

**THE SURETY & FIDELITY ASSOCIATION OF AMERICA**

**MEMORANDUM**

**TO:** Government Affairs Advisory Committee

**FROM:** Daniel Wanke

**RE:** Contract Surety Legislation

**DATE:** April 8, 2016

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There are 32 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. Florida, Georgia, Idaho, Indiana, Oregon, South Dakota, Utah, Virginia, Washington, West Virginia, Wisconsin, and Wyoming have adjourned for 2016 since the last report. Alaska, Arizona, Iowa Kentucky, Maine, Maryland, Mississippi, Nebraska, and Tennessee are projected to adjourn in April. The following report compiles and summarizes the contract surety legislation that SFAA is tracking as of April 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](http://www.surety.org).

Jurisdiction	Bill(s)	Recent History	Issue	SFAA Summary
AL	SB 287/ HB 333	04/05/2016 SB 287 passed the Senate.  HB 313 has not moved since last reported.	Public-Private Partnerships	SB 287 would allow the Alabama Corrections Institution Finance Authority to use alternative project delivery methods, including design-build, construction management at risk or public-private partnerships (P3s) for constructing, reconstructing, or renovating women's and regional prison facilities. The Division of Construction Management of the Department of Finance would have to develop procedures for the procurement of contracts or agreements through such methods. SFAA and AIA are seeking an amendment to require compliance with the public works laws for these projects for these alternative methods. As amended and passed in the Senate, SB 287 would require compliance with the public works laws for projects paid for with revenue bonds under the bill, but the bill exempts regional prison facility projects from complying with these laws. HB 313 is similar, except that it does not contain the amendment language in SB 287 concerning the public works laws.

CT	HB 5328	03/24/2016 HB 5328 has been reported from the Legislative Commissioner's Office in the House.	Retainage  Payment Bond Claims	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 10% to 5%.  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. The provisions are consistent with those in ConsensusDocs. (03/25)
CT	HB 5377	03/29/2016 HB 5377 has been reported from the Legislative Commissioner's Office in the House.	Prevailing Wages  Surety Liability	HB 5377 would subject businesses receiving financial assistance from the State or its agencies for a construction project on its property to the law's prevailing wage requirements. If the business found that a contractor or subcontractor knowingly or willfully is paid less than the prevailing wage, it could terminate the contract or withheld payment from the contractor or subcontractor. If the contract is terminated, the contractor and its sureties would be liable to the business for any excess costs resulting from it. The contractor or subcontractor would be subject to a two year debarment period for repeated violations on these projects. (03/31)
CT	HB 5487	03/04/2016 HB 5487 has been heard in committee in the House.	Bond Threshold	HB 5487 would increase the bond threshold from \$100,000 to \$200,000 for state and municipal public works and public building contracts. SFAA and AIA testified in opposition to the bill and we do not expect it to move. We will offer SFAA's Model Contractor Development Program® to address the minority contractor issue that was behind this bill. (03/15)
FL	SB 124	03/30/2016 SB 124 has been enacted.	Public-Private Partnerships	SB 124/HB 95 expands 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 are allowed to enter into P3s for such projects. The P3 agreement now must address termination in the event of a material default. The new law deletes the law establishing the Public-Private Partnership Guidelines Task Force. (03/31)
FL	HB 7027	04/04/2016 HB 7027 has been enacted.	Bond Waivers	HB 7027 authorizes 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. (04/02)

FL	HB 7061	03/30/2016 HB 7061 has been sent to the Governor.	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. (04/01)
HI	SB 3101	04/05/2016 SB 3101 passed out of committee in the House with amendments.	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. (03/14)
IN	HB 1136	03/21/2016 HB 1136 has been enacted.	Public-Private Partnerships	HB 1136 directs the legislative council to assign an interim study committee to look into whether a public-private partnership (P3) agreement should contain a requirement for performance bonds for design and construction and payment bonds for labor and materials furnished for use in construction of the P3 project. SFAA and AIA obtained this amendment following pushback on our original amendments to amend the P3 laws to require bonding. (03/17)
KY	HB 309	03/28/2016 HB 309 has been sent to the Governor.	Public-Private Partnerships	HB 309 would authorize local governments to enter into public-private partnerships for capital projects or for the procurement of services. SFAA and AIA obtained an amendment so that the P3 agreement for local governments would have to provide for the private partner’s delivery of performance and payment bonds for the design and construction portion of the project in compliance with the Little Miller Act. Maintenance bonds, performance and payment bonds, or other security would be required for the other portions of the project in the form and amounts that the local government determines to be satisfactory. The bill also would authorize the State to enter into P3s and authorizes the adoption of regulations to set for the requirements for the project, which would have to include the parameters for the P3 agreement. State capital projects would have to exceed \$25 million to use the P3 method. (04/04)
LA	SB 195	03/29/2016 SB 195 passed the Senate.	Public-Private Partnerships	SB 195 would authorize the Department of Transportation and Development (DOT) to enter into public-private partnerships (P3s) for transportation projects. The DOT would have to comply with the existing P3 law for the Louisiana Transit Authority (Authority), which requires the P3 agreement to provide for the delivery of performance and payment bonds or other security in connection with the construction of or improvements to the facility in the forms and in amounts satisfactory to the Authority. SFAA and AIA are seeking an amendment to require

