

THE SURETY & FIDELITY ASSOCIATION OF AMERICA

MEMORANDUM

TO: Government Affairs Advisory Committee

FROM: Daniel Wanke

RE: Contract Surety Legislation

DATE: May 2, 2016

There are 19 states and the District of Columbia in session. In all states except New Jersey and Virginia, the 2016 sessions are the second year of a two-year session. North Carolina convened its regular session in April. Alabama, Arizona, Connecticut, Hawaii, Iowa, Kansas, Kentucky, Maine, Maryland, Mississippi, Nebraska, Tennessee, and Vermont have adjourned since the last report. Colorado, Illinois, Minnesota, and Missouri are projected to adjourn in May. The following report compiles and summarizes the contract surety legislation that SFAA is tracking as of May 2, 2016. For additional information on how SFAA is addressing these bills, as necessary, with the AIA, NASBP, the local surety associations and other interested parties, please visit the Government Relations page of the SFAA website at www.surety.org.

Jurisdiction	Bill(s)	Recent History	Issue	SFAA Summary
AL	SB 287	05/04/2016 The Senate adopted the conference report for SB 287, sending it to the House.	Public-Private Partnerships	SB 287 would allow the Alabama Corrections Institution Finance Authority to use alternative project delivery methods for women’s and regional prison facility construction projects, including design-build, construction management at risk, or public-private partnerships (P3s). SFAA and AIA obtained two amendments to require bonding. Prior to passing the Senate, SB 287 was amended to address our concerns regarding bonding by requiring compliance with the public works laws for projects authorized under the bill, which includes the bonding requirements of the Little Miller Act. Regional prison facility projects were exempted from compliance because of the interstate implications in such projects. As amended and passed in the House, the bill also includes SFAA and AIA’s amendment that would require the design-build contract for all prison projects under authorized the bill’s provisions to be bonded in compliance with the Little Miller Act. (05/02)

CA	SB 1	04/21/2016 SB 1 was reported from committee in the Senate with amendments and then was re-referred to committee.	Public-Private Partnerships	SB 1, as amended, would extend the authorization for the Department of Transportation and regional transportation agencies to enter into comprehensive development lease agreements for public-private partnerships (P3s) for transportation projects by eliminating the current sunset on the law, which is January 1, 2017. The bill also would authorize the Santa Clara Valley Transportation Authority to enter into P3s for transportation projects. The provisions are contained in a transportation funding bill. (04/28)
CA	AB 2270	04/07/2016 AB 2270 has been reported from committee in the Assembly with amendments and then was re-referred to an additional committee.	Bond Guarantee Program	AB 2270, as amended, attempts to activate an existing bond guarantee program in the California Infrastructure and Economic Development Bank (iBank) that allows iBank to guarantee surety bonds. iBank has never implemented this bond guarantee program. Current law indicates that banks and other corporations that iBank approved would guarantee loans to contractors to assist them with the credit as a step to obtaining bonding. The bill would amend the existing by changing the loan guarantee to a surety bond guarantee. Under existing law, any bank or other corporation that iBank approves is authorized to act as a surety, guarantee, or endorse the bond. SFAA believes that the existing statutory language, although entitled as a bond guarantee program, was patterned after a loan guarantee program and may have unintended consequences if applied to surety bonds. SFAA is reviewing the bill to determine whether any amendments are needed to the existing law. The bill also would expand an additional existing bond guarantee program available through California small business financial development corporations so it would apply to disadvantaged businesses. The bill would create a new technical assistance program for obtaining bonds for contractors participating in these guarantee programs. (04/11)
CA	AB 2551	04/27/2016 AB 2551 has been reported from committee in the Assembly with amendments and then was re-referred to an	Public-Private Partnerships	AB 2551, as amended, would allow a local water agency to use public-private partnerships, construction managers at-risk, design-build, or design-build-operate for surface storage projects. The bidder for the project would have to provide evidence that it has the capacity to obtain all required payment and performance bonding, liability insurance, and errors and omissions insurance. (04/29)

