

THE SURETY & FIDELITY ASSOCIATION OF AMERICA

MEMORANDUM

TO: Government Affairs Advisory Committee
FROM: Daniel Wanke
RE: Federal and State Regulatory Report—Contract Surety
DATE: October 23, 2014

The following is a report on regulations affecting contract surety that recently were proposed or adopted. For your convenience, the report is organized by regulations that have been finalized, pending regulations on which SFAA has commented and newly proposed regulations that SFAA is reviewing. If SFAA members want additional information or copies of the regulations summarized in this report, please do not hesitate to contact us. Going forward, these reports will be distributed monthly. We appreciate your feedback on whether these monthly reports are informative and useful to you.

ADOPTED REGULATIONS

Jurisdiction	Agency	Citation	Recent History	Issue	SFAA Summary
Federal	Department of the Treasury	31 CFR Part 223	10/16/14 Final Rules	Surety Regulation	The U.S. Department of the Treasury has finalized regulations regarding the authority of federal agencies to refuse to accept a bond from a surety company that is Treasury-certified. The revised regulations authorize agency officials to decline a bond from a Treasury-certified surety “for cause,” which includes but it not limited to the surety’s failure to pay or satisfy an administratively final bond obligation that is due to the agency. Agencies may decline a bond “for cause” so long as it is defined under existing regulations or regulations that the agency develops and the decision is consistent with the agencies’

					<p>authority.</p> <p>Prior to declining a bond, a federal agency must give the surety company advance written notice of the intent to decline the bond along with the reasons or cause. The surety must be given an opportunity to rebut the reasons or cause, as well as an opportunity to cure. Finally, the procedures for declining a bond must be established by regulations developed by each agency. The regulations are subject to existing rule adoption procedures that include notice and an opportunity to comment.</p> <p>The Treasury regulations also amend existing provisions whereby a federal agency may submit a complaint to the Treasury Department to request that the surety's certificate be revoked. Treasury states that the final rules clarify existing procedures for adjudicating complaints based on these bond obligations. The final rule specifies that the Treasury's authority to review the complaint would be to review the reasonableness of the agency's administratively final decision. Treasury is required to notify the surety company of the facts or conduct indicating a failure to comply with the regulations and law and provide the surety company an opportunity to respond. The certificate will be revoked if the company does not respond in a satisfactory manner, or if it fails to demonstrate or achieve compliance.</p>
Federal	Department of Defense , General Services Administration , and the National Aeronautics	48 CFR Parts 1, 2, 4, 12, 14, 15, 19, 22, 26, 36, 52, and 53 48 CFR Parts	10/14/14 Final Rule and Interim Rules	Small Businesses	The Department of Defense (DOD), General Services Administration (GSA), and the National Aeronautics and Space Administration (NASA) have adopted a revision to the Federal Acquisition Regulation (FAR) that deletes the 5% contracting goal for contracts with small disadvantaged businesses and historically Black colleges and universities, minority institutions, Hispanic-serving institutions, and Native Hawaiian-serving institutions and Alaska Native-serving institutions of higher

	and Space Administration	205, 206, 215, 219, 226, 232, 235, 252, and Appendix I to Chapter 2			<p>education under the military procurement laws (10 USCA 2323). The statutory authority for the regulations has expired and has been found unconstitutional by the Court of Appeals for the Federal Circuit.</p> <p>In a related action, DOD has issued an interim rule to amend the FAR to remove all provisions based on 10 U.S.C. 2323. Current requirements for contracting goals and agency practices regarding contract awards for small disadvantaged businesses still will remain in place based on agency practices and requirements of other existing laws. Comments on the interim rule are due by December 15, 2014.</p>
Federal	U.S. Department of Transportation	49 CFR Part 26	10/02/14 Final Rules	Disadvantaged Business Enterprises	The U.S. Department of Transportation (DOT) has adopted a final rule for implementation of its disadvantaged business enterprise (DBE) program. With respect to the program's goal setting provisions for using DBE firms, the DOT has adopted a rule that allows the use of prequalified contractors lists to establish availability of DBEs for bidding, so long as such lists comply with the restrictions in the regulations concerning the data used to establish such lists.
Federal	Federal Highway Administration	N/A	09/10/14 Notice	Public-Private Partnerships	The Federal Highway Administration (FHWA) issued a final model contract for toll concessions for public-private partnerships. The FHWA notes that the model contract would be an educational guide rather than a prescriptive model. The model contract addresses security for the handback of the project at the end of the concession agreement, which the guide notes generally is for a term of 30 to 50 years. The contract states that the agreement should include a requirement for the developer to establish and fund a handback reserve account. The developer would have to deposit cash, a form of performance security or a combination of the two that is in amount equal to at least 100% of all costs necessary to cause the elements to meet the handback requirements at the end of the term as reasonably determined by

