**

The surety industry obtained a significant victory on this issue in **Washington**. The AIA lobbyist has successfully amended legislation to exclude surety from any exemptions in the state's existing anti-directed insurance law. As introduced, Washington S.B. 6022 would have expanded the exemptions to the existing anti-directed insurance law. An amendment to the law exempted any public construction project with an actual or estimated value of the project in excess of \$200 million. The amendment prohibited aggregation of unrelated projects in

calculating the threshold. The AIA lobbyist was successful in amending the bill so that exemptions do not include surety bonds. Note that current law included surety within the narrow exemptions in which wrap-ups are permitted. With the amendment, surety will be excluded from any wrap-up, so that this new amendment both improves the existing law as well as successfully excludes surety from the expanded exemptions. In **Indiana**, S.B. 244 enacts a prohibition on directed surety in a law authorizing design-build projects.

In related action, **California** S.B. 548 permits the state director of general services to establish a master builders' risk insurance program for all state construction projects, which would include indemnity issues. **Connecticut** S.B. 1251 exempts public projects of the University of Connecticut and one or more municipal projects in excess of \$100 million from the prohibition on owner-controlled insurance programs (OCIP). Under Connecticut law, however, there is a specific anti-directed surety provision so that surety would not be included in the OCIP provisions. Connecticut S.B. 660, which would have prohibited the use of OCIP in any state construction projects, died.

## **2. Status of Other 2005 OCIP Legislation**

**Hawaii** H.B. 644/S.B. 753 would repeal a provision limiting pooled insurance to construction projects estimated at \$50 million or more. (*Carryover*) **North Dakota** S.B. 2279 would have permitted auctioneers and auction clerks to obtain the required surety bonds from the North Dakota Auctioneers Commission. (*Dead*) **Texas** S.B. 1594 would have created a program to assist small contractors involved in public projects costing more than \$20 million, as well as a central system for the purchase of payment and performance bonds. (*Dead*) **Washington** H.B. 1127 would authorize the use of a wrap-up insurance policy for cities and counties for construction projects in excess of \$200 million. (*Dead*) **Washington** S.B. 5384 would authorize wrap-up insurance policies for public projects in excess of \$100 million and in counties with a population of 250,000 or more. (*Dead*)

## **D. Recovery Fund Legislation**

SAA has monitored legislation creating recovery funds looking for bills that would substitute such funds for surety bonds. The 2005 legislation generally involved funds to permit recovery in excess of surety bond coverage, rather than in lieu of bonds.

### **1. 2005 Enactments**

**Nevada** H.B. 34 raises the amount that can be collected from the State Contractor's Board recovery fund from \$30,000 to \$50,000 and raises the maximum that can be collected from the fund against any one contractor from \$200,000 to \$400,000.

### **2. Status of Other 2005 Recovery Fund Legislation**

**Maryland** H.B. 752 /S.B. 671 would have created the Home Builder Guaranty Fund within the office of the Attorney General for consumers to recover in the construction of a new home. (*Dead*) **New York** S.B. 3209 would create the Construction Liability Fund to provide for the issuance of insurance to owners and contractors whose liability insurance was cancelled or increased by 30% or more. (*Carryover*) **Oregon** H.B. 2714 would have created the Construction

Consumer Fund for payments after a contractor's surety bond was exhausted. (*Dead*) **Oregon** S.B. 1070 would have created the Construction Contractor Risk Management Council and require the Council to ensure that public liability, personal injury and property damage coverage is available to contractors. The Council would have been authorized to establish a program to assure the availability of coverage, to offer optional coverage and to create a warranty coverage program for contractors. This does not currently involve surety. (*Dead*)

In a related matter, legislation died in **Texas** this year -- H.B. 2902 -- that would have created a joint underwriting association for the purpose of issuing bonds.

## II. Looking Ahead to 2006

The National Conference of State Legislatures (NCSL) published surprising news early in 2005. In its first quarter report on state budgets, the NCSL reported that, while many states are still treading water trying to keep costs within expected revenues, the states also had made progress in eliminating the large budget deficits that have plagued them in recent years. In April, 34 states collected more tax dollars than projected. The increase in revenues, combined with deep cuts in state spending, has improved the overall state financial picture. The NCSL confirmed at its Annual Meeting in August that the states collectively have slashed \$235 billion in spending since 2001. By its August meeting, the NCSL reported that no state would end fiscal year 2005 with a deficit. State had an aggregate balance of \$37.8 billion, with most states having a 7% balance. **Maryland**, for example, reported a \$1 billion budget surplus due to cuts in spending and increased revenues. This is considerable improvement compared to 2004, when ten states had new gaps after the fiscal year began, and 2003 in which 31 states had that problem. Yet, over half of the states are projecting spending overruns in some portion of the budget, usually for education, Medicaid and other health care costs.

