

NEW STATE BOND REQUIREMENTS AFFECTING CONTRACTORS

BY LENORE MAREMA

The National Conference of State Legislators (NCSL) reported that 42 states had revenues in excess of predictions, a turnaround from 2002 when 42 states had budget deficits. The NCSL report indicates that states collectively slashed \$235 billion in spending since 2001. The cumulative \$21.5 billion state budget deficits now have been reduced to approximately \$1 billion.

However, state spending on Medicaid, health care and education is still draining state funds, thanks to unfunded federal mandates. Several states hope to restore spending for public construction, although taxpayer groups in other states are trying to institutionalize smaller governments.

A summary of just a few state enactments on contract surety and construction follows.

ARIZONA

HB 2579 applies state bond requirements to the Department of Transportation (DOT) construction manager-at-risk contracts. For job-order contracts, the performance bonds may be a single bond for the full term of the contract, a separate bond for each year of a multi-year contract or a separate bond for each job order.

ARKANSAS

HB 1814 authorizes cities and towns to use reverse Internet auctions for purchasing goods and services.

SB 925 allows alternative procurement procedures for municipal projects in excess of \$500,000. Bids must be reviewed by a pre-selection committee that inter-



views five candidates, who will be evaluated on their experience and record of completing projects on-time and within budget. Payment and performance bonds will be required from the winning bidder.

CALIFORNIA

SB 548 permits the state director of general services to establish a master builders risk insurance program for all state construction projects. The

deductible for any contractor is \$25,000.

SB 1113 repeals a requirement that contractors, in private construction contracts, provide the owner with a notice that contains a warning about mechanics liens and that advises the owner to require payment and performance bonds on the project. The replacement notice in the new law offers alternate ways to protect against liens, without mentioning surety bonds.

FLORIDA

HB 509 re-enacts the Prompt Pay Act and applies it to state agencies as well as local governmental entities. The bill limits retainage that state and local governments may withhold during construction. The new law also reduces the timeframe in which contractors and subcontractors must issue payments to their subcontractors and suppliers once they have been paid. Regarding claims on payment bonds, the notice of non-payment to a contractor in a public project must specify the portion being claimed for retainage.

GEORGIA

SB 270 requires 100 percent performance and payment bonds on public-private construction projects.

IDAHO

SB 1081 stipulates that if bids for a contract on the state highway system were made through electronic means, then a bid bond in electronic form with valid electronic signatures must accompany the electronic bid documents. This is the only state this year that switched to electronic bidding.

INDIANA

SB 244 enacts a prohibition on directed surety in design-build projects. The new law authorizes design-build projects in the state and specifies that public entities must require the design-builder to furnish payment and performance bonds for a project.

KANSAS

SB 33 regulates private construction projects. Owners must pay contractors within 30 days of an undisputed request for payment and contractors must pay subcontractors within seven days of receiving payment. If the parties are not paid within this timeframe, interest is added daily to the payment, calculated at an 18 percent annual rate, until the amount is paid. Retainage

is limited to 10 percent of the contract.

SB 94 increases the time from 10 days to 21 days in which a county road and highway project contract must be signed and the bonds submitted. The new law also permits 95 percent of the contract to be paid before it is fully completed. Previously, the limit was 90 percent.

KENTUCKY

HB 449 provides the following:

Any provision contained in any construction services contract purporting to indemnify or hold harmless a contractor from that contractor's own negligence or from the negligence of his or her agents or employees is void and wholly unenforceable. This section does not apply to construction bonds or affect the validity of insurance contracts.

MARYLAND

HB 674 permits the Maryland Small Business Development Financing Authority to guarantee a surety up to the lesser of 90 percent or \$1.35 million of its losses under a bid, payment or performance bond under any contract when the majority of the funding is provided by a local, state or federal governmental entity. The threshold on loan guarantees increased from \$500,000 to \$1 million.

MINNESOTA

SB 1335 requires design-build contractors and construction managers-at-risk to post performance and payment bonds in order to be qualified. A bid bond of not more than 5 percent could be required from the design-build contractor.

Florida Contractors Beware

The Florida Little Miller Act, Section 255.05, Florida Statutes, requires at subsection (2) that a payment bond claimant not in privity with the prime contractor give an initial notice that it will look to the bond for payment and a final notice that it is unpaid. The initial notice must be furnished not later than 45 days after the first of the labor or material is supplied and the final notice not later than 90 days after the last of the labor or material is supplied.