				the DOT to still follow the bonding requirements under the Little Miller Act when it uses a P3. (04/02)
LA	334	04/04/2016 HB 334 passed the House.	Payment Bonds	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	SB 380	04/04/2016 SB 380 has been introduced.	Bond Claims	SB 380 would revise the law concerning surety bonds for public works projects to provide that a surety that provides a bond for a project would be entitled to rely on the contractor’s defenses, including but not limited to, the payment provisions in the contractor’s contracts. (04/05)
MD	SB 234/ HB 871	04/01/2016 SB 234 passed the House.  03/29/2016 HB 871 passed the House.	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. (03/31)
MD	HB 403/ SB 826	03/31/2016 HB 403 passed the Senate.  03/28/2016 SB 826 passed the House.	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 2278/ HB 2340	03/08/2016 SB 2278/HB 2340 have	Subcontractor Claims	SB 2278/HB 2340 would require the State to pay subcontractors directly during the term of a contract if a state agency does not require the prime contractor to furnish a performance and payment bond or other security. The State could pay a subcontractor claim from the State’s

		<p>been introduced.</p> <p>HB 2340 is a carryover bill that has not moved since last reported.</p>		<p>retainage funds if the subcontractor's judgment against a prime contractor is uncollectible because the prime contractor has gone out of business or has declared bankruptcy. (03/11)</p>
MN	HB 2451	<p>04/01/2016 HB 2451 has passed out of committee in the House with amendments.</p>	<p>Retainage</p> <p>Pay if Paid Clauses</p>	<p>HB 2451, as amended, provides that not more than 5% retainage could be withheld for a building and construction 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. As introduced, the bill would have eliminated the ability to determine the payment schedule and the retainage requirements by contract. SFAA believed that the bill could have been read to prohibit "pay-if-paid" clauses in construction contracts, t, but that it also could have been read to simply mean that a contract must provide for payments on a monthly schedule. SFAA recommended that the bill be clarified. (04/02)</p>
MN	SB 2691/ HB 3079	<p>03/14/2016 (S) SB 2691/HB 3079 have been introduced</p>	<p>Retainage</p>	<p>SB 2691/HB 3079 would revise the existing retainage law for building and construction contracts by deleting a provision permitting the contract from allowing a different amount of retainage than prescribed by law. Current law caps retainage at not more than 5% of the progress payments, unless otherwise provided in the contract. (03/14)</p>
MO	HB 2376	<p>04/07/2016 HB 2376 has passed the House.</p> <p>SB 789, SB 595, and HB 1895 have not moved since last reported.</p>	<p>Design-Build</p> <p>Construction Managers at-risk</p>	<p>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. As introduced, the bill could have been misread to confuse the coverage between the performance bond and the 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. SB 789, SB 595, and HB 1895 are similar, but have not moved recently. (03/24)</p>

NH	SB 549	04/12/2016 SB 549 was heard in committee in the House.	Public-Private Partnerships	SB 549 would authorize the Department of Transportation to enter into 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 is seeking amendments to require bonding for the construction portion of the P3 in compliance with the Little Miller Act as part of the Commission's insurance requirements. SFAA and AIA testified at the recent hearing. We believe that our issues will be addressed if the bill moves, but there are objections in the legislature concerning the need for the overall bill and disagreements over the proposed Commission's authority. (03/15)
NY	SB 4309	03/30/2016 SB 4309 has been amended and recommitted to committee in the Senate.	Performance and Payment Bonds	SB 4309 would establish procedures for the Nassau County School District to enter into contracts for capital construction projects. The bill would require the contractor to obtain performance and payment bonds in compliance with the requirements of the General Municipal Law for the project. (03/31)
NY	AB 9008	04/01/2016 AB 9008 has been sent to the Governor.	Design-Build	AB 9008 is a budget bill that would authorize the use of design-build procurement for the following projects: the Jacob V. Javits Convention Center, the Empire State Station Complex, the James A. Farley Building Replacement, and the Pennsylvania Station New York Redevelopment. (04/04)
OK	SB 1316/ HB 3123/ HB 2476	04/07/2016 SB 1316 has been reported from committee in the House with amendments.  HB 3123/ HB 2476 have not moved since last reported.	Public-Private Partnerships	SB 1316/HB 3123/HB 2476 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. (04/08)

PA	SB 340	03/15/2016 SB 340 has been re-reported from committee with amendments.	Performance Bonds  Payment Bonds	SB 340 would revise the existing municipal finance laws in Pennsylvania. The bill provides that in order for a local government unit to obtain preliminary approval for the issuance of debt, the unit would have to provide a description of the type and amount of payment or performance bond, letter or credit or other financial security proposed to insure the completion of the project. (03/31)
SD	SB 6	03/10/2016 SB 6 has been enacted.	Bond Waivers	SB 6 permits 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 new law deletes a duplicate provision allowing the state to waive payment and performance bonds for public improvement contracts under \$50,000. (03/15)