

THE SURETY & FIDELITY ASSOCIATION OF AMERICA

MEMORANDUM

TO: Government Affairs Advisory Committee
FROM: Daniel Wanke
RE: Contract Surety Legislation
DATE: February 3, 2010

There are 36 states and the District of Columbia in regular session, while four states are pre-filing for upcoming sessions. The following report compiles and summarizes contract surety legislation under consideration in 2010, which SFAA is tracking and addressing, as necessary, with the AIA, the NASBP and the local surety associations. Summaries of legislation that have appeared in previous SFAA reports have been marked (R) for your convenience.

In almost all of the states, 2010 marks the second year of the legislative session, except for **New Jersey** and **Virginia**, which are beginning a new session. **Montana, Nevada, North Dakota, Oregon** and **Texas** will not meet in 2010 as they only meet every other year. **Arkansas** for the first time is holding a “fiscal session” this year to address the state budget, which is a departure from its usual biennial session. The following is a compilation of legislation currently pending that would impact contract surety. As always, your input is vital to our efforts, so if you have any questions, comments or information on legislation, please do not hesitate to contact us.

ARIZONA

HB 2310: Indemnity Provisions in Construction Contracts

INTRODUCED: 01/14/2010

STATUS:

01/14/2010 Introduced.

POSITION: Support

HB 2310 would make provisions in construction contracts void against public policy to the extent that they require the indemnification of another party for the indemnitee's own negligence. The bill provides that this would not apply to agreements for the indemnification of a surety on a payment or performance bond by its principal or indemnitors.

SB 1206: Subdivision Bonds

INTRODUCED: 01/25/2010

STATUS:

01/25/2010 Introduced.

POSITION: Support—New Bonding Opportunity

SB 1206 would authorize the regulation of subdivisions and plats by county boards of

supervisors. The boards would have to adopt rules, including a requirement for a performance bond or other security for the installation of the required streets, sewer, electric and water utilities, drainage, flood control and improvements for the subdivision or plat.

SB 1283: Project Delivery Methods for County Improvement Districts

INTRODUCED: 01/28/2010

STATUS:

01/28/2010 Introduced.

POSITION: Neutral

SB 1283 would authorize the board of directors for a county improvement district to use the project delivery methods of design-bid-build, design-build construction managers at-risk, and job order contracting. The bill would require the provider of construction or construction services to obtain 100% performance and payment bonds once the county improvement district accepts the guaranteed maximum price of the contract.

CALIFORNIA

◆ **AB 177: Preferences—Small Businesses and Veteran Enterprises**

INTRODUCED: 02/02/2009

STATUS:

01/25/2010 Passed Assembly. To Senate.

POSITION: Neutral

AB 177 would terminate contracts if the contractor had obtained a contracting preference as a service disabled veteran, small business or a micro-business fraudulently. The contractor could be debarred from obtaining state contracts, including construction. Further, the bill would impose civil penalties against contracts who had committed this type of fraud.

◆ **SB 189: Mechanics Liens**

INTRODUCED: 02/18/2009

STATUS:

01/25/2010 Passed Senate. To Assembly.

POSITION: Seeking Amendments

SB 189 is an extensive re-write of the current Mechanics Lien Law based on the proposal that the California Law Review Commission (Commission) issued in 2006. SFAA participated in the Commission's public comment process, submitting a letter jointly with NASBP and the AIA. The Commission's report made several revisions that could have an impact on payment bonds for both public and private works of improvement, as well as a number of other construction related bonding requirements. The legislation was gutted in 2008 to make only technical amendments to the Mechanics Lien Law and passed the legislature, only to be vetoed by the Governor in connection with some political wrangling over the State's budget woes.

COLORADO

HB 1162: Retainage for Public and Private Construction Contracts

INTRODUCED: 01/20/2010

STATUS:

01/20/2010 Introduced.

POSITION: Oppose

HB 1162 would regulate the use of retainage in private contracts and amend the law regarding retainage in public contracts. The bill would set retainage in public and private construction contracts at not more than 5% of the progress payments until the project reaches 50% completion. After a project reaches 50% completion, 2.5% retainage would be withheld. Under current law, there is no regulation of private contracts, and on public contracts exceeding \$150,000, 10% of the value of completed work is withheld from the progress payments. After the project reaches 50% completion, no further retainage is withheld. For public contracts, the bill effectively would reduce retainage from 5% to 3.75%.

