



The Surety & Fidelity
Association of America

2006 ANNUAL
STATE LEGISLATIVE REPORT
ON
CONTRACT SURETY

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2006 in Review.....

Small and Emerging Contractors Issues Dominate the Agenda

Bonding for small and emerging contractors clearly was the key legislative issue in contract surety in the 2006 state legislative sessions, with the issue arising in several different contexts. In 2006, some states again sought to remedy actual or perceived difficulties that small and emerging contractors face in obtaining bonds by increasing the state bond threshold. SFAA worked actively with AIA to stave off a \$500,000 bond threshold in **Indiana** SB 360, and through a joint effort with AIA and NASBP, we were able to convince the Utah Administrative Services Office not to increase the state bond threshold from \$50,000 to \$100,000 in its regulations. State bond threshold legislation was also defeated in **Iowa, Kansas** and **Washington**.

In **Virginia**, HB 64 raised the bond threshold from \$100,000 to \$250,000 for state Department of Transportation Projects. The small and emerging contractor was a factor with this bill. As originally drafted, the bill would have increased the state bond threshold to \$500,000 for all public projects. In Oklahoma, the state bond threshold was raised from \$25,000 to \$50,000, but that was raised in the context of an inflation increase.

California Governor Schwarzenegger issued an Executive Order to help small businesses grow and obtain Department of Transportation (DOT) construction contracts. The Order instructs the DOT to develop a legislative proposal to establish a \$40 million state transportation bond guarantee fund to assist small and emerging contractors to bid on state and federally-assisted transit-related projects. The Orders also asks the DOT to explore ways to reduce the cost of insurance coverage to general contractors and subcontractors for DOT contracts.

The small and emerging contractor issue came up in the context of individual surety legislation in **Maryland** HB 169, which now allows individual sureties to write surety bonds in Maryland without being licensed as a surety — in contradiction to the Insurance Code. This bill only had traction because it was presented as a way to assist small and minority contractors in obtaining bonds. SFAA worked closely with AIA local counsel in meeting with the bill sponsors regarding the potential for fraud that this bill would create, and in testifying when the bill was heard, but the perceived need to assist small and minority contractors carried the day. The **Louisiana** Senate passed Resolution 158, which calls for a study of the feasibility of permitting individual sureties to provide surety bonds on public works projects, with the possibility of legislation in 2007. **North Carolina** HB 2793, an individual surety bill, was heard but did not move. The public owners took the lead in testimony in opposition to it, and SFAA persuaded the local minority contractors association to speak against the bill. North Carolina adjourned without any final action on HB 2793, but the bill was added to a long list of items in HB 1723, which permits the Legislative Research Committee to study the topics listed.

Lastly, the small and emerging contractor issue was raised in connection with **New Jersey** AB 3038, which is legislation to license and bond home service contractors. Concern was expressed that small and emerging contractors would not be able to get the license bonds, and the bill was amended to include a recovery fund as an option to the bond. After discussions with the sponsor about the problems with recovery funds, these provisions were removed.

Retainage Issue Was in the Background. While a number of retainage bills were introduced or carried over into 2006, unlike prior years, few of these bills moved in 2006. **Michigan** eliminated retainage in all 2006 Department of Transportation (DOT) contracts as a pilot project for testing compliance with the Federal Highway Administration regulations in 49 CFR Part 26.29 regarding the retainage procedures that states must follow in order to retain DOT highway funding. The federal regulations give the states three options: 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 have taken the path of least resistance and eliminated retainage. The other options in the federal regulations are perceived as requiring too much administrative and paper work, and Michigan is following the lead of other states that have eliminated retainage, including **Illinois** and **New York**.

New Jersey SB 2864 lowered retainage on state DOT projects. Under prior law, 5% was retained for the first 50% of the project, with nothing held thereafter until substantial completion, upon which another 1% was withheld. Under the new law, 2% retainage is held for the entire project. The SFAA and AIA state counsel objected to the change, but the DOT insisted that it was a wash in that no less retainage would be held at the end of the project. They argued that the change made the administration of the law easier in that all billings would contain a 2% withholding. They complained of the burdens under the prior system in which state employees needed to determine when a project was 50% completed so that there would be no further withholding on the rest of the billings for the project. The 2% rule creates a uniform administrative rule.

OCIPs. As originally drafted, **Virginia** SB 271 would have allowed a public body to purchase an owner-controlled insurance program (OCIP) in connection with any public construction contract. The OCIP specifically included surety bonds. The AIA counsel was successful in convincing the sponsor to take surety out of the OCIP. As amended and enacted, an OCIP can include “*general liability; property damage; workers compensation; employers liability; pollution or environmental liability; excess or umbrella liability; builders risk; and excess or continent professional liability.*”

Other Key Issues in Contract Surety This Year

• **Immigration Issues Posed New Challenges in 2006.** As Congress debates reform of the federal immigration laws, the issue has arisen at the state level with implications for sureties. **Colorado** HB 1343 prohibits a state agency or political subdivision from entering into or renewing a public contract with a contractor who knowingly employs or contracts with subcontractors that employ illegal aliens. The law requires contractors to participate in a specified federal pilot project administered by the Department of Homeland Security for purposes of checking the status of employees. If a contractor violates the law, the public owner may terminate the contract for breach of contract, and the contractor shall be liable for the actual and consequential damages.

While **Missouri** SB 1250 officially died when the legislature adjourned, the immigration issue continued to be considered during interim hearings. SB 1250 would have prohibited contractors on public projects from employing illegal aliens as workers or using subcontractors that employ illegal aliens. The bill would have made it a material breach of contract to have illegal aliens working on a public project and would have required the public owner to terminate the contractor if illegal aliens

were found on the job. The bill also would have required construction contracts to contain a provision that the performance bond would hold the public entity harmless for any losses due to the breach of the contract. Any interested party would have been permitted to bring a suit to enforce the law, in addition to the state Attorney General.

SFAA and NASBP presented the industry view of the bonding problems that SB 1250 would create to the Missouri House Special Committee on Immigration so that they would be reflected in any final report from these hearings. The local chapter of the Associated General Contractors took the lead in the testimony at one of the public hearings, and local NASBP members presented the surety perspective in terms of the impossibility of underwriting the bond contemplated under SB 1250 and the marketplace disruptions that could result from this bill, none of which benefit the State or the taxpayers. No report was issued from the interim committee.

- **Bad Faith Was Defeated in the 2006 State Sessions.** Bad faith legislation moved, but was defeated in **Louisiana, Rhode Island** and **Wyoming**. **Louisiana** SB 707 would have given third parties a cause of action against insurers and did not exclude sureties from its provisions. The bill passed the Senate but did not pass out of the House Insurance Committee. Senate Bill 2182 in **Rhode Island** was aimed directly at sureties and would have permitted "any obligee, principal or claimant under any performance or payment bond" to sue the surety on the bond for bad faith failure to pay or settle a claim. It passed the Senate but did not get out of Committee in the House. Late in the session, a companion bill to the Senate bill was introduced as HB 8250. It did not move but may be an indication that a sponsor and support has surfaced in the House so that we will see this bill again in 2007. **Wyoming** HB 68, which would have created a third party bad faith and a direct action law, was killed on the House floor this year.

- **Service of Process Surfaced.** Prior to this session, **Indiana** and **Nebraska** were the only two states that did not have a state official to receive service of process for purposes of 31 USC 9306, so that SFAA members had to file an agent for service of process in the federal district courts of those states if they wrote any bonds required or permitted for the federal government. SFAA has longstanding model amendments, and AIA state counsel successfully had them added to Indiana HB 1359 to solve the service of process issue for sureties in Indiana. The new law requires foreign insurance companies that write surety bonds to appoint the Insurance Commissioner as the agent for service of process. SFAA has targeted Nebraska for 2007 so that this issue will be solved in all jurisdictions.

The **Iowa** Insurance Department had a provision introduced in SB 2364 to repeal the requirement that the Insurance Commissioner act as agent of service of process for insurers. The Department bill would have caused SFAA members to begin filing an agent for service of process in the Iowa federal district courts. SFAA worked with AIA to craft an amendment that designates the Secretary of State to receive service of process for sureties for purposes of 31 US C 9306 to the extent the surety cannot otherwise be served in Iowa. Insurers otherwise file a resident agent for licensure in Iowa.