The state budget picture is by no means rosy, but it has turned the corner. The cuts that the states have made over the past several years are now generating pressure to restore state funding in a few states, including public construction. **New Jersey**, for example, just approved a \$27.9 billion budget for 2006, the second largest in state history, not long after being listed as one of the states with the biggest budget deficits. **Connecticut, Maryland, New York** and **Ohio** are all using 2005 "windfalls" to restore funds to education and health programs and in grants to cities and towns. Other states are returning excess funds to the taxpayers. **Nevada**, for example, will return \$300 million.

Yet, the current push in many states is to institutionalize cuts and limitations on state government spending. In **California**, Governor Schwarzenegger is pushing the *Live Within Our Means* ballot initiative in November, which will ask voters to enact an initiative to prevent the state budget from growing faster than average increases in state revenues from the three prior years. Almost half of the states considered spending cap bills this year. Some had different approaches than California, prohibiting budget growth faster than the growth rate of the population, inflation or personal income. None of these passed; but the Americans for Tax Reform, an anti-tax activist group pushing these initiatives, believes that a successful effort in California this November is a catalyst for the 2006 state sessions.

Overall, states still fear budget shortfalls due to export of the federal deficit to the states in unfunded federal mandates, particularly through statutory and fiscal obligations imposed on the states for entitlement and mandatory programs, such as Medicaid.

### **A. Public Policy Issues for 2006**

The state and federal insurance legislative and regulatory agendas in the near future may well be dominated with issues related to Hurricane Katrina in New Orleans. An unprecedented level of construction will be needed to rebuild the highways and infrastructure of New Orleans. This effort will pressure the capacity of the surety, construction and other industries involved in rebuilding activities. Availability and affordability issues may need to be addressed. In addition, the area may be highly visible focal point for many of the current legislative and regulatory issues that affect surety. There will be pressure to waive bond requirements, suspend competitive bidding, and eliminate retainage, among many other protections and requirements, just to get the work done. Already, President Bush has signed an emergency proclamation suspending the minimum labor standards in the federal Davis-Bacon Act for federal construction projects in affected areas of the Gulf Coast region. That federal law requires that contractors pay workers the locally prevailing wage in federal construction projects. The Administration also wants federal agencies to have the authority to expedite procurement contracts needed to get aid New Orleans. One such proposal would raise the threshold at which federal contracts are subject to competitive bidding requirements from \$25,000 to \$250,000 for any disaster-related purchase. Small business and other considerations would also be waived. This type of pressure to waive the public policy protections contained in state and federal procurement processes will escalate as the recovery and rebuilding process goes on in New Orleans.

In the normal course of the state legislative process, the SAA expects that retainage will continue as a key legislative issue. The Associated Subcontractors of America (ASA) has targeted elimination of retainage laws as one of its priority issues. At its Annual Legislative Institute in June 2005, one of the key programs on the agenda for the American Subcontractors Association was "Getting Your State to Eliminate Retainage." The **North Carolina** Department of Administration has underway a broad based study of the retainage issue.

In addition, states are continuing to look at legislation to conform their laws to the federal Department of Transportation's regulations in 49 CFR Part 26 (1999) regarding the retainage procedures that states have to follow in order to retain DOT highway funding. The federal regulations are aimed at creating a level playing field in the award of federally funded transportation contracts for disadvantaged business enterprises (DBEs). States that want to receive federal funding must have a DBE program, which, among many other things, requires prompt payment mechanisms to be in place. The DOT gives the states 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 seem to think that the path of least resistance is the elimination of retainage on a highway project on which federal funds are involved. Other routes are perceived as requiring too much administrative and paper work. **Illinois** was the first state to eliminate

retainage by way of a DOT bulletin in 2003, shortly after the federal regulations became effective. This year, **New York** enacted S.B. 4058, eliminating the retainage provisions in the state highway law. The New York law, however, also now requires payment and performance bonds. Only payment bonds were required under prior law. Still pending in **California** is S.B. 920, which would limit retainage to 5% and require the contractor to pay it within seven days of completion of state DOT projects involving federal funding.