Under current law in public contracts, the owner must (shall) withhold the required retainage until the contract is completed satisfactorily and finally accepted by the public owner. Under the bill, retainage in private and public contracts would be released at the earlier of: satisfactory completion or the building being approved for occupancy. Payment of retainage in both private and public contracts must be made 30 days after the earlier of the building being approved for occupancy or receiving notice of substantial completion. "Substantial completion" is further defined as the earlier of when an architect or engineer has issued a certificate of substantial completion or all the conditions for final payment and release under the construction contract have been met.

Retainage can continue to be withheld and not paid if the contractor's performance is unsatisfactory. The bill also contains a prompt pay measure, requiring contractors to pay subcontractors within seven days of the completion of work. SFAA developed talking points on this bill for the AIA's local counsel to use on why retainage should not be regulated in private contracts and on the benefits of retainage for public contracts.

FLORIDA

HB 693/SB 1048: Payment Bond Recording Requirements

PRE-FILED: 01/15/2010
STATUS:
01/15/2010 Pre-filed
POSITION: Neutral

HB 693/SB 1048 states in the summary of the bill that it requires sureties to record the payment bond for a public works or public building contract in the public records of the county in which the improvement will be located upon issuance of the bond. Currently, filing the bond is the contractor's responsibility. As drafted however, the bill would maintain the current requirements for the contractor. SFAA would oppose the bill if amended to require the surety to file the bond.

SB 1056: Prompt Pay

PRE-FILED: 01/06/2010
STATUS:
01/06/2010 Pre-filed.
POSITION: Neutral

SB 1056 would require a local government entity to pay any remaining contract amount within 20 business days of the contractor's request for the release of all retainage as allowed under

existing law. Currently, the contractor may make such a request if the local government entity does not provide a list of the items necessary to deem a construction project complete within the statutory time limits, but there is no deadline for the local government entity to release the retainage,

HAWAII

HB 2021/HB 2833/SB 2200: Miscellaneous Bond—Development Agreements

INTRODUCED: 01/20/2010

STATUS:

01/20/2010 Introduced.

POSITION: Support—New Bonding Opportunity

HB 2021/HB 2833/SB 2200 would require a bond in connection with a development agreement for a hotel or resort. The bond would secure the full and faithful performance of the development agreement. **HB 2833** and **SB 2200** have not moved since they were introduced.

HB 2100/SB 2384: Prevailing Wages—Service Contracts

INTRODUCED: 01/20/2010

STATUS:

01/29/2010 In House Committee on Labor and Public Employment:
Voted Do Pass with Amendment.

POSITION: Oppose

HB 2100/SB 2384 would extend the existing prevailing wage requirements to service contracts. The bill provides that if the amounts withheld from a service contract were not sufficient to reimburse the service employees for the unpaid wages and overtime due to them, then the contractor and his or her sureties would be liable to the service employees for the amount due, and for an additional equal amount as liquidated damages. With respect to the surety's liability, liquidated damages would not be paid until the claims of all other creditors had been paid. Current law does provide that bid, payment and performance bonds may be required on contracts for services if the purchasing agency obtains permission from the chief procurement officer to require them. **SB 2384** still is pending in committee in the Senate.

HB 2213: Technical Assistance Program for Surety Bonding

INTRODUCED: 01/20/2010

STATUS:

01/20/2010 Introduced.

POSITION: Support

HB 2213 would establish a technical assistance program for small and emerging contractors in the State to obtain surety bond guarantees from the U.S. Small Business Administration and liability insurance. The bill notes that not being able to obtain bonding and liability insurance has served as a barrier to small businesses in obtaining federal defense contracts in Hawaii.

HB 2506/SB 2659: Bond Threshold

INTRODUCED: 01/25/2010

STATUS:

01/25/2010 Introduced.

POSITION: Oppose—Increases Bond Threshold

HB 2506/SB 2659 would increase the threshold at which bonds are required for public construction contracts from \$25,000 to \$50,000. Current law requires bid, payment and performance bonds for such contracts that are above the \$25,000 threshold. **SB 2659** still is pending in committee in the Senate.

HB 2735/SB 2841: Preferences

INTRODUCED: 01/26/2010

STATUS:

01/26/2010 Introduced.

