

THE SURETY & FIDELITY ASSOCIATION OF AMERICA

MEMORANDUM

TO: Government Affairs Advisory Committee

FROM: Daniel Wanke

RE: Contract Surety Legislation

DATE: February 9, 2016

There are 42 states and the District of Columbia in session. In all states except New Jersey and Virginia, the 20156 sessions are the second year of a two-year session. The following report compiles and summarizes the fidelity bond legislation that SFAA is tracking as of February 1, 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
AZ	HB 2268	02/08/216 HB 2268 has passed out of committee in the House.	Payment Bond Claims	HB 2268 would revise the notice requirement for payment bond claims to provide that it could be delivered by any means that provides written, third-party verification of delivery instead of requiring that it be sent via registered or certified mail, postage prepaid, in an envelope addressed to the contractor. (01/22)
FL	HB 95/ SB 124	02/04/2016 HB 95 has passed of committee in the House. 02/05/2016	Public-Private Partnerships	HB 95/SB 124 would expand the existing law authorizing the use of public-private partnerships (P3s) for or public facilities, buildings, and water and wastewater projects so that special districts also would be allowed to enter into P3s for such projects. The P3 agreement would have to address termination in the event of a material default. The bill would delete the law establishing the Public-Private Partnership Guidelines Task Force. (02/09)

		SB 124 has been referred to an additional committee in the Senate.		
FL	HB 211/ SB 438	01/12/2016 HB 211 and SB 438 have been introduced.	Bond Waivers	HB 211/SB 438 would prohibit an agency, general contractor, or prime contractor from requiring a vendor of goods and services to post a bid bond, performance bond, or other surety for a contract that does not exceed \$500,000. Construction contracts would be excluded. This would not apply to any requirement for posting a bond pending the protest of a solicitation, the protest of a rejected bid, proposal, or reply, or the protest of a contract award. The bill also would require agencies to structure contracts to facilitate competition by small businesses, avoiding unnecessary contract bundling that may preclude small business participation as prime contractors. The agency would have to conduct market research to determine whether contract bundling is necessary. Written justification would be required for bundled contracts. (01/13)
FL	SB 756/ HB 7027	02/04/2016 SB 756 has passed out of committee in the Senate. 02/03/2016 HB 7027 passed the House.	Bond Waivers	SB 756/HB 7027 would authorize the Department of Transportation to establish a program for highway projects to help small businesses obtain contracts that could include waiving bond requirements, setting aside contracts, providing preference points for using small businesses, providing special assistance in bidding and contract completion, and implementing other strategies to increase competition. For the purposes of the program, a small business would be defined as a business with average gross receipts of less than \$15 million for road and bridge contracts and less than \$6.5 million for professional and nonprofessional services contracts. (02/09)
FL	SB 1592/ HB 807	01/12/2016 HB 807/SB 1592 have been introduced.	Bond Guarantee Program	SB 1592/HB 807 would revise an existing small business and entrepreneur loan guarantee program through the Department of Economic Opportunity to include a new surety bond guarantee program. The program would provide a 25% guarantee for surety bonds ranging from \$25,000 to \$1 million. The bill also would revise the program so that it applies to microbusinesses, which the bill would define as a “small business that employs 5 or fewer persons, including the owner, and generates annual gross revenues that average \$100,000 or less per year for the preceding 2 years.” (01/14)

FL	HB 7061	02/03/2016 HB 7061 passed the House.	Bond Waivers	HB 7061 would permit 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 could not waive the bond amount for more than the amount of the subcontract. The bill also requires a bond or insurance for vehicle technology testing. (01/21)
GA	HB 712/ SB 295	01/27/2016 HB 712/SB 295 have been introduced.	Bonding Assistance Programs Minority-Owned Businesses Women-Owned Businesses	HB 712/SB 295 would create the Division of Supplier Diversity (Division) within the Department of Administrative Services to provide for programs to assist minority- and women-owned businesses obtain state contracts and subcontracts. The Director of the Division could provide assistance to, and facilitate access to, programs serving these businesses through bonding and insurance education programs. The Director also could review contracting agencies’ bonding and paperwork requirements that may unnecessarily impede the ability of such certified businesses to compete and use available federal resources, including the U.S. Small Business Administration’s surety bonding guarantees, to maximize using minority- and women-owned businesses. Contracting agencies also would be directed to consider the severability of construction projects and other bundled contracts where it is practicable to do so. (01/28)
HI	HB 1721	02/04/2016 HB 1721 has been deferred in committee in the House.	Public-Private Partnerships	HB 1721 would authorize the Department of Public Safety to enter into a public-private partnership to build the Halawa correctional facility. The bill does not specify a bonding requirement. (01/25)
HI	HB 1963/ SB 2507	01/25/2016 HB 1963/SB 2507 have been introduced.	Public-Private Partnerships	HB 1963/SB 2507 would authorize the Hawaii Community Development Authority to enter into public-private partnerships with private investors through leasing agreements for the renovation, improvement, or construction or public infrastructure. The bill does not provide for a bonding requirement. (01/25)
HI	HB 2064	01/25/2016 HB 2064 has been introduced.	Public-Private Partnerships	HB 2064 would authorize counties to enter into public-private partnerships (P3) for transportation facility projects. The P3 agreement may include a requirement requiring the private partner to provide performance and payment bonds, parent company guarantees, letters of credit, and other forms of security. The bonds or other security could be less than 100% of the contract value based upon the county’s determination on a facility-by-facility basis of what is required to adequately protect the State. (01/25)