From the SAA perspective, legislation prohibiting retainage on all state DOT contracts is overbroad. The federal regulations apply only when federal funding is involved and only when DBEs are involved. In New York this year, SAA and AIA agreed to approach the New York DOT to urge adoption of the other, narrower options under the federal regulations. AIA state counsel was met with strong resistance because of the perceived administrative burden of the other alternatives. The DOT argued that it could still require retainage when appropriate because the net affect of S.B. 4058 makes New York law silent on the issue of retainage. It was clear that at least this state DOT had been contacted by the federal DOT about its compliance with the prompt pay provisions and felt pressure to come into compliance. It remains to be seen if the federal DOT will be enforcing its regulations with urgency in the near future and whether this will generate other state legislation on the issue. This situation may also create an opportunity for opponents of retainage to seek elimination in other contexts as well.

To help address the retainage issue in all the contexts in which it arises, SAA has published a policy statement on the issue, as well as a summary of the state laws on retainage. The policy statement and summary are available on the SAA website in the Member Access section.

The state bond thresholds for public projects also will continue to be an issue. While the majority of states have bond thresholds of \$50,000 or less, the \$100,000 threshold in the federal Miller Act becomes a target. In addition, SAA expects to continue to see attempts to exempt specific projects or entities from the bond requirements, such as was done this year in Jacksonville, Florida. Increasingly, state governments at various levels attempt to incorporate the principles and operations of private enterprises into public functions to become more efficient and effective. As states look at alternative methods of delivery, such as design build and public-private ventures, and enter into different kind of contracts or partnerships with the private sector on public construction projects, they may see less value in some of the current state rules and practices, including surety bonds. The legislation authorizing new methods of construction delivery often provides the vehicle to specify the bond requirements.

It also remains to be seen what the 2005 emphasis on state ethics will have on public contract law. Virtually every state considered some form of ethics or lobbying bill in 2005 in the wake of several high profile state government scandals involving high-ranking state politicians.

**Connecticut** Governor John Rowland was forced to resign in the wake of a kickback scandal, and a **Tennessee** state senator resigned due to allegations of influence peddling. Connecticut responded by creating a new State Contracting Standards Board and charged it with creating a uniform procurement code for all state agencies. The Standards Board has the ability to suspend questionable contract awards. Tennessee prohibited legislators and many other government officials from taking consulting jobs with state contractors. Many other states created or enhanced their state ethics commissions, tightened state lobbying laws or prohibited lawmakers from voting on issues if they have a conflict of interests.

## **B. State-Specific Issues**

In May, the **West Virginia** Supreme Court held that the surety issuing the general contractor's payment bond could enforce an unambiguous pay-if-paid condition precedent clause in a subcontract. In other states where the courts reached this conclusion, the subcontractor groups introduced legislation the following session to change the result.

The Joint State Government Commission in **Pennsylvania** must report on its study of the state procurement laws and how they might be changed to allow unsolicited bids to be made to state agencies, boards and commissions. The November 30, 2005, report of the Commissioner may generate legislation in the State. Another issue being raised in Pennsylvania is a repeal of the Separations Act, which requires multiple-prime contracting on state projects.

SAA has approached the **Indiana** and **Nebraska** Insurance Departments about amending their laws to permit sureties to appoint the insurance commissioner as agent for service of process. These are the only two states that still require sureties to have an agent for service of federal process in each federal judicial district in the state in which bonds are provided. SAA hopes that each state will make the necessary amendment a part of the state insurance department legislative package next year. Indiana is one of the states that will have a short session next year, but the insurance department still will have the limited bill it will seek.

The **Utah** Department of Transportation proposed regulations to allow the DOT to waive bid security and to reduce the amount of payment and performance bonds to less than the 100% level. The regulations implement, for the first time, a design-build law enacted in 1996. Since the current law supports the regulations, SAA will address the benefits of surety bonds when the DOT has a specific contract before it with a proposed reduction in the bond requirement

## **C. Carryover States**

**Arkansas, Montana, Nevada, North Dakota, Oregon** and **Texas** are not in regular session in 2006. A number of other states have a short session in the even-numbered years in which only state budget and a limited number of other issues are considered before the state legislators go home to campaign for re-election.

