



The Surety & Fidelity
Association of America

2007 ANNUAL

STATE LEGISLATIVE REPORT

ON

CONTRACT SURETY

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2007 IN REVIEW

November 2006 Elections Change State Agendas. The trial lawyers resurrected their bad faith and anti-tort reform agenda in states that experienced a turnover in leadership as a result of the November 2006 elections. While the industry still affirmatively sought some tort reforms, most of the industry's efforts were spent on the defense against trial bar initiatives.

Significant new bad faith bills were enacted in **Maryland** and **Washington**. **Maryland** HB 425 creates a new administrative process in the Maryland Insurance Department to determine if an insurer failed to act in good faith in first-party claims. Damages in this administrative proceeding are limited to the contractual amount plus attorneys' fees and interest, but the Department is given new authority to impose a civil penalty of up to \$125,000 for a single violation. **Washington** SB 5726 creates a first-party bad faith action and contains likely the lowest standard of bad faith in the country. The new law defines a first-party claimant as "anyone asserting a right to payment as a covered person under an insurance policy." Treble damages and attorneys' fees can be awarded in first-party bad faith suits against insurers and also for violations of the state insurance unfair claims settlement practices act and regulations. The insurance industry and business communities are working together on a referendum to reverse SB 5726 in the November elections. All attempts to compromise on a corrective bill for 2008 failed, leaving putting the issue to the voters in November as the only course of action.

New York Governor Spitzer vetoed SB 6306, which would have prohibited insurers from denying a claim because of a late notice unless the insurer can demonstrate that it suffered "material prejudice" as a result of the late notice. This issue will be back in New York, quite possibly when the New York legislature reconvenes this fall. In his veto message, the Governor indicated support for the concept that insurance coverage should not be denied because of "technicalities" and said that he would sign the bill if it was well drafted to achieve that purpose. The New York Insurance Department already has circulated a revised draft of the legislation, and the new draft does not include surety and fidelity. However, the new draft still is problematic for the claims operations of insurers.

SFAA worked with AIA and NASBP to defeat **Rhode Island** SB 192, which was a bad faith bill aimed directly at surety. It would have permitted any obligee, principal or claimant under a payment or performance bond to bring an action against the surety when it is alleged that the surety wrongfully and in bad faith refused to pay or settle a claim or refused to perform its obligations under the bond. Compensatory and punitive damages were permitted, as well as reasonable attorneys' fees. SFAA retained a local surety claims lawyer to testify at the hearing, in addition to the lobbying efforts of the AIA's state counsel and CNA Surety's local counsel. At SFAA's request, several SFAA members wrote letters of opposition to SB 192 to the Rhode Island House leadership. SFAA also contacted Rhode Island legislators who are members and officers of the National Conference of Insurance Legislators.

Working in coalitions with the business community, the insurance industry also defeated three other trial bar initiatives. While different bad faith bills passed both houses in **Minnesota**, the coalition persevered; and bad faith legislation was defeated before the session adjourned. **New Hampshire** Senate Bill 188 would have subjected insurers to the consumer protection law if a court of competent jurisdiction found that the insurer engaged in unfair claims settlement

practices and would have allowed a third party to bring a direct action against an insurer for an unfair claims settlement practice, independent of any actions taken by the Commissioner.

Labor issues surfaced in 2007. Onerous prevailing wage bills were defeated for 2007 in **Iowa, Minnesota** and **Missouri**. These bills would have substantially increased the penalties for failure to pay the prevailing wage and/or permit workers or their unions to bring private actions to enforce the law. Recovery of attorneys' fees was permitted in some of the legislation as well. Some of the bills were silent on the liability of the surety for the new penalties imposed, but one version of the Minnesota legislation permitted the state to assess the surety for wages and penalties owed if the contractor was deemed insolvent. The Iowa bill carries over to 2008. It would permit recovery of attorneys' fees and punitive damages.

The **New York** prevailing wage legislation that SFAA and AIA were successful in having vetoed in 2004 was reintroduced again this year, and it was almost surprising that it did not pass. The focus of most labor issues, however, shifted to the Governor's bill to amend the Wicks Act, which requires that separate contracts be competitively bid and awarded to a minimum of four general contractors for general construction, plumbing, electrical and heating and ventilation. Senate Bill 6146, Governor Spitzer's bill, addresses payment and performance bonds by way of a new provision that would be added to the labor law. As drafted, SB 6146 would require every contract for a public work to contain a provision requiring payment and performance bonds. The bill neither states a bond amount nor a bond threshold. As drafted, the labor law would be amended to require payment and performance bonds from dollar one. Yet, Section 137 of the state finance law, the Little Miller Act, would remain largely the same. The Little Miller Act currently requires a payment bond but provides that it can be waived for contracts under \$100,000 and for contracts under \$200,000 if the contract is not subject to the multiple-award requirements of the Wicks Act. SB 6146 would amend Section 137 to include a reference to performance bonds. When payment bonds are waived, retainage may be set at 20%. The bill would amend the provision on waiver of payment bonds to include a reference to a waiver of performance or payment bonds.

Overall, SB 6146 is a pro-labor effort to encourage use of union labor on public projects in New York, even though it does not contain the onerous prevailing wage provisions that have been introduced in prior sessions. AB 9204 is the companion bill in the Assembly. The Associated General Contractors and AIA have reported that this is the agreed-upon bill that will pass in New York this year. There is little chance of any further amendments. The bill remained in the Senate Rules Committee when New York recessed for the summer, but it may be taken up when the legislature returns in the fall.

Small and Emerging Contractors Remain a Key Issue. Bonding for small and emerging contractors was a factor in legislation in **Indiana, North Carolina** and **Rhode Island** to increase the state bond threshold. SFAA, AIA and NASBP were able to narrowly limit the Indiana state bond threshold increase and defeat the bills in North Carolina and Rhode Island. The issue of minority contractors surfaced in the two major initiatives in the states this year to permit individual sureties to issue contract bonds on public construction projects. SFAA worked with AIA and NASBP to defeat the bills in **New Mexico** and **Virginia**. The increasing cost of construction and/or pending mega construction projects also is causing some states to revisit their state bond thresholds. This was the rationale for state bond threshold increases in **Connecticut, Florida** and **Georgia**. The 2007 state legislative sessions also brought a new wave of proposed bond programs in the states, and much of the legislation was enacted. There are new

bond assistance or guarantee programs in **Arkansas, Colorado, Florida, North Carolina** and **Texas**. Similar legislation is moving in **California**.

Retainage Becomes An Active Issue Again. There was more activity on the retainage issue in the state sessions this year than there has been in recent past. This year, there were two major efforts to repeal existing retainage laws. In **Colorado**, SFAA and AIA worked together to defeat HB 1115, that would have prohibited retainage on construction contracts. **New Mexico** SB 604, however, was enacted. It repeals the existing retainage law and prohibits withholding retainage.

Of General Interest. Several states made major changes in their rating laws this year. **Louisiana** HB 960 abolished the long standing Insurance Rating Commission and transferred its rate and form review function to a newly established Office of Consumer Advocacy within the Insurance Department. The new law also provides for a file and use rating system. **New Mexico** SB 483 repealed the prior approval system for rates and went to a competitive rating system. **North Dakota** SB 2296 creates a new rating system based on competitive and non-competitive markets. For surety and fidelity, a competitive market is presumed to exist, which means that a use and file system applies. In other action, **South Dakota** HB 1180 repeals the countersignature law.

2007 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's reports are based on the three major lines of business: contract surety, commercial surety and fidelity. This report contains the 2007 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 2007 state legislation on SFAA's priority issues for contract surety and the second section is a state-by-state compilation of the 2007 state enactments relating to contract surety.

Summary of State Legislative Activity on SFAA Priority Issues

Little Miller Act Thresholds

--Enactments. **Connecticut** SB 1182 raises the state bond threshold for payment bonds from \$50,000 to \$100,000. The State increased the performance bond threshold last year. **Florida** HB 985 increases the bond threshold for DOT projects from \$150,000 to \$250,000. **Georgia** HB 192 raises the state bond threshold from \$50,000 to \$100,000. **Indiana** SB 211 raises the state bond threshold from \$100,000 and \$150,000 to \$200,000 for all public entities. As originally drafted, the bill would have increased the threshold to \$500,000. The bill also permits state contracting entities to require bonds for projects below the threshold and requires the Department of Administration to annually offer education on bonding for small businesses and minority- and woman-owned businesses. **Nebraska** LB 208 increases the bond threshold for counties, cities, villages, schools districts and public boards from \$5,000 to \$15,000. LB 256 increases from

\$40,000 to \$100,000 the threshold at which performance bond are required on public construction contracts.

--Defeated in 2007. Florida SB 2090 would have increased the bond threshold from \$200,000 to \$500,000 for counties, municipalities, political subdivisions and public authorities. Two bills were defeated in **North Carolina** that would have raised the bond threshold to \$500,000. HB 73/SB 93 would have raised the state bond threshold, and HB 749 would have raised the threshold for the University of North Carolina. **Rhode Island** HB 6335/SB 972 would have increased the state bond threshold from \$50,000 to \$200,000.

There were two sets of companion bills in **New York** that would have permitted payment and performance bonds to be waived for small-, minority- and women-owned business on contracts under \$500,000: AB 3329/SB 5199 and AB 8108/SB 2431. AB 3329 has passed the Assembly and is in the Senate, where the companion bill has never moved. SB 2431 was amended in the Senate Finance Committee to increase the threshold to \$1 million.

Individual Surety

There were two major initiatives in the states this year to permit individual sureties to issue contract bonds on public construction projects. Both bills were defeated. The issue of minority contractors surfaced on both bills.

Virginia HB 3065 would have allowed individual sureties in a bill similar to the 2006 Maryland law. The bill was heard in a Subcommittee on January 30 and was defeated. SFAA and AIA worked together to generate substantial opposition to the bill. The Office of the Virginia Attorney General, the local AGC and the Independent Insurance Agents of Virginia (IIAV) testified in opposition to the bill. The IIAV got the Richmond chapter of the association of state purchasing agents to express opposition to the bill. NASBP got the local roofing contractors to testify in opposition to the bill. Karen Barbour, representing the individual sureties, was the lone supporter, as she was on the 2006 Maryland law. The state agencies took a neutral position when the minority contractor issue surfaced. After the bill was defeated, SFAA sent a letter to the bill sponsor to rebut the oral testimony of the proponents to the effect that individual sureties are permitted in several states. SFAA sent the sponsor the laws from the states cited in the proponent's testimony, which require a licensed surety to issue the bid, payment and performance bonds.

New Mexico SB 436 would have deleted all requirements in the existing law that require a corporate surety, licensed in New Mexico and on the U.S. Treasury list, to provide all bid, payment and performance bonds on public projects. The bill would have required the "personal surety" to be a resident and own real property in New Mexico and excluded attorneys, owners or employees of contractors and subcontractors and anyone related by marriage to the owners or employees of the contractor and subcontractor. The assets that could have been pledged, however, were just as problematic as the other versions of the individual surety legislation. Assets did not have to be deposited in a federally-insured financial institution, but rather can be pledged by way of documents that can be issued by persons or entities unregulated and outside of the United States.

The individual surety issue arose in the context of commercial surety for the first time this year. SFAA believes that these bills are bad precedents and works to defeat or amend them.

Connecticut HB 7053 would have amended the State's dram shop act, which imposes liability

on sellers of alcohol, to permit the financial responsibility requirements to be met with cash, an insurance policy, a surety bond from a surety company or an individual surety who owns real estate. SFAA drafted amendments to allow sellers of liquor to post their own property in case the bill could not be defeated; but the problems with the bill were obvious, and it did not get out of committee. Still pending is **Pennsylvania** HB 445, which would require dog kennels to be licensed and bonded. The bond must be issued by a surety licensed in the state or “two sufficient individual sureties approved by the Secretary” (of Agriculture). SFAA has given AIA amendments for the bill.

