

# THE SURETY & FIDELITY ASSOCIATION OF AMERICA

## MEMORANDUM

**TO:** Government Affairs Advisory Committee  
**FROM:** Daniel Wanke  
**RE:** Contract Surety Legislation  
**DATE:** June 4, 2010

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There are 10 states and the District of Columbia in regular session. The following report compiles and summarizes contract surety legislation under consideration in 2010, which SFAA is tracking and addressing, as necessary, with the AIA, the NASBP, the local surety associations and other interested parties. Summaries of legislation that have appeared in previous SFAA reports have been marked (♦) for your convenience. The status of such legislation is being updated in this report.

California, Delaware, Louisiana, Massachusetts, Michigan, New Hampshire, New Jersey, New York, North Carolina, Ohio and the District of Columbia are in session. The vast majority of the state legislative sessions have ended for 2010. SFAA is producing an End of Session Report for each state that has adjourned. Completed reports can be found on the Government Relations page of the SFAA Member Access website ([www.surety.org](http://www.surety.org)). The following is a compilation of legislation currently pending that would impact contract surety bonds. As always, if you have any questions, comments or information on legislation, please do not hesitate to contact us.

### CALIFORNIA

#### ♦ AB 1853: Bid Preferences

**INTRODUCED:** 02/12/2010

**STATUS:**

06/02/2010 Passed Assembly. To Senate.

**POSITION:** Neutral

AB 1853 would require public entities awarding a public works contract to give a 2% bid preference to a bidder and its subcontractors with “credible health care coverage.” Originally, the health care payments would have had to be at least 6.5% of the aggregate Social Security wages paid to their employees in California. The specifications were taken out in committee just before the bill passed the Assembly. A civil penalty for falsely claiming this bid preference would be imposed if done knowingly.

#### AB 2216: Works of Improvement

**INTRODUCED:** 02/18/2010

**STATUS:**

05/20/2010 Passed Assembly. To Senate.

**POSITION:** Pending Review

AB 2216 would decrease the time in which a general contractor is required to pay subcontractors from 10 to 7 days after the receipt of a progress payment from the public owner. The bill also would change the time frames for giving notice in order to enforce a claim against the payment bond. Current law requires a 20-day preliminary bond notice, but if that notice is not given, the claimant still may enforce a claim by giving written notice within 15 days after the recordation of the notice of completion, or if no recording is made, with written notice to the surety and principal within 75 days of completion of a public work. Under the bill, as recently amended, if the 20-day preliminary notice is not given, a claim may be made if written notice is given to the surety and principal before completion of the project or recordation of a notice of completion, whichever is later. The bill now also requires every project entity to give each subcontractor, which filed the 20-day preliminary notice, a written notice of pending completion. SFAA has concerns with the requirement of every project entity having to give each subcontractor, which filed the 20-day preliminary notice, a written notice of pending completion. SFAA believes that the bill is unclear on who the project entity is and whether the new notice requirement would have an impact on sureties. We are reviewing this bill with the local surety associations in California to determine its impact.

**SB 1457: Alternative Project Delivery**

**INTRODUCED:** 02/19/2010

**STATUS:**

05/17/2010 From Senate Committee on Appropriations: Do Pass as Amended.

05/25/2010 In Senate. To Third Reading.

**POSITION:** Neutral

SB 1457 would permit alternative project delivery methods, including construction managers at risk and job order contracts. The existing performance bond and payment bond requirements would apply.

**KANSAS**

◆ **SB 377: Retainage**

**INTRODUCED:** 01/14/2010

**ENACTED:** 04/19/2010

SB 377 caps retainage for public contracts at not more than 5% of the value of the contract or subcontract. Prior law capped retainage at not more than 10% of the progress payments. The new law allows owners, architects and general contractors to increase the amount of retainage up to 10% under specified conditions that warrant additional retainage. Current law permits alternative security to be posted in lieu of the retention of funds. These same standards will apply to private contracts. The new law became effective upon enactment.