- **Prevailing Wages.** This issue continues to surface in **New York**, and again came dangerously close to enactment late in the regular session. The bills that were pending would have provided for damages in the amount of three times the unpaid wages, attorneys' fees and expenses, as well as a 25% penalty to the State if a contractor did not pay the prevailing wage. AB 4040 passed the Assembly and was sent to the Senate, but it failed to move further and died in committee. SB 4857, a similar bill, got out of committee and as far as the Senate floor calendar by the time the legislature

adjourned its regular session. It also died. The legislature came back for special sessions this fall, but as expected, no action was taken on any surety issues so the prevailing wage issue is dead for 2006, but is expected to be back in 2007.

● **Insurance Claims.** **Louisiana** SB 620 changes the Insurance Code provisions concerning the regulation of provisions in insurance contracts, such as cancellations and non-renewals. Insurers now are required to pay an additional 50% of the damages, plus attorneys' fees and costs, if a claim is not paid within 30 days. The penalty was set at an extra 25%, and no attorneys' fees were awarded under prior law.

Some Unusual Legislative Issues This Year

● **Mandatory Arbitration.** As originally drafted, **New Jersey** SB 1726 would have required that all construction payment disputes go to arbitration with the American Arbitration Association (AAA). The bill was amended in the House to require that all construction contracts in New Jersey provide that payment disputes may be sent to alternative dispute resolution. To the extent that such disputes are litigated, the case must be heard in New Jersey, and attorneys' fees are awarded to the prevailing party. The amended bill was enacted. **Massachusetts** SB 2655 would have required ADR for all contractually based claims arising from public construction projects. The bill set forth minimum ADR requirements on which all state agencies would have been required to base their own procedures. The Governor vetoed the bill.

● **Waiver of Defenses.** Under **Connecticut** HB 5187, as introduced, a surety would have waived all of its defenses to a claim if the surety did not respond to a claim within 90 days either by paying the claim or identifying the portions that are in dispute. SFAA worked with AIA and NASBP on talking points to oppose the bill, and SFAA drafted amendments, in the event that the bill would move, to limit the waiver to the surety's defenses based on the notice of the claim. In our proposed amendments, the surety would not have waived any statutory defenses or any defenses of the principal. After negotiations with the sponsor, however, a substitute bill was introduced in which the provision regarding the surety's waiver of defenses was removed. The amended bill passed, and the Governor signed it into law.

● **Safety Education.** **Maine** LD 1628 would have required all employees working on public construction projects in excess of \$10,000 to complete a safety-training course. The bill would have allowed the State to cancel a construction contract if untrained workers were on the project. The bill did not directly address surety and the consequences to the surety if a contract were cancelled. This is a bill that may come back next year.

Still Pending

● **Eligibility Requirements for Surety.** **New Jersey** SB 1392 would give all municipalities and counties the authority to set their own requirements for sureties. The bill was amended to further require that the surety eligibility requirements conform to existing law under which the surety has to be either: a licensed insurer in the State, on the U.S. Treasury list or have one of the three highest ratings from a nationally recognized rating organization, depending on the size of the bond. The amended bill, however, retains the language from the original bill that would give municipalities and counties the discretion to look at other factors, including, but not limited to, the rating of the surety from a nationally recognized rating organization, other information about the surety's

financial condition and the surety's past performance in meeting its obligations. SFAA remains concerned that this bill may well be implemented in such a way that the existing requirements in the law become a starting point upon which each county and municipality could add its own eligibility requirements for sureties.

AIA and CNA Surety have met with the sponsor several times. The Senate minority staff understood our concerns with the bill and agreed to draft an alternate procedure under which a problematic surety could be placed on a municipal "watch list." The process would include due process for the surety in terms of objective criteria for listing and the ability to be heard on removal from the list. The U.S. Treasury Department has such a process for removing sureties from the Treasury list, although it is seldom used. No alternative process has been proposed at this point in New Jersey, and there is no companion bill in the Assembly. Since legislation in New Jersey carries over into 2007, SFAA will continue to watch this bill.

2006 Annual State Legislative Report on Contract Surety

Introduction

Because of the diversity of the business of its members, SFAA tracks all state and federal fidelity and surety legislation. In reporting legislative developments, however, SFAA has moved to reports based on the three major lines of business: contract surety, commercial surety and fidelity. This report contains the 2006 enactments on contract surety. Interested SFAA members can access the reports on commercial surety and fidelity on the SFAA website.

This SFAA Annual State Legislative Report on Contract Surety contains two major parts: one section contains a summary of the 2006 state legislation on SFAA's priority issues for contract surety and the second is a state-by-state compilation of all the 2006 state enactments relating to contract surety.

I. Summary of State Legislative Activity on SFAA Priority Issues

A. Little Miller Act Thresholds

An increasingly frequent state legislative initiative attributed to the lack of bonds for dis-advantaged contractors is the increase of the state bond thresholds at which bonds are required under the Little Miller Acts. SFAA opposes all increases in the thresholds. SFAA aggressively works to stop them if they are a significant increase, trying to keep state thresholds at \$25,000. AIA works to oppose any threshold above \$50,000.

1) 2006 Enactments

Virginia HB 64 raised the threshold for surety bonds on public works projects from \$100,000 to \$250,000 for state Department of Transportation (DOT) projects. The bill passed both houses and was sent to the Governor, who sent it back to the House with amendments that removed the limit to DOT projects so that the bill would have increased the state bond threshold to \$250,000 for all public projects. The legislature rejected the Governor's amendment, and the Governor signed the bill as a threshold increase for DOT projects. This bill was part of the new Governor's package of legislation designed to assist small and minority businesses in the state. The original bill would have increased the state bond threshold from \$100,000 to \$500,000 for all public construction projects, so it is not surprising that the Governor wanted to expand the bill, but it is disappointing that the Governor ignored the compromise that was reached in the legislative process. SFAA and

AIA worked together on this bill, with AIA organizing substantial local opposition and SFAA providing testimony, talking points and letters to the Legislature from the local surety association and SFAA staff.

In **Oklahoma**, SB 558/HB 1770, which originally would have raised the limit from \$25,000 to \$100,000, was amended to \$50,000 and was enacted.

2) Defeated Bills in 2006

Legislation to increase state bond thresholds was defeated this year in **Indiana, Iowa, Kansas, Missouri** and **Washington**.

SFAA worked with AIA to stave off an increase in the bond threshold in **Indiana**. SB 360, which would have raised the state bond threshold to \$500,000, failed to pass this year in Indiana. SFAA staff spent several days in Indianapolis with the AIA regional manager and state counsel, together persuading the associations for the cities, towns and counties to oppose the bill and the local contractor associations and chambers of commerce to support alternatives, including the SFAA Model Contractor Development Program. SFAA killed the legislation this year, but the issue of bonding for small and minority contractors still needs to be addressed. SFAA has been working with the local surety association and the Indianapolis Black Chamber of Commerce on a contractor education program. Indiana is a good model for the other states, in that SFAA avoided an increase in the state bond threshold because it had a convincing alternative to the problem.

The **Utah** Department of Administrative Services heard the comments of SFAA, AIA and NASBP and decided against increasing the state bond threshold from \$50,000 to \$100,000. SFAA originally contacted the Department and was told that its intent was to expand the definition of a “small contract” that is exempt from the full state procurement process. Under existing regulations, the State needs to solicit at least two written quotations on any contract under \$50,000 and must award it to the lowest bidder, and the Department wanted to expand this authority to \$100,000. As originally drafted, however, the proposed regulation also would have increased the state bond threshold from \$50,000 to \$100,000. Under Utah law, the state bond threshold is set by regulation rather than by statute. SFAA, AIA and NASBP submitted joint comments that showed the State how to achieve its purpose without changing the bond threshold and argued the merits of retaining the \$50,000 bond threshold. In the final regulation, the rules for procurement of construction raise the ceiling for small purchases from \$50,000 to \$100,000. The Department achieved its goal of streamlining the procurement process and saving time and money through the increased threshold of a “small purchase,” but maintained the security requirements for a bid and a contract award.