HI	SB 2499	02/04/2016 SB 2499 has been deferred in committee in the Senate.	Bond Threshold	SB 2499 would delete the current threshold for requiring performance and payment bonds, which currently is \$50,000. The bill also would delete the \$25,000 threshold for requiring bid security. The bill would subject all state construction procurement to the requirements of the Federal Acquisition Regulation. The Miller Act threshold currently is \$150,000 for performance bonds and \$35,000 for payment security. The bill would delete an authorization to use the design-build procurement method. (01/29)
HI	SB 3101	02/05/2016 SB 3101 is scheduled to be heard in committee on 02/10/2016/	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. (02/01)
IN	SB 346	01/07/2016 SB 346 has been introduced.	Prevailing Wages	SB 346 would require the payment of the prevailing wage for public construction projects that exceed \$150,000 for the costs of construction. The bill provides for the termination of the contract if the contractor or the subcontractor fail to pay the prevailing wage. The Commissioner of Labor (Commissioner) or workers could bring action against the contractor or subcontractor's surety if necessary to collect the unpaid wages. The surety would be liable for the costs of the action and reasonable attorneys' fees if the Commissioner prevailed. Actions to enforce the payment of the wages and penalties also could be brought against the contractor or subcontractor's bonds. (01/11)
IN	HB 1319	01/19/2016 HB 1319 has been introduced.	Indemnity Provisions in Construction Contracts	HB 1319 would make a provision in a private construction contract that requires the purchase of or an insurance policy or endorsement that provides for additional insured coverage for the purposes of indemnification for a construction contract under existing law void and unenforceable. The bill includes a performance bond in the definition of a construction contract. (01/15)
MD	SB 234	01/27/2016 SB 234 has been scheduled for a hearing in committee in the Senate on 02/09/2016	Indemnity Provisions in Construction Contracts	SB 234 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. (02/01)

MD	HB 403	02/04/2016 HB 403 is scheduled for a hearing in committee in the House on 02/17/2016.	Change Orders	HB 403 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. (01/30)
MO	SB 595 and SB 789/ HB 1894 and HB 2376	02/02/2016 SB 595 and SB 789 have been heard in committee in the Senate. 01/07/2016 HB 1894 and HB 2376 have been introduced.	Construction Managers at-risk Design-Build Performance Bonds Payment Bonds	<p>SB 595 would authorize political subdivisions to use design-build contracts and construction managers at risk (CM at-risk) for civil works projects exceeding \$1 million and non-civil works projects exceeding \$5 million. 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, but performance bonds would not cover design services if the provider has professional liability insurance. The CM at-risk would have to furnish performance and payment bonds for the contract amount or the guaranteed maximum price.</p> <p>HB 1894/SB 789 are similar to SB 595, but they would authorize political subdivisions to use design-build contracts and construction managers at risk (CM at-risk) for civil works projects exceeding \$2 million and non-civil works projects exceeding \$7 million. 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, but performance bonds would not cover design services if the provider has professional liability insurance. The CM at-risk would have to furnish performance and payment bonds for the contract amount or the guaranteed maximum price (GMP), or the bonds would have to be equal to the project budget if the contract price or GMP has not been established. The CM at-risk would have 10 days to furnish the bonds unless a bid bond or other security is furnished to secure their delivery. HB 2376 is identical to HB</p>