The states in which legislation not enacted this session carries over to 2006 and can be considered next year are: **Alaska, California, Delaware, Georgia, Hawaii, Illinois, Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, Nebraska, New Hampshire, New York, North Carolina, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Washington and Wisconsin.**

## **III. 2005 State Enactments on Contract Surety**

Many types of legislation affect the market for contract surety, and this final section of the Annual report contains a comprehensive state-by-state listing of all the 2005 new laws affecting contract surety legislation. Since SAA members are generally most interested in new bond enactments and any reduction or elimination of existing bond requirements, SAA publishes a monthly summary of those enactments on its website – [www.surety.org](http://www.surety.org) -- so that SAA members can get prompt notice of these enactments. All the new bond enactments are included below, along with other enactments affecting contract surety. **This compilation is accurate as to September 1, 2005. SAA will publish a year-end update in December 2005.**

SAA members can find copies of these new laws on the various state legislature websites. SAA staff will be happy to assist any member in obtaining copies of these bills.

**ALABAMA -- no enactments to date.**

**ALASKA -- no enactments to date.**

### **ARIZONA**

-- H.B. 2579 applies the state bond requirements to the department of transportation construction manager-at-risk contracts. For job-order contracts, the performance bonds may be a single bond for the full term of the contract, a separate bond for each year of a multi-year contract or a separate bond for each job order.

### **ARKANSAS**

- H.B. 1814 authorizes cities and towns to use reverse Internet auctions for purchases of goods and services.
- H.B. 2390 raises the threshold, from \$500 to \$1,000, for requiring bids for contracts between contractors and fire protection districts.
- H.B. 2469 requires a bond of at least \$10,000 from sewage disposal system installers and from their designated representatives.
- S.B. 201 provides that only surety companies licensed in Arkansas may write bid bonds for public works projects.
- S.B. 482 requires a qualified efficiency engineering company to post a financial guarantee to guarantee the efficiency savings to be derived from engaging in an efficiency project
- S.B. 858 permits school districts to use public-private partnerships. Rules need to be developed to implement this new law.
- S.B. 925 allows alternative procurement procedures for municipal projects in excess of \$500,000. Bids must be reviewed by a pre-selection committee and interviews held with five candidates. Candidates will be evaluated based on their experience and record to complete projects on time and within budget. Payment and performance bonds will be required from whoever wins the bid.
- S.B. 1091 requires a provider of a guaranteed energy cost savings contracts to a state agency to post a bid bond, performance bond or similar financial assurance. The bill repeals a similar section that required the contractor to post one (1) multi-year performance bond covering the aggregate amount of the guaranteed savings over the contract term.
- S.B. 1093 authorizes public school districts to use design-build. The new law will require rules to implement it.
- S.B. 1095 requires the provider of an energy savings contract to post performance and payment bonds when contracting with a school district.

## **CALIFORNIA – Adjournment on September 8, 2005; Enactments to Date;**

--A.B. 1329 permits any city in Solano and Yolo counties to enter into design-build contracts. Adequate bonding is required in such contracts, but retainage is limited to 5%.

-- S.B. 548 permits the state Director of General Services to establish a master builders risk insurance program for all state construction projects. The deductible for any contractor is \$25,000.

-- S.B. 1113 repeals a requirement that contractors, in private construction contracts, provide the owner with a notice that contains a warning about mechanics liens and that advises the owner to require payment and performance bonds on the project. The replacement notice in the new law offers alternate ways to protect against liens, without mentioning surety bonds.

## **COLORADO**

-- S.B. 142, vetoed by the Governor, would have voided any provision in a construction contract that requires any person or their surety or insurer to indemnify, insure, defend or hold harmless a third party against liability for death or bodily injury to a person or damage to property caused by the negligence of the third party.

## **CONNECTICUT**

-- S.B. 653 increases the thresholds for bonds on public projects from \$50,000 to \$100,000.

-- S.B. 948 provides that political subdivisions that fail to obtain bonds are liable to persons that the contractor does not pay for labor and materials in the same manner in which the surety would have been liable.

-- S.B. 1251 exempts construction projects of the University of Connecticut from the prohibition against OCIPs. Also excluded are one or more municipal construction projects in excess of \$100 million if they are either (a) under the supervision of one construction manager or (b) in a municipality if they are under the supervision of two or more construction managers. The new law also clarifies that the state bonding requirements apply to the state and municipalities and deletes the previous application to political subdivisions of the state.

## **DELAWARE**

-- S.B. 73 allows state agencies and political subdivisions to enter into energy performance contracts to conserve energy and reduce energy or operational costs. The qualified provider has to provide a payment and performance bond relating to the installation of energy conservation measures in the amount equal to 100% of the value of the performance contract.