Retainage

There was more activity on the retainage issue in the state sessions this year than there has been in the recent past. This year, there were two major efforts to repeal existing retainage laws. In **Colorado**, SFAA and AIA worked together to defeat HB 1115, which would have prohibited retainage on construction contracts. An owner could not withhold retainage from a contractor, and a contractor could not withhold retainage from a subcontractor. Subcontractors also would be prohibited from withholding retainage from a second-tier subcontractor or a supplier. **New Mexico** SB 604, however, was enacted. It repeals the existing retainage law and prohibits withholding retainage. The New Mexico law is applicable to all public and private projects, except residential construction with fewer than four units. As originally drafted, **Texas** HB 2075 would have repealed the retainage law in the Transportation Code applicable to DOT projects. As substituted and enacted, the new law provides that the DOT may withhold retainage up to 5% rather than requiring retainage at 5%.

--Enactments. **Kentucky** HB 490 sets retainage at no more than 10% until the project is 50% completed, after which retainage could be no more than 5%. Retainage must be released within 30 days after substantial completion, except for an amount equal to 200% of the estimated costs of the uncompleted work remaining. The contractor must give subcontractors their proportional share of any retainage released within 15 days of release by the contracting entity to the contractor. The new law applies to public and private construction, excluding residential construction. **Kansas** SB 333 permits an owner, contractor or subcontractor to hold no more than 10% retainage in public construction projects. Prior law in Kansas did not specify a retainage amount. **Tennessee** HB 1003 provides that retainage on public and private construction projects may not exceed 5%. The new law also requires that retainage be released within 90 days of completion or substantial completion, whichever occurs first.

North Carolina SB 1245 was one of several bills introduced to implement the General Services Administration’s study on retainage in 2005. SFAA and AIA worked together with the Carolinas Surety Association to achieve substantial changes in the bill over the course of the session. As introduced, the bill would have prohibited retainage on public construction contracts where the total project cost is less than \$300,000. As passed, SB 1245 would prohibit retainage in contracts less than \$100,000.

As introduced and enacted, SB 1245 limits the amount of retainage that could be withheld on public projects to 5% of each progress payment until 50% completion. After the project has reached 50% completion, no more retainage can be withheld if the contractor is performing satisfactorily. As introduced, however, the bill also would have required the owner to release half of the retainage to the general contractor at 50% completion, with the approval of the architect, engineer or designer in charge of the project and the written consent of the surety. The original bill provided that no party could unreasonably withhold consent. As enacted, SB 1245

does not mandate release of retainage to the general contractor at 50% completion. SFAA and AIA expressed concern that the bill draft released retainage to the general contractor at the midway point, but contained no requirement that subcontractors be paid. Instead, the new law provides for line item release to the early completing trades, which includes structural steel, piling, caisson and demolition. Trades that are afforded lien item release of retainage must be identified on the original bid documents. If such trades 100% complete their contracts before the project is 50% complete, and if the owner receives approval from the architect or engineer of record, the owner must reduce the retainage for those trades to .5%.

In addition, the new law provides that, notwithstanding the prohibition on retainage after 50% completion and release of retainage to early completing trades, the owner is authorized to withhold retainage from payments after 50% completion in order to allow the owner to hold 2.5% total retainage until completion of the project.

The new law requires the owner to release retainage within 60 days of a pay request, with written consent of the surety, if the owner receives either a certificate of substantial completion or beneficial occupancy or use of the project. The owner may retain funds to secure completion of the work in an amount of 2.5 times the estimated value of the work to be completed. As introduced, the bill would have required payment in 45 rather than 60 days and would have permitted the owner to retain 1.5 times the estimated costs to complete.

As introduced and enacted, SB 1245 provides that the existence of any third-party claims against the contractor or any additive change order to the contract shall not be a basis for delaying release of retainage. The final release of retainage, however, does require consent of the surety, so if there are pending payment claims, the surety will have some ability to avoid dissipation of the contract funds.

Finally, SB 1245 does not require any retainage. It caps the amount, but it also authorizes the public entity to permit bids with and without retainage.

--To Governor. New Jersey AB 3649 extends the 2005 retainage law for DOT projects to the construction and maintenance projects of the New Jersey Turnpike Authority. The new law sets retainage at 2% until substantial completion, after which 1% of a payment could be withheld. The Authority would be able to withhold 4% if the project is not progressing according to specifications.

--Still Pending. California SB 593 was amended to include some unusual retainage provisions. It would require the Department of Transportation (DOT) to withhold no retainage until 75% of the days allotted to the project have passed. At that point, the DOT can require retainage only if the percentage of working days elapsed exceeds the percentage of work completed by at least 15%. For example: If the contractor has 300 days to complete the job and has 30 days to go, the percentage of working days left is 10%. If the contractor has \$250,000 more work to do on a \$1 million job, the percentage of work to be completed is 25%. The public owner could require retainage because the percentage of working days elapsed (90%) exceeds the percentage of work completed (75%) by 15%. Once the difference between these two amounts is less than 15%, any retainage held must be returned in the next progress payment. SFAA worked with the Local Surety Associations to address this bill; and the bill sponsor agreed to make this a two-year bill, meaning it won't be heard until 2008. SB 619 provides that the Department of General Services cannot withhold *more than 5%* of the contract price until final completion and acceptance of a

project in contracts entered into after January 1, 2008. Existing law in Section 10261 of the Public Contract Code states that the General Services Administration (GSA) shall withhold *not less than 5%* of the contract price in any progress payment. In other words, retainage is now at least 5% and could be higher. Under the bill, it will be 5% or lower. AB 617 would require the GSA to study and develop guidelines for the acquisition of information technology (IT). The GSA must provide financial protections for the State in any IT purchase that, at a minimum, allows for recovery of costs associated with a project that the contractor cannot complete. Under current law, 10% of the contract must be withheld until final delivery and acceptance; and the contractor is required to post a performance bond. The change under AB 617 is that a bond is now one of the options that GSA may require after study. **Massachusetts** HB 3181 requires the escrow of retainage with interest to accrue and to be paid to the contractor.

--Defeated in 2007. **Arizona** HB 2406 would have reduced retainage from 10% to 5% on a contracted commercial project. **Colorado** House Resolution 1041 would have created a special joint legislative committee to consider prompt payment measures, including retainage. **Connecticut** HB 7202 would have reduced retainage on commercial construction contracts from an amount that does not exceed 7.5% to 5%. In all public projects, other than DOT projects, retainage would have been reduced from 10% to 5%. Under existing law, retainage on DOT projects is 2.5%. **Maryland** HB 342 would have limited retainage on private construction contracts to not more than 5%. **Utah** SB 180 would have reduced the required retainage in school construction contracts from 10% to an amount specified by the school district that could not exceed 5%.

Bonding on Mega Construction Projects

--Enactments. **Florida** HB 985 increases the bond threshold for DOT projects from \$150,000 to \$250,000 and would permit the DOT to waive 100% bonds on contracts in excess of \$250 million. For such large projects, the DOT would be permitted to set the bond amount at some portion of the total contract price and accept other forms of security for amounts in excess of the bond. **Florida** HB 1489 requires a 100% performance and payment bond for all other public projects, except for projects over \$250 million, for which the public owner can require the largest bond reasonably available, but not less than \$250 million. The existing statute was silent as to whether the bond had to be for 100% of the contract price.

--Carryover. **Washington** SB 5208 would have permitted the state DOT to set the amount of the bond on projects of \$80 million or greater to cover the State's maximum probable loss, but the bond could not be less than \$80 million. The bill passed the Senate but did not pass the House by the time the legislature adjourned. The DOT intended to increase the number of contractors that could bid on some upcoming mega projects by decreasing the bond amount to cover the State's maximum exposure to loss rather than the total contract price. Although SFAA was unable to defeat the concept or raise either the threshold or the bond amount required, SFAA and AIA were successful in having the bill amended to require the DOT to develop risk assessment guidelines to show how it will measure the State's exposure to loss and how the bond amount that they set protects 100% of the State's loss, which will increase transparency in the process. Travelers provided excellent testimony when the Senate bill was heard in the House Committee. The bill carries over to 2008, but SFAA expects that it will be enacted as no more testimony will be heard on the bill and there is bad precedent in Washington with less than 100% bonding for the Washington State Ferry projects.

Bond Guarantee and Technical Assistance Programs

The current state legislative sessions have brought a new wave of proposed programs in the states, as well as renewed efforts in existing programs. Much of the legislation was enacted.

--Enactments. **Arkansas** HB 1808 appropriates funds for the development, implementation and administration of the state's Surety Bonding and Mentor Protégée-Training Pilot Program. **Colorado** HB 1209 requires the Director of the Minority Business Office (Director) to establish a program that would provide surety technical assistance services for the benefit of historically underutilized businesses (HUBs). The Director is authorized to contract with insurance companies, surety companies, agents or brokers for the purpose of implementing the program. The Director also must compile a centralized directory of all historically underutilized businesses that have obtained the contract performance and payment bonds required for the award of a government procurement contract. **Florida** HB 1283/S 2860 creates the Black Business Investment Board to assist in the development and expansion of black business enterprises, including a new program offering assistance in obtaining surety bonds and other credit instruments. The new Black Contractors Bond Trust Fund authorizes the Board to provide up to 90% bond guarantees. **Maryland** HB 989/SB 318 increases from \$1.35 million to \$5 million the maximum amount to be guaranteed for bid, payment and performance bonds under the state bond guarantee program. Existing law allows the State to guarantee up to 90% of a surety's losses under this program. **North Carolina** HB 1181 creates the Small Business Contractor Authority (Authority), which would be composed of 11 members, four of whom would be members of the General Assembly. One of the General Assembly appointees would be required to have experience in surety underwriting. Several special revenue funds would be created 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. **Texas** SB 704 amends the small contractor participation assistance program. The new law creates a technical assistance program for contractors to prepare bond application packages for public works projects in a format acceptable to bond underwriters and assist such contractors in obtaining bonds. Prior law provided that the program was applicable to contracts costing over \$20 million and had no such bonding assistance program. The new law now applies to public works projects that will involve a contract or aggregated multiple contracts with costs over \$1 million.

--Bills on the Move. **California** AB 1491 would implement part of the Governor's Executive Order in 2006. It would require the DOT to establish a Small and Emerging Contractor Technical Assistance Program by September 1, 2008, to provide training and technical assistance to small contractors to improve their ability to obtain the surety bonds and liability insurance necessary to qualify for public works construction projects. The bill has passed the Assembly and is moving in Committee in the Senate. AB 1695, which would create a state bond guarantee program, remains in the Assembly Appropriations Committee.

--Still Pending. **California** AB 761 would require the Director of General Services (Director) to establish a 25% goal for the participation of small businesses in the construction of the state's infrastructure, as provided in the State's revenue bond acts. The Director would have to provide notice of the opportunity to bid on such projects to small businesses and he or she would have to provide California small businesses with information regarding available training and technical

assistance for understanding and bidding on contracts for these projects. The bill has passed the Assembly and is moving in Committee in the Senate.

The bill provides that each department that has awarded any contract on and after January 1, 2009, and annually thereafter, that was financed with the proceeds of the infrastructure-related revenue bonds in the previous calendar year would be required to report to the Director on the percentage of small businesses that have been awarded those contracts. Any department that did not award at least 25% of those contracts to small businesses would be required to include a plan of action in its report to award at least 25% of the contracts to small businesses during the next calendar year.