				1894/SB 789, except that the bill only sets a \$7 million cost threshold for using the design-build method for non-civil works projects. (02/04)
MO	HB 2308	01/20/2016 HB 2308 has been introduced.	Individual Sureties	HB 2308 would create the Bonding Review Board to determine if individual sureties have sufficient financial assets and rating providers of individual sureties. Individual sureties would have to register with the Board. The Board would have to establish procedures for creating and assigning credit ratings for any individual, partnership, or corporation that markets or provides individual sureties to satisfy bonding requirements. The Board would have to conduct investigations into an individual surety provider's financial solvency and ability to satisfy their obligations if petitioned to do so. The Board would report annually to the Governor and the General Assembly on the providers and their ratings, documented complaints received against the providers, and changes to a provider rating. The Department of Insurance, Financial Institutions and Professional Registration would be authorized to promulgate rules to administer these provisions. (01/21)
MO	HB 2437	01/28/2016 HB 2437 has been introduced.	Public-Private Partnerships	HB 2347 would authorize the Missouri Highways and Transportation Commission (Commission) to enter into P3 agreements for the construction of Interstate 70. While bid bonds would not be required, the Commission could require the private partner to provide bonds in an amount it determines to protect it adequately, including performance bonds, as well a payment bond for the protection of all persons supplying labor and material in carrying out the work for the project. The payment bond would have to be in an amount equal to the total amount payable under the P3 agreement unless the Commission determines that this amount is impractical. If the amount is impractical, the Commission would establish the payment bond amount, which could not be less than the performance bond amount. The sureties providing the bonds would have to be satisfactory to the Commission. (01/29)
NJ	SB 123	01/12/2016 SB 123 has been introduced.	Bonding Assistance Program	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 program would have to provide services and assistance designed to increase small businesses' bonding knowledge and capacity to qualify for surety bonding, including improving their financial presentation, operational efficiency, profitability, and bonding capacity and knowledge through

				workshops and strategic consulting sessions. The bill would provide an annual appropriation of \$250,000 to fund the program. (01/19)
NJ	SB 501/ AB 2186	01/12/2016 SB 501/AB 2186 have been introduced.	Public-Private Partnerships	SB 501/AB 2186 would authorize school districts to enter into a public-private partnership for the construction, reconstruction, repair, alteration, improvement, or extension of school facility projects. The private entity financing the project would have to post, or cause to be posted, a bond to secure payment to its contractor, the subcontractors, and to all persons furnishing labor or materials to the contractor or the subcontractors performing the work on the project. (01/19)
NJ	SB 693	01/12/2016 SB 693 has been introduced.	Design-Build	SB 693 would establish procedures for awarding design-build contracts. Performance and payment bond requirements would have to be specified in the solicitation for the project. (01/19)
NJ	SB 891/ AB 1753	01/12/2016 SB 891/AB 1753 have been introduced.	Public-Private Partnerships	SB 891/AB 1753 would authorize local governments to enter into P3 agreements for public building, structure, road, facility, and infrastructure projects; provided that road and highway projects must use at least \$10 million in public funds to be a P3. School districts could enter into P3 agreements for public building and infrastructure projects. The State could to enter into P3 agreements for building projects and highway projects that use at least \$10 million in public funding. State colleges may enter into P3s for construction projects under current law and the private partner furnishes the bonds if no public fund has been established. For all of these project authorizations, the bill would require the general contractor, construction manager, or design-build team to post a performance bond and a payment bond in compliance with the State's little Miller Act. The bill would require a "long range maintenance bond" for a P3 long-range maintenance plan. (01/19)
NY	SB 6296/ AB 5883	01/06/2016 SB 6296 has been introduced. AB 5883 is a carryover bill from 2015.	Infrastructure Bank	SB 6296/AB 5883 would establish the New York State Infrastructure Development Bank to provide financial assistance to energy, environmental, telecommunications, or transportation infrastructure projects. Eligible entities for receiving assistance would include individuals, corporations, partnerships (including public-private partnerships), joint ventures, trusts, the State or other governmental entity, including a political subdivision or any other instrumentality of the State or a revolving fund. (01/07)
NY	SB 6315	01/06/2016 SB 6315 has been introduced.	Retainage	SB 6315 would revise the existing retainage law for state and municipal construction contracts to define "substantial completion" for the purposes of releasing the remaining contract amount to the contractor. The bill provides that the project would be

