

THE SURETY & FIDELITY ASSOCIATION OF AMERICA

MEMORANDUM

TO: Government Affairs Advisory Committee
Contract Bonds Advisory Committee

FROM: Lenore S. Marema

DATE: September 28, 2007

SUBJECT: 2007 Overview of the State Legislative Sessions—Contract Surety

Most states have concluded their 2007 legislative session, so that there is little activity to report at this time. Massachusetts, Michigan, New Jersey, Ohio, Pennsylvania and Wisconsin still are in session.

The following summarizes key state legislation affecting contract surety that SFAA has been working on most recently with AIA and the NASBP. This report updates the August 2007 overview report, which can be accessed on the SFAA website for reference.

Small and Emerging Contractor Issues Arise in New York

Bonding for small and emerging contractors remains an active issue at this time of the year. SFAA entered into a Memorandum of Understanding (MOU) with the New York State Division of Minority and Women Business Development to conduct a program to assist minority- and women-owned construction businesses to qualify for and access bonding, or increase their bonding capacity, through education and direct assistance in the bonding process. The program is modeled on the SFAA Model Contractor Development Program (MCDP), and a “pilot” contractor development program will be conducted shortly in Lower Manhattan. It is intended that the program will be repeated in various locations throughout the State. The New York Lieutenant Governor was a signatory to the MOU, as bonding for small and emerging contractors is a high priority on his agenda.

The New York Insurance Department, however, believes that this is a long-term solution; and, since it will be implemented initially in Lower Manhattan, it does not address bonding needs of contractors immediately or the needs of contractors statewide. A related concern of the Department is that some contractors may not need the educational modules of the MCDP, but rather need sureties to loosen their underwriting guidelines in evaluating them. The Department believes an additional solution is needed to write bonds now for small and emerging contractors and has talked with SFAA and AIA about a Market Assistance Program (MAP), a bond guarantee program or an assigned risk plan. One of the stated driving factors for the Department is that there is a 5% set-aside requirement for state agencies, and most agencies award only 2-3% to women- or minority-owned contractors. The Department also seems to feel under pressure

from the Governor and the Lieutenant Governor to address the small and minority contractor issue.

The conversations with the New York Insurance Department over the past two weeks have been frustrating in that the Department seemingly has vacillated on its directions. The pattern has been that SFAA's discussions indicate that the Department has been persuaded to give the MCDP a chance to work before implementing its own program. SFAA has suggested ways for the Department to be a part of the MCDP. The AIA, however, continues to be told that the MCDP is not enough and that the Department wants either the MAP program or some other solution. SFAA and AIA plan to meet with Superintendent Dinallo and his staff some time in the near future to resolve the issue. We will keep our members advised of the status of this issue.

Bond Guarantee and Technical Assistance Program Legislation

--Enactments. North Carolina HB 1181 creates the Small Business Contractor Authority (Authority), which will be composed of 11 members, four of whom will be from the General Assembly. One of the General Assembly appointees would be required to have experience in surety underwriting. The new law creates several special revenue funds to assist small businesses, including a surety bond fund, under which the Authority could guarantee a surety for up to 90% of losses under a bond or \$900,000, whichever is less. The Authority may vary the terms and conditions of its guarantees from surety to surety based on its experience with the sureties. The Authority also may execute bonds as a surety for the benefit of an applicant for a contract in which the majority of the funding is provided by a state government entity. The total amount of bond guarantees cannot exceed 90% of the money in the surety bond fund. The Authority's guarantees are not backed by the full faith and credit of the State.

--Bills on the Move. California AB 610 would amend existing law that authorizes the formation of small business financial development corporations to grant loans or loan guarantees. The bill would provide that it is the intent of the Legislature that such corporations make maximum use of their statutory authority to provide guarantee loans and surety bonds. The bill is on the Governor's desk for signature.