**LOUISIANA**

**SB 70: Surety Disclosure Requirements for Contractors**

**INTRODUCED:** 03/29/2010

**STATUS:**  
03/29/2010 Introduced.  
**POSITION:** Neutral

SB 70 would require bidders for public contracts to put the full name of the surety insurance company and its NAIC identification number on the outside of a sealed envelope that contains a bid form so that it is plainly visible. The same information would have to be on payment and performance bonds. Failing to do so or providing false, misleading or incorrect information about the surety issuing the bond would result in the rejection of the bid.

**SB 218: Retainage**

**INTRODUCED:** 03/29/2010  
**STATUS:**  
04/26/2010 Passed Senate. To House.  
05/19/2010 From House Committee on Civil Law and Procedure:  
Reported with Amendment.  
05/20/2010 Reported from the Legislative Bureau without  
Amendments.  
05/24/2010 Committee Amendment Adopted on House Floor.  
**POSITION:** Neutral

SB 218 would require retainage withheld on private contracts exceeding \$50,000 to be in escrow accounts. The funds would have to be held in a non-interest bearing account.

**MASSACHUSETTS**

◆ **HB 3044: Payment Bond—Construction Supervisor Services**

**INTRODUCED:** 01/19/2009  
**STATUS:**  
03/22/2010 In Joint Committee on State Administration and  
Regulatory Oversight: Set Aside For Study.  
**POSITION:** Support

HB 3044 would permit the property owner to require a payment bond on contracts for construction supervisor services for private projects. Such a bond option would have to be required in the contract and the owner would have to make an affirmative decision on whether to require one.

◆ **HB 3864: Performance Bonds**

**INTRODUCED:** 03/20/2009  
**STATUS:**  
03/16/2010 In Joint Committee on Consumer Protection and  
Professional Licensure: Set Aside for Study.  
**POSITION:** Seeking Amendments

HB 3864 would amend the unfair trade practices law to establish a \$250,000 bonding threshold for subcontractors performing on any building remodeling, rehabilitation and reconstruction contracts. Subcontractors would have to obtain a performance bond on contracts exceeding this amount. The bill would define performance bond to mean "an irrevocable financial instrument as security for the faithful performance of the contract and which binds the contractor to fulfill its

obligations under contract with any subcontractor." SFAA has discussed this bill with the AIA and it does not appear that the bill will move this year. It is, however, an opportunity for a subcontractors bond, although the bonding provisions need clarification.

## **MICHIGAN**

### **◆ HB 4512: Preferences**

**INTRODUCED:** 03/04/2009

**ENACTED:** 03/25/2010

HB 4512 provides a 10% contracting preference on state contracts for service disabled veteran-owned businesses.

### **◆ HB 4961: Public Private Partnerships**

**INTRODUCED:** 05/19/2009

**STATUS:**

05/26/2010 Passed House. To Senate.

**POSITION:** Neutral

HB 4961 would authorize the Michigan DOT to enter into public-private partnerships (PPP) for transportation facilities. The bill provides that the PPP could permit the operator or the contractor for the transportation facility to provide a letter of credit in lieu of a payment or performance bond.

### **◆ SB 1164: Women- and Minority-Owned Businesses**

**INTRODUCED:** 03/03/2010

**STATUS:**

05/18/2010 Passed Senate. To House.

**POSITION:** Support

SB 1164 would continue a program of the Department of Transportation (DOT) to increase the use of women- and minority-owned businesses for state and local road construction projects. The bill would require at a minimum that the program consist of education and outreach efforts to these businesses to inform them of DOT competitive bidding requirements and processes. Of note, the DOT would have to conduct an assessment of the availability of surety bonds to women- and minority-owned businesses.

### **◆ SB 1319: Performance and Payment Bonds**

**INTRODUCED:** 05/06/2010

**STATUS:**

05/06/2010 Introduced.