Illinois SB 1511 continues to have some life. 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. The deadline for passage of the bill keeps getting extended as the legislature is in an extraordinary extra session—both in length of time and contentiousness—to pass the state budget.

In a related matter, **Oregon** HB 2776 extends the exemption for small and emerging contractors from one to five years from the requirement to file the new public works bond, which was enacted in 2005. This bill was enacted in lieu of HB 2777, which would have eliminated the requirements that disadvantaged, minority- and woman-owned or emerging small businesses post the public works bond.

--Still Pending. **California** AB 655 would require any awarding department soliciting and awarding bids under the Bond Acts of 2006 (revenue bonds) to consider the employment practices of a bidder with respect to hiring residents from low-income areas, as well as the contractor's history as, or provisions to, small businesses and micro-business. Awarding departments would have to require all bidders to hire no less than 10% of its employees from low-income areas of the State. If a contractor failed to demonstrate a good faith effort to meet this goal, the awarding department would have to award the contract to the next lowest responsive and responsible bidder.

Awarding departments also would have to consider a bidder's responsiveness and history as a small business or micro-business, or as a non-small business providing for small business and micro-business subcontractor participation. If a contractor failed to demonstrate a good faith effort in meeting the 10% goal, the awarding department would be required to award the contract to the next lowest responsive and responsible bidder.

--Carryover. **South Carolina** HB 3902 would define historically underutilized businesses (HUBs) and require the General Services Division (Division) to establish a program to provide surety technical assistance to HUBs. The Division could contract with surety companies or agents to implement the program.

--Dead. **Connecticut** HB 5569 would have provided \$1 million of payment bonds for minority contractors working on projects in Bridgeport. **Washington** HB 2221 would have created and funded a Contractor Assistance and Bond Guarantee Program Fund (Program). The Program

would have been authorized to guarantee surety bonds for qualified disadvantaged contractors or qualified small business contractors on public contracts of \$500,000 or less.

Other Key Contract Surety Issues in 2007

Public-Private Projects (PPPs)

Possibly as a result of the National Conference of State Legislators (NCSL) 2006 report on state transportation alternatives, a number of states have introduced bills this session to permit public-private partnerships (PPPs) on various highway projects. Many of the PPP bills are for large transportation projects and raise the same bonding and procurements issues as the mega construction project legislation. SFAA reviews these bills solely for any impact on surety bonding requirements. Most of the bills did not alter bonding requirements. SFAA worked with AIA and NASBP to address problems in a few of these bills.

--Enactments. **Texas** SB 792 permits PPPs in specified toll way projects. The bill would require the private entity to provide payment and performance bonds or alternate security for the cost of constructing and maintaining the project. If the toll way authority finds it impracticable for the private entity to provide bonds or security in the amounts required, the authority will set the amount of the bonds or alternative security. The bill also would provide that the authority may require alternative security in lieu of or in addition to performance and payment bonds. Under the bill, the design and planning services, among other non-construction items, do not have to be bonded.

SFAA worked with the Texas Surety Federation, which was active in proposing amendments to assure a maximum amount of bonding on any PPPs authorized. The PPP concept had a lot of support, and the DOT wanted flexibility in the amount of security required. The major debate on the PPP bills centered on the terms and conditions of the PPPs rather than on surety bonding issues. The bills were hard to amend, and SB 792 was the result of compromise. The **Texas** Governor vetoed HB 447 and HB 1892, the latter of which started out as the companion bill to SB 792. The bonding provisions in the bills were similar to SB 792, but the bills were different in the terms and conditions under which PPPs could operate.

Mississippi SB 2375 authorizes the Mississippi Transportation Commission (Commission), county boards of supervisors and municipal governmental entities to contract with a private entity for the construction, operation and maintenance of toll roads and bridges. The new law requires bonds for the total contract price for all contracts for construction or reconstruction. Such bonds are subject to an obligation in existing law that provides the principal and surety shall be liable to the State in a civil action instituted by the State for double the amount of any money or property that State may lose or be overcharged or otherwise defrauded of by any wrongful criminal act of the contractor or its agents and employees.

The new law also contains provisions applicable to the contract for the operation and maintenance of the toll roads. The governmental entity must require the private party to provide a bond and such security as the governmental unit determines is necessary to ensure timely completion and proper execution of the contract. The term of the contract cannot exceed the date of the retirement of the debt for the construction of the toll road. All such highway projects shall be built and maintained with not less than the minimum standards established by the contracting governmental entity, which must conduct periodic inspections. Failure to comply with the

standards constitutes a breach of the contract and subjects the contractor to liability on his or her bond or security or to rescission of the contract according to the terms of the contract.

--Still Pending. As originally drafted, **California** SB 61 would have authorized the DOT (Caltrans) to enter into public-private transportation projects that could have required less than 100% bonding. As substituted, the bill no longer contains the bonding provisions and eliminates the four-project limit and the requirement that the legislature approve each project by statute.

Missouri is in special session to enact legislation for its 800 bridges project. The DOT intends to award a single design, build, finance and maintenance contract with between \$400-\$600 million of construction costs under which the repairs would be completed by 2012 and after which the contractor would be responsible for the maintenance for the next 25 years. Current Missouri law requires 100% payment and performance bonds. All involved in this project believe that bonding will not be available for the financing and maintenance parts of the contract, but SFAA believes that bonds would be available to qualified contractors if limited only to the construction work.

SFAA and representatives of its members met with the DOT and its consultant on this project regarding the DOT legislation. Many, but not all, of the concerns of SFAA members were addressed as a result of that meeting and other conference calls with the DOT. The DOT bill was revised and introduced in the special session as HB2a and SB 1a. The legislation would give the DOT some flexibility in bonding the project. A bid bond of at least \$5 million would be required. The performance bond could not be less than \$200 million or 25% of a reasonable estimate of the cost of the construction project, whichever is less. The DOT may allow other security in lieu of or in addition to the bond. The payment bond must equal a reasonable estimate of the total amount payable for the cost of the construction work, unless the DOT determines that such a bond is impractical, in which case the DOT sets the amount of the payment bond at not less than the aggregate amount of the performance bond plus any other performance security. The bill also would give the DOT the authority to require either the design build entity or the contractors providing construction services to provide the bonds.

The SFAA proposed the following additional revisions to the DOT legislation: 1) The bid or proposal bond would have to be provided by the design builder, not the construction entity, but the design builder could use alternate forms of security; 2) The performance bond for the project shall be: 1) an aggregate amount of not less than \$250 million or 25% of a reasonable estimate of the construction cost, whichever is lower, or if the contract is executed through work orders, in an amount of 100% of the construction work of each work order. Any "other security" would be in addition to, not in place of, the bond; 3) The performance bond would be conditioned solely upon the performance of the construction work, including a one-year warranty period, not any design, financing or maintenance obligation; and 4) Unless the design builder provides payment bonds, the contract with the owner must contain provisions to assure payment to the construction entities for work satisfactorily completed, such as the establishment of an escrow account for the benefit of the construction entities.

SFAA has raised with the DOT the issue of protection for Missouri contractors working on this project if they have to provide the payment bonds instead of the design builder. Their bonds will protect their subcontractors and suppliers if they are not paid, but will not protect the contractors if the design builder fails to pay them. The DOT listened to our concerns; but, in the end, they felt that they had addressed most of the concerns of the sureties and had to go with the bill as

introduced in the special session. The DOT needs at least two bidders on this project, and at least one of the two groups of potential bidders has said that it cannot bid on the project without the alternatives to the surety bonding. The DOT bill has the Governor's blessing. It is possible that some of the remaining concerns can be addressed in the construction contract or otherwise in the implementation of the project. HB 2a recently passed the House after being heard in two committees and now is in the Senate.

--Carryover. **Hawaii** HB 70 would authorize public-private partnerships. The bill would permit the penal sum of the bond to be less than 100% of the value of the contract based on the DOT's determination. **Oklahoma** HB 1648 would amend the definition of a "public construction contract" to effectively authorize public-private partnerships in toll road projects. **Tennessee** HB 1205/SB 347 would authorize public-private transportation projects and would require a comprehensive agreement with the private party, which would require bonds in forms and amounts satisfactory to the public entity.

Illinois SB 378 technically is dead, as the bill has been parked in the Senate Rules Committee; but Illinois has extended its session until October 31. While the bill would have applied the Little Miller Act to public-private projects, it also provided that performance and payment bonds, or other suitable performance security, could be a condition of the PPP agreement. The Department of Transportation (DOT) would have determined the appropriate security, which could include letters of credit, U.S. bonds and notes, parent guarantees and cash. The amount of security required could be set forth either in the public-private agreement or the DOT would determine the amount necessary to protect the State and payment bond beneficiaries.

--Dead. **Arizona** SB 1635 would have permitted a public-private project to construct highway "fast lanes." The private entity would have provided bonding as the DOT reasonably required. SFAA worked with AIA and the local surety association on amendatory language to clarify the bonding provisions, but the bill stalled and ultimately died. **Arizona** SB 1587 would have created the Innovative Partnership Program for transportation projects and directed the Department of Transportation (DOT) to develop partnerships with private entities and units of the government. The bill provided that the DOT could not enter into such agreements unless the agreement provided for bonding, financial guarantees, deposits or the posting of other security that would secure the payment of laborers, subcontractors and suppliers that perform work or provide materials as part of the project. **Missouri** HB 595, which would have allowed public-private projects for a period of 25 years and also would have permitted an annual bid bond, failed to pass. The bonding provisions in the bill would have required a payment bond required by Missouri law and a performance bond that covered the maximum amount of construction work the contractor performed in any year of the agreement.

Texas SB 1693 would have authorized creating and constructing inland ports and related facilities and public authorities to run them, created either by a county or a municipality. The public authority would have been authorized to enter into comprehensive development agreements with a private entity for such projects. With respect to its impact on surety, the bill provided that the public authority had to require the private entity to provide a performance and payment bond or an alternative form of security. At a minimum, the bond or security would have had to have been in an amount sufficient to ensure the proper performance of the agreement and to protect the public authority, as well as the payment bond beneficiaries who had a direct contractual relationship with the private entity or a subcontractor of the private entity to supply labor or material. The bill also would have required that the bond or security be in an amount

equal to the cost of constructing or maintaining the project—in addition to the requirements noted above.

West Virginia SB 3044 would have required “bid, payment or performance bonds” on public-private partnerships, which could have been misread to authorize less than all three bonds on a project. SFAA and AIA worked to amend or defeat the bill.

Indemnity Agreements in Construction Contracts

Legislation has been introduced in the states that would prohibit clauses in construction contracts that shift liability for negligence and other causes of action in torts. SFAA takes a neutral position on these, as long as they do not affect surety. This year, several bills were introduced that could impact surety because the bills prohibited indemnity clauses in construction contracts. In SFAA’s experience, when indemnity provisions are prohibited in construction contracts, some public owners also opt to include such provisions in the bond form, which has happened in **Illinois**. SFAA has been in contact with the national Associated General Contractors of America, as most of these bills are driven by local contractors who are seeking legislation to prevent shifting of tort liability under a construction contract and have no intent to alter contractual liability. On individual bills, SFAA and the local surety associations have approached the local contractors supporting these bills to explain the unintended impact on surety. AIA recently agreed to address these bills on a state-by-state basis, depending on other priorities in the state.

