

THE SURETY & FIDELITY ASSOCIATION OF AMERICA

MEMORANDUM

TO: Government Affairs Advisory Committee

FROM: Daniel Wanke

RE: Contract Surety Legislation

DATE: June 3, 2016

There are 11 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. Colorado, Illinois, Minnesota, Missouri, New Hampshire, Oklahoma, and South Carolina have adjourned since the last report. Delaware, Louisiana, New York, North Carolina, and Rhode Island are projected to adjourn in June. The following report compiles and summarizes the contract surety legislation that SFAA is tracking as of June 3, 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 175	05/03/2016 SB 175 has been enacted.	Bid Bonds	SB 175 increases the maximum amount of the bid bond required for contracts with the Department of Transportation and for public works contracts under the Little Miller Act from \$10,000 to \$50,000. The law requires the bid bond to be not less than 5% of the bid amount. Prior law capped it at not more than \$10,000. (05/06)
AZ	HB 2268	05/12/2016 HB 2268 has been enacted.	Payment Bonds	HB 2268 revises the notice requirement for payment bond claims to provide that it may 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. (05/19)
AZ	HB 2342	04/05/2016 HB 2342 has been enacted.	Counter-signatures	HB 2342 repeals the countersignature law and replaces it with a requirement that the policy, declarations page or endorsement must identify the name of the insurance producer. As enacted, an authorized insurer may not issue a policy covering a subject of insurance resident,

				located or to be performed in Arizona without identifying the insurance producer. The list of lines of business and types of policies that were exempt from the countersignature law remain the same. Bid bonds are exempt, which means that this new requirement applies to surety and fidelity bonds. The effective date of the new law is August 6, 2016.
CA	SB 1a	04/21/2016 SB 1a passed out of committee in the Senate.	Public-Private Partnerships	SB 1a, 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	SB 734	05/19/2016 SB 734 passed out of committee in the Assembly.	Prevailing Wages	SB 734 would require contractors and subcontractors to pay the prevailing wage to workers on the construction of economic investment projects that the Governor certifies for streamlining from environmental impact reporting requirements. The bill provides that the Labor Commissioner could issue civil penalty assessments for failure to pay the prevailing wage. The contractor, subcontractor, and surety on a bond or bonds issued to secure the payment of wages covered by the assessment would be liable for liquidated damages as provided under the existing labor law. Projects under a project labor agreement that provides for the enforcement of the wage requirements would be exempt from these penalties. (05/24)
CA	AB 2270	06/02/2016 AB 2270 passed the Assembly.	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, or other “corporations” that contract with iBank, to guarantee, endorse or act as a surety on bonds for small, emerging and minority contractors that has not been implemented to date. “Corporations” under this bond guarantee program are the existing network of small business financial development (SBFDC) corporations composed of local banks and non-bank lenders, which largely have been engaged in loan guarantees and otherwise helping small businesses with their capital and credit. iBank charters and regulates the SBFDCs and ultimately backs their loan guarantees. The bill would now allow the SBFDCs to expand into assistance with surety bonds. SFAA believes that the bill could be misread to permit these corporations to issue bonds and guarantee bonds. We believe that the bill is not needed since there are existing programs in place through the federal government and our Model Contractor Development Program®, but if California wants this program, the bill should be amended so that it is a traditional bond guarantee program under which iBank would guarantee the bonds of licensed

				sureties. The bill also would create a new technical assistance in obtaining bonds for contractors participating in these guarantee programs. (05/31)
CA	AB 2551	05/23/2016 AB 2551 passed the Assembly.	Design-Build Construction Managers at-risk	AB 2551, as amended, would allow a local water agency to use 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)
CA	AB 2742	05/27/2016 AB 2742 has been held 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 public-private partnerships for transportation projects from January 1, 2017, to January 1, 2030. The bill also would authorize the Santa Clara Valley Transportation Authority to enter into P3s for transportation projects. (06/01)
CT	HB 5328	05/16/2016 HB 5328 has been sent to the Governor.	Retainage Payment Bonds	<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% for the whole project 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. (05/23)</p>
IL	HB 5660	05/25/2016 HB 5660 has been sent to the Governor.	Payment 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. (05/26)