**POSITION:** Seeking Amendments

SB 1319 would revise Michigan's Little Miller Act to increase the mandatory amount of the payment and performance bonds from an amount not less than 25% of the contract amount to not less than 100% of the contract amount. The bill also would prohibit "pay if paid" clauses in payment bonds, which condition the payment of the subcontractor on the governmental unit's payment of the general contractor. Regarding claims on the payment bond, the bill would add the loser pays (English) rule so that the prevailing party in any payment bond litigation could recover court costs and attorneys fees from the other party. If the court finds that there was no

good faith basis for the nonpayment, then the claimant on the bond would get 12% all the way back to the date the payment was due. SB 1319 also makes other technical changes to the Little Miller Act. AIA state counsel notes that the bill is a late introduction and likely will not move this session. SFAA is preparing a letter to volunteer to work with the bill sponsor to draft acceptable legislation for next year. We see this as an opportunity to amend the Michigan law to overturn case law that interprets the construction trust provisions in the law to apply to private construction projects only.

## **NEW JERSEY**

### **◆ AB 2360: Captive Insurers**

**INTRODUCED:** 02/25/2010

**STATUS:**

05/06/2010

From Assembly Committee on Financial Institutions and Insurance as Amended.

**POSITION:** Oppose—Seeking Exclusion for Surety and Fidelity

AB 2360 would regulate captive insurance companies. Of note, the bill would permit captives to write fidelity and surety insurance, among other lines. SFAA, AIA and CNA Surety worked together and obtained an exclusion for surety from the lines of business that a captive would be permitted to write. The bill still would allow captives to write fidelity bonds. AIA state counsel has approached the New Jersey Insurance Department for support for exclusion of surety and fidelity bonds.

### **SB 1846: Construction Liens**

**INTRODUCED:** 05/10/2010

**STATUS:**

05/10/2010

Introduced.

**POSITION:** Support

SB 1846 would revise the construction lien law. For private property on which a lien is filed, current law provides that the property owner, contractor or subcontractor can post a surety bond for 110% of the lien amount claimed to discharge the lien. The bill would permit community associations to post this bond as well. Further, the bill provides that when the lien is filed in connection with a residential construction contract, the bond amount could not be greater than the "earned amount of the contract between the owner and the contractor as determined by [an] arbitrator." The bill also would provide mandatory language for a bond form for the discharge of a construction lien.

## **NEW YORK**

### **◆ AB 2279: Retainage Escrow Accounts**

**INTRODUCED:** 01/15/2009

**STATUS:**

05/18/2010

From Assembly Committee on Economic Development.

**POSITION:** Neutral

AB 2279 would require any retainage withheld on a construction contract to be deposited in a separate, interest bearing escrow account with a third party escrow agent. For sums that the public owner withholds from the contractor, the retainage would become the contractor's

property, and the interest on the deposits would accrue to him or her. Construction contracts funded by a public benefit corporation would be excluded from these provisions.

◆ **AB 2349: Contract Preferences—Employee Health Plans**

**INTRODUCED:** 01/15/2009

**STATUS:**

05/04/2010 From Assembly Committee on Rules.

**POSITION:** Neutral

AB 2349 would require the State, any state agency, public benefit corporation or public authority to grant a contracting preference to any contractor that provides its employees with employer sponsored health coverage. The bill includes construction contracts in this preference.

◆ **AB 2387: Payment Bond Claims**

**INTRODUCED:** 01/15/2009

**STATUS:**

05/26/2010 From Senate Committee on Finance.

05/26/2010 Substituted for SB 797.

**POSITION:** Oppose

AB 2387 would change the date from which subcontractor payment bond claims are permitted for state contracts. Under existing law, the subcontractor shall commence a claim after one year from the date on which final payment under the claimant's subcontract became due. The bill provides that the subcontractor shall not commence a claim after one year from the date on which the public improvement has been completed and the public owner accepts it.

◆ **AB 4094/SB 7654: State Bond Threshold**

**INTRODUCED:** 01/30/2009

**STATUS:**

04/29/2010 Amended in Assembly Committee on Governmental Operations.