--Enactments. **Arkansas** HB 1387 makes any clause in a construction agreement or contract unenforceable as against public policy if one party is required to indemnify another party for damages arising out of the sole negligence of the indemnitee. The bill specifically does not apply to an insurance contract, construction bond or a contract to defend a party against liability. Public owners may try to misconstrue this to permit them to put the indemnity provision in the bond form. As originally drafted, **Colorado** SB 87 would have made provisions in construction contracts void against public policy to the extent that they require any party to the contract or its surety to indemnify another party for the indemnitee’s own negligence. As amended and enacted, SB 87 no longer contains the references to surety, so that provisions in construction contracts under which the surety would be liable for the indemnitee’s negligence are not void against public policy. **Montana** SB 319 was enacted with the same problem. It may be that none of these states will follow the Illinois lead and try to circumvent the intent of their law in that manner, but the possibility exists. SFAA will seek amendments to the above laws in future sessions.

--Defeated in 2007. **Arizona** HB 2607 would have extended the existing prohibition on indemnity agreements in private construction contracts to contracts for architect-engineer professional services. **Kansas** SB 379 would have expanded existing law, which provides that an indemnification provision in a construction contract or other agreement is void if the indemnitee is indemnified for its own negligence. The law does not define what constitutes an “other agreement.” The bill would have extended the prohibition to indemnity provisions in which one party is indemnified for intentional acts or omissions. If a surety bond or General Agreement of Indemnity is considered an “other agreement” under the law, the bill could have been misread to void the principal’s indemnity agreement with the surety in a situation, for example, in which the principal intentionally withheld payments from a subcontractor. The bill passed out of the Senate Judiciary Committee, but AIA was able to obtain an agreement that the bill would not be sent to the Senate floor in 2007. Rather, all interested parties will work

together over the summer on a bill for next year. **Nevada SB 181** and **Oklahoma SB 755** would have declared indemnification agreements void against public policy.

Prevailing Wages

Iowa HB 810 would have: 1) permitted the public entity to terminate a contractor or subcontractor found not to be paying the prevailing wage; 2) required the contractor or its surety to pay for any excess costs resulting from failure to pay the prevailing wage; 3) required the *performance* bond to include a provision guaranteeing payment of the prevailing wage rates under the contract; 4) given workers a private cause of action against the contractor or subcontractor to recover the difference between wages paid and the prevailing wage, plus reasonable attorneys' fees; 5) imposed an additional penalty on the contractor of 50% of the underpayment to be paid to the State; 6) required the contractor to pay punitive damages to the workers in an amount equal to 5% of the underpayment for each month it remains unpaid, together with costs and attorneys' fees and 7) increased the penalty amounts for subsequent violations. This onerous prevailing wage bill did not move much this year, but does carryover into 2008.

Minnesota HB 1443 would amend the state prevailing wage law to include new penalties that the surety could be asked to pay if the contractor is insolvent. The contracting agency could order payment of wages owed plus a 100% penalty to the workers and could then order another penalty of 100% of the amount owed to be paid to the State. The bill also is interesting in that it imposes penalties on contracting agencies as well. Any contracting agency that fails to include in its contracts the wage determinations and a notice that the prevailing wage law applies to the contract is liable for making the contractor whole for any increases in the wages paid, including employment taxes and reasonable administrative costs. An employee or officer of a contracting agency who closes a contract without these requirements would be subject to penalties individually as well. If the Department of Labor assesses penalties against a contractor, but deems the contractor to be insolvent, the contracting authority shall deduct the assessment from the funds owed to the contractor or assess the bonding company for the Department's assessment.

Missouri SB 175 increases the penalties under the existing prevailing wage law. Existing law contains a penalty of \$10/worker/day to be paid to the contracting unit. This bill would increase that penalty to \$50/worker/day and would require an additional \$50/worker/day to be paid to the Department of Labor, which would be deposited in a newly-created Education and Enforcement Fund (Fund) to be used for the Department's education about and enforcement of the prevailing wage law. The bill also contains provisions under which monies in the Fund could revert to the state general fund.

New York AB 3630 would increase the penalties for failure to pay the prevailing wage. The court must award a sum equal to three times the full amount of wages owed to each employee. In addition, all court costs and reasonable attorneys' fees and costs must be paid, including the fees of expert witnesses. In addition, the court must award the Commissioner of Labor (Commissioner) a civil penalty in an amount equal to 25% of the total of all wages found to have been improperly held. This sum shall be paid into a special account for the sole purpose of funding the Commissioner's enforcement of the law. The bill also provides that, when a state or local government official has waived the payment bond or when such a bond is not required, aggrieved employees may bring an action against the contractor or subcontractor. Employee organizations can bring any suit permitted under this bill on behalf of their members.

Immigration Issues

--Enactments. Arizona HB 2779 provides for penalties against employers who hire illegal immigrants. The new law requires the County Attorney or Attorney General to investigate complaints alleging that a business is knowingly employing an unauthorized alien. The Attorney General or County Attorney is required to review the complaint; and, if they determine that the complaint is not frivolous, then they must send the complaint to federal authorities. The County Attorney also must bring an action against the employer in the county in which the unauthorized alien is employed. Frivolous complaints are a Class 3 misdemeanor.

For a first violation, employers must terminate the employment of all unauthorized aliens and file an affidavit that such termination has occurred and that the employer will not employ knowingly an unauthorized alien in the future. Failure to file the affidavit within three days results in the suspension of the employer's business licenses until the affidavit has been properly filed. A second violation results in the permanent revocation of the employer's business licenses that are necessary to operate the business location where the unauthorized alien was employed. If a license is not necessary to operate the employer's business at that location, then the license of the employer's primary place of business will be revoked permanently.

The new law also requires that all businesses utilize the Federal pilot program of the U.S. Department of Homeland Security to verify the employment eligibility of all new employees by March 1, 2008. Use of the Federal program will create a rebuttable presumption that the employer did not violate this law relating to the employment of unauthorized aliens.

Arkansas House Bill 1024 was enacted. This measure prohibits a state agency from entering into or renewing a contract with a contractor who knowingly employs, or has a subcontractor that knowingly employs, an illegal immigrant to perform work under a public contract. The new law applies to any public contract in excess of \$25,000. The new law requires general contractors to certify that they do not employ or contract with any illegal immigrants before executing a public contract. If the general contractor violates the law, the State will give the contractor 60 days to remedy the violation. The State must terminate, for breach of contract, any contractor that fails to remedy within 60 days. Any contractor terminated is liable to the State for actual damages.

The new law also requires any subcontractors employed for a public project to provide the general contractor with a certification regarding their employees. The subcontractor's certification must be completed within 30 days after the execution of the subcontract. The general contractor is required to maintain the subcontractor's certification on file throughout the duration of the term of the contract. If the contractor learns that a subcontractor is in violation of the law, the contractor is permitted, but not required, to terminate the subcontractor. If the subcontractor is terminated, neither the contractor nor the subcontractor is considered to have breached the contract under the provisions of this new law.

--Still Pending. Michigan HB 4397 would prohibit the use of illegal aliens on contracts for goods and services. SFAA is monitoring this bill in case it is extended to apply to construction contracts.

--Carryover. Oklahoma SB 31 would require documentation that substantiates that all employees of a state contractor are lawful residents of the United States according to the U.S. Citizenship and Immigration Services. Such documentation would be submitted with the surety

bonds for the contract. **South Carolina** SB 392 would provide for law enforcement measures on illegal immigration. The bill would require all public employers to participate in the federal work authorization program, as well as contractors and subcontractors entering into contracts with such employers

--Dead for 2007. **Nevada** AB 219 would have required monthly demographic reports from contractors and subcontractors. For contractors, this would apply to contracts in excess of \$25 million and to subcontractors whose portion of the work exceeds 1% of such a contract. The report must include aggregate information on the race, gender and ethnic background of all the workers employed by the contractor and subcontractor in connection with the public project. In addition, there are mandatory monthly meetings of a committee consisting of the contracting entity, contractor, each subcontractor doing more than 1% of the job and representatives appointed by the contractor from groups that promote the interests of women or minorities qualified to perform the work on the public project.

The construction contract must contain a provision that the public entity may, but is not required to, withhold the entire amount of a progress payment or retainage payment as a result of the failure of a contractor or its subcontractor to submit a required report or attend a required monthly meeting. Absences from monthly meetings are permitted if conditions affecting the project make it impractical, such as delays in work caused by weather. Some written excuse is required to prevent missing a progress payment. The contractor has the same rights to withhold payments from subcontractors for failure to comply. The local chapters of the AGC and ABC are actively opposing this bill.

Additional Contract Surety Issues Addressed in 2007

Anti-Directed Surety

--Enactments. **Hawaii** HB 1833 prohibits any person or entity from requiring that the bond for a public construction contract be acquired from a particular surety or group of sureties or a producer or agent of any surety or group of sureties. **North Dakota** HB 1033 revises the State's procurement code. The new law retains the existing \$100,000 bond threshold and adds an anti-directed surety provision. **South Carolina** HB 3902 carries over to 2008. Among other provisions, it contains an anti-directed surety provision.

Electronic Bidding

--Enactments. **Louisiana** SB 280 permits electronic bidding by eliminating the requirement that all bid documents must be submitted in writing. The new law also requires all bids on projects in excess of \$50,000 to be submitted with a bid bond. It eliminates the prior options of a cashier's check, certified check, money or company check. **North Carolina** SB 579 authorizes the City of Charlotte to receive bids electronically in addition to or instead of paper on public construction projects.

--Dead for 2007. **Missouri** SB 52 would have provided for electronic filing of bids and bid bonds for contracts for the construction, maintenance, repair or improvement of any bridge or highway on the state highway system. Bids and bid bonds submitted electronically would have to contain digital signatures and seals and all other required bid information and certifications, in accordance with the State Highways and Transportation Commission's administrative rules, the

Uniform Electronic Transaction Act as adopted in Missouri and with any applicable federal competitive bidding requirements.

Contracts with Veterans

--Dead for 2007. **Arkansas** HB 1646 would have given a 10% preference and set a 3% goal for the Office of State Procurement in awarding contracts to qualified disabled veterans.

Connecticut SB 1020 would have required a 3% set aside for such contractors measured by the total value of all construction contracts let by each agency in a fiscal year. **Indiana** HB would require the Department of Administration to collect information on price preferences for certain contracts, provide a price preference for disabled-veteran businesses in certain contracts and public works projects and set a goal for contracts with disabled-veteran businesses equal to 3% of total expenditures. **Maryland** HB 742 would have established goals for certified, disabled-veteran business in state contracts. **New York** AB 7733 would have given a 3% bid preference to service-disabled-veteran-owned businesses.

--Carryover. **Washington** SB 5289 would increase state contracts with veteran-owned businesses, declare that the purpose of this act is to mitigate economic damage to veteran-owned businesses as a result of military service and provide opportunities to them in recognition of the outstanding service they have given to their country and require a report to the legislature outlining the progress made in implementing this agreement.

--Still Pending. **Pennsylvania** HB 62 would establish goals for certified, disabled-veteran business in state contracts.

Penalties for Defaulting Contractors

Mississippi HB 373 is dead for this session. It would have imposed new penalties on contractors for failing to complete construction, reconstruction or repair to highways, roadways, bridges and drainage structures or other property or infrastructure damaged or destroyed as a result of a natural or man-made disaster. If a contractor were 30 days late, the penalty was double the penalty ordinarily imposed by the State Highway Commission in other contracts. If a contractor were 45 days, the penalty was triple the penalty and the contract would be terminated and rebid. The bill provided that either the contractor or the surety bond would have to respond to these increased penalties

Bidding Preferences

--Enactments. **Illinois** HB 634 would permit a 5% bid preference to bidders using biobased products.

--Still Pending. **California** AB 655 would provide a 5% preference to small businesses and micro-businesses doing business in low-income areas and areas with high unemployment rates. Other bidders providing for small business or micro-business subcontractor participation would be able to receive a preference up to 5%. The bill is being held in the Appropriations Committee. **New Jersey** AB 4276 would extend to public construction projects the preference to bidders that comply with retrofit requirements for off-road diesel equipment and on-road diesel vehicles. **New York** AB 8442 would require that a bidding preference be given to any state contractor, including construction, that provides its employees with employer-sponsored health coverage. The bill was on the Assembly floor when the legislature adjourned for the summer.