		additional committee.		
CA	AB 2699	04/18/2016 AB 2699 has been re-referred to committee in the Assembly.	Performance and Payment Bonds	AB 2699, as amended, would require the Contractors' State License Board to adopt regulations requiring contractors to furnish a blanket performance and payment bond for residential solar panel installation projects. (04/19)
CA	AB 2742	04/27/2016 AB 2742 is scheduled to be heard in committee in the Assembly.	Public-Private Partnerships	AB 2742 would extend the authorization for the Department of Transportation and regional transportation agencies to enter into comprehensive development lease agreements for P3s for transportation projects from January 1, 2017, to January 1, 2030. The bill would authorize the Santa Clara Valley Transportation Authority to enter into P3s for transportation projects. The law requires the contracting entity or the lessee to provide evidence that it has the capacity to obtain all required payment and performance bonding and insurance. (04/22)
CT	HB 5328	05/04/2016 HB 5328 passed the Senate, sending it to the House for concurrence.	Retainage Payment Bond Claims	<p>HB 5328 would reduce the amount of retainage that the Department of Administrative Services and its prime contractors can withhold on public works contracts from not more than 10% to not more than 7.5% until the project reaches 50% completion. After the project reaches 50% completion, retainage would be capped at not more than 5%. As introduced, the bill would have lowered the maximum amount of retainage for the whole project to not more than 5%.</p> <p>The bill also provides that for payment bond claims, if the surety failed to meet its obligations in the claims process under the law, it would have to reimburse the claimant for reasonable attorneys' fees and costs subsequently incurred for recovering any amounts owed to him or her. The bill provides that failing to meet claims obligations would not be a waiver of the surety's defenses, except for any part of the claim that has been resolved already. This is consistent with the provisions in ConsensusDocs. (04/25)</p>
FL	HB 7061	04/14/2016 HB 7061 has been enacted.	Bond Waivers	HB 7061 permits the Department of Transportation (DOT) to waive the bond requirements for its construction contracts if the prime contractor is a qualified nonprofit agency for the blind or for the "other severely handicapped" or it is using a subcontractor that is a qualified nonprofit agency for such persons. For subcontractors, the DOT may not waive the bond amount for more than the amount of the subcontract. The new law also requires a bond or insurance for vehicle technology testing. (04/18)

HI	SB 3101	04/29/2016 SB 3101 has been sent to a conference committee.	Public-Private Partnerships	SB 3101 would direct the Department of Business, Economic Development, and Tourism to study the use of public-private partnerships for all state agencies for any kind of project and for the provision of services. The Department would have to report to the legislature no later than twenty days prior to the convening of the regular session of 2017, on its findings and any recommended legislation. (04/11)
IL	SB 2884	04/21/2016 SB 2884 passed the Senate.	Bond Guarantee Program	SB 2884, as amended, would repeal the law that authorizes the Illinois Department of Commerce and Economic Opportunity to guarantee any surety up to 90% of its losses incurred under a bid bond, a payment bond, or a performance bond issued to a small business for a contract of not more than \$500,000 for each bond on any contract with the federal, the State, or any local government, with a member of the private sector, or with a state-regulated utility. The bill was amended to include the elimination of this program on the Senate floor just prior to passing. There has been little funding for the program, so it has not been used. (4/28)
IL	HB 5813/ SB 3020	04/13/2016 SB 3020 passed out of committee in the House. HB 5813 has not moved since last reported.	Design-Build Construction Managers	HB 5813/SB 3020 would authorize the Department of Transportation and the Illinois State Toll Highway Authority to use design-build and construction manager-general contractor (CM-GC) project delivery methods, as well as alternative technical concepts proposed by bidders and proposers. The RFP for design-build and CM-GC procurements could include information on the bid, payment, and performance security requirements. Performance and payment security requirements could be in contract. SFAA is working with the DOT to obtain bond requirements for these projects. (04/18)
IL	HB 5660	04/12/2016 HB 5660 passed the House.	Bond Claims	HB 5660 provides that the verified notice required to file a claim on a contractor's bond for a public works project would be deemed filed on the date personal service occurs or the date where the verified notice is mailed in the form required under current law. (04/14)
KY	HB 309	04/08/2016 HB 309 has been enacted.	Public-Private Partnerships	HB 309 authorizes local governments to enter into public-private partnerships (P3s) for capital projects or for the procurement of services. As enacted, the new law includes SFAA and AIA's amendments to require bonding for P3s. Our amendment provides that the P3 agreement for local governments must require the private partner to deliver or cause to be delivered performance and payment bonds for the design and construction portion of the project in compliance with the Little Miller Act. Under current law, Kentucky requires a 100% payment and performance bond. Maintenance bonds or other security will be required for the other portions of the project, in the form and amounts necessary to provide adequate protection for the local government. The new law also authorizes the State to enter into P3s

