

THE SURETY & FIDELITY ASSOCIATION OF AMERICA

MEMORANDUM

TO: Government Affairs Advisory Committee

FROM: Daniel Wanke
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RE: August State Legislative Report—Recent Enactments in Contract Surety

DATE: September 1, 2006

The following is a list of laws affecting contract surety that were enacted into law in August 2006.

CALIFORNIA

HB 378: *Design-Build Contracts*

To Governor

HB 378 extends the sunset date of existing law that allows transit operators to enter into design build contracts to January 1, 2011. The law would expire 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.

SB 535: *Design-Build Contracts*

To Governor

SB 535 authorizes the city of Victorville to enter into design-build contracts until January 1, 2011, by amending existing law already authorizing use of the process for the counties of Solana and Yolo. The law would require 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 bill 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 percent.

SB 667: *Best Value Construction Contract Pilot Program*

To Governor

SB 667 creates the Best Value Construction Contract Pilot Program (Program), authorized for use at the University of California-San Francisco. The bill 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 1627: *Wireless Telecommunication Facilities*

To Governor

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.

MASSACHUSETTS

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 its 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 – Effective Immediately*

HB 5796 is an appropriations bill that also contains several provisions concerning departments in the state government. The bill 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 bill 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 implementing its Model Contractor Development Program in Michigan.

NORTH CAROLINA

HB 1834: *Road Maintenance* – Effective Immediately

HB 1834 authorizes the Department of Transportation (DOT) to implement up to two performance-based contracts for routine maintenance and operations under which the required bonds are 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.

The following is a list of laws affecting commercial surety that were enacted into law in August 2006.

ALASKA

HB 3001: *Lease Expense* – Effective Immediately

HB 3001 excludes amounts paid to indemnify the State as a part of lease expenditures for oil and gas producers. The new law also provides that the costs of obtaining insurance or surety bonds from a third-party insurer or surety are not excluded under this provision.

CALIFORNIA

SB 263: *Travel Agents*

To Governor

SB 263 regulates “sellers of travel discount programs,” (program) which are membership or benefit programs providing discounted travel services and transportation prices not generally available to the public. Anyone selling such a program must register as a seller of travel, pay a \$150 fee, and maintain a surety bond for \$100,000 from a surety company admitted to do business in the State. A copy of the bond must be filed with the Secretary of State, and a copy must be given to the Attorney General. The bond must be in favor of the State for the benefit of purchasers of the program who are harmed by a violation of the new law, the seller's misrepresentation or misapplication of funds, or the failure of the seller to comply with the terms of the program.

NEW JERSEY

SB 1321: *New Jersey Real Estate Timeshare Act* – Effective November 2, 2006

SB 1321 requires time-share developers to register all timeshare plans with the New Jersey Real Estate Commission that have accommodations located in the State or that are sold to any resident of the State. The new law gives purchasers a period in which to cancel their contracts and requires the developer to keep deposits with an escrow agent during this cancellation period. If the developer sells a timeshare when the construction is

not completed, the funds of that sale must remain in the escrow account after the expiration of the cancellation period. In lieu of the escrow account, a surety bond, U.S. bond, or irrevocable letter of credit, or other acceptable financial assurance may be deposited with the Commission. The amount of any financial assurance must be equal to or more than the amount which would be placed in escrow during the cancellation period, or equal to the cost to complete the incomplete property, whichever is less. The amount of financial assurance may not be less than the amount of funds that would otherwise be placed in escrow during the cancellation period.

NEW YORK

SB 5463: *Apparel Manufacturers and Contractors* – Effective December 16, 2006

SB 5463 amends existing the labor laws that require a manufacturer or contractor to register with the Commissioner of Labor (Commissioner). Under the new law, the Commissioner may require a surety bond as a condition of continued registration after a second violation of existing labor laws concerning minimum wage, overtime compensation, unemployment insurance coverage, child labor and industrial homework, instead of revoking registration. The surety bond is for the benefit of production employees damaged by any failure of a manufacturer or a contractor to pay wages or benefits, or for failure to comply with any other provisions in the labor laws. The Commissioner determines the penal sum and form of the bond. The penal sum is what the Commissioner determines to be necessary to protect production employees but may not exceed \$2500 per production employee. The new law requires manufacturers to provide documentation that any surety bond, which may be required under the new law, has been paid according to the new law.

The new law also expands the existing powers of the special task force for the apparel industry to investigate businesses for such violations, giving it authority to assess and collect penalties, and to confiscate property for violations, in addition to the existing and new civil and administrative penalties. Such violations lead to the potential necessity of posting a surety bond in order to maintain registration as a manufacturer or contractor.

SB 6542: *Real Estate Tax* – Effective Immediately

SB 6542 provides that anyone disputing collection of the tax and filing for a refund in Tompkins County, under the new tax imposed on any conveyance of real property, must deposit an amount equal to the amount of the tax and any penalties due under local laws, along with a surety bond from a state-licensed surety. The state supreme courts determines the amount of the surety bond, under the condition that if the proceeding is dismissed or if the tax is confirmed, the petitioner must pay all of the costs and charges accrued during the prosecution of the proceeding. The petitioner has the option of posting a bond including the amount of the taxes, the interest and penalties he or she has stated in his or her determination, in addition to the costs and charges accrued during the prosecution of the proceeding, rather than making a deposit. Any person whose request for a refund of new tax has been denied may dispute the decision, and a surety bond also is required for this proceeding.

SB 7328: *Real Estate Tax – Effective Immediately*

SB 7328 is similar to SB 6542, except that it establishes a community preservation fund for the town of Red Hook for the purposes of preserving town character through property acquisitions and improvements, which will be funded by a new real estate transfer tax, among other methods. As with SB 6542, the tax may be reviewed under the same procedures, requiring anyone disputing the tax to file a surety bond in the amount as described for SB 6542.

SB 6852: *Motor Vehicle Tax – Effective December 1, 2006*

SB 6852 amends the existing tax law to authorize a “qualified person” to collect the existing tax due for the sale or the use of a motor vehicle, when they register the motor vehicle. Under the new law, a “qualified person” is someone who has registered as required under existing law, but is not a vendor. A qualified person is authorized to register vehicles or accept applications for a certificate of title required under existing vehicle and traffic laws. The new law requires that such persons file a surety bond, or other acceptable security, with either the Taxation and Finance Commissioner or the Commissioner of Motor Vehicles, in the amount that the Taxation and Finance Commissioner determines is necessary to secure the payment of taxes, interest or penalties due or any other money collected that is considered a tax. The surety must be authorized to do business in the State and approved by the Superintendent of Insurance.

The following is a list of laws affecting fidelity that were enacted into law in August 2006.

CALIFORNIA

HB 2462: *State Teacher Retirement*

To Governor

HB 2462 sets forth the retirement plans that employers could provide to employees eligible for coverage as a part of the State Teacher’s Retirement Plan. An employer, now including community colleges, may enter into a written contract with the State Teacher Retirement System (System) for services regarding an annuity contract, a custodial account, or deferred compensation plans. If the System chooses to contract with a third-party administrator for the administrative or compliance services provided to employers, the third-party administrator must provide proof of liability insurance and a fidelity bond in an amount sufficient to protect the assets of participants and beneficiaries in the annuity contract and custodial account, as determined by the system, or the employer, depending on with whom the third-party administrator has entered into a contract.