--Dead for 2007. Nevada AB 140 would have allowed a 6% contracting preference for contractors participating in the State's contractor apprenticeship program, providing health benefits to their employees or meeting other State certification requirements. Texas SB 1221 would have provided preferences to contractors providing health insurance to their full time employees and their families. Of note, if a contractor used such a preference, he or she would have had to include in the contract a provision for failure to provide health insurance, creating a condition for a breach of contract for which the agency could have terminated the contract. Also, if the contractor used such a preference, he or she would have had to use the same preference in awarding subcontracts.

Looking Ahead to 2008

Because of some recent issues and problems with the New York Port Authority that have been made public, New Jersey Governor Corzine and New York Governor Spitzer both have called for changes in the operation of the Port Authority. SFAA is working with AIA to determine if this presents an opportunity to address the surety bonding issues in the Port Authority's operations. The Port Authority is an interstate compact between New York and New Jersey. The Authority historically has taken the position that it is not bound by either New York or New Jersey law, but rather by the rules of the compact, which it promulgates. The Port Authority generally requires bid bonds on construction projects but often waives the final bonds. Even when the Authority chooses to require final bonds, it often has refused to pay additional bond premiums as a result of change orders. SFAA is working with AIA to determine whether the current situation presents a real opportunity to change the Authority's bonding practices.

The National Conference of State Legislators (NCSL) has its annual survey underway to determine the top issues that will be addressed in the states next year. In some cases, the states will have a short session next year, and some devote that time to budgetary issues. If the keynote addresses at the NCSL Annual Meeting this July are an indicator of what is important to state legislators, we can expect the following issues to be addressed in 2008:

State Budgets

The huge deficits of the recent past have disappeared in virtually all state budgets. States have been conservative on spending and have experienced growth in revenues from taxes. Most states spent increased revenues on one-time projects or put the money into reserves. The NCSL reported, however, at its recent Annual Meeting, that most states are in a transition period. They have needs that will increase spending by slightly more than their revenue projections. Priorities for spending in 2008, based on reports from the 45 states that have passed their 2008 budget bills, are: salary increases for school teachers, new buildings and technology improvements for high school and colleges, restoring Medicare provider rates and pay raises for prison personnel. The NCSL Annual Meeting was prior to the bridge collapse in Minneapolis, but even so, many states already had cited highway and other infrastructure projects as high on their lists for new spending in 2008. The Minnesota disaster has led more states to review and inspect their infrastructure.

Immigration

At the NCSL Annual Meeting, the immigration issue was portrayed as a federal ship that had sunk and given rise to 50 state life boats in the water seeking a solution. The NCSL reported that there were over 1,200 immigration bills introduced in the states in 2007 that addressed a wide

variety of issues, including employment, education, health care, public benefits, human trafficking and enforcement issues. Much of this legislation was delayed for potential federal action. The NCSL Executive Committee created a task force to examine both the state and federal roles in immigration issues. State legislators are concerned about future federal actions that present the states with costly unfunded mandates to implement.

Green Energy

State legislators are increasingly interested in green energy. The environmental benefits of using clean energy were the subject of panel discussions and educational sessions. It was mostly an opportunity for state legislators to network and share ideas of what is being done in the individual states to promote green energy.

2007 STATE ENACTMENTS ON CONTRACT SURETY

ALABAMA

HB 339: *Bid Bond*

VETOED: 05/31/2007

HB 339 would have granted discretion to the awarding authority to require a bid bond on public contracts. Existing law requires a bid bond on contracts exceeding \$10,000 if bonding is available. The bill would have given the contracting authority the discretion to require a bid bond.

ALASKA—No Contract Surety Enactments in 2007.

ARIZONA

All enactments in this state will become effective on September 21, unless otherwise specified in the summary of the enacted bill.

HB 2870: *Performance Bond*

ENACTED: 06/04/2007

HB 2870 repeals a law that required a successful bidder for providing fire protection and emergency medical services to post a \$10 million performance bond, which was forfeited if the bidder did not fully perform or if he or she terminated the contract with a county island fire district with less than one year's notice. County island fire districts were governed separately from county fire districts under prior law, which permitted the services to be provided by a private entity in the island district. The bill eliminated such districts which had their own governing board, unifying the governance of all county fire districts under the county board of supervisors.

Existing law does require a bond to create a county fire district. The bond is required from the person proposing the creation of such a district, including the costs to the county to complete the required impact statement and the costs of finishing the finalization of the proposal. The bill became law without the Governor's signature and had emergency status, so it became effective upon enactment.

ARKANSAS

All enactments in this state became effective on August 1, unless otherwise specified in the summary of the enacted bill.

HB 1024: *Immigration Issues*

ENACTED: 02/28/2007

HB 1024 prohibits a state agency from entering into or renewing a contract with a contractor who knowingly employs, or has a subcontractor that knowingly employs, an illegal immigrant to perform work under a public contract. The new law applies to any public contract in excess of \$25,000. The new law requires general contractors to certify that they do not employ or contract with any illegal immigrants before executing a public contract. If the general contractor violates the law, the State will give the contractor 60 days to remedy the violation. The State must terminate, for breach of contract, any contractor that fails to remedy within 60 days. Any contractor terminated is liable to the State for actual damages.

The new law also requires any subcontractors employed for a public project to provide the general contractor with a certification regarding their employees. The subcontractor's certification must be completed within 30 days after the execution of the subcontract. The general contractor is required to maintain the subcontractor's certification on file throughout the duration of the term of the contract. If the contractor learns that a subcontractor is in violation of the law, the contractor is permitted, but not required, to terminate the subcontractor. If the subcontractor is terminated, neither the contractor nor the subcontractor is considered to have breached the contract under the provisions of this new law.

HB 1175: *Competitive Bidding Threshold*

ENACTED: 02/06/2007

HB 1175 increases the threshold at which competitive bidding is required for rural fire protection districts from \$1,000 to \$10,000. Existing law requires all contractors to give a performance bond for these contracts with good and sufficient sureties in an amount to be fixed by the Board of Commissioners.

HB 1387: *Indemnification in Construction Contracts*

ENACTED: 04/03/2007

HB 1387 makes any clause in a construction agreement or a construction contract unenforceable as against public policy if one party is required to indemnify another party for damages arising out of the sole negligence of the indemnitee. The new law was amended in the legislative process so that it specifically does not apply to an insurance contract, construction bond or a contract to defend a party against liability. SFAA will seek a clarifying amendment to this law in 2009 to prevent the possibility of public owners misconstruing the new law so as to permit them to put the indemnity provision in the bond form.

HB 1808: *Bond Assistance*

ENACTED: 04/03/2007

HB 1808 provides \$1,530,000 in funding for the development and implementation of the Small Minority Contractors Surety Bonding and Mentor-Protégé Program, and \$1,280,245 for administration and program services for small and minority businesses that specialize in construction for the Program's pilot project. This law became effective on July 1.

HB 2585: *Retainage*

ENACTED: 03/23/2007

HB 2585 provides that retainage shall be partially released within 30 days of completion in direct proportion to the value of the part of a capital improvement that has been completed for public construction contracts that permit phased work that may be completed on a partial occupancy. The release would be subject to the same conditions of existing law for releasing retainage.

CALIFORNIA—Still in Session . No Contract Surety Enactments to Date.

COLORADO

All enactments in this state became effective upon enactment, unless otherwise specified in the summary of the enacted bill.

HB 1209: Bonds for Historically Underutilized Businesses

ENACTED: 05/24/2007

HB 1209 requires the Director of the Minority Business Office (Director) to establish a program that would provide surety technical assistance services for the benefit of historically underutilized businesses (HUBs). The Director is authorized to contract with insurance companies, surety companies, agents, or brokers for the purpose of implementing the program. The Director also is required to compile a centralized directory of all HUBs that have obtained the contract performance and payment bonds required for the award of a government procurement contract. Ensuring that the directory is accessible to governmental entities that enter into procurement contracts also will be the Director's responsibility. The new law also provides for the definition of which groups qualify as HUBs. The act became effective 90 days from adjournment on August 4.

SB 87: Indemnity Agreements in Public Construction Contracts

ENACTED: 04/11/2007

SB 87, as introduced, would have declared void against public policy all indemnity agreements in construction contracts that require one person or their surety to indemnify another for acts of negligence of the indemnitee. The bill was amended in the Senate Committee to clarify it, and as enacted it does not specifically include sureties such that it can be misread to mean that indemnity provisions applicable to contractors are void and unenforceable, but that such clauses in construction contracts or bonds applicable to sureties are not void. The act became effective on July 1.

CONNECTICUT

All enactments in this state will become effective on October 1, unless otherwise specified in the summary of the enacted bill.

SB 707: State Pre-qualification Standards

ENACTED: 07/10/2007

SB 707 amends the State's pre-qualification provisions for contractors by establishing a \$500,000 threshold at which such requirements would be imposed. Existing law, which exempted public works project contractors from meeting these specifications, has been repealed and the new law also specifies that public buildings are subject to the law's provisions.

The new law requires the form for surety bonds on public construction contracts with the State or a municipality over \$500,000 to contain the following provision:

"In the event that the surety assumes the contract or obtains a bid or bids for completion of the contract, the surety shall ensure that the contractor chosen to complete the contract is pre-qualified pursuant to section 4a-100 of the Connecticut general statutes in the requisite classification and has the aggregate work capacity rating and single project limit necessary to complete the contract."

This provision requires the surety to ensure that the contractor will meet with the existing law's pre-qualification standards in the event that the surety has to complete the project or find another contractor to complete the project. This provision only takes effect when the contractor on the project has failed. The new law became effective upon enactment.

SB 1182: *State Bond Threshold*

ENACTED: 07/10/2007

SB 1182 increases the threshold at which payment bonds may be required on public construction projects. Prior law mandated that a payment bond be furnished on contracts exceeding \$100,000; and a payment bond may be furnished on contracts over \$50,000, but are prohibited on contracts below that amount. The bill increased from \$50,000 to \$100,000 the threshold below which bonds are prohibited from being furnished. The new law is consistent with changes made in 2006 to the performance bond requirements.

DELAWARE—No Contact Surety Enactments in 2007.

DISTRICT OF COLUMBIA—Still in Session. No Contract Surety Enactments to Date.

FLORIDA

All enactments in this state became effective on July 4, unless otherwise specified in the summary of the enacted bill.

HB 985: *State Bond DOT Threshold/Mega Construction Projects/PPPs*

ENACTED: 06/19/2007

HB 985 increases the bond threshold for Department of Transportation (DOT) projects from \$150,000 to \$250,000 and permits the DOT to waive 100% bonds on contracts in excess of \$250 million. For such large projects, the DOT is authorized to set the bond amount at some portion of the total contract price and accept other forms of security for amounts in excess of the bond. The new law also authorizes the Orlando-Orange County Expressway Authority (Authority) to waive bonds for contracts under \$500,000 if the contract is awarded through an economic development program to a small business. Such contracts need to be competitively bid by participants in the economic development program. For any contract in which bonds are waived, the Authority shall pay all persons as though a payment bond were in place. The Authority must conduct bond eligibility training. The new law also authorizes public-private partnerships and requires that the DOT shall ensure that the procurement documents include provisions for the performance of the private entity, including among other things, surety bonds. The law became effective on July 1.