**POSITION:** Oppose—Increases Bond Threshold

AB 4094/SB 7654 would increase the state bond threshold. Under current law, the head of the state agency or commission may waive the bond requirements on contracts if the contracts exceed \$100,000, or if it exceeds \$200,000 for a contract not subject to state requirements for multiple awards under the Wicks Act. The bill would increase the bond threshold to \$150,000, and to \$300,000 for contracts not subject to the Wicks Act. The bill also provides that the head of the state agency or commission would have to adjust the threshold annually to account for the increases in the costs of construction. The bill also would outline a mentor-protégé program for contracting agencies to foster relationships between mentor firms and small, minority-, and women-owned businesses. It also contains provisions for increasing contract awards through reporting and enforcement measures. The recent amendments to AB 4094 did not impact these provisions. **SB 7654** was recently introduced as a companion bill.

◆ **AB 9707: Bond Threshold—State University of New York**

**INTRODUCED:** 01/19/2010

**STATUS:**

03/24/2010 Amended in Assembly Committee on Ways and Means.  
**POSITION:** Oppose

AB 9707 would increase the threshold at which performance and payment bonds are required for state university construction projects from \$50,000 to \$250,000. SFAA was successful in having this removed from last year's budget legislation. Labor opposes this provision, and we believe that we will be successful in having it removed from the final budget bill again this year. **AB 9707** was amended recently in the Assembly Committee on Ways and Means. The recent committee amendments did not impact the bond threshold increase in AB 9707.

The AIA informed us that the Assembly rejected this bond threshold increase in response to the Governor's release of his budget resolution, while the Senate accepted an increase for the performance bond requirement and the Senate remained silent on the payment bond threshold. With the Assembly's rejection of the increase, AIA does not believe that the final budget will include a threshold increase for university construction projects. SFAA continues to monitor this issue and work with the AIA.

**AB 1055/SB 7913: Performance Bond—Security Contracts**

**INTRODUCED:** 04/07/2010

**STATUS:**

04/07/2010 Introduced.

**POSITION:** Support

AB 1055/SB 7913 would require a performance bond or cash deposit on public contracts for security services that exceed \$500,000. The bond would have to be in an amount not less than 50% of the amount payable under the contract, and it would have to be from a surety authorized to do business in the State. **SB 7913** was just introduced and has not moved yet.

◆ **SB 4134: Lease of Lands**

**INTRODUCED:** 04/14/2009

**STATUS:**

05/27/2010 Amended in Senate Committee on Higher Education.

**POSITION:** Support

SB 4134 would authorize senior learning communities to be built on state university and college campuses. The bill provides that the performance bond and payment bond requirements of the section 103-f of the general municipal law would apply to these projects. The recent committee amendment did not impact the bonding provisions.

◆ **SB 5987/AB 8681: Bond Waivers for Small Businesses**

**INTRODUCED:** 06/19/2009

**STATUS:**

05/11/2010 From Senate Committee on Finance.

**POSITION:** Oppose—Seeking Amendments

SB 5987/AB 8681 would create the Small Business Mentoring Program under the Metropolitan Transportation Authority (MTA) in which small businesses would be partnered with construction manager mentors. For small businesses participating in this mentoring program, the bill would

allow the executive director of MTA to waive a number of requirements for public contracts, including the bid, payment and performance bond requirements of the State's Little Miller Act.

The MTA bill passed the New York Assembly in the eleventh hour last year with a long list of other bills before the Assembly went home. It was passed again in a perfunctory way again this year with other bills that had passed last year. AIA state counsel was successful in having the bill laid aside this year when it was heard for the first time in the Senate. SFAA, AIA and key Senate staff met by conference call with the MTA staff. The MTA staff believed that the legislation created the same bond waiver program that the School Construction Authority had allegedly successfully implemented. No explanation was given as to how the School Construction Authority implemented such a program without legislation to change New York law and why the MTA staff thought that this bill was necessary to proceed. The MTA staff also was unable to explain how projects would be funded and completed if there was a default in a project on which the bonds had been waived. The MTA staff agreed to circulate information about an internal "bond escrow account" which the staff contended answered the questions about defaults. We have received this information from the MTA to date.

SFAA noted that the School Construction Authority program contained no bonding education and that a new model existed in New York that MTA needed to explore. The Dormitory Authority now has a bonding education program, based on our MCDP. The call also gave us an opportunity to explain what already is being done under the SFAA's bonding initiative with the Empire State Development Corporation, the New York State Insurance Department, New York State Small Business Development Centers and the Jamaica Business Resource Center.