## **DISTRICT OF COLUMBIA**

-- L.B. 375 amends The Housing Production Trust Fund Act of 2005, the purpose of which is to develop mixed income housing and mixed-use projects in Northwest DC. Among other things, this bill would provide that the District of Columbia Procurement Practices Act shall not apply to any contract the Mayor may from time to time enter into for purposes of this title or the Mayor may determine to be necessary or appropriate for purposes of this title to place, in whole or in part. Of particular interest to the SAA is a provision that states that the contracts or other arrangements shall contain whatever payment security, terms and conditions as the Mayor may consider appropriate and shall be entered into with whatever party or parties the Mayor may select, after giving due consideration, where applicable, to the creditworthiness of the counterparty or counterparties, including any rating by a nationally recognized rating agency or any other criteria as may be appropriate.

## **FLORIDA**

-- H.B. 113 prohibits a surety from using the fact that the principal was unlicensed as a defense in a surety claim. The new law also provides that any provision in a payment bond that restricts the classes of persons protected or the venue in any proceeding related to the bond is unenforceable.

-- H.B. 509 re-enacts the Prompt Pay Act so that it applies to state agencies as well as local governmental entities. The bill limits retainage that state and local governments may withhold during construction. The new law limits retainage to 10% until the project is 50% completed, and 5% thereafter. Small municipalities may retain 10% until completion. After 50% completion, the new law permits a contractor to request that half of the retainage be released and to withhold more than 5% from subcontractors. The new law also reduces the time frames in which contractors and subcontractors must issue payments to their subcontractors and suppliers once they have been paid. Regarding claims on payment bonds, the notice of non-payment to a contractor in a public project must specify the portion being claimed for retainage.

-- H.B. 1167 allows the City of Jacksonville to waive payment and performance bonds on public projects when the cost is less than \$500,000 and the contract is awarded to a race-neutral and gender-neutral economic development program to encourage small local businesses.

-- H.B. 1681 provides that, in bonds issued on state DOT contracts, the surety is liable to the full extent of any modification to the construction contract up to 25% over the original contract, without regard to whether the surety was aware of the change. Modifications in excess of 25% of the original amount require the surety's approval to bond the surety on amounts over 25%.

-- S.B. 652 provides that a surety issuing a payment or performance bond on a construction project is not an "insurer" for purposes of the Florida bad faith law. The new law also requires that any bond form used in a public construction project must contain references to the notice and suit limitations in the Florida Code.

## **GEORGIA**

-- H.B. 530 changes the requirements for design-build contracts of the Department of Transportation from "the most responsive bidder" to the "lowest qualified bidder." No more than 15% of the DOT's contracts can be design-build in any fiscal year.

-- S.B. 270 requires 100% performance and payment bonds on public-private construction projects.

## **HAWAII**

-- S.B. 962 contains prevailing wage provisions. The new law requires the Department of Labor and Industrial Relations to establish the prevailing wage for laborers and mechanics in public works projects. The prevailing wage shall be the basic hourly cost plus fringe benefits.

## **IDAHO**

-- H.B. 263 requires that all public works construction valued at over \$100,000 requires 5% bid security if the political subdivision deems it is in the political subdivision's best interest. Similar provisions will apply to a political subdivision's decision to purchase or lease personal property or to procure services greater than \$50,000. Under prior law, a 10% bid bond or other financial security was required for construction greater than \$25,000 in irrigation districts.

-- S.B. 1081 stipulates that, if bids for a contract on the state highway system were made through electronic means, then a bid bond in electronic form with valid electronic signatures would have to accompany the electronic bid documents.

## **ILLINOIS**

-- S.B. 518 prohibits construction managers from being awarded a state contract if the CM or entity that owns or controls the CM furnishes the payment or performance bonds for other contractors on the project.

## **INDIANA**

-- S.B. 244 enacts a prohibition on directed surety in design-build projects. The new law authorizes design-build projects in the state and specifies that public entities must require the design-builder to furnish payment and performance bonds for the projects.

-- S.B. 307 gives the controller the authority to sue principals or sureties on any obligation, whether the obligation is in the name of the state or another person.

## **IOWA**

-- H.B. 581 repeals a law requiring a company building an interstate natural gas pipeline to either have property subject to execution within this state, other than pipelines, of a value in excess of \$250,000, a \$250,000 surety bond or other security.

## **KANSAS**

-- H.B. 2390 raises the value of the blanket performance bond that oil and gas well operators could post instead of an individual performance bond.

-- S.B. 33 regulates private construction projects. Owners must pay contractors within 30 days of an undisputed request for payment, and contractors must pay subcontractors within seven days of receiving payment. If the parties are not paid within this timeframe, interest is added daily to the payment, calculated at an 18% annual rate, until the amount is paid. Retainage is limited to 10% of the contract. The new law does not apply to single family residential housing and multifamily residential housing of four units or less.