					an independent consultant. Performance security may be used to meet the whole amount required for the reserve account. Letters of credit may be used to meet this requirement.
Maryland	Maryland Insurance Administration	COMAR 31.03.04.01	09/05/14 Adopted Regulations	Individual Sureties	The Maryland Insurance Administration has revised the regulations on unfair trade practices to repeal provisions in the State Finance and Procurement Article that allowed contractors who bid on state procurement contracts to submit surety bonds issued by individual sureties. The provision became obsolete when the authority of individual sureties was terminated on September 30, 2014.
Oklahoma	Oklahoma Water Resources Board	OK ADC 785:50-7-1, 3, 5; OK ADC 785:50-8-5; OK ADC 785:50-9-21, 23, 28, 30, 32, 35, 38, 42, 61	09/02/14 Adopted Regulations	Retainage	The Oklahoma Water Resources Board (Board) has adopted revised regulations regarding retainage for its water and sewer program based on a newly enacted law. Prior regulations provided for 10% retainage, which could have been reduced to 5% of the amount earned when the project reached 50% completion. Current law provides for 5% retainage throughout a project and the regulations were revised accordingly.

SFAA's RECENT COMMENTS ON PROPOSED RULES

Jurisdiction	Agency	Citation	Recent History	Issue	SFAA Summary
Federal	Department of Defense, General Services Administration, and the National Aeronautics and Space	N/A	07/24/14 Notice	Individual Sureties	The Department of Defense, General Services Administration, and the National Aeronautics and Space Administration have issued a notice of a request for an extension of an existing information collection concerning Standard Form 28, Affidavit of Individual Surety. SFAA used the opportunity to comment that Form 28 does not achieve its intended purpose of assisting federal contracting officers to evaluate the assets that individual sureties pledge. Rather, individual sureties should be required to give the public contracting officers

	Administration				control over the assets pledged for the duration of the contract by placing them in a federally insured financial institution.
--	----------------	--	--	--	--

NEWLY PROPOSED REGULATIONS

Jurisdiction	Agency	Citation	Recent History	Issue	SFAA Summary
Federal	Federal Accounting Standards Advisory Board	N/A	10/07/2014 Notice	Public-Private Partnerships	<p>The Federal Accounting Standards Advisory Board (Board) has issued an exposure draft of its proposed disclosure requirements for public-private partnerships (P3) with regard to fiscal exposures for federal financial reports. The Board seeks disclosure requirements specifically for P3s due to the complex nature of P3 agreements, such as the mix of funding and financing sources and the legal risks involved in P3s. The proposal also notes the risk sharing nature of P3s, including contractual agreements, guarantees, insurance, and indemnification strategies.</p> <p>As a part of the document, the Board has proposed the following definition for P3s:</p> <p style="padding-left: 40px;">Federal public-private partnerships (P3s) are contractual arrangements or transactions between public and private sector entities to provide a service or an asset for either government or general public use where in addition to the sharing of resources, each party shares in the risks and rewards of said arrangements or transactions. Sharing of risks and rewards is evidenced by conditions such as (1) agreements covering a significant portion of the economic life of a project or asset, and/or lasting more than five years, (2) financing provided in whole or shared in part by the private partner, (3) conveyance or</p>