				and to adopt regulations to set forth the requirements for the project, which must include the parameters for the P3 agreement. State capital projects have to exceed \$25 million to use the P3 method. (04/15)
LA	SB 195	05/02/2016 SB 195 is on the House calendar for 05/10/2016.	Public-Private Partnerships	SB 195 would authorize the Department of Transportation (DOT) to enter into P3s for transportation projects. Under the bill, the DOT would have to comply with the existing P3 law for the Louisiana Transit Authority (Authority). The existing law for the P3 agreement provides for the delivery of performance and payment bonds or other security in connection with the construction, in the forms and in amounts satisfactory to the Authority. SFAA and AIA have obtained an amendment in committee in the House, which the DOT supported, to require the DOT to still follow the bonding requirements for transportation projects when it uses a P3. (05/02)
LA	HB 334	04/04/2016 HB 334 passed the House.	Bond Claims	HB 334, as amended, provides that the bond required under the Little Miller Act for public construction projects would secure payments from a contractor or a subcontractor to claimants when the payment is due and owing pursuant to a contract between the claimant and the owner, the contractor, or a subcontractor. The bill would have provided that contracts have to be “valid” with regard to bond claims, but the provisions were eliminated. (04/05)
LA	HB 1077	04/06/2016 HB 1077 has been introduced.	Bond Claims	HB 1077 would require any person having a direct contractual relationship with a subcontractor, but no contractual relationship with the contractor, to record his or her claim and give written notice to the contractor within 60 days from when the notice of termination of the work has been recorded to have a right of action against the contractor or the surety on the contractor’s bond for private works projects. The law requires the claim to be recorded and the notice to be sent within 30 days. (04/12)
LA	HB 1078	04/06/2016 HB 1078 has been introduced.	Retainage	HB 1078 would permit a contractor for a public works project to post a bond in lieu of retainage being withheld. The bond would have to be for 10% of the contract amount for contracts less than \$500,000 and for 5% of the contract amount for projects exceeding \$500,000. The bond amounts mirror the current law’s retainage amounts for public works projects. (04/06)
MD	SB 234/ HB 871	04/02/2016 SB 234/HB 871 have been sent to the Governor.	Indemnity Provisions in Construction Contracts	SB 234/HB 871 would revise the existing law for indemnity agreements to provide that agreements to defend or pay the costs of defending promisees or indemnitees against liability in a contract or an agreement relating to architectural, engineering, inspecting, or surveying services, or the construction, alteration, repair, or maintenance of a building, a structure, an appurtenance, or an appliance for bodily injury or property damage would be against public

				policy and would be void and unenforceable. Insurance contracts and surety bonds required for construction or other contracts are exempt from the existing law's restrictions on indemnity agreements. (04/14)
MD	HB 403/ SB 826	03/29/2016 HB 403/SB 826 have been sent to the Governor.	Change Orders	HB 403/SB 826 would prohibit procurement units from requiring a prime contractor and prime contractors requiring subcontractors to begin work on a change order unless the procurement officer issues a written change order that specifies if the work will proceed on an agreed-to price, force account, construction change directive or time and materials basis in compliance with the contract. Procurement units would have to adopt regulations for an expedited change order process for those exceeding \$50,000. For change orders less than \$50,000, the procurement officer would have to make payments for work under an accepted change order within 30 days of receiving an invoice. Procurement units would be required to develop guidelines for their change order process. The bill would not apply to state contracts for public school construction or capital improvements. The bill would provide for establishing a working group of stakeholders to address state construction contracting and procurement. (04/05)
MN	SB 1898/ HB 2451	04/11/2016 SB 1898 passed out of committee in the Senate. HB 2451 has not moved since last reported.	Retainage	SB 1898/HB 2451, as amended, provides that not more than 5% retainage could be withheld for a building and construction contract. The bill would repeal the current law permitting retainage to be set by contract. The amended bill specifies that there is nothing in the law requiring retainage to be withheld. The bill also would permit subcontractors to suspend work if a progress payment is not received. (04/11)
MO	HB 2376/ HB 1895/ SB 789/ SB 595	04/27/2016 HB 2376 has passed out of committee in the Senate. SB 789, SB 595, and HB 1895 are similar, but have not moved since	Design-Build Construction Managers at Risk	HB 2376 would authorize political subdivisions to use design-build contracts and construction managers at risk (CM at-risk). Payment bonds for design-build contracts would be required according to the Little Miller Act. Design services providers would be covered under the payment bond. SFAA and AIA sought amendments to clarify the performance bond's coverage for design professionals. As amended, the bill provides that the design-builder's performance bond would not need to cover any damages of the type specified to be covered by the professional liability insurance in the amount set forth in the request for proposals. While not perfect, the bill is substantially improved from when it was introduced. The CM at-risk would have to furnish bonds for the contract amount or the guaranteed maximum price, or the bonds be equal to the project budget if those have not