POSITION: Neutral

HB 2735/SB 2841 would provide for a bidding preference for Hawaii residents to obtain construction contracts for public projects. The bill would require a contractor to certify that at least 80% of his or her workforce is Hawaii residents. For failure to comply with the requirements after receiving a contract for this preference, the State could impose sanctions on the contractor, which could include temporary suspension or the permanent disqualification of the contractor from the project, or debarment or suspension of the contractor as provided for under existing law. **SB 2481** still is pending in committee in the Senate.

SB 2062: Contractor Qualifications

INTRODUCED: 01/20/2010

STATUS:

01/20/2010 Introduced.

POSITION: Oppose

SB 2062 would create a set of requirements for contractors bidding on public projects for general contracts of \$250,000 or more and subcontracts of \$50,000 or more. Some of the requirements for a responsible contractor include: provide prepaid health care benefits to all employees; secure and maintain appropriate licenses for the contractor and all subcontractors; provide all employees with a fair and neutral process to resolve disputes; and certification of compliance on a monthly basis from an officer in the contractor's company, just to mention a few. Compliance with these requirements would not be required for employees that are subject to a collective bargaining agreement if such agreement clearly waives application of these requirements.

There are degrees of penalties for failure to comply with the new standards for responsible contractors ranging from temporary suspension from the project until the contractor or sub comes back into compliance, withholding payment on the project until the contractor or sub comes back into compliance, permanent disqualification for the contractor or subcontractor from the project, recovery by the public owner of any moneys expended on the contract or subcontract and debarment from future work. The surety bond could be affected by the suspension or termination of a financially sound and performing principal that is found not to meet some of the requirements mid-term in a project. We have alerted the contractor groups to this bill and expect that they will take the lead on it.

IDAHO

SB 1251: Subdivision Bonds

INTRODUCED: 01/15/2010

STATUS:

01/15/2010 Introduced.

POSITION: Pending Review

SB 1251 would change the bond requirements for subdividers of land in Idaho. Current law requires the subdivider to post a bond to secure the subdivider's faithful performance of his or her obligations and compliance with the applicable law and rules. The bond must be in an amount not less than \$10,000. The Idaho Real Estate Commission (Commission) determines the actual amount required based on the subdivider's volume of business and "other relevant factors." Instead, the bill would require a bond in the amount of \$100,000 and an escrow deposit would be accepted in lieu of the bond. Further, the bond would be liable for the State or the Commission's attorney fees in any administrative or judicial proceeding to enforce the applicable laws. The bond would have to remain in place for one year after one of the following: the subdivision no longer must be registered; the subdivider discontinued offering for disposition interests in the subdivision and thus does not renew the registration; the law no longer requires any bond from the subdivider; or the subdivider deposits sufficient funds in an escrow account, provided that the bond still would have to respond to claims that were filed while the bond was in effect. SFAA is consulting with its Contract Bonds Advisory Committee to determine our position on this bill.

SB 1279: Preferences

INTRODUCED: 01/22/2010

STATUS:

01/22/2010 Introduced.

POSITION: Neutral

SB 1279 would provide a bidding preference for Idaho resident contractors and for those contractors using Idaho materials and supplies for contracts with the State.

ILLINOIS

SB 2621: Public Private Partnerships

INTRODUCED: 01/21/2010

STATUS:

01/21/2010 Introduced.

POSITION: Seeking Amendments

SB 2621 would authorize the State and its political subdivisions to enter into public-private partnerships (PPP) for the construction of transportation facilities. The bill provides that the PPP agreement would have to provide for performance and payment bonds for the development and/or operation of the facility in an amount that the public entity determined to be satisfactory. The bill appears to be identical to SB 305, a carryover bill from 2009, for which SFAA developed amendatory language to address the bonding issue.

INDIANA

HB 1111/HB 1121/SB 369: Preferences

INTRODUCED: 01/05/2010

STATUS:

01/21/2010 Passed House. To Senate.

POSITION: Neutral

HB 1111/HB 1121/SB 369 would provide a three percent price preference to service-disabled veteran-owned small businesses bidding on public works contracts, goods and services purchase contracts, and state highway contracts. **HB 1121** and **SB 369** have not moved since they were introduced.

SB 213: E-Verify Requirements for Public Contracts

INTRODUCED: 01/05/2010

STATUS:

01/28/2010 From Senate Committee on Pensions and Labor: Do Pass as Amended.