-- S.B. 94 increases the time from, ten to 21 days, in which a county road and highway project contract must be signed and the bonds submitted. The new law also permits 95% of the contract to be paid before it is fully completed. Previously, the limit was 90%.

## **KENTUCKY**

-- H.B. 449 provides the following:

(2) Any provision contained in any construction services contract purporting to indemnify or hold harmless a contractor from that contractor's own negligence or from the negligence of his or her agents, or employees is void and wholly unenforceable.

(3) This section does not apply to construction bonds or affect the validity of insurance contracts.

-- S.B. 49 raises the threshold for when performance and payment bonds are required on public construction projects from \$25,000 to \$40,000. Contract administrators on other public procurement contracts are now required to evaluate whether performance bonds are needed when the contract is greater than \$40,000, as opposed to the previous threshold value of \$25,000. The new law also prohibits the use of reverse auctions for procurement contracts that need bonding.

## **LOUISIANA**

- H.B. 280 repeals a requirement that bidders awarded construction contracts in Claiborne Parish post surety bonds and other provisions that subject such contracts to the public contract law.
- S.B. 46 increases the threshold from \$50,000 to \$100,000 for performance bonds on contracts with the New Orleans Sewerage and Water Board.

## **MAINE -- no enactments to date.**

## **MARYLAND**

- H.B. 674 permits the Maryland Small Business Development Financing Authority to guarantee the surety up to the lesser of 90% or \$1.35 million of its losses under a bid, payment or performance bond under any contract, the majority of the funding for which is provided by a local, state or federal governmental entity. The threshold on loan guarantees increased from \$500,00 to \$1 million.
- S.B. 324 raises the bond threshold from \$100,000 to \$200,000 for state projects. SAA and AIA were successful in obtaining a veto appeal. The Assembly reconvenes in January 2006, and any vote to override the veto usually comes early in the session.

## **MASSACHUSETTS -- Still in Session.**

## **MICHIGAN -- Still in Session.**

## **MINNESOTA**

- H.B. 2228 provides that if a lender, surety, or other person pays wages to a group of employees on behalf of their employer, they are liable for the taxes that are required to be deducted and withheld from such wages by an employer. If funds are supplied to an employer, and the lender, surety, or other person has actual notice or knowledge that the employer does not intend to pay the required employment taxes, the person providing the funds is liable for the taxes.
- S.B. 1335 requires design-build contractors and construction managers-at-risk to post performance and payment bonds in order to be qualified. A bid bond of not more than 5% could be required from the design-build contractor.

## **MISSISSIPPI**

- H.B. 1290 clarifies the rights of claimants on performance and payment bonds. If the obligee is the owner, then the suit must be brought within one year of completion or actual use or occupancy, whichever is earlier. If the obligee is not the owner, then the suit must be brought within one year of final payment. If only a performance bond has been issued, suppliers and laborers can bring suit six months after final completion or actual use or occupancy, whichever is earlier, if the obligee has not brought suit. If only a performance bond is given, then only one action shall be brought for payment and performance claims. If a separate payment bond is given, then only one separate action shall be brought on the bond, and intervention shall be allowed in accordance with existing law.
- H.B. 1302 permits local school boards to accept the same type of deposits or bid bonds that the state and other political subdivisions may accept.

## **MISSOURI -- no enactments to date.**

## **MONTANA**

-- H.B. 67 removes an existing limit on letters of credit given as financial security for state contracts for the procurement of services or supplies. Previously, such letters of credit could not exceed \$100,000. Surety bonds remain an acceptable form of security and the bond does not have a specific value attached to it.

-- H.B. 493 requires that engineers or architects that prepare the plans or specifications for infrastructure be licensed and bonded in Montana, with the state named as an additional insured under and contract or performance bond. The new law applies to projects funded from the proceeds of the aerospace technology bond program.

-- H.B. 559 permits irrevocable letters of credit as another method of security that can be used in public contracts in lieu of a surety bond.

-- H.B. 612 requires a performance bond from those who purchase timber from state land.

-- S.B. 286 reduces the amount of retainage permitted in public construction contracts from 10% to 5% and provides that retainage must be released on substantial completion of the project.

## **NEBRASKA -- no enactments to date.**

## **NEVADA**

-- H.B. 34 raises the maximum amount of money that one could collect from the State Contractor's Board recovery fund from \$30,000 to \$35,000 for actual damages. Further more, the bill raises the maximum amount in claims that could be recovered from the fund against one contractor from \$200,000 to \$400,000.