California HB 2833 would have raised the bond threshold from \$15,000 to \$50,000 for projects let by school districts. **Iowa** HB 449/SB 1219 would have amended numerous thresholds in the public contract law and would have raised the bond thresholds from \$25,000 to \$100,000. **Kansas** HB 2186 would have raised the threshold from \$10,000 to \$100,000. **Missouri** HB 1223 would have raised the bond threshold from \$25,000 to \$100,000. **South Carolina** HB 3653 would have defined a “historically underutilized business” (HUB) and provided 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.

New York had the most onerous carryover legislation from 2005. AB 9069 would have raised the threshold for requiring performance and payment bonds on public contracts in New York to \$500,000 for small businesses and minority and women-owned businesses. Advertisements for bids would have been required to provide information as to the requirements for, or waiver of, performance and payment bonds.

Also dead in 2006 is **New York** HB 9070, which would have increased the size of the Minority and Women Owned Business Advisory Board in the Division of Minority and Women Owned Business Development and the size of the Small Business Advisory Board in the Division of Small Business, each by two members. In addition, the bill would have directed the Division of Small Business to provide programs educating small contractors about surety bonding requirements on state contracts and identifying resources available to such contractors in obtaining their first bond and in increasing their bonding capacity, including, but not limited to, the federal Small Business Administration Bond Guarantee Program. The Division of Small Business would have been required to maximize the use of federal surety bond guarantees and other assistance programs. The bill passed the Assembly but never moved past the Commerce and Economic Development Committee in the Senate.

In **Pennsylvania**, a whole string of bills carried over that would have raised the threshold for bonds from \$10,000 to \$25,000 for specific political subdivisions or building authorities. The bond threshold would have been adjusted yearly thereafter, based on changes to the Consumer Price Index. These bills included HB 1854, 1855, 1856, 1857, 1859, 1871 and 1872. HB 1860 was similar, but it would have raised the bond threshold from \$4,000 to \$10,000 on projects of the public school construction authority.

Washington HB 1138/SB 5249 would have permitted state agencies to waive bonds and retainage on contracts under \$200,000, in which case the State assumed liability for payment for amounts due from the general contractor, if not paid.

B. Bonds on Mega Construction Projects

There also were some bills introduced in 2006 to change the bond thresholds for specific projects or for mega-projects, particularly state transportation projects. For many of these projects, SFAA has found that the public owners intend to require bonds, but want to include permissive, rather than mandatory, language in the bills because of concerns that the projects are so large that there may be an issue of bond availability. In some cases, however, the emerging contractor concern has arisen.

1) 2006 Enactments

Georgia, HB 1177 allows the Department of Transportation, on projects that exceed \$300 million, to make a determination that 100% bonds are not reasonably available. It then has to require payment and performance bonds of not less than \$300 million and protect the balance of construction costs with a combination of letters of credit and corporate guarantees. SFAA member company representatives and staff assisted in crafting this bill. **Indiana** SB 259 allows the Indiana Convention and Stadium Building Authority to waive payment bond requirements on capital improvement projects provided that: (1) that an otherwise responsive and responsible bidder is unable to provide the payment bond or the cost or coverage of the payment bond is not in the best interests of the project and (2) that an adequate alternative is provided through a letter of credit, additional retainage of at least ten percent (10%) of the contract amount, a joint payable check

system or other sufficient protective mechanism. **Minnesota** HF 2480/SB 2297 creates a new baseball authority to build a new stadium for the Minnesota Twins. As originally drafted, the bill had bond provisions that made surety bonding on the project discretionary. SFAA worked with AIA, and the bill that was enacted makes bonds mandatory. The new law also provides that the bonds must cover any costs that may be incurred in excess of the contractor's certified price, including, but not limited to, costs incurred by the authority or loss of revenues resulting from incomplete construction on the completion date. SFAA and AIA opposed this portion of the bill.

Virginia HB 150 creates management agreements between the State of Virginia and Virginia Polytechnic Institute and State University, the University of Virginia and the College of William and Mary to allow these educational institutions greater freedom in many procurement functions, including construction projects. The new law sets forth the terms and conditions under which these universities must manage their operations, which include procurement provisions that differ in whole or in part from the public procurement laws, including bonding requirements in any construction they undertake. Bid, performance and payment bonds would be required on projects costing more than \$1 million.

Missouri HB 1380 allows for a public-private partnership to finance, develop and operate a toll bridge between Illinois and Missouri. Bid bonds will not be required on the project, but the Missouri Highways and Transportation Commission may require performance and payment bonds.

2) Defeated Legislation in 2006

Florida HB 7077 would have permitted the Orlando-Orange County Expressway Authority to waive performance and payment bond requirements on projects costing less than \$500,000 if the project was awarded in a way to encourage local small business participation. The Authority would have been obligated to pay all those who would have normally found protection under the payment bond had it not been waived. This bill was similar to bills previously enacted for projects in Hillsborough County (Tampa) and Jacksonville, Florida.

Florida SB 1350 passed both houses and was sent to the Governor, who vetoed the bill. It would have allowed maintenance contractors on long-term Department of Transportation (DOT) projects to post only bonds necessary to cover the next year's work. Furthermore, the bill would have raised the bond threshold for DOT contracts from \$150,000 to \$250,000 and would have permitted the DOT to accept alternative security for DOT projects in excess of \$250 million. SFAA discussed the bill with the DOT and wanted to amend the bill so that it could not be misread to allow the DOT to waive all bonds on projects over \$250 million, but the DOT assured SFAA that this would be remedied in the regulations. SFAA opposed the increase in the bond threshold for the DOT. The veto had nothing to do with the surety issues so that the surety issues may be back in 2007. The Governor opposed a new tax provision under which municipalities would have been allowed to impose a surcharge on rental vehicles.

C. Individual Surety Legislation

1) 2006 Enactments

Maryland HB 169 enacted a new law that allows individual sureties to write surety bonds in the State without being licensed as a surety. SFAA worked closely with AIA local counsel to approach the bill sponsors regarding the potential for fraud that this bill would create. SFAA also testified

when the bill was heard and provided alternative language. The bill passed, however, without any of the industry-sponsored suggestions or protections for the State, as it was perceived as assisting small and emerging contractors. In addition to allowing individual sureties to write bonds without pledging verifiable assets to the State, the bill will increase the size of the surety bond guarantee available from the Maryland Small Business Development Financing Authority to \$1,350,000, and the size of the bond MSBDF can write directly to \$5,000,000. Lastly, the new law includes a reporting requirement on the impact of the bill on small businesses and minority businesses and a three-year sunset.

The **Louisiana** Senate passed Resolution 158, which calls for a study of the feasibility of permitting individual sureties to provide surety bonds on public works projects, with the possibility of legislation there in 2007. In the resolution it is noted that small, local contractors obtain bonding through the “federal individual surety program,” but that state bonds can be written only by licensed and domiciled sureties, meaning that such contractors frequently have difficulty obtaining bonding.

2) Defeated Legislation in 2006

North Carolina HB 2793, an individual surety bill, was introduced this year but did not pass. Relatively speaking, the bill was “better” than the Maryland bill that was enacted this year. The North Carolina bill was patterned more closely to the federal regulations, but still would not have subjected individual sureties to licensure and regulation under the state insurance code. Under the bill, state contracting officers would have to determine the validity of the assets of an individual surety. The minority contractors supported this bill as a way of assisting small and emerging contractors to obtain bonding. The public owners took the lead with testimony in opposition to the bill, which was re-referred to the House Judiciary Committee; and North Carolina adjourned without any final action on HB 2793. The bill and the individual surety issue was added to a long list of items in HB 1723, which permits the Legislative Research Committee to study the topics listed.

D. Retainage

This is a perennial legislative issue for SFAA, although it was not an active issue in the 2006 sessions. SFAA supports the judicious use of retainage in private and public construction projects at both the general contractor and subcontractor level. SFAA opposes any bill in which the retainage will be reduced to less than 5%, and works to oppose reductions to amounts above 5%. A number of retainage bills have been introduced in 2006.