LA	SB 195	06/01/2016 SB 195 has been sent to the Governor.	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 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. (05/27)
LA	HB 1009	05/26/2016 HB 1009 has been sent to the Governor.	Electronic Bidding	HB 1009 would require public entities to provide for electronic bidding on contracts in addition to the methods provided under current law. (05/26)
MD	HB 403/ SB 826	05/19/2016 HB 403/SB 826 have been enacted.	Change Orders	HB 403/SB 826 prohibits 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 must adopt regulations for an expedited change order process for those exceeding \$50,000. For change orders less than \$50,000, the procurement officer is required to make payments for work under an accepted change order within 30 days of receiving an invoice. Procurement units are required to develop guidelines for their change order process. The new law does not apply to state contracts for public school construction or capital improvements. The new law provides for establishing a working group of stakeholders to address state construction contracting and procurement. (05/20)
MD	HB 871	05/19/2016 HB 871 has been enacted.	Indemnity Provisions in Construction Contracts	HB 871 revises 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 is 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. (5/20)
MN	SB 1898	05/20/2016 SB 1898 has been enacted.	Retainage	SB 1898 provides that not more than 5% retainage can be withheld for a building and construction contract. The new law repeals a provision permitting the retainage to be set by contract. The new law specifies that there is nothing in the law requiring retainage to be

				withheld. The new law permits prime contractors and subcontractors of any tier to suspend work if an undisputed progress payment is not received within 10 days of the request for payment. (05/24)
MO	SB 861	05/25/2016 SB 861 has been sent to the Governor.	Public-Private Partnerships	SB 861 would expand the definition of “project” under the existing law authorizing the use public-private partnerships (P3s). The bill would allow the use of P3s for public buildings, water facilities, water ways, water supply facilities or pipelines, wastewater or wastewater treatment facilities, vehicle parking facilities, and any related infrastructure needed for these projects. The bill excludes any highway, interstate or bridge construction, or any rest area, rest stop, or truck parking facility connected to an interstate or other highway from the definition of “project” for the P3 law. Existing law allows the use of P3s for pipelines, ferries, river ports, airports, railroads, light rail, or other mass transit facilities. The bill was amended late in the session to expand the authority for P3 projects and the bill quickly passed. (05/25)
MO	HB 2376	05/25/2016 HB 2376 has been sent to the Governor.	Design-Build Construction Managers at-risk Performance and Payment Bonds	HB 2376 would authorize political subdivisions to use the design-build and construction managers at-risk (CM at-risk) methods. Payment bonds and performance 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 performance and payment bonds for the contract amount or the guaranteed maximum price, or the bonds would have to be equal to the project budget if those have not been established. CM at-risk only could be used on civil works projects exceeding \$2 million and non-civil works projects exceeding \$3 million. The bill sets a \$7 million cost threshold for using design-build for non-civil works and there is no cost threshold for using the method for civil works projects. (05/23)
NH	SB 549	05/19/2016 SB 549 has been sent to the Governor.	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 and AIA obtained an amendment in the House that would require bonding for the design and construction portion of the P3 in compliance with the Little Miller Act as part of the Commission’s insurance requirements. (05/19)