POSITION: Oppose—Seeking Amendments on Contract Termination

SB 213 would require contractors to use E-Verify for their employees on "public contracts for services." Neither the bill nor existing law appears to define what "services" means, so it is not clear whether this bill would apply to public works. Of note, the bill would give contractors 30 days to remedy violations of the proposed law. If the contractor failed to do this, then the state agency could terminate the contract. The bill would allow the state agency some discretion in terminating contracts if the termination would harm the public interest or public property. Similarly, contractors could terminate subcontracts if the subcontractor had hired illegal aliens.

KANSAS

SB 469: Lien Claims

INTRODUCED: 01/27/2010

STATUS:

01/27/2010 Introduced.

POSITION: Neutral

SB 469 would provide that a remote claimant for a mechanic's lien could not file a claim on a payment bond for private work without serving a "notice of furnishing" on the original contractor and the owner. Existing law provides that a contractor or owner may obtain a bond for a private contract that is conditioned for the payment of all lien claims. The bond must be in an amount not less than the contract price. The bill also would apply this notice requirement for remote claimants to claims filed on a public works bond.

KENTUCKY

HB 317: Retainage

INTRODUCED: 01/25/2010

STATUS:

01/25/2010 Introduced.

POSITION: Oppose

HB 317 would revise the current retainage requirements for public works projects. Currently, not more than 10% of the progress payments can be withheld until the project reaches 50% completion, after which not more than 5% of the progress payments can be withheld until the project reaches substantial completion. Instead, the bill provides that not more than 5% of the

progress payments could be withheld throughout the course of the project. If the bill passed, the retainage amounts no longer would be based on the status of the project, but the overall amount withheld would be reduced. The bill also would require the retainage funds to be held in an interest-bearing escrow account. The bill also would add a 30-day prompt pay requirement for the contracting entity to pay the prime contractor for the final payment.

SB 45: Preferences

INTRODUCED: 01/05/2010
STATUS:
01/28/2010 Passed Senate. To House
POSITION: Neutral

SB 45 would give resident contractors a bidding preference over nonresident contractors that receive bidding preferences in their own state. The resident contractor would receive a bidding preference in an amount equal to what the nonresident contractor would receive in his or her state. This amount would be added to the nonresident contractor's bid.

MARYLAND

HB 359/SB 171: Preferences

INTRODUCED: 01/28/2010
STATUS:
01/28/2010 Introduced.
POSITION: Neutral

HB 359/SB 171 would establish a minimum 0.5% set-aside goal for state awarding units to directly or indirectly let procurement contracts to certified service disabled veteran business enterprises. **SB 171** has not moved since it was introduced.

MAINE

HB 1167: Public-Private Partnerships

INTRODUCED: 01/06/2010
STATUS:
01/06/2010 Introduced.
POSITION: Seeking Amendments

HB 1167 would allow the Maine Department of Transportation (DOT) to enter into an agreement with a private entity for the building, operation, ownership, leasing or financing of any transportation facility that was prioritized under a 2007 law. The bill provides that the DOT would have to ensure that the procurement documents included provisions for performance of the private entity and for the payment of subcontractors, including surety bonds, letters of credit, parent company guarantees and lender and equity partner guarantees. SFAA gave amendments to the AIA local counsel that would require the projects to be bonded, which were presented to the bill sponsor. At a recent meeting, the sponsor and other legislators were receptive to our amendments.

MISSOURI

HB 1710: Design-Build Contracts for Schools

INTRODUCED: 01/19/2010

STATUS:
01/19/2010 Introduced.
POSITION: Oppose—Payment Bond Liability for Design Services
Seeking Amendments

HB 1710 would authorize school districts to enter into design build contracts for any project. The bill provides that the payment bond required under existing law would apply to the project and that all persons furnishing design services would be deemed to be covered the same way that any person furnishing labor or materials is covered by the payment bond. The performance bond would not cover the design services as long as the design build contractor or its subcontractors providing design services carried professional liability insurance. If there was no professional liability insurance, the performance bond would be required to cover the design services.

MISSISSIPPI

HB 763/SB 2800: Payment Bond Coverage

INTRODUCED: 01/13/2010
STATUS:
01/28/2010 From House Committee on Judiciary B: Do Pass with
Substitute.
POSITION: Neutral

HB 763/SB 2800 would permit rental and lease equipment dealers to file lien claims on construction projects. Payment bonds would be extended to provide protection to these dealers.