1) 2006 Enactments

Indiana SB 359 repeals a requirement that retainage must be placed in an escrow account if portions of the contract are subcontracted. Originally, the bill also would have increased the amount of retainage held. Under existing law, either 6% can be held until 50% completion with nothing held thereafter or 3% can be held until work is satisfactorily complete. This bill would have raised the percentages retained to 10% and 5% respectively, but the provision increasing retainage was removed from the bill during the legislative process. **Virginia** HB 1502 creates management agreements between the State and its major universities to allow these educational institutions more flexibility in procurement functions, including construction money. In the provisions for construction projects, retainage in any construction project would be limited to 5%.

New Hampshire HB 1107 would have established laws for commercial construction contracts. Such contracts were defined as being greater than \$25,000, not a public works project, not funded or insured by HUD and, if for residential occupancy, containing more than four units. Retainage could not exceed 7.5% and would have been placed in an escrow account. The bill was deferred to the Commerce Committee for interim study.

Michigan eliminated retainage by way of regulation in all 2006 contracts as a pilot project for testing compliance with the Federal Highway Administration regulations in 49 CFR Part 26.29 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 have chosen the path of least resistance and eliminated retainage on highway projects on which federal funds are involved. The other options are perceived as requiring too much administrative and paper work, and **Michigan** followed the lead of other states that have eliminated retainage, including **Illinois** and **New York**.

2) Defeated Legislation in 2006

California AB 245 would have added Orange County to the list of counties that are permitted to enter into design build contracts for contracts in excess of \$10 million. In such contracts, retainage may not exceed 5% if payment and performance bonds are in place. SB 920 would have permitted a contractor to hold no more than 5% retainage and would have required the contractor to pay retainage within seven days of completion on federally funded Department of Transportation contracts. Retainage would have been permitted only if the contractor requires bonds from the subcontractor, and the bonds are not provided. **Iowa** SB1199 would have reduced substantially the retainage that must be held on construction projects under the control of the state board of regents. Under the bill, payments would have been made without retainage until the project is 95% completed. Thereafter, contractors could have demanded release of any retainage held. **Illinois** SB 2742 would have limited retainage to 10%, reduced to 5% after 50% of the contract was complete. There is no specific percentage requirement in existing Illinois law. **Kansas** SB 516 would have limited retainage on public contracts to 5%. The bill passed the Senate, but died in the House. **Maryland** HB 488 would have limited retainage to 5%. The bill passed the House but died in the Senate. **Ohio** HB 497 would have limited retainage to 8% for the first 50% of the job. Retainage could not be held for materials delivered or otherwise approved. Attorneys' fees could be rewarded in suits to claim retainage held.

Numerous retainage bills died in New York. AB 2721/SB 2547 would have required retainage on private contracts to be held in an escrow account and would have subjected the owner to payment of 1% interest if retainage was not released at the appropriate time. SB 2549/AB 6035 would have required retainage 50% of the retainage to be released when 50% of a public project is completed. AB 6600/SB 3161 would have permitted retainage at 20% if payment and performance bonds were waived. In addition, there were a number of 2005 carryover bills in New York, each applicable to one specific project, which would have required 5% retainage if payment and performance bonds

were in place and 10% if there were no bonds. These bills were AB 40/SB 89, AB 42/SB 91, AB 1021, AB 6196, SB 3068, SB 3072, SB 4415 and AB 8144. While there was some movement on a few of these retainage bills in New York, all of them failed.

Pennsylvania HB 652 would have reduced retainage on public projects to 6% or less until the project was 50% completed. Under the existing law, retainage is 10%. The bill also would have reduced the retainage that can be held after the project is 50% complete from 5% to 3%. HB 1514 would have increased, from 50% to 80%, the amount of retainage that must be returned to contractors when a project is 50% complete. After a project is 50% complete, retainage could not be more than 2%. HB 1878 would have provided 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 was released. **Washington** HB 1138/SB 5249 would have allowed the government to waive retainage and payment and performance bonds on small works projects, which were defined as construction projects under \$200,000.

Owner Controlled Insurance Programs

Virginia SB 271 would have allowed a public body to purchase an owner-controlled insurance program (OCIP) in connection with any public construction contract. As originally drafted, the OCIP specifically included surety bonds. The AIA counsel was successful in convincing the sponsor to take surety out of the OCIP. When the bill was heard, an amendment was offered by way of a substitute bill. An OCIP can now include “*general liability; property damage; workers compensation; employers liability; pollution or environmental liability; excess or umbrella liability; builders risk; and excess or contingent professional liability.*” The bill passed and was signed into law.

II. Looking Ahead to 2007...

2007 is the start of a new legislative session in all the states, except New Jersey and Virginia, which carry over from 2006. **Alabama, Florida and Louisiana** still are the “spring session” states with later starting dates in March and April. Look for **Louisiana**, however, to have another special session before its regular session to addressing the continuing issues of recovery from Katrina. For a majority of states, this is the first of a two-year session and bills not enacted in 2007 can carryover to 2008.

The November, 2006 elections in the states were ‘federalized’ in that Democrats gained a total of 274 state House seats and 56 state Senate seats. This mirrored the change in the U.S. Congress. All states except Nebraska have two chambers, for a total of 99 state legislative bodies. With the elections shifting control to the Democrats in 10 state chambers, and the Republicans gaining control of only one chamber, which was previously evenly divided, in 2007, the Democrats will control 56 state chambers and the Republicans will control 41 state chambers. The Oklahoma Senate is evenly divided and legislators in Nebraska’s unicameral legislature run on a nonpartisan basis.

--States in Which the Democrats Will Have Total Legislative Control (23): Alabama, Arkansas, California, Colorado, Connecticut, Hawaii, Illinois, Iowa, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Mississippi, New Hampshire, New Jersey, New Mexico, North Carolina, Oregon, Rhode Island, Vermont, Washington and West Virginia.

--States in Which the Republicans Will Have Total Legislative Control (15): Alaska, Arizona, Florida, Georgia, Idaho, Kansas, Missouri, North Dakota, Ohio, South Carolina, South Dakota, Texas, Virginia, Utah and Wyoming.

--States in Which Republicans and Democrats Each Control One House (11): Delaware, Indiana, Kentucky, Michigan, Montana, Nevada, New York, Oklahoma, Pennsylvania, Tennessee and Wisconsin.

At the start of each year, the National Conference of State Legislators (NCSL) releases its “Top Ten” list of hot political issues for the upcoming state legislative sessions based on surveys of its members. For 2007, the NCSL expects the following to be key issues in most states:

- 1) **Immigration.** To the extent Congress is deadlocked on immigration reform, the Number One issue in the states will be “innovative solutions” to the social and economic issues illegal immigrants present in each state.
- 2) **Real ID.** States need to act to comply with the federal Real ID Act, which aims to standardize the state drivers’ license process so that states authenticate documents that residents provide as identification and as proof that they are legally in this country.
- 3) **Budgets.** Most state budgets are still in pretty good shape, but most states are expecting some budget pressure because of two federal programs that the states are struggling to implement, namely, No Child Left Behind and Real ID.
- 4) **Health Insurance.** All the states want to review the new laws in Massachusetts and Vermont as a possible model for providing coverage to the uninsured.
- 5) **Sex Offenders and Predators.** States have to implement the federal Child Protection and Safety Act of 2006, which requires them to meet standards in sharing information with other states about sex offenders, and increasing penalties for failure to register as a sex offender. States will lose related federal funding for failure to comply.
- 6) **Energy and Environment.** Global warming is becoming an issue and states may move to limit emissions and encourage alternative energy sources.
- 7) **Minimum Wage.** This will be an issue in states in which the Democrats are in control as the national political party has this as a key priority—federal and state.
- 8) **Higher Education.** Most states have issues with rising tuition costs causing affordability and access issues, as well as funding for state schools to maintain quality education.
- 9) **Privacy.** The public is increasing concerned about the loss or theft of personal information on private or government systems, and the costs of identity theft.
- 10) **Obesity.** There is significantly more interest than ever before in banning trans fats and requiring disclosure of nutrition information.