HB 1077: *Bonding Requirements*

ENACTED: 06/15/2007

HB 1077 eliminates the surety requirements for electrical contracts in the City of Key West. Prior law prohibited the City from entering into a contract for construction, improvements or repairs of the City's electric system unless the contractor provides an undertaking with sufficient surety or sureties to ensure the faithful performance of the contract. The City's Utility Board set the amount required. This law became effective upon the Governor's signature on June 15.

HB 1153: *Bond Threshold*

ENACTED: 06/20/2007

HB 1153 increases the amount at which a contractor is required to post a surety bond from \$15,000 to \$50,000 on projects for the construction, improvement or repair of the Hillsborough County Aviation Authority's (Authority) facilities. This new law does not require the Authority to respond to payment claims when it waives bonds. This law became effective upon the Governor's signature on June 20.

HB 1283: *Bond Guarantee and Technical Assistance Program*

ENACTED: 06/15/2007

HB 1283 creates the Black Business Investment Board (Board) to assist in the development and expansion of black business enterprises, including a new program offering assistance in obtaining surety bonds and other credit instruments. The new Black Contractors Bond Trust Fund created under this bill authorizes the Board to provide up to 90% bond guarantees. This law became effective on July 1.

HB 1285: *Public-Private Partnerships*

ENACTED: 06/26/2007

HB 1285 amends existing law concerning the performance and payment bonds that the law requires of any person entering into a contract with the State or any county, city, or political subdivision thereof, or other public authority. Under existing law the requirement applies to contracts for the construction of a public building, a public work or for repairs upon a public building or public work. The new law extends the performance and payment bond requirement to contracts for such public buildings and works to contracts between any person and a private entity—meaning a contract performed under a public-private partnership. The new law became effective on July 1.

HB 1489: *State Bond Threshold*

ENACTED: 06/15/2007

HB 1489 requires a 100% performance and payment bond for all public projects, except for projects over \$250 million for which the public owner can require the largest bond reasonably available, but not less than \$250 million. The existing law was silent as to whether the bond had to be for 100% of the contract price, and this law adds clarifying language SFAA drafted for the Florida Surety Association. The new law also clarifies that the bond only guarantees performance on the construction portion of the contract for CM's at risk and design-build entities. The payment bond only provides for the protection of claimants supplying labor or materials for construction. Note that Department of Transportation projects are covered under a separate provision in Florida law and are the subject of HB 985 above.

HB 1515: *Bonding Requirements*

ENACTED: 06/27/2007

HB 1515 creates the Babcock Ranch Independent Special District (District). The new law provides that the District's board (Board) must comply with the bidding procedures of existing law and other applicable general law when seeking to construct or improve a public building, structure or other public works. The Board is authorized to require bidders to furnish a bond with a responsible surety that the Board will approve. Of note, the Board is required to accept the bid of the lowest responsive and responsible bidder, unless all bids are too high or the Board otherwise decides that rejecting all bids is in its best interest.

SB 1270: *Bonding Requirements*

ENACTED: 06/26/2007

SB 1270 requires contractors paid from a public university's funds to furnish a performance bond in the amount provided under existing law for school construction contracts, or in the amount required under the rules of the Board of Governors (Board) of the State University System. The new law provides that the trustees of the university are responsible for requiring a bond that is in an amount adequate to protect the Board's funds. The law became effective on July 1.

HB 1395: *Bonding Requirements*

VETOED: 06/28/2007

HB 1395 is similar to HB 1515, except that it would have amended existing law concerning the Coral Springs Improvement District. The bill contained the same surety bond requirement for construction contracts and public works projects. The Governor did not issue a veto message for this bill.

GEORGIA

All enactments in this state became effective on July 1, unless otherwise specified in the summary of the enacted bill.

HB 134: *Performance Bonds*

ENACTED: 05/18/2007

HB 134 increases the amount at which a governmental entity may accept an irrevocable letter of credit issued by a bank or savings and loan association. The amount has been increased from \$300,000 to \$750,000, so that the local governmental entity may accept an irrevocable letter of credit when the amount of the bond is less than \$750,000.

HB 192: *State Bond Threshold*

ENACTED: 05/16/2007

HB 192 raises the threshold at which performance and payment bonds are required for public works contracts from \$50,000 to \$100,000.

HB 758: *Performance Bonds*

ENACTED: 05/16/2007

HB 758 revises the law concerning the Board of Commissioners of Bacon County, requiring that all bonds that a contractor furnishes, and all performance bonds, be in compliance with existing law.

HB 766: *Bond Threshold*

ENACTED: 05/18/2007

HB 766 revises the bond threshold for public works construction contracts of the Muscogee County School District to exclude routine operation, repair or maintenance of existing structures, buildings or real property from the definitions of a public works contract.

SB 200: *Bid and Performance Bonds*

ENACTED: 05/30/2007

SB 200 creates infrastructure development districts in a county. The new law permits the board for the development district (board) to require a bid bond from a surety for contracts for goods, supplies and materials over \$100,000. The new law also permits local governing authorities to require performance bonds for infrastructure construction projects in connection with any of the board's development projects. The bill will become effective on January 1, 2009, pending approval on the November 2008 ballot for its amendments to the state constitution.

HAWAII

All enactments in this state become effective as specified in the summary of the enacted bill.

HB 1833: *Anti-directed Surety*

ENACTED: 07/03/2007

HB 1833 prohibits any person or entity, public or private, that requires a bid, payment, or performance bond as security to guarantee the performance of any contract for the construction of improvements from requiring any person or entity to acquire the bond from a particular surety or group of sureties, or a producer or agent of any surety or group of sureties. The law became effective upon signature on July 3.

HB 116: *Performance Bonds*

ENACTED: 06/12/2007

HB 116 establishes a new process for the construction of wireless telecommunication facilities. The new law prohibits any contracting authority from imposing surety requirements, including bonds, escrow deposits or other types of financial surety, to ensure that abandoned or unused facilities can be removed unless similar requirements are allowed for permits for other types of commercial development or land use. The new law provides that, if surety requirements are imposed, they must be "competitively neutral, nondiscriminatory, reasonable in amount, and commensurate with the historical record for similar requirements." The law became effective upon signature on July 1.

IDAHO—No Contract Surety Enactments in 2007.

ILLINOIS

All enactments in this state become effective as specified in the summary of the enacted bill.

HB 634: *Contracting Preference*

ENACTED: 08/13/2007

HB 634 provides a contracting preference to bidders using bio-based products. The new law exempts contracts for construction projects awarded by the Capital Development Board or the Department of Transportation from this provision. The new law becomes effective on January 1, 2008.

INDIANA

All enactments in this state became effective on July 1, unless otherwise specified in the summary of the enacted bill.

SB 211: *State Bond Threshold*

ENACTED: 05/03/2007

SB 211, as amended, increases the state bond threshold from \$100,000 and \$150,000 to \$200,000 for all public entities. As originally drafted, it would have increased the threshold to \$500,000, but SFAA and AIA were successful in persuading the Senate to reduce the amount of the increase. The new law also permits state contracting entities to require bonds for projects below the threshold. This was important to the municipalities, cities and towns, as they read the existing statute to prohibit bonding below the threshold.

The new law also requires the Department of Administration to annually offer education on bonding for small businesses and minority- and woman-owned businesses. SFAA contacted the Department about a statewide forum for our Model Contractor Development Program. One of our partners, The Veterans Corporation, also has a strong interest in a bonding program in Indiana. Indiana has multiple "Little Miller" provisions in its Code, as opposed to a single threshold.

The new law also reduces amount of retainage required. Under the prior law, political subdivisions and agencies were required to include one of the following provisions on retainage in contracts over the bond threshold: a) not more than 10% retainage until 50% completion and no retainage thereafter or b) not more than 5% retainage until substantial completion. The amended provisions now provide for retainage of not more than 10% nor less than 6% and not more than 5% and not less than 3%, respectively.

IOWA

All enactments in this state became effective on July 1, unless otherwise specified in the summary of the enacted bill.

HB 830: *Bonding Approval*

ENACTED: 05/09/2007

HB 830 prohibits a contractor from commencing work on a construction contract until the governmental entity has approved the required performance and payment bond. The new law also requires a contractor to deduct the premium paid on his or her performance and payment bond from the total contract price when the contract may be performed by an employee of a governmental entity. Existing law already requires the deduction of the estimated sales and fuel tax in this case.

KANSAS

All enactments in this state become effective upon the Governor's approval.

SB 333: *Retainage*

ENACTED: 04/20/2007

SB 333 provides for retainage up to 10%. The new law also provides that the owner has 30 days to pay the prime contractor, and the prime has seven days from receipt of payment from the owner to pay his or her subcontractors.

KENTUCKY

All enactments in this state became effective on June 27, unless otherwise specified in the summary of the enacted bill.

HB 490: *Retainage*

ENACTED: 04/05/2007

HB 490 enacts new law concerning retainage for all construction contracts—both public and private. The new law provides that no more than 10% may be withheld from the amount of any undisputed payment due until 50% of the project has been completed. Any retainage held after 51% of the project has been completed cannot be more than 5% of the total contract amount. The new law also provides for prompt pay and requires the owner to pay the contractor within 30 days of a request for payment. The contractor has 15 days to pay his or her subcontractors from the receipt of a payment.

LOUISIANA

All enactments in this state became effective on August 15.

HB 960: *Insurance Rating Commission Abolished*

ENACTED: 07/11/2007

HB 960 abolished the Insurance Rating Commission (Commission) and established the Office of Consumer Advocacy within the Department of Insurance. The bill transferred the Commission's duties to the Commissioner of Insurance. The new law provides for a file and use system for rates with a 45 day waiting period and permits the filing of loss cost multipliers.

SB 280: *State Bonding Threshold*

ENACTED: 07/10/2007

SB 280 increases the state bonding threshold from \$25,000 to \$50,000, and further provides that only bid bonds may be submitted on contracts over \$50,000. Prior law allowed for other types of financial instruments to be deposited, including a bid bond, on contracts in excess of the current contract limit of \$25,000.

MAINE—No Contract Surety Enactments in 2007.

MARYLAND

All enactments in this state became effective on June 1.

HB 989/SB 318: *Small Business Development Financing Authority*

ENACTED: 05/17/2007

HB 989/SB 318 increases from \$1.35 million to \$5 million the maximum amount to be guaranteed for bid, payment and performance bonds under the state bond guarantee program. Existing law allows the State to guarantee up to 90% of a surety's losses under this program.

HB 691: *Minority Business Utilization Program*

ENACTED: 05/17/2007

HB 691 establishes the Office of Small, Local, and Minority Business Enterprise (Office) in the Washington Suburban Sanitary Commission (WSSC). The new law directs the Office to adopt regulations providing for a system of granting a preference of up to of 5% or \$50,000 (whichever would be less) to minority business enterprises in evaluating bids and proposals. The rules also must require the consideration of geographic location and the principal place of business of the minority business enterprise for participation in the program. This includes requiring Montgomery County and Prince George's County businesses to each have a targeted percentage of at least 40% of any of the contracts.

The new law creates a sheltered market program in which bidding on procurement contracts designated by the WSSC as appropriate is restricted to certified minority business enterprises. However, the new law also conditions the use of such a program on the occurrence of certain factors. The program may not be used until all less restrictive remedies provided in the new law and race-neutral remedies such as assistance with bonding requirements, financing, or bidding procedures for small firms have been used and found to be ineffective.

MASSACUSETTS—Still in Session. No Contract Surety Enactments to Date.

MICHIGAN— Still in Session. No Contract Surety Enactments to Date.

MINNESOTA—No Contract Surety Enactments in 2007.

MISSISSIPPI

All enactments in this state become effective as specified in the summary of the enacted bill.