NEBRASKA

◆ LB 552: Prompt Payment

INTRODUCED: 01/21/2009
STATUS:
01/29/2010 Placed on Final Reading.
POSITION: Neutral

LB 552 is a prompt pay measure that would apply to both public and private construction contracts. The bill would give owners 30 days to pay contractors any periodic or final payments and contractors and subcontractors would have 10 days from the date that the periodic or final payment was received to pay their subcontractors. Of note, the bill provides that retainage would be the amount specified in the contract.

NEW JERSEY

AB 321: Preferences

INTRODUCED: 01/12/2010
STATUS:
01/12/2010 Introduced.
POSITION: Neutral

AB 321, the Invest in New Jersey First Act, would require State agencies and political subdivisions of the State to give a limited preference to qualified businesses in New Jersey that employ New Jersey residents when awarding public contracts on State financed critical infrastructure projects.

AB 1501: Preferences

INTRODUCED: 01/12/2010

STATUS:

01/12/2010 Introduced.

POSITION: Neutral

AB 1501 would authorize counties and municipalities to establish local contractor preference programs. The bill would permit a bidding preference to a bidder whose principal place of business is located in the county or municipality. The local bid could not be more than 10% greater than the bid that the lowest responsible bidder who is not a local contractor had submitted.

AB 1685: Preferences

INTRODUCED: 01/12/2010

STATUS:

01/12/2010 Introduced.

POSITION: Neutral

AB 1685 would give a contract preference to New Jersey manufacturers in purchasing contracts and for public construction contracts where the contractor uses materials from New Jersey manufacturers.

SB 168: Captive Insurers

INTRODUCED: 01/12/2010

STATUS:

01/12/2010 Introduced.

POSITION: Oppose

SB 168 would regulate captive insurance companies. Of note, the bill would permit captives to write fidelity and surety insurance, among other lines.

NEW YORK

◆ **AB 2387: Payment Bond Claims**

INTRODUCED: 01/15/2009

STATUS:

01/06/2010 Recalled from Senate. Returned to Assembly.

POSITION: Oppose

AB 2387 would change the date from which subcontractor payment bond claims are permitted for state contracts. Under existing law, the subcontractor shall commence a claim after one year from the date on which final payment under the claimant's subcontract became due. The bill provides that the subcontractor shall not commence a claim after one year from the date on which the public improvement has been completed and the public owner accepts it. A similar bill passed in the Assembly in previous sessions, but failed to move in the Senate.

◆ **AB 8681/SB 5987: Bond Waivers for Small Businesses**

INTRODUCED: 06/03/2009

STATUS:

01/06/2010 Recalled from Senate. Returned to Assembly.

POSITION: Oppose

AB 8681/SB 5987 would create the Small Business Mentoring Program under the Metropolitan Transportation Authority (MTA) in which small businesses would be partnered with construction manager mentors. For small businesses participating in this mentoring program, the bill would allow the executive director of MTA to waive a number of requirements for public contracts, including the bid, payment and performance bond requirements of the State's little Miller Act. Small businesses would be able to participate in the program for up to four years. The program would apply to contracts for non-federally funded projects under \$1 million for first time program participants working with a mentor construction firm, and under \$3 million for small businesses that have completed the program who would be able to obtain these special contracts for up to four years following such completion. For MTA public works contracts that are not part of the program but are awarded to small business participants, the bill directs the MTA to provide technical assistance to these firms to obtain the necessary bid, payment and performance bonds for the contracts. Small businesses also would be able to obtain such assistance for up to four additional years after completing the first portion of the program in which bonds were waived. The contracts for the first year of the program would have to be in an aggregate amount of not less than \$10 million dollars, and shall not exceed \$100 million dollars. The Executive Director of the MTA would determine the maximum amount after the first year. AB 8681 had passed the Assembly last year, but it was recalled. **SB 5987** still is pending in the Senate.

AB 9707/SB 6607 and SB 2020: Bond Threshold—State University of New York

INTRODUCED: 01/19/2010

STATUS:

01/19/2010 Introduced.

POSITION: Oppose

AB 9707/SB 6607 would increase the threshold at which performance and payment bonds are required for state university construction projects from \$50,000 to \$250,000. **SB 6607** has not moved since it was introduced. The bonding provisions are contained in budget bills again this year. SFAA was successful in having them removed from last year's budget legislation and we will seek to kill them again. Standalone legislation to increase the bond threshold for other state universities also was introduced in 2009.