				considered substantially complete when the work under the public contract is sufficiently complete in accordance with the contract so the public owner may occupy or utilize the work for its intended use. The meaning of the term would apply to the entire project or a portion of the project if the contract provides for occupying or using a portion of the project. The bill also would require the public owner to submit a punch list to the contractor within 14 days after the project reaches substantial completion after which the contractor would have seven days to submit a punch list to the subcontractors from whom the contractor is withholding retainage. (01/07)
NY	SB 1568/ AB 9141	01/29/2016 AB 9141 has been introduced SB 1568 is a carryover bill from 2015.	Bond Threshold	<p>SB 1568/AB 9141 would increase the bond threshold for public construction contracts subject to the separate award requirements of the Wicks Act from \$100,000 to \$150,000 for public improvements. For contracts not subject to the Wicks Act requirements, the bill would have increased the threshold from \$200,000 to \$300,000 for public works projects. The bill also would require the head of the state agency, public benefit corporation or commission, or his or her designee, to adjust the bond threshold annually to account for increases in the costs of construction.</p> <p>The bill also would provide for additional outreach programs to minority- and women-owned businesses, including a mentor-protégée program. The bill also would increase the required frequency of reporting for state agencies on their efforts to reach out to such businesses. The bill also would add enforcement provisions related to the fraudulent use of minority- and women-owned businesses. (01/30)</p>
NY	AB 9008/ SB 6408	01/14/2016 AB 9008/SB 6408 have been introduced.	Public-Private Partnerships	AB 9008/SB 6408 would authorize the New York City Transit Authority to enter into joint arrangements, which can include a public-private partnership. The arrangement can be used for the planning, acquisition, design, construction, reconstruction, rehabilitation, establishment, improvement, renovation, extension, repair, operation, maintenance, development or financing of transportation facilities. The bill does not include a bonding requirement.
OK	SB 1316/ HB 3123	02/01/2016 SB 1316/HB 3123 have been introduced.	Public-Private Partnerships	SB 1316/HB 3123 would authorize governmental entities in Oklahoma to enter into public-private partnerships (P3s) for transportation and public facility projects. The comprehensive agreement between the public owner and the private partner 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. (01/29)
OK	HB 2598	02/01/2016 HB 2598 have been introduced.	Retainage	HB 2598 would permit a subcontractor on a public works project to submit a request for the release of retainage for his or her work under the subcontract 60 days after completion to the prime contractor and the public owner. The public owner would have 30 days to respond with payment or a written explanation for refusal. (01/23)
OK	HB 2639	02/01/2016 HB 2639 has been introduced.	Payment Bond Claims	HB 2639 would create the Oklahoma Construction Registry (Registry) and would allow an owner or general contractor to register a project under the Registry within ten days of signing a contract. If the owner or general contractor has elected not to register or fails to register a project within the time allowed, the project would default to the current state lien and bond law. Registering would preserve the lien rights of a project provider for activity up to 60 days prior to registration through the completion date of the project. All project providers who fail to register in the required time period would forfeit their lien and bond rights for the protected time period under the lien and bonding laws of the State on a private construction project or the right to proceed against a contractor's bond on a public or private construction project. Providers who have registered would be exempt from the pre-lien notice requirements in current law. (01/23)
SD	SB 6	01/26/2016 SB 6 has passed the House.	Performance Bonds	SB 6 would permit the waiver of performance security requirements for emergency procurements when there is a threat to public health, welfare, or safety, or other urgent and compelling reasons. The law for emergency procurements requires a written determination of the basis for the emergency and the selection of the particular contractor. The bill also would delete a duplicate provision allowing the state to waive payment and performance bonds for public improvement contracts under \$50,000. (02/04)
TN	SB 2093/ HB 2407	01/21/2016 SB 2093/HB 2407 have been introduced.	Public-Private Partnerships	SB 2093/HB 2407 would authorize the State, counties, and municipalities to enter into public-private partnerships (P3s) for transportation projects. The comprehensive agreement for the P3 would have to provide for the delivery of performance and payment bonds or other forms of security for the development, redevelopment, or operation of the qualifying transportation facility in the forms and amounts satisfactory to the public entity. (01/30)
UT	HB 91	01/25/2016 HB 91 has been introduced.	Payment Bond Claims	HB 91 would revise the interest rate applicable to claims on payment bonds to provide that it would be based on the federal post-judgment interest rate as calculated under the