SFAA will be tracking all 2007 state immigration legislation because of the potential impact on surety. While most bills introduced in 2006 were aimed at improving enforcement of the laws, there was a growing sentiment for legislation that would prohibit the use of undocumented workers in public construction projects and/or to require state contractors and other private sector employers to use a federal work authorization verification system to assure that only eligible workers were on the job. The local Associated General Contractors took the lead in opposing such legislation as the verification process imposes costly new requirements on contractors as employers. SFAA will continue to review such legislation for the penalties imposed on contractors if illegal workers are found on a public job. Some states in 2007 may again be looking to “punish” the contractor for employing illegal immigrants by terminating the contract midterm and looking to the surety to

complete the job and pay the extra costs. SFAA will continue to work with the NASBP to present the surety perspective in terms of the impossibility of underwriting the bonds contemplated under such legislation and the marketplace disruptions that could result from this bill, none of which benefit the State or the taxpayers.

SFAA also believes that more states will consider the individual surety issue in 2007. Louisiana and North Carolina authorized studies of the issue in 2006, and in responding to proposed regulations in Maryland to implement its new law, SFAA learned that the individual sureties, which initiated the Maryland legislation, in 2006, may well have contacted lobbyists in Colorado, Louisiana, Mississippi and Texas regarding getting individual surety legislation passed in 2007.

Bonding for small and emerging contractors was the key legislative issue for contract surety in 2006, and the issue will be back in 2007. While the issue usually arises in the form of increased state bond thresholds, in 2006 it also was the impetus for the individual surety bills, and the issues may well be intertwined again in 2007.

It remains to be seen how the change to Democratic control in some state legislatures will impact surety issues. SFAA expects more attempts to reduce or eliminate retainage and more prevailing wage legislation. SFAA and the local general contractors have fought the onerous prevailing wage bill in New York for several years, including 2004 when the SFAA had it vetoed. The bill has been reintroduced and moved in every session since that time, and likely will be back in 2007.

III. 2006 State Enactments on Contract Surety

Many types of legislation affect the market for contract surety. This final section of the SFAA Annual Report contains a comprehensive state-by-state listing of new laws affecting contract surety that were enacted in 2006. Since SFAA members generally are most interested in new bond enactments and any reduction or elimination of existing bond requirements, SFAA publishes a monthly summary of those enactments on its website – www.surety.org -- so that SFAA members can get prompt notice of these enactments and their effective dates.

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

ALABAMA

HB 68—Contractor Immunity

HB 68 amends the Good Samaritan Law to give licensed contractors and subcontractors immunity from civil damages for any work done without compensation within 30 days after a declaration of an emergency.

HJR 653—Study Commission

This Resolution creates a Building Code Study Commission to make recommendations to the Governor prior to the fifth day of the 2007 legislative session.

ALASKA—No Enactments in 2006

ARIZONA

HB 2145—Performance Bonds

HB 2145 creates county island fire districts. Those who successfully bid to provide fire protection and emergency medical services have to post a \$10 million performance bond. Municipalities do not have to post this bond if they are the successful bidder.

ARKANSAS—Not in session in 2006

CALIFORNIA

HB 372—Design-Build Contracts

HB 372 extends the sunset date of existing law that allows transit operators to enter into design build contracts to January 1, 2011. The law would have expired on January 1, 2007. Existing law requires that the contractor submit certain information, which includes evidence that the design-build entity has the capacity to obtain all required payment and performance bonding, liability insurance, and errors and omissions insurance, as well as a financial statement that assures the transit operator that the design-build entity has the capacity to complete the project. Information on any work that a surety has completed also must be submitted. The new law authorizes a transit operator to establish the final procedure for selecting a design-build entity. The project may be awarded to the lowest responsible bidder or the transit operator may use the best value method. The new law requires project costs to exceed \$25,000,000 for the transit operator to use design-build entities. Note that the bill number has been corrected from the September Report, which listed this bill as HB 378.

SB 535—Design-Build Contracts

SB 535 authorizes the city of Victorville to enter into design-build contracts until January 1, 2011, by amending existing law which already authorizes use of the process for the counties of Solana and Yolo. The law requires the City of Victorville, if it elects to use design-build contracts, to report to the Legislative Analyst's Office (Office) before December 1, 2009, and the Office would have to make a report on the effectiveness of the design-build method. The new law authorizes the City to establish a procedure to pre-qualify design-build entities using a standard questionnaire. In preparing the questionnaire, the City also is required to consult with the construction industry, including representatives of the building trades and the surety industry. The questionnaire must include information on any work that a surety has completed. The new law states that selected design-build entities "shall possess or obtain sufficient bonding to cover the contract amount for non-design services." Payment or performance bonds must be in a bond form developed by the City. If a performance and payment bond, issued by an admitted surety insurer, is required for bid solicitation, retainage may not exceed 5%.

SB 667—Best Value Construction Contract Pilot Program

SB 667 creates the Best Value Construction Contract Pilot Program (Program), authorized for use at the University of California-San Francisco. The new law requires the Regents of the University of California to award any contract for a project in this Program to the lowest responsible bidder or else reject all bids. During the bidding process, in order to determine the contractor's financial condition, the University must consider at a minimum, his or her capacity to obtain all required payment bonds, performance bonds, and liability insurance.

SB 1026—Payment and Performance Bonds

SB 1026 allows the Los Angeles County Metropolitan Transportation Authority to use design-build contractors until January 1, 2010, for high-occupancy vehicle lanes. Payment and performance bonds are required.

SB 1196—Local Government Omnibus Act of 2006

SB 1196 amends existing law, which provides procedures that local agencies (formerly known in the prior law as a “public entity”) are required to follow when building public works projects. If a local agency voluntarily follows the Uniform Public Construction Cost Accounting Act, the agency may use its own employees for projects worth \$25,000 or less, and projects worth \$100,000 or less require only informal bids. Projects worth more than \$100,000 require formal bids. With respect to projects worth less than \$100,000, if all the informal bids received are in excess of \$100,000, the agency’s governing board may adopt a resolution by a 4/5 vote to award the contract at \$110,000 to the lowest responsible bidder. The new law increases the above thresholds in the law from \$25,000 to \$30,000, from \$100,000 to \$125,000, and from \$110,000 to \$137,500, respectively.

SB 1627—Wireless Telecommunication Facilities

SB 1627 requires a permit for construction or reconstruction for a development project. The new law also prohibits a city or county from requiring an escrow deposit for the removal of a wireless telecommunication facility or any of its components. The new law allows a performance bond, other surety, or other security to be required, so long as the amount is “rationally related” to the cost of the facility’s removal. In establishing the amount required the city or county is to take into consideration information on the cost of removal that the permit applicant provides.

COLORADO

HB 1077—Indemnity Agreements—VETOED

The Governor vetoed this bill, which would have voided indemnity agreements in construction contracts.

HB 1148—VETOED

HB 1148 would render void and unenforceable any indemnity provision in a construction agreement that requires a person, their surety or insurer to indemnify, insure or defend in litigation another person against liability for damage arising out of death or bodily injury to persons or damage to property caused by the negligence or fault of the indemnitee or any third party under the control or supervision of the indemnitee. This provision would not affect any provision in a construction agreement that requires a person or the person’s surety or insurer to indemnify another person against liability for damage, including but not limited to the reimbursement of attorney fees and costs, if provided for by contract or statute, arising out of death or bodily injury to persons or damage to property, but not for any amounts that are greater than that represented by the degree or percentage of negligence or fault attributable to the indemnitor or the indemnitor’s agents, representative, subcontractors or suppliers.

HB 1343—Employment of Illegal Aliens

The new law creates the Basic Pilot Employment Verification Program. It prohibits a state agency or political subdivision from entering into or renewing a public contract with a contractor who knowingly employs or contracts with subcontractors that employ illegal aliens. Prior to contracting, the contractor must certify that it does not knowingly employ illegal aliens and that the contractor has participated in the basic pilot program to verify that it does not employ illegal aliens. Public

contracts must contain provisions prohibiting the knowing employment of illegal aliens. If a contractor violates the law, the public owner may terminate the contract for breach of contract; and the contractor shall be liable for the actual and consequential damages.

CONNECTICUT

HB 5677/SB 493—Waiver of the Surety’s Defenses

As originally drafted and introduced as HB 5187, a surety would have waived all of its defenses to a claim if the surety did not respond to a claim within 90 days either by paying the claim or by identifying the portions that are in dispute. SFAA worked with AIA and NASBP to oppose the bill, and SFAA drafted amendments in the event that the bill would proceed. In our proposed amendments, the surety did not waive any statutory defenses or any defenses of the principal. After negotiation with the sponsor, a substitute bill was introduced in which the provision regarding the surety’s waiver of defenses was removed. The bill passed, and the Governor signed it into law.