SB 2020 would increase the bond threshold from \$50,000 to \$250,000 for performance and payment bonds on contracts the State University of New York at Buffalo. The bill passed the Senate last year, but recently it was recalled from the Assembly and it now is pending in committee in the Senate.

OHIO

HB 412: Prevailing Wages

INTRODUCED: 01/19/2010

STATUS:

01/19/2010 Introduced.

POSITION: Neutral

HB 412 would change the prevailing wage law so that it only applied to new construction projects. Current law provides that it applies to new construction and any enlargement, alteration,

repair, remodeling, renovation, or painting of any public improvement. Further, the bill would increase the threshold at which the rates apply to \$1 million. Current law provides that the prevailing wage rates apply to contracts exceeding \$50,000. The current threshold is adjusted on a biennial basis by the Director of Commerce.

OKLAHOMA

SB 1303: Bid Bond Waivers

INTRODUCED: 02/01/2010

STATUS:

02/01/2010 Introduced.

POSITION: Oppose

SB 1303 would permit the State Construction Administrator to waive the bid bond requirements for any or all bids on public construction contracts awarded for a construction management project by the Construction and Properties Division. Currently, a bid bond or other security in an amount equal to 5% of the bid is required on public construction contracts exceeding \$50,000.

SB 1602: Retainage

INTRODUCED: 02/01/2010

STATUS:

02/01/2010 Introduced.

POSITION: Neutral

SB 1602 provides that in lieu of retainage, a prime contractor, subcontractor or sub-subcontractor would be able to post a release of retainage bond in an amount equal to 10% of the contract or subcontract price. The bill would require coverage under the new retainage bond that is similar to what already would be covered under the payment and performance bond.

SB 1606: Bond Threshold

INTRODUCED: 02/01/2010

STATUS:

02/01/2010 Introduced.

POSITION: Oppose—Increases Bond Threshold

SB 1606 would increase the bond threshold from \$50,000 to \$100,000. Current law requires a bid bond, a payment bond and a performance bond on public works contracts exceeding the threshold. SFAA is working with the AIA to oppose this bill. To date, the bill has not moved since it was introduced. (Why mention letters of credit under existing law – is it being changed?) What are we doing to fight this increase?

PENNSYLVANIA

HB 2140/HB 2142: Small Business Bonding Programs

INTRODUCED: 01/19/2010

STATUS:

01/19/2010 Introduced.

POSITION: Neutral

HB 2140 would direct the Department of General Services to create a "statewide bonding program" based on the best practices in procurement that the bill would outline. The program

would be for enabling "small businesses and disadvantaged businesses to build capacity and to competitively bid on State and other public contracts." Existing law already permits a purchasing agency to alter the bond requirements or accept alternative security "to the extent reasonably necessary to encourage procurement from small and disadvantaged businesses."

The bill also would create a mentor-protégé program in which small businesses could compete for contracts by partnering with large companies to help small businesses gain experience in contracting. There also are small business reserve and procurement goals that the bill would establish. Under the reserve program, all agencies of the Commonwealth would have to set aside 10% of their procurement dollars to make awards to small and disadvantaged businesses. At a minimum, the agencies each would have to set aside \$25,000 and a maximum of \$5 million for these awards. The additional procurement goal would be a 25% "aspirational goal" for set asides of procurement and construction moneys for disadvantaged businesses in contracts and grants from the Commonwealth. Finally, the bill would reduce the time period for the prompt payment of funds to subcontractors. The bill would reduce the time in which a contractor must pay a subcontractor after receiving a progress payment from 14 days to 5 days. **HB 2142** is similar, except that it only provides for the statewide bonding program for which it would provide \$5 million in funding. This bill has not moved since it was introduced.

VIRGINIA

HB 1258: Indemnification Provisions in Construction Contracts

INTRODUCED: 01/19/2010

STATUS:

01/19/2010 Introduced.

POSITION: Support

HB 1258 would clarify existing law, which prohibits indemnification clauses in any contract or agreement for construction work that indemnify or hold harmless another party to the contract against liability for damage arising out of bodily injury to persons or damage to property suffered in the course of performance of the contract resulting from negligence. The bill would close a loophole by prohibiting such clauses from being placed in the performance bond, payment bond or other documents related to the construction contract. SFAA believes that without such a specification, owners may place such clauses in the bond form when they are prohibited in the construction contract. The bill further provides that the indemnity prohibition would not apply to indemnity agreements that sureties may require as a condition of providing a bond.