HB 1537: *Dual Phase Design-Build Construction*

ENACTED: 03/27/2007

HB 1537 authorizes the use of dual phase design-build method for construction projects, contingent upon the legislature's approval or its specific requirement of the method's use. Any decisions to use this construction method must include a detailed explanation of why using the dual phase design-build method for a particular project would satisfy the public need better than the traditional design-bid-build method—based on the criteria that the project will provide a savings in time or cost over traditional methods, and the size and type of the project is suitable for design-build.

The new law also provides for the use of construction managers at risk for any specific, single project with a minimum construction cost of \$25 million. For this contracting method, the new law also provides for a qualifications-based selection procedure. The Act became effective on July 1.

SB 2375: *Toll Roads*

ENACTED: 04/21/2007

SB 2375 authorizes the Mississippi Transportation Commission (Commission), county boards of supervisors and municipal governmental entities to contract with a private entity for the construction, operation and maintenance of toll roads and bridges. The new law requires bonds for the total contract price for all contracts for construction or reconstruction. Such bonds are

subject to an additional obligation in existing law where the principal and surety shall be liable to the State in a civil action instituted by the State for double the amount of any money or property that State may lose or be overcharged or otherwise defrauded by any wrongful criminal act of the contractor or its agents and employees.

The new law also contains provisions applicable to the contract for the operation and maintenance of the toll roads. The governmental entity must require the private party to provide a bond and such security as the governmental unit determines is necessary to ensure timely completion and proper execution of the contract. The term of the contract cannot exceed the date of the retirement of the debt for the construction of the toll road. All such highway projects shall be built and maintained with not less than the minimum standards established by the contracting governmental entity, which must conduct periodic inspections. Failure to comply with the standards constitutes a breach of the contract and subjects the contractor to liability on his or her bond or security or to rescission of the contract according to the terms of the contract. The Act became effective on July 1.

SB 3172: Minority Economic Development Bond

ENACTED: 04/21/2007

SB 3172 authorizes letters of credit to be used to back the bid, payment and performance bonds that the Mississippi Development Authority (Authority) issues to minority businesses. This amends an existing bond assistance program and the law is intended to enhance its funding and claims payment by allowing the Authority to secure the bonds it issues through the letter of credit. The Act took effect upon passage.

MISSOURI—In Special Session

MONTANA

All enactments in this state will become effective on October 1, unless otherwise specified in the summary of the enacted bill.

HB 319: Construction and Highway Contracts

ENACTED: 04/26/2007

HB 319 makes certain indemnification provisions in construction contracts void against public policy and amends existing law concerning retainage. The new law voids such agreements only as to parties to the construction contract and not their sureties or insurers. The new law does not apply to the indemnity of a surety by a principal on a construction contract bond and an insurer's obligation to its insureds.

The law retains the provisions in existing law that provides that the maximum retainage applied to construction contracts may not exceed 5%, but the bill repealed a provision that prohibits a construction contractor from requiring more retainage withheld from a subcontractor than the owner withheld from the prime. The new law requires retainage withheld to be released upon the final acceptance of each portion of work for which a separate price is stated in the construction contract.

HB 657: Release of Lien Bond

ENACTED: 04/17/2007

HB 657 allows an owner to file a bond within 30 days of an action brought to foreclose on a construction lien. Existing law already provides for such a bond, which must be 1.5 times the amount of the lien in the form of cash or a corporate surety bond.

NEBRASKA

All enactments in this state will become effective on October 1, unless otherwise specified in the summary of the enacted bill.

LB 208: Bond Threshold

ENACTED: 05/16/2007

LB 208 increases the threshold at which payment bonds are required on public construction contracts proposed by any county board, contracting board of any city, village or school district, public board or officer from \$5,000 to \$10,000. The bill originally would have increased this threshold to \$15,000. Existing law permits the State, departments, agencies, boards or officers to require such a bond below the threshold in the project specifications.

LB 256: State Bond Threshold

ENACTED: 05/16/2007

LB 256 increases from \$40,000 to \$100,000 the threshold at which performance bonds are required on public construction contracts.

NEVADA—No Contract Surety Enactments in 2007.

NEW HAMPSHIRE—No Contract Surety Enactments in 2007.

NEW JERSEY

All enactments in this state are effective on July 4, unless otherwise specified in the summary of the enacted bill.

AB 3889: Debarred Contractors

ENACTED: 04/26/2007

AB 3889 prohibits a contractor that has been debarred in the State from creating a new business entity to circumvent prevailing wage requirements.

AB 4336: School Construction

ENACTED: 08/06/2007

AB 4336 establishes the New Jersey Schools Development Authority (Authority). The new law also provides that the Authority must require all contractors on school construction projects to provide a performance and payment bond in compliance with existing law.

NEW MEXICO

All enactments in this state became effective on June 17, unless otherwise specified in the summary of the enacted bill.

Senate Memorial 6: Contractors – Surety Recognized for Providing Protection to Consumers

ADOPTED: 02/12/2007

The New Mexico Senate passed a resolution under Senate Memorial 6 concerning unlicensed contractors. The resolution requests that the Construction Industries Division of the Regulation and Licensing Department warn the people of New Mexico through media announcements about “unscrupulous and unethical activities” of those who falsely claim to be a licensed contractor. The resolution notes that “unlicensed contractors do not have the surety required of licensed contractors that can provide protection for consumers against injury resulting from incomplete or improper home repairs.”

SB 227: *Subcontractor Bonds*

ENACTED: 04/02/2007

As originally drafted, SB 227 would have repealed the bonding requirement under existing law for subcontractors and allowed contractors to become licensed after the award of a public works contract under certain conditions. As substituted and enacted, it provides for an increased threshold at which a subcontractor is required to furnish a performance and payment bond. The threshold has been increased from \$50,000 to \$125,000. SB 227 became effective on July 1.

SB 574: *Liens*

ENACTED: 04/02/2007

SB 574 amends existing law to exempt original contractors from pre-lien notice requirements and to allow original contractors to cancel liens and deposit security for the cancellation. The new law now permits the use of binding arbitration for the enforcement of liens instead of the courts. The new law also requires contractors to defend all lien claims, except for those due to the contractor in the case of the owner's non-payment.

SB 604: *Repeal and Prohibition of Retainage*

ENACTED: 04/02/2007

SB 604 repealed the Retainage Act in its entirety. The state's retainage law applied to all construction contracts except those for residential property containing four or fewer units. The new law provides for prompt payment instead, and specifically prohibits an owner, contractor or subcontractor from retaining, withholding, holding back or not paying in any other manner amounts owed for work performed. SB 604 became effective on June 17.

SB 1058: *Rural Infrastructure Loans*

ENACTED: 04/02/2007

SB 1058 subjects solid waste facilities to regulation under existing law and provides funding through the rural infrastructure revolving loan fund. As a condition of receiving a grant from the fund, the law requires the contractor constructing such facilities to furnish a payment and performance bond in accordance with the state's little Miller Act under § 13-4-18. This act became effective on July 1.

SB 483: *Rate Filings*

ENACTED: 04/06/2007

SB 483 changes the rate and form filing laws entirely within the State. The bill repealed prior law which required prior approval of all rates with a 60 day deemer. The new law provides for rate filings based on the competitiveness of the market. The new law defines competitive and non-competitive markets, but also provides for reverse competitive markets and residual markets. Competitive markets are presumed to exist unless the Superintendent of Insurance (Superintendent) determines otherwise. In a reverse competitive market, the new law provides

that this is where the rates are determined primarily or exclusively by parties other than the policyholders.

In a competitive market, rate filings are not required for commercial insurance rates from individual insurers, other than workers' compensation and professional medical liability insurance policies. Large commercial risks are excluded from the rate and form filing requirements, which would consist of the class of large commercial policyholders that the Superintendent has the authority to determine. The new law became effective on July 1, 2007.

NEW YORK—Still in Session.

All enactments in this state become effective as specified in the summary of the enacted bill.

AB 9227: School Construction

ENACTED: 08/01/2007

AB 9227 provides for the refurbishing of schools in the city of Rochester. The new law creates the Rochester Schools Construction Board (Board) to manage the remodeling projects. The new law requires every contract into which the Board enters to contain a provision requiring the contractor to furnish a performance bond and a labor and material payment bond, which are required to guarantee the prompt payment of moneys due to all persons that furnished labor and materials under the requirements of any contracts for a project. Of note, the new law also permits the Board to require project labor agreements. The new law became effective upon enactment.

NORTH CAROLINA

All enactments in this state become effective upon enactment, or as specified in the summary of the enacted bill.

SB 1245: Retainage

ENACTED: 08/17/2007

SB 1245 was one of several bills introduced to implement the General Services Administration's study on retainage in 2005. SFAA and AIA worked together with the Carolinas Surety Association to achieve substantial changes in the bill over the course of the session. As introduced, the bill would have prohibited retainage on public construction contracts where the total project cost is less than \$300,000. As passed, SB 1245 would prohibit retainage in contracts less than \$100,000.

As introduced and enacted, SB 1245 limits the amount of retainage that could be withheld to 5% of each progress payment on contracts, until 50% completion. After the project has reached 50% completion, no more retainage can be withheld so long as the contractor is performing satisfactorily. As introduced, however, the bill also would have required the owner to release half of the retainage to the general contractor at 50% completion, with the approval of the architect, engineer or designer in charge of the project and the written consent of the surety. The original bill provided that no party could unreasonably withhold consent. As enacted, SB 1245 does not mandate release of retainage to the general contractor. SFAA and AIA expressed concern that the bill draft released retainage to the general contractor at the midway point but contained no requirement that subcontractors be paid. Instead, the new law provides for line item release to the early completing trades, which includes structural steel, piling, caisson and

demolition. Trades that are afforded lien item release of retainage must be identified on the original bid documents. If such trades 100% complete their contracts before the project is 50% complete, and if the owner receives approval from the architect or engineer of record, the owner must reduce the retainage for those trades to .5%.

In addition, the new law provides that, notwithstanding the prohibition on retainage after 50% completion and release of retainage to early completing trades, the owner is authorized to withhold retainage from payments after 50% completion in order to allow the owner to retain 2.5% total retainage for the completion of the project. The new law requires the owner to release retainage within 60 days of a pay request, with written consent of the surety, if the owner receives either a certificate of substantial completion or beneficial occupancy or use of the project. The owner may retain funds to secure completion of the work in an amount of 2.5 times the estimated value of the work to be completed. As introduced, the bill would have required payment in 45 rather than 60 days, and would have permitted the owner to retain 1.5 times the estimated costs to complete.

As introduced and enacted, SB 1245 provides that the existence of any third-party claims against the contractor or any additive change order to the contract shall not be a basis for delaying release of retainage. The new law becomes effective on January 1, 2008.

NORTH DAKOTA

All enactments in this state became effective on August 1, or will become effective 90 days after being filed with the Secretary of State if filed after August 1, unless otherwise specified in the summary of the enacted bill.

HB 1033: Public Improvement Contracts

ENACTED: 03/12/2007

HB 1033 completely revises the law for public improvement projects. A performance and payment bond is required for at least the amount of the contract price on all contracts exceeding \$100,000 for public improvements. The new law retains the bond threshold from the prior North Dakota law. The new law adds an anti-directed surety provision, which prohibits a governing body from requiring any person to obtain the bond from a specified insurance or surety company or insurance producer or to submit financial data to the company or producer.

A bid bond is required in a sum equal to 5% of the full amount of the bid, executed by a surety, conditioned that if the bid is accepted and the contract awarded to the bidder, within 10 days after notice of the award he or she must execute a contract according to the terms of the bid, the bid bond and any condition of the governing body. A countersignature of a bid bond is not required. If a successful bidder does not execute a contract within the 10 days allowed, the bidder's bond must be forfeited to the governing body.