SB 5695—UConn 2000

UConn 2000 is a \$2.3 billion, 20-year state project to rebuild and enhance the University of Connecticut. Public Act 95-230 created UConn and exempted it from certain local laws and environmental regulations. In 2005, legislation was enacted exempting the UConn 2000 construction project from the state law provisions prohibiting OCIPs. The new law in 2006 contains several new provisions to provide independent oversight of UConn 2000 construction projects, including board of trustee audits and an independent committee to review construction policies and procedures. The new law subjects UConn 2000 projects to public building construction requirements, requires public bidding on projects over \$500,000 and requires compliance with the state building code, among other provisions.

DELAWARE—No Enactments in 2006

DISTRICT OF COLUMBIA—No Enactments in 2006

FLORIDA

HB 1089/SB 1940—Statute of Repose

The new law shortens the time in which an action can be brought based on the design, planning or construction of an improvement to real property by reducing the statute of repose from 15 to ten years. SFAA, AIA and the local surety association supported this effort.

SB 1350—DOT Bond Threshold--VETOED

SB 1350 allows maintenance contractors on long-term Department of Transportation (DOT) projects to post only bonds necessary to cover the next year’s work. Furthermore, the new law raises the threshold for DOT contracts from \$150,000 to \$250,000 and permits the DOT to accept alternative security on DOT projects for amounts in excess of \$250 million. SFAA discussed the bill with DOT and wanted to amend the bill so that it could not be misread to allow the DOT to waive all bonds over \$250 million, but the DOT assured SFAA that this would be remedied in the regulations so that it is clear that bonds will be required for amounts under \$250 million and alternative security will be considered for amounts over that. SFAA opposed the increase in the bond threshold for the DOT.

GEORGIA

HB 1177—DOT Bond Threshold

The new law allows the Department of Transportation, on projects that exceed \$300 million, to make a determination that 100% bonds are not reasonably available. It then has to require payment and performance bonds of not less than \$300 million and protect the balance of construction costs with a combination of letters of credit and corporate guarantees. SFAA member company representatives and staff assisted in crafting this bill.

HAWAII

HB 2966—Public and Low Income Housing

HB 2966 divides the Housing and Community Development Corporation of Hawaii into two separate agencies, the Hawaii Housing and Finance Corporation, “Corporation,” and the Hawaii Public Housing Authority, “Authority.” Under the new law, the Hawaii Public Housing Authority handles the administration of low-income and public housing projects. The Hawaii Housing and Finance Corporation handles the actual construction of public housing projects. The Corporation may develop housing projects privately through a competitive bidding process with public notice given. The successful bidder is required to furnish a payment bond and a performance bond. Under the contract, the Corporation maintains control of the project until it is available for occupancy. Also, the new law allows for the Corporation to develop housing projects on its own or to enter an agreement with an independent developer. The developer must furnish a performance bond to the Corporation, conditioned on completion of the project on time, with sureties acceptable to the Corporation.

HB 3036—Prompt Pay

HB3036 amends and enhances the existing prompt pay requirements for subcontractors on public projects. Existing law requires that any money paid to a contractor must be paid within ten days to the subcontractors, and the new law extends this requirement to retainage. The new law requires any retainage that the general contractor requests or requires to be withheld, to be held by the public owner. Under the new law, there are two ways in which a subcontractor can receive final payment from the prime. First, if the subcontractor completes its work satisfactorily, provides the contractor with a properly documented final payment and provides the prime with payment and performance bonds, the subcontractor is entitled to interest from the contractor on the amount owed if it is not paid, and such penalty may be withheld from future payments due to the contractor. This provision is similar to existing law except that the new law eliminates the alternatives previously permitted to providing performance and payment bonds, and contains a new definition of “properly documented final payment.” Second, 90 days after the last day on which labor was provided, if the subcontractor provides either a retainage release bond, any other bond acceptable to the prime or any other mutually acceptable collateral, all funds retained from the subcontractor shall be paid by the owner to the general contractor, who is required in turn to pay the subcontractor within ten days. This method of payment is new under HB 3036.

The new law allows the prime or subcontractor to negotiate their contracts so that a maximum of 10% of each progress payment due for performance may be retained, without cause, without incurring a late payment interest penalty. Existing law provides that the prime may not withhold more from the subcontractors than the percentage withheld from the prime. These provisions also apply to subcontractors who hire other subcontractors to perform work.

IDAHO—*No Enactments in 2006*

ILLINOIS—*No Enactments in 2006*

INDIANA

HB 1008—Public-Private Agreements

HB 1008 allows public-private agreements to develop transportation facilities. The agreement may provide for performance and payment bonds, but is not specifically required to provide for bonds.

SB 259—Bond Requirements for a new Building Authority

SB 259 allows the Indiana Convention and Stadium Building Authority to waive payment bond requirements on capital improvement projects provided that: (1) that an otherwise responsive and responsible bidder is unable to provide the payment bond or the cost or coverage of the payment bond is not in the best interests of the project and (2) that an adequate alternative is provided through a letter of credit, additional retainage of at least ten percent (10%) of the contract amount, a joint payable check system or other sufficient protective mechanism.

SB 359—Retainage

SB 359 alters retainage law for public works contracts. Prior to the passing of this bill, in contracts between general contractors and subcontractors in connection with public works projects, if retainage was withheld, it had to be placed in an escrow account. This bill eliminates this mandate and provides instead that retainage may with placed in escrow as mutually agreed.

IOWA

SB 2364—Service of Process

As originally drafted, SB 2364, the Iowa Insurance Department's legislative package, contained a provision to repeal the requirement that the Insurance Commissioner act as agent of service of process for insurers. The Department bill would have caused SFAA members to begin filing an agent for service of process in the Iowa federal district courts. SFAA worked with AIA to craft an amendment that designates the Secretary of State to receive service of process for sureties for purposes of 31 USC 9306 to the extent the surety cannot otherwise be served in Iowa. Insurers otherwise file a resident agent for licensure. At the eleventh hour, the trial lawyers complained about the Department no longer accepting service of process, so the provisions were added back to the Insurance Code, in addition to the new option of allowing the Secretary of State to accept service of process. The Insurance Department is now permitted to charge a reasonable fee for acting as agent for service of process.

HB 2713—Bid Security

HB 2713 provides that the bid threshold for seeking competitive bids on public works projects will be decided by a new advisory committee. The prior law set the threshold at \$25,000.

KANSAS

HB 2394—Construction Contracts

The new law establishes the use of two contracting methods for public construction, which includes construction manager at risk and design-build contracts. Both are required to submit a statement of qualifications that must demonstrate the firm is able to provide the required public works bond during the bid solicitation process. Such evidence must be submitted to the State Building Advisory Commission.

SB 332—Insurance Contracts

With the exception of employee health insurance, post-secondary institutions may purchase any kind of insurance through a competitive bid process without going through the State Committee on Insurance and Surety Bonds, and it must be purchased from an insurance company licensed to do business in the State.

KENTUCKY

HB 380

HB 380 appropriates funds for the renovation of the Executive Mansion. Performance and payment bonds are required.

LOUISIANA

HB 1294—Public/Private Construction Agreements

The bill authorizes the Louisiana Transportation Authority to pursue public-private agreements for the construction of specified facilities. Payment and performance bonds are required.

SB 151—Small Business Contracts

SB 151 creates a program for acquiring data processing equipment and software and sets goals for small businesses to participate. The Commissioner of Administration determines the goal for awarding small businesses a portion of the contracts for these procurements under the new provision. The new section of the law defines a small business as fifty employees or less for this program. Even if the goals of the program are not met, small businesses may still participate in the normal bidding process. The Commissioner will establish the contracting procedure, and surety bonds guaranteed by the federal Small Business Administration are acceptable as security for an award under this program.

SB 383—Surety Definition

SB 383 amends the Uniform Commercial Code with several general revisions. Among them, a surety has been further defined to include any “other secondary obligor” in addition to the existing definition as a guarantor.