Illinois SB 1511 still has life, as the deadline for enactment has been extended once again. It is now July 31, 2007. The original bill would have allowed the Board to waive bonds for small and minority-owned contractors. SFAA and AIA worked together to amend the bill in the House, so that the Board could accept cash, letters of credit, U.S. debt obligations or debt obligations backed by the full faith and credit of the State of Illinois from small and minority businesses in lieu of surety bonds.

Public Private Projects

--Enactments. Enacted in a special session, **Missouri** HB 2a will allow the Department of Transportation (DOT) to repair 802 bridges in the State under a single design, build, finance and maintenance contract. The construction costs to complete the repairs by 2012 will be between \$400-\$600 million, after which the contractor would be responsible for maintenance for the next 25 years. With financing and maintenance costs included, the overall contract is expected to exceed \$1 billion. What is unique about this project is that, while the State intends to fund the

project, the contractor selected will finance the construction phase and will not receive any payments from the State until after the construction phase is completed. Some state revenues have been earmarked into the future to pay for this project.

New York Port Authority Update

SFAA has contacted the staff of the New York Senate Veterans and Homeland Security Committee, which has jurisdiction over issues related to the Port Authority. There has been some conversation in the legislature recently about the operation of the Port Authority regarding changes in its operations due to recent allegations of mismanagement of operations and funds. Some consideration has been given to the applicability of various government codes, such as security requirements and ethics rules, to the Port Authority. SFAA raised the issue of surety bonding for Port Authority projects. The Port Authority often requires bid bonds, but not final bonds; and, even when final bonds are required, the Authority may not permit additional surety premiums when change orders are issued.

The Port Authority was created by Act of Congress in 1921 after New Jersey and New York enacted enabling legislation. The Senate staff's conclusion at this point is that there likely is a legal argument that the Port Authority operates under neither the laws of New York nor New Jersey, but under its own rules. Major changes in its operations may well need Congressional approval.

The staff gave us the following suggestions for pursuing the surety bonding issues, and SFAA will work with AIA to explore these options in the near future. There is no reason that the Port Authority cannot and should not require bonds or otherwise comply with New York and New Jersey laws if we can persuade it that bonding is in the best interests of the Port Authority. This can be addressed through the Board and the appointment process. The Governor of each state appoints six members to the Board of Commissioners of the Port Authority, subject to state senate approval. The Governor of each state can veto the actions of its Board members. The Board hires an Executive Director. The Senate staff suggested that we need to contact the Executive Branch regarding our concerns on the surety bonding issues. Governor Spitzer may have some appointments to make and/or could encourage the Board to rethink the Authority's policy on bonding its construction projects. A legislative solution may be impracticable if Congressional action is needed.

The staff also suggested that we look into the Waterfront Commission, which is a separate entity from the Port Authority but also is under the jurisdiction of New York and New Jersey. The Commission was not created by an Act of Congress; and we might be able to address bonding issues as to this Commission, if any, through legislation in both states.

Finally, there are some bills pending related to port security that we might review as a vehicle to address surety issues. Legislation to address security at the Port that involves procurement issues might be used to address bonding the jobs related to port security. Legislation to address the procurement process for homeland security goods and services for the Port Authority might provide another vehicle.

Set Aside Requirements

--Bills on the Move. California AB 761 would require each state agency to establish a 25% goal for participation of small businesses in the construction of the State's infrastructure. On or before August 1, 2009, each state agency must report its statistics on small business participation. The bill is on the Governor's desk for signature.

--Recent Introductions. Michigan SB 751 would increase from 3% to 5% the participation goal for service-disabled veterans in construction and other contracts with the Department of Management and Budget.

Electronic Bidding

--Bills on the Move. California SB 161 would amend existing law, which authorizes public entities to adopt methods and procedures to receive bids on public works or other contracts over the Internet. The bill provides that contracts bid on under the California State University Contract Law also could be submitted electronically, so long as the bid security required under existing law were submitted within 24 hours after the opening of the bids. The bill does not specify the method by which the security must be received, either electronically or on paper. The bill is on the Governor's desk for signature.