SB 225: E-Verify For Public Contracts

INTRODUCED: 01/13/2010

STATUS:

01/27/2010 From Senate Committee on General Laws and
Technology: Reported Favorably.

POSITION: Oppose—Seeking Amendments on Contract Termination

SB 225 would require employers to register and participate in the federal Electronic Work Verification Program that the U.S. Department of Homeland Security operates to verify the information of newly hired employees. Any business that violated this requirement would be debarred from obtaining a public contract for one year. The contract entered into with a public

entity, under which the violation arose, would be terminated immediately.

SB 318: Subdivision Ordinance

INTRODUCED: 01/13/2010
STATUS:
02/01/2010 Passed Senate. To House.
POSITION: Support

SB 318 would permit a local governing body to allow a developer to provide evidence that the deadline for recording a mechanics lien has passed or evidence that any debt for the construction of the public improvements may be due and owing is contested in lieu of certifying to the locality that the construction costs had been paid in full. The developer would have to provide “indemnity with adequate surety” in this case. The local governing body would determine the amount required.

WASHINGTON

HB 3055: Bonding Thresholds

INTRODUCED: 01/21/2010
STATUS:
01/21/2010 Introduced.
POSITION: Oppose

HB 3055 would alter the bonding requirements for public construction contracts with the State and its political subdivisions. Current law provides that a surety bond is required on contracts in excess of \$35,000 and on contracts below this amount, bonding is discretionary. On unbonded contracts, the public entity may retain 50% of the contract amount. The bill would increase the threshold at which bonding is mandatory to \$100,000. For contracts below this amount, requiring surety bonds would be at the discretion of the public entity, provided that bonding would be prohibited on contracts that are less than \$35,000. For unbonded contracts, the bill would reduce the retainage to 25% of the contract amount. Of note, for contracts under \$100,000, existing law permits individual sureties.

HB 3086: Jurisdiction of State and Federal Courts

INTRODUCED: 01/22/2010
STATUS:
01/22/2010 Introduced.
POSITION: Neutral

HB 3086 would specify that the state and federal courts would have concurrent jurisdiction over a suit or action brought against the surety or sureties on performance and payment bonds for construction contracts. States cannot confer concurrent jurisdiction on federal courts. Under existing federal court rules, there may be concurrent jurisdiction.

◆ SB 5041: Contract Set-Asides

INTRODUCED: 01/12/2009
STATUS:
01/28/2010 From Senate Committee on Government Operation and Elections: Do Pass as Substituted.

POSITION: Neutral

SB 5041 would include veteran-owned businesses in the State's existing contracting set-aside programs for small, minority- and women-owned businesses. The bill would provide for a 3% participation goal on contracts with the State for include veteran-owned businesses. The bill also would include veterans in the rules that the Department of Transportation contract is authorized to adopt providing for bids and award of contracts to small businesses, minority, and women contractors for the performance of work, or furnishing equipment, materials, supplies, or operating services when the cost of the work would not exceed \$100,000.

WEST VIRGINIA

HB 2923: Anti-Bid Shopping Provisions

INTRODUCED: 01/13/2010

STATUS:

01/13/2010 Introduced.

POSITION: Neutral

HB 2923 is an anti-bid shopping measure which would require the general contractor to submit a list of all subcontractors to be used on a public construction contract. The bill would prohibit the general contractor from substituting any subcontractors unless he or she could prove its advantage to the owner.

HB 4200/SB 352: West Virginia Community Empowerment Transportation Act

INTRODUCED: 01/27/2010

STATUS:

01/27/2010 Introduced.

POSITION: Seeking Amendments

HB 3200/SB 352 would provide for public private partnerships (PPP) for transportation facilities. The bill provides that the comprehensive agreement for the project would be between the governmental entity sponsoring the project and the West Virginia Division of Highways (Division). The bill would define a PPP as a "consortium that includes the [Division], a political subdivision of this state, a public service district, a highway authority or any combination thereof, together with a private entity or entities, which proposes to finance, plan, design, construct, expand, improve, maintain or control a transportation facility." Existing law already provides for PPPs in which the agreement is directly between the private entity and the Division. The bill provides that the comprehensive agreement would have to provide for performance and payment bonds on the construction portion of the project for a transportation facility. The bill would allow the Division to determine the form and amount for the bonds that would be satisfactory.