SB 620—Insurance Claims

SB 620 amends the Insurance Code provisions on cancellations and non-renewals. The bill requires insurers to pay an additional 50% of the damages, plus attorneys’ fees and costs, if a claim is not paid within 30 days. Prior law set the penalty at an extra 25%, and no attorneys’ fees were awarded.

S Res. 158—Study on Individual Surety for Public Works Projects

S Res. 158 requests the Senate Committee on Transportation, Highways and Public Works to conduct a study on the feasibility of permitting individual surety on bonds required for public works contracts. The Resolution states that small businesses have been able to easily secure bonding for federal projects under the Federal Individual Surety Program, but that the Louisiana law contains restrictions that make it difficult or even prohibit these small businesses from obtaining individual surety for state projects. The current law has no alternative to the conventional bonding market, and small or growing Louisiana businesses are losing out on bids and contract awards from the state. The committee is to report on its study and any proposed legislation by March 15, 2007.

MAINE—*No Enactments in 2006*

MARYLAND

HB 169—Individual Sureties

The new law allows individual sureties to write surety bonds in Maryland without being licensed as a surety. SFAA worked closely with AIA local counsel to approach the bill sponsors regarding the potential for fraud that this bill would create. SFAA also testified when the bill was heard, and provided alternative language. The bill passed, however, without any of the industry-sponsored suggestions or protections for the State, as it was perceived as assisting small and emerging contractors. In addition to allowing individual sureties to write bonds without pledging verifiable assets to the State, the new law increases the size of the surety bond guarantee available from the Maryland Small Business Development Financing Authority (MSBDFFA) to \$1,350,000, and the size of the bond MSBDFFA can write directly to \$5,000,000. Lastly, the new law includes a reporting requirement on the impact of the bill on small businesses and minority businesses and a three-year sunset.

HB 869—Minority Businesses

HB 869 extends until July 1, 2011, the provisions in the State Procurement Law regarding minority businesses. A final study of the Minority Business Enterprise Program must be submitted to the Legislature before September 30, 2010.

MASSACHUSETTS

HB 5253—Economic Development Plans

HB 5253 contains procedures for the submission and approval of proposals for economic development of the Commonwealth. Among the many requirements in the new law, approval of an economic development project is conditioned on the developer obtaining a blanket performance bond or other security that is satisfactory to the Secretary of State and payable to the Massachusetts Development Finance Agency. The bond or security posted is for securing the developer's obligation to complete the construction of the proposed economic development project and public infrastructure improvements included in the proposal. The bond or security must be in an amount equal to or greater than the outstanding principal sum of any revenue bonds that the Agency issues to finance the costs of the public infrastructure improvements.

SB 2655—Mandatory ADR—VETOED

SB 2655 would have created a mandatory alternative dispute resolution (ADR) program for claims under construction contracts with a value of less than \$10 million in connection with public works projects and capital facilities for the State and all its agencies. For claims with a value of at least \$10 million, the parties would have had to agree to the ADR in this new law or mediation. Each state agency could have adopted its own ADR procedure consistent with the minimum standards contained in the new law, which provide for non-binding ADR and allow the parties to agree to binding arbitration. The Governor returned this bill unsigned under the provisions of the state constitution, resulting in a veto. In his message to the state legislature, Governor Romney stated that the bill only permitted state contractors to use binding arbitration to settle construction disputes with the Commonwealth, which he said was not in the state's best interests. Referencing the recent problems with the "Big Dig," the Governor said that he believes the Commonwealth must preserve its ability to exercise oversight on public works projects, including defending itself in court against construction claims.

MICHIGAN

HB 5796—Women and Minority Owned Businesses

HB 5796 is an appropriations bill that instructs the Department of Transportation (DOT) to continue its program to increase the use of women- and minority-owned businesses for state and local road construction projects. The new law also requires that, at a minimum, the program 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 bill instructs the DOT to report to the House and Senate Appropriations Subcommittees on Transportation, and the House and Senate fiscal agencies of its progress by March 31, 2007. The SFAA will be working with the Subcommittees on this issue, as well as seeking to present its Model Contractor Development Program in Michigan.

MINNESOTA

HB 2480—New Stadium Construction

HF 2480/SB 2297 creates a new baseball authority to build a new stadium for the Minnesota Twins. As originally drafted, the bill had bond provisions that made surety bonding on the project discretionary. SFAA worked with AIA, and the law that was enacted makes bonds mandatory. The new law also provides that the bonds must cover any costs that may be incurred in excess of the contractor's certified price, including, but not limited to, costs incurred by the authority or loss of revenues resulting from incomplete construction on the completion date.

HB 3073—Mechanics Lien

Existing law concerning lien releases has been amended to allow a surety bond to be posted in addition to cash that must be deposited during court proceedings. The bond must be from a surety company on the U.S. Department of Treasury List and be payable upon entry of a judgment as provided in existing law.

MISSISSIPPI

HB 1663

HB 1663 creates the Panola County Utility District. Contracts entered into by the District exceeding \$20,000 require a performance bond.

SB 2556—Payment under Public Construction Contract

SB 2556 lowers the amount of time to pay public construction contractors from 60 days to 45 days from when payment was due before interest would begin to accrue.

SB 2727—Payment under Private Construction Contracts

SB 2727 is similar to SB 2556, but applies to all construction contracts except contracts for public construction, and lowers the time frame for payment to 30 days.

MISSOURI

HB 1380—Missouri Public-Private Partnerships Transportation Act

HB 1380 creates a public-private partnership to finance, develop and/or operate a toll bridge between Illinois and Missouri. Bid bonds would not be required on the project, but the Missouri Highways and Transportation Commission may require a private partner to provide performance and payment bonds for its protection, in any amount that it determines. The new law provides that the Commission may require a payment bond for the total amount of the agreement unless it is documented that the amount is not practical. In that case, the Commission may set the amount of the payment bond, but it may not be less than the amount of the performance bond.

MONTANA—*Not in session in 2006*

NEBRASKA—*No Enactments in 2006*

NEVADA—*Not in session in 2006*

NEW HAMPSHIRE—*No Enactments in 2006*

NEW JERSEY

HB 2641—Bid Bond Threshold

HB 2641 raises the threshold for requiring public advertising for bids on contracts with state colleges from \$17,700 to \$26,200. Bid bonds can be required when bidding on a publicly advertised project. Furthermore, the bill removes a requirement that, if a performance bond is required on a contract with a state college, bidders on the project be required to “submit with the bid a certificate from a surety company stating that it will provide that bidder with a performance bond in the specified amount and form.” The bill also removes the requirement that “All bid security except the security of the three apparent lowest responsible bidders shall, if requested, be returned within 30 days from the opening of the bids, Sundays and holidays excepted, and the bids of those bidders shall be considered as withdrawn.” In addition, the bill no longer requires that bids from subcontractors show evidence of performance security.

SB 1726—ADR for Construction Disputes

SB 1726 as originally drafted would have required that all construction payment disputes go to arbitration with the American Arbitration Association (AAA). The bill was amended to require that all construction contracts in New Jersey provide that payment disputes may be sent to alternative

dispute resolution. To the extent that such disputes are litigated, the new law requires that the case must be heard in New Jersey, and that attorney's fees be awarded to the prevailing party.

SB 2864—Retainage

SB 2864 alters retainage rules on state DOT projects. Previously, 5% was retained for the first 50% of the project, with nothing held thereafter. In addition, 2% was withheld upon substantial completion of the project. This new law allows 2% to be withheld for the entire project, with 1% being withheld upon substantial completion. Retainage can be increased to 4% at any time, if work is not progressing as defined by the New Jersey Department of Transportation Standard Specifications for Road and Bridge Construction.

NEW MEXICO—No Enactments in 2006

NEW YORK

SB 6884—Lien Release

SB 6884 amends existing law to exempt private entities from being a necessary party to an action involving a private improvement lien foreclosure. Existing law only exempted state or public corporations from being a party to such actions. The exemption is conditioned on a prime or a subcontractor executing a bond or undertaking to the county clerk with which such notice is filed, conditioned on the payment of any judgment that may be recovered in an action to enforce a lien. Existing law already provided this exemption condition for public improvements.

HB 9558—Payment and Performance Bonds

HB 9558 authorizes the reconstruction of school buildings in Syracuse. Payment and performance bonds are required in every contract.