-- S.B. 300 limits retainage in public and private construction contracts to 10%.

-- S.B. 434 amends the requirements for payment and performance bonds that residential pool or spa contractors must have in place before performing work. The new law requires the bonds to be not less than \$10,000 and not more than \$400,00, but provides that the bond can be waived for any contractor licensed for more than five consecutive years.

-- S.B. 467 increases the threshold for payment and performance bonds on public projects from \$35,000 to \$100,000. The new law also states that nothing shall prohibit the state from requiring bonds in any contract and allows design-build contracts in projects in excess of \$10 million.

## **NEW HAMPSHIRE**

-- H.B. 263 allows design-build and construction manager methods of delivery for major capital projects in the state. The bill increases the amount for which transportation projects are eligible for design-build from \$1 million to \$5 million.

## **NEW JERSEY -- Still in Session.**

-- S.B. 1298 requires specific public entities to bid competitively on pupil transportation contracts for school districts.

-- S. B. 1937 extends from 5 to 7 days, excluding Saturdays and Sundays, the notice of revisions or addendums to advertisements for bids for state contracts. The new law makes this requirement uniform throughout state law.

## **NEW MEXICO**

-- H.B. 720 allows other financial guarantees aside from a performance bond, previously the only acceptable guarantee, to be used in guaranteed utility savings contracts.

-- S.B. 814 requires a subcontractor on a public works project to post a performance and payment bond if his/her contract was \$50,000 or more.

## **NEW YORK**

-- S.B. 4058 eliminates the retainage provisions in the highway law.

## **NORTH CAROLINA – Adjournment on August 31, 2005; No enactments to date;**

## **NORTH DAKOTA**

-- H.B. 1169 creates the North Dakota Transmission Authority and authorizes it to require bid bonds from contractors submitting bids for projects of the Authority

## **OHIO -- Still in Session.**

-- H.B. 66, the state budget bill, raises the threshold for counties to require bid bonds from \$10,000 to \$25,000.

## **OKLAHOMA**

-- H.B. 1535 repeals the deemer clause for fidelity, surety or guaranty bond rate and form filings.

-- S.B. 823 creates the Oklahoma Tourism and Recreation Commission and requires anyone performing work for the Commission, which is subject to a bid, to post a performance bond.

## **OREGON**

-- H.B. 2071 requires anyone making a claim against a contractor to deliver a copy to the contractor's surety company.

-- H.B. 2214 enacts a \$100,000 threshold for performance and payment bonds on public projects and a \$50,000 threshold for contracts for highways, bridges and other transportation projects. Previously, no such threshold existed.

-- H.B. 2595 adds the property of a homeowners association to the list of properties to which the United States, the State of Oregon or federal, state or local agencies, instrumentalities, political subdivisions, counties, cities, towns, municipal corporations, irrigation, drainage or other districts or other federal, state or local governmental bodies can apply pesticides without obtaining a license as a pesticide operator or furnishing evidence of a financial responsibility.

-- S.B. 477 requires a contractor or subcontractor working on a public project to post a \$30,000 public works bond. This is in addition to any payment and performance bonds required. The new bond would be used to pay wage claims of workers, including prevailing rate claims. The new law provides that, if a business enterprise elects not to post the public works bond, it must notify the public agency that awarded the contract and that a claim for unpaid wages can be made under the payment bond of the contractor.

-- S.B. 6022 excludes surety bonds from any exemptions granted to the existing state anti-directed insurance programs provisions.

## **PENNSYLVANIA -- Still in Session.**

## **RHODE ISLAND -- no enactments to date.**

## **SOUTH CAROLINA**

-- H.B. 3008 changes the statute of limitations from thirteen to eight years to bring an action to recover damages based upon or arising out of the defective or unsafe condition of an improvement to real property. This includes actions against sureties or other guarantors.

-- S.B. 365 reduces the maximum amount for retainage in public projects from 5% to 3.5%.

## **SOUTH DAKOTA -- no enactments to date.**

### **TENNESSEE**

-- H.B. 1371 raises the threshold from \$1,000 to \$5,000 on public works projects in the town of Pleasant Hill, which requires a contractor to post a 100% bond.

### **TEXAS**

-- H.B. 467 eliminates the requirement for payment and performance bonds for economically distressed political subdivisions, which apply for financial assistance for the construction, acquisition, or, improvement of water supply and sewer services.