The new law authorizes new project delivery methods of agency construction management, construction management at-risk and design-bid-build. An agency construction manager, before starting any work, is required to provide the governing body with a bond that is equal to the cost of the agency construction manager's services with the governing body. A construction manager at-risk, before starting any construction, would have to provide the governing body with a bond in an amount at least equal to the amount of the guaranteed maximum price of the contract. Also, each mechanical contractor and electrical contractor providing work on a public

improvement project that utilizes the construction management at-risk delivery method must provide the governing body with a separate bond for his or her portion of the public improvement.

SB 2296: *Rate and Form Filings*

ENACTED: 05/03/2007

SB 2296 creates a distinction between competitive and non-competitive markets for insurance rate and form filings. For surety and fidelity, a competitive market is presumed to exist. The bill eliminated a prior law, which provided that special filings for surety and guaranty bonds that are required by law, by court, or by an executive order or order of a public body become effective when filed. Insurers providing a competitive market commercial risk product are now under a use and file system and are given 30 days to file a notice of the rate change with the Commissioner of Insurance under the new law.

OHIO—Still in Session. No Contract Surety Enactments to Date.

OKLAHOMA—No Contract Surety Enactments in 2007.

OREGON

All enactments in this state will become effective on January 1, 2008, unless otherwise specified in the summary of the enacted bill.

HB 2309: *Alternatives to Bonds on Special Projects*

ENACTED: 05/31/2007

HB 2309 requires the Construction Contractors Board (Board) to adopt rules on the terms and conditions under which a general or specialty contractor that is a nonprofit organization engaged in rehabilitating an illegal drug manufacturing site may substitute a letter of credit from a bank authorized to do business in the State, or a cash deposit, for a surety bond required under existing law. Such a substitution only may be for the purposes of the work the contractor performs on an illegal drug manufacturing site. The letter of credit or cash deposit must be equivalent in amount to the bond that would otherwise be required. The Board is authorized to charge the contractor a fee to cover any expense incurred in allowing the contractor to substitute a letter of credit or cash deposit.

The new law further provides that a contractor supplying a letter of credit or cash deposit under this section will be considered to be bonded under existing law for these projects. A letter of credit or cash deposit that a contractor supplies under this section is considered to be a surety bond for the purposes of claims involving the contractor's work. The issuer of a letter of credit will be considered to be a surety for a bond only for purposes of receiving notice.

HB 2776: *Public Works Bonds*

ENACTED: 06/13/2007

HB 2776 extends from one year to five years the authority of disadvantaged, minority, women or emerging small business enterprises to elect not to obtain public works bond. Existing law allows such businesses not to do so from the date the business enterprise is certified. The law requires contractors and subcontractors to file such a bond with the Construction Contractors Board from a corporate surety licensed in the State in the amount of \$30,000. The bond is required for the payment of any claims ordered by the Bureau of Labor and Industries to workers

performing labor upon public works projects. Of note, the surety's liability for the aggregate of claims that may be payable from the bond may not exceed the penal sum of the bond.

PENNSYLVANIA—Still in Session. No Contract Surety Enactments to Date.

RHODE ISLAND—No Contract Surety Enactments in 2007.

SOUTH CAROLINA— No Contract Surety Enactments in 2007.

SOUTH DAKOTA— No Contract Surety Enactments in 2007.

TENNESSEE

All enactments in this state will become effective 40 days after the Governor signs the bill or as specified in the summary of the enacted bill.

HB 1003/SB 1275: *Retainage*

ENACTED: 05/22/2007

HB 1003/SB 1275 limits retainage withheld on public and private construction contracts to 5%. The new law also requires that retainage be released within 90 days after the completion of the work or within 90 days after substantial completion, whichever occurs first. The act became effective on July 1.

SB 2031: *Liens*

ENACTED: 05/18/2007

SB 2031 amends existing law concerning mechanics' and materialmen's liens on contracts for improving real property. The new law prohibits remote contractors from filing a lien if the owner or his or her agent has provided a payment bond in the amount of 100% of the prime contractor's price. The bond must be executed with "sufficient surety" by one or more sureties that are licensed in the State and must be recorded in the office of the register of deeds in every county where the real property or any part affected by the improvement is located. Under the new law, the payment bond must be furnished before any work, labor, materials, services, equipment or machinery is provided in connection with the improvement on the property.

The new law also contains a new bond requirement. Anyone seeking to assert a lien must file a bond with the clerk of the court in an amount equal to the lesser of \$1,000 or the amount of the lien claimed. The bond is conditioned upon the plaintiff proceeding with the case for attachment, or in case of failure, to pay the defendants all costs and damages that the defendant sustained as a result of the wrongful suit for attachment. There are no alternatives stated in SB 2031 to the new bond.

When a release of lien bond has been provided according to existing law, the new law provides that an action to enforce it shall be enforced by an "action on the bond..." However, the new law then goes on to say that the plaintiff must serve the owner or owner's agent, but is given discretion to serve the prime contractor, any remote contractor and the surety on the bond. Please be aware that, under this new provision, you could be sued on a lien release bond and never receive notice of the suit until judgment is entered. SFAA will send this to the Surety Claims Advisory Committee and draft corrective language.

TEXAS

All enactments in this state become effective as specified in the summary of the enacted bill.

HB 576: *Bid Bond Forms*

ENACTED: 06/16/2007

HB 576 amends existing law concerning water districts, which provides that the district must require a bidder to submit a certified or cashier's check, or a bid bond from a surety company licensed in the State, for at least 2 % of the total amount of the bid issued for construction contracts over \$25,000. The new law provides that the district must accept a bid bond in the amount the district required as a bid deposit on contracts over \$250,000, if the bid bond meets the other requirements of existing law described above. The bill became effective upon enactment.

HB 1886: *Design-Build Contracts*

ENACTED: 06/15/2007

HB 1886 authorizes the use of design-build firms for certain municipalities and counties. The new law prohibits bonding of the design portion of the contract. Performance and payment bonds are required in an amount equal to the guaranteed maximum price or the fixed contract amount, whichever is used. A bid bond or other security may be provided to guarantee that the final bonds will be furnished in the event that the guaranteed maximum price or the fixed contract amount has not been set or the design-build firm may provide bonds in the amount of the project budget. The act becomes effective on September 1.

HB 2075: *Retainage*

ENACTED: 06/15/2007

HB 2075 replaces the retainage law in the State Transportation Code, which required 5% of the contract price on highway projects to be retained until the entire improvement has been completed and accepted, unless recycled materials are used, then retainage was withheld at 4%. The new law provides that the Texas Department of Transportation may withhold up to 5% of the contract price. The act became effective upon enactment.

SB 657: *Bond Threshold*

ENACTED: 05/04/2007

SB 657 increases the bond threshold for water districts from \$25,000 to \$50,000 at which bid, payment and performance bonds are required. The act becomes effective on September 1.

SB 704: *Small Contractor Participation Assistance Programs*

ENACTED: 06/16/2007

SB 704 creates a small contractor assistance program for contractors to prepare bond application packages for public works projects in a format acceptable to bond underwriters and to assist such contractors in obtaining bonds. Prior law provided that the existing small contractor participation program was applicable to contracts costing over \$20 million and had no such bonding assistance program. The new law applies to public works projects that involve a contract or aggregated multiple contracts with costs over \$1 million. The act becomes effective on September 1.

SB 792: *Public-Private Partnerships—Toll Roads*

ENACTED: 06/11/2007

SB 792 authorizes counties to enter into comprehensive development agreements for the construction of toll roads. The new law requires a performance and payment bond or an alternative form of security in an amount equal to the cost of constructing or maintaining the project as a condition of entering into the agreement. Design contracts are excluded from the bonding requirement, and bonds may not provide coverage for such contracts.

The new law also provides, however, that, in addition to or instead of performance and payment bonds, an authority is authorized to require alternative forms of security, including a cashier's check, a United States bond or note, an irrevocable bank letter of credit or any other form of security that the authority has deemed suitable. The act became effective upon enactment.

HB 447: *Project Delivery Methods*

VETOED: 06/15/2007

HB 447 would have repealed the Texas Building and Procurement Commission's authorization to adopt rules to determine the use of project delivery methods for construction and design services. The bill would have enacted procurement laws instead, including bonding requirements for each type of delivery method. The bill also provided that reverse auction procedures would have been prohibited for obtaining services related to a public works contract for which a bond is required under existing law. The Governor's veto statement announced that the bill would have discouraged competition in public sector capital project developments because it would have limited how the government contracted for design and construction services. Of note, the Governor said that the "limitations and extra contracting requirements contained in this bill would likely result in increased costs and project delays for taxpayers." Governor Perry also said that a similar bill, HB 2525, was vetoed in the 79th Legislative Session based on similar concerns.

HB 1892: *Public-Private Partnerships—Turnpikes*

VETOED: 05/18/2007

HB 1892 would have authorized public authorities to enter into a comprehensive development agreement with a private entity for the construction of a toll road. With respect to its impact on surety, the bill provided that the public authority had to require the private entity to provide a performance and payment bond or an alternative form of security. At a minimum, the bond or security would have had to be in an amount sufficient to ensure the proper performance of the agreement and protect the public authority, as well as the payment bond beneficiaries who had a direct contractual relationship with the private entity or a subcontractor of the private entity to supply labor or material. The bill also would have required that the bond or security be in an amount equal to the cost of constructing or maintaining the project—in addition to the requirements noted above. Although the Governor vetoed this bill for reasons related to its impact on state control of public assets and financing for projects, in his veto message on HB 1892 he pledged to sign a similar bill under SB 792.

UTAH—No Contact Surety Enactments in 2007.

VERMONT—No Contact Surety Enactments in 2007.

VIRGINIA

All enactments in this state became effective on July 1, unless otherwise specified in the summary of the enacted bill.

HB 3065: *Individual Surety*

DEFEATED: 01/30/2007

The most important legislation in Virginia this session was the individual surety bill that was defeated. Virginia HB 3065 would have allowed individual sureties in a bill similar to the 2006 Maryland law. The bill was heard in a Subcommittee on January 30 and was defeated. SFAA and AIA worked together to generate substantial opposition to the bill. The Office of the Virginia Attorney General, the local AGC and the Independent Insurance Agents of Virginia (IIAV) testified in opposition to the bill. The IIAV got the Richmond chapter of the association of state purchasing agents to express opposition to the bill. NASBP got the local roofing contractors to testify in opposition to the bill. Karen Barbour, the main proponent of the 2006 Maryland law, was the lone supporter. The state agencies took a neutral position. When the minority contractor issue surfaced, the state agencies did not want to oppose the bill. After the bill was defeated, SFAA sent a letter to the bill sponsor to rebut the oral testimony of the proponents that individual sureties are permitted in several states. SFAA sent the sponsor the laws from the states cited in the proponent's testimony, which require a licensed surety to issue the bid, payment and performance bonds.

SB 1181: *Performance Bonds*

ENACTED: 03/15/2007

SB 1181 provides that the Department of Transportation (DOT) is required to develop regulations for the requirements for accepting a new street into the State's secondary highway system. The new law requires the regulations to include provisions for performance bonding of new secondary streets.

WASHINGTON

All enactments in this state became effective on July 22, unless otherwise specified in the summary of the enacted bill.

HB 2010/SB 5856: *Bidder Criteria for Public Works Contract*

ENACTED: 04/19/2007

HB 2010/SB 5856 enacts a new law outlining the requirements and criteria for "responsible" bidders. Contractors are required to apply the new standards to their subcontractors, verifying their responsibility.

WEST VIRGINIA—No Contact Surety Enactments in 2007.

WISCONSIN—Still in Session. No Contact Surety Enactments to Date.

WYOMING—No Contact Surety Enactments in 2007.