		last reported.		been established. (04/29)
NH	SB 549	04/28/2016 SB 549 passed out committee in the House with amendments.	Public-Private Partnerships	SB 549 would authorize the Department of Transportation to enter into public-private partnerships (P3s) intermodal infrastructure and transportation projects. The bill would create the Public-Private Partnership Infrastructure Oversight Commission (Commission) to administer these projects, including determining contract terms and qualifications for bidders. SFAA and AIA obtained an amendment in the bill that would require bonding for the construction portion of the P3 in compliance with the Little Miller Act as part of the Commission's insurance requirements.
NJ	AB 3559/ SB 123	04/04/2016 HB 3559 has been introduced. SB 123 has not moved since last reported.	Bond Guarantee Program	AB 3559/SB 123 would require the New Jersey Economic Development Authority establish the Small Business Bonding Readiness Assistance Program to provide support services to small businesses and help them qualify for surety bonding to bid on State or federal public works projects or perform on such contracts. The bill provides for grants to small businesses to help meet bond requirements. The bill would provide an annual appropriation of \$250,000 to fund the program. (04/12)
NY	AB 9740	04/05/2016 AB 9740 has been introduced.	Retainage	AB 9740 would revise the retainage requirements for state and municipal public works projects so that the public owner would withhold the retainage from the subcontractor instead of the contractor. The bill provides that the public owner would pay the subcontractors directly instead of the contractors paying the subcontractors. (04/06)
OK	SB 1316	04/21/2016 SB 1316 passed the House with amendments, sending it back to the Senate.	Public-Private Partnerships	SB 1316 would authorize governmental entities in Oklahoma to enter into P3s for transportation and public facility projects. The comprehensive agreement for the P3 would have to include requirements for performance and payment bonds for all construction activities for the project. The agreement also would have to include letters of credit or other security for the development or operation of the project in the forms and amounts satisfactory to the public owner. (04/29)
PA	SB 344	04/28/2016 SB 344 is on the Senate calendar for 05/09/2016.	Bond Threshold	SB 344 would revise the existing bond threshold for public works contracts to repeal the discretion granted to the contracting body to approve any form of security and would specify that a performance bond and a payment bond may be furnished to meet the law's requirements. The current law permits the contractor to provide an irrevocable letter of credit or restrictive or escrow accounts equal to 100% of the contract amount as performance and payment security. (04/29)
RI	SB 2229	04/26/2016 SB 2229 passed	Bond Claims	SB 2229 provides that the performance and payment bond required under the Little Miller Act would be conditioned on the payment of any penalties, assessments, and fines due under

		out of committee in the Senate and is on the Senate floor calendar for 05/11/2016.		law for nonpayment or late payment of wages due in addition to the bond's existing conditions. The bill would authorize the State to sue for these amounts. SFAA and AIA submitted a statement in opposition to this bill and we are working to stop it from moving further in the Senate. (04/29)
TN	SB 2093	04/27/2016 SB 2093 has been enacted.	Public-Private Partnerships	SB 2093 authorizes the State, counties, and municipalities to enter into public-private partnerships (P3s) for mass transit system projects. As introduced, performance and payment bonds or other forms of security would have been required for the development, redevelopment, or operation of the project in the forms and amounts the public entity determines. SFAA and AIA obtained amendments that require performance and payment bonds in compliance with the DOT's bonding law or a letter of credit for the development or redevelopment of the project. Bonds, letters of credit, or other forms of security will be required for the operation of the transportation facility in the forms and amounts that the public entity determines. There was some initial pushback on our original amendment, which called for bonding in the amount of the estimated cost of the design and construction, because Tennessee requires only a payment bond for not less than 25% of the contract. Ultimately, we prevailed in our efforts. (05/02)