NJ	SB 123/ AB 3559	05/05/2016 SB 123 passed out of committee in the Senate.	Bonding Assistance Programs	SB 123/AB 3559 would require the New Jersey Economic Development Authority to establish the Small Business Bonding Readiness Assistance Program to provide support services to small businesses and help them obtain surety bonding for State or federal public works projects through a non-profit business advocacy association. Small businesses would receive grants to help meet bond requirements or the association for its services. The bill would provide \$250,000 annually to fund the program. (05/09)
NY	SB 7459/ AB 9932	05/03/2016 SB 7459/ AB 9932 have been introduced.	Performance and Payment Bonds	SB 7459/AB 9932 would establish the Yonkers Joint Schools Construction Board (Board) for administering the school district's construction projects. Contractors performing on contracts for the Board would have to furnish a labor and material bond as required by the construction contract and performance bond that complies with requirements of the general municipal law. (05/12)
NY	SB 7613	05/11/2016 SB 7613 has been introduced.	Retainage	SB 7613 would establish payment requirements for private construction contracts and would cap the amount of retainage that the owner could withhold at not more than 5% of the progress payment, unless performance and payment bonds are not required in which case, retainage could not be more than 10% progress payment. (05/19)
NY	SB 7652/ AB 10275	05/12/2016 SB 7652/ AB 10275 have been introduced.	Retainage	SB 7652/AB 10275 would prohibit withholding any amounts for a public or a private construction project that are due for materials that have been delivered, accepted and are covered by a manufacturer's warranty, and/or are graded to meet industry standards. For public projects, the bill would specify that the public owner and the contractor would have to pay in full for these materials. The bill would exempt contractors from this prohibition on retainage for these materials if the materialmen also had the installation contract. Existing law prohibits contractors from withholding retainage from payments that represent proceeds that are owed to a subcontractor and/or materialman from the public owner's payments to the contractor. (05/12)
NY	AB 9965	05/02/2016 AB 9965 has been introduced.	Retainage	AB 9965 would delete the specifications for retainage for state public construction contracts. Current law provides that contractors may not withhold more than 5% of the progress payment to a subcontractor, unless the subcontractor does not provide a bond, in which case retainage would be capped at not more than 10%. The bill also would mandate that contractors pay their subcontractors regardless of whether the public owner has paid the contractor. Payment to subcontractors would be due upon the completion of the work or materials supplied. (05/09)

NY	AB 10276	05/20/2016 AB 10276 has been introduced.	Retainage	AB 10276 would require the retainage withheld on a public construction project to be held in a separate, interest bearing escrow account. (05/24)
NY	AB 10446	05/27/2016 AB 10446 has been introduced.	Retainage	AB 10446 would cap retainage on private construction contracts at not more than 5%. The bill would provide for release of retainage when the project reaches substantial completion instead of final completions as provided under current law. (05/31)
RI	HB 8193/ SB 2229	05/26/2016 HB 8193 has been held in committee in the House for study. 05/11/2016 SB 2229 passed the Senate.	Prevailing Wages	HB 8193/SB 2229, as introduced, provides that the performance and payment bonds required under the Little Miller Act must cover any penalties, assessments, and fines due under law for nonpayment or late payment of wages. The legislation provides that in suits on the bond, the right of the State to recover will now include any penalties, assessments and fines due for late or nonpayment of wages. SFAA and AIA have met with the labor unions to explain the issues regarding the bond's coverage and the surety's underwriting process in order to work out a solution. As a result of the discussions, the labor unions understood our concerns and agreed to our suggestion that the bill should track the existing prevailing wage law, which already requires the surety to pay the prevailing wage penalties, but not the assessments, fines, and other relief. The Department of Labor and Training is reviewing our recommended changes to the bill. (05/12)
RI	SB 2550/ HB 8269	05/24/2016 SB 2550 has been placed on the House calendar. 05/30/2016 HB 8269 has been held in committee in the House for further study.	Retainage	SB 2550/HB 8269 would revise the retainage requirements for municipal sewer and water main or any municipal public works projects to provide that the State, municipalities, its agencies, or its political subdivisions could not withhold retainage exceeding 5%. General contractors and construction managers also could not hold more than 5% retainage from their subcontractors. When the project reaches substantial completion or when a permanent certificate of occupancy is issued (whichever occurs first), the retainage would have to be paid to the contractor or construction manager within 55 days, except for an amount equal to 150% of the value of any punch list as determined by the owner for each project. The general contractor must pay the subcontractors within 10 days. Under current law, retainage for municipalities and its political subdivisions cannot exceed 5% of the contract price. For such contracts less than \$500,000, the law permits the contracting parties to otherwise agree on the amount of retainage.