Prompt Pay

--Enactments. The Governor signed **Illinois** HB 743, which requires owners to pay contractors within 15 days of the approval of the contractor's billing and requires the contractor to pay subcontractors within 15 days of the date that payment was received from the owner. The new law applies to private construction projects, excluding residential construction of buildings with under twelve units.

Other

--Performance Bonds on Technology Contracts. As finally amended and sent to the Governor, **California** AB 617 would repeal, until January 2013, the requirement of a performance bond for any state contract for information technology goods and services. Existing law requires the contractor to submit a faithful performance bond in a sum not less than one-half of the contract price. AB 617 would require the Department of General Services to develop guidelines to measure the risk to the State in the acquisition of technology and to determine the need for financial protection in the form of either a surety bond, letter of credit, protection in the form of contract terms or any other form of security or guaranty that is sufficient to protect the State in the case of default of the contractor or malfunction of the technology. The bill is on the Governor's desk for signature.

2007 Overview of the State Legislative Session—Commercial Surety

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LICENSE BONDS

Martial Arts

--Enactments. **Illinois** HB 1947 extends the licensing and bonding requirements for promoters of boxing matches to all martial arts matches. Existing law requires a \$10,000 bond to guarantee that the promoter will make payment on all obligations relating to the promotional activities. **North Carolina** HB 1786 increases the amount of the license bond required of promoters of boxing and kickboxing matches from \$5,000 to \$10,000. The new law also subjects promoters of mixed martial arts matches to the license bond requirement.

Pre-Need Funeral Services

--Enactments. **North Carolina** SB 1435 would require funeral establishments to post a surety bond in the amount of \$50,000 in connection with licensure as a pre-need establishment. The bond would have to be in place for five years or upon demonstrating solvency, which would have to be demonstrated no less than one year from the date the original license was issued. The bill, however, also would permit the Board of Funeral Service to extend the bonding requirement in the event there was a claim paid from the bond. The bill is on the Governor's desk for signature.

--Still Pending. The issue of regulation of pre-need funeral contracts is being considered in **Ohio** SB 210. SFAA spoke with the state funeral directors board, the state regulatory agency, and explained and promoted a license bond. The state is considering a recovery fund, which the board would have to administer; and the board is concerned with the resources that would be required to discharge its duties in connection with a recovery fund.

Other License Bonds

--Still Pending. The deadline for passage of legislation has been extended again in Illinois, as the legislature continues to refine the budget. **Illinois** HB 25 would subject casino operators to the existing \$250,000 license bond for managers of casino operations. HB 1292 would require the Commerce Commission to establish license requirements, including bonding, for agents, brokers or consultants engaged in the procurement or sale of retail electricity. **Illinois** HB 1947/SB 509 would require wholesale drug distributors to post a \$100,000 license bond. The bill remains on the Governor's desk for signature.

PUBLIC OFFICIALS

--Enactments. **Michigan** HB 4641 increases from \$5,000 to \$100,000 the surety bond required under existing law for the county drain commissioner. The bond is conditioned on faithful performance of the commissioner's duties. The commissioner may be covered by a blanket or individual bond as determined by the county board of commissioners.

TRUST BONDS

--Bills on the Move. **California** AB 1727 would make the surety liable for attorney's fees and costs incurred in a successful action against a conservator or guardian for breach of duties. Such costs would be considered a surcharge against the conservator or guardian, and if they went unpaid, the surety would have to pay them.

MISCELLANEOUS BONDS

--Enactments. **California** SB 959 requires private providers of involuntary home detection programs to show evidence of financial responsibility, which could be in the form of a surety bond or an errors and omissions insurance policy.

North Carolina SB 1457 requires commission contractors that are not governmental subdivisions, which have been granted a contract to issue license plates, to post a "guaranty bond" from a bonding company licensed in the State. The bond would have to be in an amount the Division of Motor Vehicles determined to be adequate to provide indemnification to the Division, at a minimum of \$100,000. An assigned savings account or a certificate of deposit also would be permitted in lieu of the bond.