These notice requirements help the prime contractor protect itself from the double liability that can result if the prime contractor pays its subcontractor but the subcontractor fails to pay a supplier or sub-subcontractor that can then make a claim on the prime contractor's payment bond. With notice, the prime contractor can issue joint checks, require releases or withhold funds to cover its exposure to payment of the subcontractor's debts. Without notice, the prime contractor has no way to know if the subcontractor is paying its obligations.

Another section of the act, Section 255.05(6), Florida Statutes, requires that the bond inform potential claimants of the notice requirements and the one-year suit limitation in 255.05(2). As recently amended, subsection (6) states:

All payment bond forms used by a public owner and all payment bonds executed pursuant to this section by a surety shall make reference to this section by number and shall contain reference to the notice and time limitation provisions in subsection (2).

The importance of complying with subsection (6) is illustrated by the Florida Supreme Court's decision in *American Home Assurance Co. v. Plaza Materials Corp.*, which held that the contractor and surety could not assert the notice or limitations defenses under subsection (2) if the bond did not comply with subsection (6) and the claimant could show that it was not already aware of the notice and suit requirements. Thus, if the bond form required by the public owner fails to refer to the notice and suit limitations in subsection (2), the prime contract and its surety can lose the protections afforded by the statute.

In the past, many public entities in Florida routinely used bond forms that did not comply with subsection (6), which is why the legislature amended the subsection to explicitly state that the public owner must use a form that references the notice and limitations provisions of subsection (2). The amendment only took effect on June 14, and bond forms, like other documents, tend to acquire a life of their own.

It is crucial, therefore, for prime contractors, bond producers and sureties on Florida public projects to be alert to the statutory requirements and insist that any payment bond form proposed by a public owner comply with Section 255.05 and contain the references required by subsection 255.05(6).

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MISSISSIPPI

HB 1290 clarifies the rights of claimants on performance and payment bonds. If the obligee is the owner, then the suit must be brought within one year of completion or actual use or occupancy, whichever is earlier. If the obligee is not the owner, then a suit must be brought within one year of final payment.

If only a performance bond has been issued, suppliers and laborers can bring suit six months after final completion or actual use or occupancy, whichever is earlier, if the obligee has not brought suit. If only a performance bond is given, then only one action shall be brought for payment and performance claims. If a separate payment bond is given, then only one separate action shall be brought on the bond and intervention shall be allowed in accordance with existing law.

NEVADA

HB 34 raises the maximum amount of money that can be collected from the State Contractor's Board recovery fund from \$30,000 to \$35,000 for actual dam-

ages. Furthermore, the bill raises the maximum amount in claims that could be recovered from the fund against one contractor from \$200,000 to \$400,000.

NEW HAMPSHIRE

HB 263 allows design-build and construction manager methods of delivery for major capital projects in the state. The bill increases the amount for which transportation projects are eligible for design-build from \$1 million to \$5 million.

NEW MEXICO

SB 814 requires a subcontractor on a public works project to post a performance and payment bond if the contract is \$50,000 or more.

OREGON

HB 2071 requires anyone making a claim against a contractor to deliver a copy to the contractor's surety company.

SB 477 requires a contractor or subcontractor working on a public project to post a \$30,000 public works bond in addition to any payment and performance bonds required. The new bond would be

used to pay wage claims of workers, including prevailing rate claims. The law provides that if a business enterprise elects not to post the public works bond, it must notify the public agency that awarded the contract. It also provides that a claim for unpaid wages can be made under the payment bond of the contractor.

TEXAS

HB 2039 waives the sovereign immunity of local governmental entities and permits them to be sued for breach of contract.

HB 2659 requires that a claim against a payment or performance bond in connection with a privatized maintenance contract must be filed against the bond in effect on the date that the basis for the claim arose.

UTAH

HB 105 amends the law to add a further exemption for a person who contracts directly with the payment bond principal. Existing law already provides that a party in privity of contract with the bond principal need not give notice of its claim, and contains certain exemptions. It specifically requires any person who furnishes labor, service, equipment or material for which a payment bond claim may be made, to provide preliminary notice to the payment bond principal.

VIRGINIA

HB 2666/SB 1108 requires any private enterprise, pursuant to the Public Private Transportation Act, to provide payment and performance bonds in connection with the development of any qualifying transportation facility under the act. The new law also requires private entities to include "cost and completion guarantees" in their contracts.

WEST VIRGINIA

HB 2592 creates a design-build act to be implemented by a new Design-Build Board. The new law contains requirements for bid, payment and performance bonds and an anti-directed surety provision for design-build projects.

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