NORTH CAROLINA

HB 914/SB 1108—Retainage

HB 914/SB 1108, the State Budget Act, requires the Department of Transportation (DOT) to fully fund retainage from transportation project contracts during the year that the work is performed. Additionally, the DOT is required to maintain an available cash balance at the end of each month in the amount of 5% of the unpaid balance of the transportation project contract obligations. If the cash balance is not available, then the DOT is prohibited from entering into any further transportation project contract commitments until the cash balance is regained. "Cash" may include any amount due from the federal government and the Highway Bond Fund for any un-reimbursed expenses for contract awards involving federal aid for the purposes of the available 5% cash balance.

HB 1834—Public Construction Bonds

HB 1834 authorizes the Department of Transportation (DOT) to require public construction bonds for routine maintenance and operations to be provided on a periodic basis. These bonds only cover that specific period for which they are required and not the entire duration of the project.

SB 2009/HB 2780—Public-Private Partnerships

SB 2009/HB 2780 permits public schools to enter into capital lease agreements with private developers in the construction of public schools. The new law gives the local school board discretion to require the private developer to furnish a performance and payment bond for construction work. The local school board also may require a bond or other type of appropriate guarantee for any other products, guarantees or services that the developer will provide.

NORTH DAKOTA—*Not in session in 2006*

OHIO—*No Enactments in 2006*

OKLAHOMA

HB 2083—Indemnity Provisions

The new law makes any provision in a construction contract void and unenforceable that requires any entity or its surety to indemnify, insure, defend or hold harmless another entity for liability for death or bodily injury or damage of property based on the indemnitee's negligence or fault. This does not affect provisions requiring a surety or insurer to indemnify another entity.

SB 558/HB 1770—State Bond Threshold

SB 558/HB 1770 raises the state bond threshold from \$25,000 to \$50,000. As originally drafted, the bill would have raised the threshold to \$100,000. The new law also provides that contracts less than \$50,000 must be let to the lowest responsible bidder through written bids and that contracts of less than \$2,500 for repairs and maintenance can be negotiated with a qualified contractor. With regard to public school districts, contracts under \$25,000 may be negotiated with a qualified contractor; and contracts between \$25,000 and \$50,000 must be let to the lowest responsible bidder through written bids. The new law also provides that, when all bids for a public construction project exceed an agency's estimate and available funding, the State Contract Administrator may enter into negotiations with the lowest responsible bidder for the purpose of modifying the project scope and reducing the construction cost.

OREGON—*Not in session in 2006*

PENNSYLVANIA

HB 1637—Waiver of Liens

HB 1637 amends the law on liens to provide that a subcontractor may waive the right to file a claim against the property of a residential building with a signed, written instrument or by conduct which operates to estop the subcontractor from filing a claim, irrespective of the contract price between the owner and the prime contractor. Such waiver may be made, provided that the prime has posted a payment bond for the labor and materials provided by subcontractors. With respect to non-residential buildings, such a waiver by a subcontractor is prohibited, unless given in consideration for payment for the work, services, materials or equipment provided and only to the extent that the payments have of been received, or that the prime has posted a payment bond for the labor and materials provided by subcontractors.

RHODE ISLAND

HB 8250—Contractor’s License

HB 8250 amends existing law that requires a contractor to obtain a certificate of registration by registering with the Contractors Registration Board.

SB 2660/HB 8203—Increase in Fines to Contractors

SB 2660 and HB 8203 increases the fines for contractors who have failed to pay wages from the minimum of \$50 to \$500 and the maximum of \$100 to \$1,000 for each separate offense. The law concerning civil penalties in any action for nonpayment of wages has been amended such that the order from the Director of Labor may require an additional civil penalty of up to three times the amount due, rather than a sum equal to three times the amount due that was mandated under prior law. Existing law provides that the amount due includes any wages or supplements plus interest, and that the surety of the person, firm or corporation found to be in violation of the law is bound to pay the penalties that have been assessed.

SB 3071—Release of Liens

SB 3071 gives those seeking to lien property 200 days from the last day they did work or furnished materials to give notice of their intention. Under prior law, the time period was 120 days. Such persons now have 40 days after giving the notice to file a complaint to enforce the lien. Prior law gave 120 days to file a complaint. Existing law allows the owner of the land against which the lien is asserted to file a deposit or bond to release the lien. The new law provides that the amount of the deposit or bond must now include interest at the statutory rate and attorney’s fees.

SOUTH CAROLINA

SB 572—Bid Security

SB 572 amends the existing law regarding bid security for construction contracts. Under the prior law, bid security was required for construction contracts in excess of \$100,000. That amount has been lowered to \$50,000. The amount for the waiver of bid security accordingly was amended, lowering the amount from \$100,000 or less to \$50,000 or less.

SOUTH DAKOTA—No Enactments in 2006

TENNESSEE

HB 3068—Prompt Pay

HB 3068 amends the existing prompt pay law to provide that a contractor must make payment to a subcontractor within 30 days after the subcontractor timely submits a correct application for payment. The new law also provides that late payments must be made with accrued interest. Prior law only required that the payments be made within the time specified in the contract.

HB 3859—Contract Bonds

HB 3859 requires bid bonds of 5% and 100% performance bonds on all public works contracts in the Town of Gibson.

HB 4090/SB 4024—Payment and Performance Bonds

HB 4090/SB 4024 rewrites the existing charter for the city of Cowan. Among its provisions, the new law requires a bid bond for 5 percent of the bid price offered for public works projects in the city. A performance bond for 100 percent of the contract price from a Tennessee authorized surety

company must be posted before the contract is awarded. This requirement may be waived for contracts under \$5,000.

TEXAS—*Not in session in 2006*

UTAH

SB 80—Public-Private Partnerships

SB 80 authorizes public-private partnerships for the construction of tollways. Payment and performance bonds are allowed, but are not specifically required.

VERMONT—*No Enactments in 2006*

VIRGINIA

HB 64—State Bond Threshold

HB 64 raises the threshold for surety bonds on public works projects from \$100,000 to \$250,000 for state Department of Transportation (DOT) projects. The original bill would have increased the state bond threshold from \$100,000 to \$500,000 for all public construction projects.

HB 1259—Bonding Requirements

Existing law requires payment and performance bonds on any public construction project exceeding \$100,000 or on any contract in excess of \$100,000 requiring the furnishing of labor or materials for buildings or improvements to real property owned or leased by a public body. HB 1259 adds that bonding also is required on any contract in excess of \$100,000 on which the performance of labor or furnishing of material will be paid with public funds.

HB 1014—Performance Bonds

Under current law, when a city or town leases its property for a term greater than five years, the lessee must post a bond in such sum as the city or town shall determine, conditioned upon the construction, operation and maintenance of the plant or plants provided for in the granted franchise, right, lease or privilege. HB 1404 provides that a video provider that develops or operates a cable system is not required to post performance bonds in excess of \$50,000.

HB 1502/SB 675—Bond Threshold for Universities

HB 1502 creates management agreements between the State of Virginia and Virginia Polytechnic Institute and State University, the University of Virginia and the College of William and Mary to allow these educational institutions greater freedom in many procurement functions, including construction projects. The law sets forth the terms and conditions under which these universities must manage their operations, which include procurement provisions that differ in whole or in part from the public procurement laws, including bonding requirements. Bid, performance and payment bonds would be required on projects costing more than \$1 million. Retainage is set at 5%.

SB 371—Private Funding

SB 371 would allow subdivisions to use private funding for public construction. Bonds or other security would be required.

WASHINGTON—*No Enactments in 2006*

WEST VIRGINIA

SB 673—Special Infrastructure Project

SB 673 allows counties to impose service fees on people working within the county. Any special infrastructure project financed in whole or part with these fees has to be bonded if the cost exceeds \$25,000.

SB 759—Design-Build

SB 759 allows design-build construction on transportation projects. Bonds are required

WISCONSIN

SB 450—Liens

SB 450 amends the construction lien law in which a lien can be removed from the judgment and lien docket if a surety bond or a deposit is posted with the clerk of the court. Previously, the law provided that two or more sureties could execute the surety bond. This bill would change that to a single surety.

WYOMING

HB 135—CMs and CMs at Risk

HB 135 allows construction manager and construction manager at risk contracts. Bonds are required.