				federal law, plus 2%, for a contract or other “chase of action” prior to judgment. Current law provides for an annual rate of 10%. (01/27)
VA	HJR 70	01/26/2016 HJR 70 has been tabled in subcommittee in the House.	Public-Private Partnerships	HJR 70 would direct the Joint Legislative and Audit Review Commission (JLARC) to study whether to enter into a public-private partnership for the construction and operation of new state parks and the management of existing state parks. The JLARC would have to turn in an executive summary by the 2017 legislative session that will indicate if it will issue a report on its findings. The report would be due following the submission of the summary. (01/07)
VA	HB 1218	02/04/2016 HB 1218 has been tabled in subcommittee in the House.	Bond Waivers	HB 1218 would revise the existing provisions for waiving bid, payment, and performance bonds for local governments. Currently, for non-transportation construction contracts that exceed \$100,000 and are less than \$500,000, contractors must be pre-qualified under the existing law’s standards when bid bonds are waived. The bill would permit local governments to waive the prequalification requirement if it makes a written determination that the waiver is in its best interests. AIA state counsel met with the bill sponsor, who agreed to pull the bill so that it will not be considered this year based on SFAA’s background information and talking points. The bill would have eliminated a “compromise” SFAA had achieved on a bond threshold bill in 2011, so that there would be no pre-qualification on contracts under \$500,000 if HB 1218 was enacted. (01/19)
VT	SB 162	01/05/2016 SB 162 has been introduced.	Public-Private Partnerships	SB 162 would create a study committee to study public-private partnerships for public works and infrastructure. The study committee would be tasked with designing a transparent system that will accept, manage, and distribute funds when a P3 is established. The study committee would have to report to the legislature on its findings and any recommended legislative actions by January 15, 2017. (01/05)
WA	SB 6393/ HB 2722/ HB 2933	02/04/2016 SB 6393 has passed out of committee in the Senate. 02/08/2016 HB 2933 has passed out of	2015 WA H.B. 2722 (NS), 2015 Washington House Bill No. 2722, Washington Sixty-Fourth Legislature - 2016 Regular	SB 6393/HB 2722/ HB 2933 revises the law regarding the limited procurement process permitted for awarding public work projects to small contractors. The bill would increase the contract amount for which such contracts can be awarded to small businesses listed on a “small works roster” from \$300,000 or less to \$500,000 or less. The bill would allow the public entity to waive retainage in these projects. In lieu of using a small works roster, the existing law permits the state and local governments to waive the bond requirements in the Little Miller Act and the retainage requirements for projects less than \$35,000. The bill also would increase the amount of the contracts in which bonds could be waived to \$150,000. The existing law provides that if bonds

		committee in the House. 01/19/2016 HB 2722 has been introduced.	Session Version: Introduced, Jan. 19, 2016	and retainage are waived, the public owner assumes liability for the contractor's nonpayment of laborers, mechanics, subcontractors, materialpersons, suppliers, and taxes for the project. The bill also changes the law so that these limited procurement provisions would only apply to mini-businesses (gross revenues of \$1 million to \$3 million) and microbusinesses (gross revenues of less than \$1 million). (02/09)
WA	SB 6615	01/29/2016 SB 6615 has been introduced.	Wage Bond	SB 6155 would require contractors and subcontractors performing work on a publicly subsidized public works project work to post a surety bond or escrow deposit equal to 5% of the amount due for the project. The bond would be conditioned to recover against the contractor and its officers, agents, and employees for a violation of the prevailing wage law. (01/30)
WV	SB 56/ SB 44	01/14/2016 SB 56/SB 44 have been introduced.	Anti-Bid Shopping	SB 56/SB 44 would lower the threshold at which a contractor must submit a list of subcontractors for public building and facility construction contracts from \$250,000 to \$100,000. The law provides that contractors must submit a list of subcontractors performing \$25,000 or more of the work on the project. Written permission is required to substitute a contractor on the list. (01/27)
WV	SB 95	01/13/2016 SB 95 has been introduced.	Performance Bonds— Information Technology	SB 95 provides that for major information technology projects exceeding \$1 million, retainage or a performance bond would be required in an amount sufficient to ensure that the project's benchmarks and deliverables in the contract are met. Other forms of security could be furnished for ongoing maintenance or support contracts. Amounts not paid under a retainage agreement or collected under a performance bond to be returned to the agency paying for the project or deposited in the State's Revenue Fund.(01/27)
WV	SB 315	01/19/2016 SB 315 has been substituted.	Performance and Payment Bonds— Broadband Projects	SB 315 provides for the Water Development Authority for the construction of broadband middle mile infrastructure projects. Bidders would have to provide sufficient performance and payment bonds for the construction portion of these projects. The bill would exclude these projects from the existing law's definition of a public improvement for project financing purposes. (01/20)