-- H.B. 2039 waives the sovereign immunity of local governmental entities and permits them to be sued for breach of contract.

-- H.B. 2157 amends the insurance liquidation law, including the impact on surety bonds of an insolvent insurer. Surety bonds, like all other coverages of an insolvent insurer, are cancelled upon insolvency. The cancellation of a bond does not release the co-surety or the guarantor from its obligations. The bill also contains general provisions regarding voidable preferences in insolvencies and specific provisions regarding liens. If the receiver can challenge a lien as a voidable preference, and the surety has dissolved the lien, the new law provides that any indemnifying transfer or lien to surety in that transaction is also a voidable preference. Any property transferred to the surety must be given to the receiver as an asset of the estate.

-- H.B. 2659 requires that a claim against a payment or performance bond in connection with a privatized maintenance contract must be filed against the bond in effect on the date that the basis for the claim arose.

-- H.B. 2702 addresses issues that have arisen since Texas overhauled its law regarding transportation development and financing several years ago regarding the Trans-Texas Corridor and the creation of Texas DOT turnpike system. The new law gives the state DOT the authority to set the amount of the payment and performance bonds required if it is impracticable for a private entity to provide a bond for the full contract amount under a comprehensive development agreement with the DOT. The DOT may also allow alternative forms of security in addition to or instead of payment and performance bonds.

-- H.R. 2770/ SR 1098 adds design-build provisions to projects under H.B. 2702.

-- S.B. 1214 allows counties with a population in excess of 800,000 to appoint a licensed agent as the sole broker to obtain all the necessary insurance coverage, including public official liability, property, casualty, workers compensation and specific and aggregate stop-loss coverage for self-funded health care.

### **UTAH**

-- H.B. 105 amends the law to add a further exemption for a person who contracts directly with the payment bond principal. Existing law already provides that a party in privity of contract with the bond principal need not give notice of its claim and contains certain exemptions. It specifically requires any person, who furnishes labor, service, equipment or material for which a payment bond claim may be made, to provide preliminary notice to the payment bond principal.

## **VERMONT -- no enactments to date.**

### **VIRGINIA**

-- H.B. 2666/S.B. 1108 requires any private enterprise, pursuant to the Public Private Transportation Act, to provide payment and performance bonds in connection with the development of any qualifying transportation facility under the Act. The new law also requires private entities to include "cost and completion guarantees" in their contracts.

#### **WASHINGTON**

-- H.B. 1491 requires each bidder in an auction from the Department of Natural Resources to post a bid bond or equivalent security.

-- H.B. 2173 provides that when a court suspends or vacates an order due to military service, the court may also suspend or vacate the liability of a surety.

#### **WEST VIRGINIA**

-- H.B. 2592 creates a new design-build act to be implemented by rules from a new Design-Build Board. The new law contains requirements for bid, payment and performance bonds and an anti-directed surety provision for design-build projects.

-- S.B. 700 allows municipal utilities and public service districts to enter into community infrastructure investment agreements with any person for the purpose of constructing new project facilities or substantially improving or expanding project facilities, provided that the person responsible for the construction obtains a performance bond payable to the municipal utility or public service district equal to the estimated cost of construction. -- S.B. 700 allows municipal utilities and public service districts to enter into community infrastructure investment agreements for the purpose of constructing or substantially improving or expanding facilities, provided that the person responsible for the construction of the public facility has obtained a performance bond, payable to the municipal utility or public service district, in an amount equal to the estimated cost of construction.

**WISCONSIN -- Still in Session.**

**WYOMING -- no enactments to date.**

### **IV. Legislation on Specific Projects / 2005 Enactments**

#### **MONTANA**

-- H.B. 5 allows the waiver of bidding, bonding and contractor registration for the construction of a privately funded chapel at the Montana state hospital in Warm Springs.

#### **NEVADA**

-- H.B. 5 exempts the Airport Authority of Washoe from the public bidding and other public contract requirements for any project that is financed with revenue bonds or other installation obligations.

#### **MINNESOTA**

-- Has carryover bills regarding the construction of new major league baseball and football stadiums. The bills require payment and performance bonds, but provide that the performance bond must cover the loss of revenues to the public entity if the stadiums are not completed on time. These bills include H.B. 2480/S.B. 2297, S.B. 2013/H.B. 2425 and S.B. 2062/H.B. 2295.

**TEXAS**

-- H.B. 2019 requires the Baylor county Hospital District to follow the state code regarding payment and performance bonds in any construction contracts.