We learned that the MTA contacted the Dormitory Authority about its program. Most recently, the SB 5987 was amended to remove the bond waiver provisions. SB 5987 instead would give the MTA authority to assist small business mentoring program participants that have been awarded a small business mentoring program contract to obtain any surety bond or contract of insurance required of them in connection such contract, notwithstanding the anti-directed surety provisions in the New York law. While elimination of the bond waiver provisions is a significant improvement, it is still unclear what type of "assistance" the MTA would be providing to contactors that involves waiving the anti-directed surety provisions of the procurement law. The language of the amended bill also is problematic in that it appears to permit the MTA to provide bonding assistance only after a contract has been award to a mentoring program participant. The contractor would need a bid bond to bid on the job in order to obtain the contract. SFAA and AIA are seeking a follow up call with the MTA staff to clarify what "bonding assistance" it intends to provide before the bill is heard again, which could be soon. In other action, the Assembly recently called back its bill, **AB 8681**, from the Senate and also removed the bond waiver provisions. That bill still is pending in the Assembly. **SB 5987** recently moved out of the Senate Finance Committee.

## **NORTH CAROLINA**

### **HB 2059: Electronic Bids**

**INTRODUCED:** 05/27/2010

**STATUS:**



05/27/2010      Introduced.  
**POSITION:**      Neutral

HB 2059 would permit the City of Winston-Salem to receive electronic bids for construction contracts. Paper bids still would be accepted as provided under existing law.

## **OKLAHOMA**

### **◆ SB 573: Retainage**

**INTRODUCED:**    02/02/2009  
**ENACTED:**        05/05/2010

SB 573 provides that not more than 5% of the progress payments can be withheld during a construction project. Prior law provided that retainage may be in an amount not to exceed 10% of the progress payments, until the prime, the subcontractor, or the sub-subcontractor's gross proper invoice equals or exceeds 50% of the value of the contract, at which point retainage may not exceed 5% of the progress payments. The new law became effective upon enactment.

## **PENNSYLVANIA**

### **SB 1266: Bid, Performance and Payment Bonds—Third Class City Code**

**INTRODUCED:**    03/10/2010  
**STATUS:**  
03/10/2010      Introduced.  
**POSITION:**      Oppose

SB 1266 would overhaul the Third Class City Code, including the city procurement laws. The bill would maintain the bid and performance security requirements in current law, but the bill would increase the \$1,500 payment security threshold for public construction contracts to \$10,000 by requiring compliance with an existing public works law.

## **RHODE ISLAND**

### **◆ SB 2189: Contract Set Asides**

**INTRODUCED:**    02/09/2010  
**STATUS:**  
05/13/2010      Scheduled for Hearing and/or Consideration.  
**POSITION:**      Neutral

SB 2189 would authorize a 10% contract preference for women-owned businesses.

### **◆ SB 2230/HB 8121: Retainage**

**INTRODUCED:**    02/09/2010  
**STATUS:**  
04/08/2010      Passed Senate. To House.  
**POSITION:**      Neutral

SB 2230 would provide that the limitation period to file a notice of intention to claim retainage would be two years after the performance of work or the furnishing of such materials. **HB 8121** was recently introduced and scheduled for a hearing; however, the bill sponsor requested that the hearing be postponed.

◆ **SB 2279: Bidding Preference**

**INTRODUCED:** 02/11/2010

**STATUS:**

05/27/2010 In Committee: Committee Heard.

**POSITION:** Neutral

SB 2279 would give Rhode Island businesses a 3% bidding preference on municipal contracts.

**SB 2791: Performance Bonds**

**INTRODUCED:** 04/13/2010

**STATUS:**

04/29/2010 In Senate Committee on Judiciary: Committee  
Recommends Measure to Be Held for Further Study.

**POSITION:** Support

SB 2791 provides that the financial ability of a contractor would have to be considered in connection with permits for the demolition or relocation of a structure located in a local historic district. The ability to provide a performance bond or other security would be part of such considerations.