					<p>transfer of real property, personal property, or multi-sector skills and expertise, or (4) formation of special purpose vehicles (SPVs).</p> <p>The Board is seeking comments on this proposed definition. The Board also proposes to require a description of the purpose, objective, and rationale for the P3 arrangement or transaction, the relative benefits/revenues being received in exchange for the government's consideration, monetary and non-monetary, and the entity's statutory authority for entering into the P3 in the required reports. The document also sets forth P3 risk-based “conclusive characteristics” and “suggestive characteristics” that would be used to determine what P3s should be considered for the proposed additional financial reporting disclosures. The draft sets forth several questions for respondents to consider when commenting on the exposure draft regarding the proposed requirements for disclosure, risk based characteristics, and the definition of a P3. Comments are due January 2, 2015.</p>
Federal	Department of Defense	32 CFR Part 238	09/17/14 Proposed Rules	Completion Bonds	<p>The Department of Defense (DoD) has proposed rules for DoD assistance to non-government entertainment media productions such as feature motion pictures, episodic television programs, documentaries, and computer-based games. To obtain a commitment for support from the DoD, the producer would have to have an acceptable public exhibition agreement and the capability to complete the production, such as a completion bond or other industry-recognized guarantor of completion, such as the commitment of a major studio or other source of financial commitment. Comments are due November 17, 2014.</p>
Florida	Department of Management Services	FL ADC 60D-5.002, 004, 0041,	09/30/14 Proposed Rules	Performance and Payment Bonds	<p>The Florida Department of Management Services (Department) has proposed deleting provisions in the existing regulations that specify the bond requirements for</p>

		007, 0071, 0073, 008, 0082, 0091			performance and payment bonds for the construction of a public building or public work. The Department would replace them with a reference the statutory citation for the Little Miller Act, which contains identical provisions to those being deleted from the regulation.
Florida	Department of Economic Opportunity	FL ADC 73C-23.0031, 0035, 0041, 0045, 0048, 0049, 0051, 0061, 0071, 0081	10/06/14 Proposed Rules	Performance and Payment Bonds	The Florida Department of Economic Opportunity has proposed revisions to the regulations for the Small Cities Community Development Block Grant (CDBG) Program that would require construction contracts funded by CDBG funds to have a 100% performance bond and a payment bond when the contract exceeds \$100,000. Current regulations do not have a bonding requirement.
Texas	Community Development	10 TAC 10.400, 401, et seq.	09/19/14 Proposed Rules	Retainage	<p>The Texas Department of Housing and Community Affairs (Department) has proposed to revise the retainage requirements for housing under the community development loan programs. Currently, 10% of the construction contract must be withheld and retainage is released 30 days after documentation for project completion, labor compliance, inspection, and certificates of occupancy are submitted.</p> <p>The proposed rules provide that following 50% construction completion, the remaining funds will be released in accordance with the percentage of construction completion, not to exceed 90% of the loan award, at which point funds will be held as retainage until the final draw request. The rules would require AIA Form G704 for demonstrating substantial completion. Evidence of compliance with wage requirements would have to be submitted only if the project is subject to the federal Davis-Bacon Act. The proposed rules also would require development completion reports that include a demonstration of compliance with applicable laws and regulations, including environmental conditions.</p>

Washington	Department of Revenue	WAC 458-20-217	09/03/14 Expedited Proposed Rules	Retainage	The Washington Department of Revenue has proposed expedited rules to revise its current regulations concerning liens and retainage. Under the existing regulations, the public owner is required to retain 5% of the total contract price on contracts exceeding \$20,000. The proposed rules would increase this to contracts exceeding \$35,000. The regulations provide that all taxes, increases, and penalties due or to become due from a contractor or the contractor's successors or assignees with respect to a public improvement contract exceeding \$20,000 is a lien upon the amount of the retainage that the disbursing officer withholds under the contract. The proposed rules would increase this amount to \$35,000.
------------	-----------------------	----------------	--	-----------	---