Dems Puff, GOP Pass on Cannabis Safe Harbors

Mississippi Encourages Bonding on Private Projects

New York Executive Order Imposes Integrity Clause on State Contracts

Local Governments Pressuring on State Bond Thresholds

---

Dems Puff, GOP Pass on Cannabis Safe Harbors

The banking industry is expecting H.R. 1595, with its safe harbors for doing business with marijuana-related businesses, to be marked up in the House Financial Services Committee this week. Cannabis is still a controlled substance under federal law, even though many states have legalized it for medicinal and/or recreational use. Under federal law, the proceeds from legal transactions in the states are still the proceeds from illegal activities such that banks cannot accept them or provide any other financial services for marijuana-related businesses without risking federal prosecution.

SFAA worked with APCIA and developed similar safe harbors for insurers dealing with marijuana-related businesses. The House committee staff understands that insurers have the same issues as the bankers, but asked the insurance industry to work with a wider group within the industry on these amendments. The Financial Services Committee is willing to accept the revised amendments from the insurance industry, but some now question whether the safe harbors will achieve their intended purpose. The House Republican leadership is now questioning whether the Democrats have done their due diligence in thinking through all the laws, regulations and practices that would be affected, whether the safe harbors are sufficient, or whether the criminal code needs to be changed.
Mississippi Encourages Bonding on Private Projects

A new Mississippi law aims to regulate payment and performance bonds furnished on private construction. It requires the surety to be authorized to do business in the state and be listed with the U.S. Treasury. The payment bond will substitute for the mechanics lien rights of subcontractors and suppliers. The right to sue on the payment bond accrues 90 days after the claimant’s last date of work, and all second tier subcontractors and suppliers must provide written notice – which includes email – to the contractor or its surety within 90 days of its last date of work. An action to enforce payment bond claims shall be brought within 1 year of the claimant’s last date of work. An action on the performance bond must be brought within 1 year of the principal’s termination, abandonment of the contract, or the owner’s final payment.

The new law also has some drafting issues. Both the performance and the payment bonds are “payable to” the owner. Yet in the new law the payment bond is “conditioned for the prompt payment” of first and second tier subcontractors and suppliers. The owner or contractor must give a copy of the bond and/or contract to any subcontractor or supplier that makes a written request for the same. If the bond and/or contract is not furnished within 30 days, the party that received the request must pay the requestor’s attorneys’ fees for any “subsequent actions.”

New York Executive Order Imposes Integrity Clause on State Contracts

Currently, under New York law, a contractor bidding for state contracts must be found to be a “responsible” entity, as demonstrated by, among other things, satisfactory financial and organizational capacities, at the time the contract is awarded. Also, New York state agencies currently can “debar or deem ineligible for future bidding” contractors that violate labor, payment, or anti-corruption laws.

Executive Order-No. 192 now directs state agencies to evaluate whether a contractor is a “responsible” entity throughout contract performance, not just when awarding the contract. In the event an agency discovers information “that indicates” a contractor may no longer be “responsible,” this Executive Order directs that agency to investigate and determine whether the contractor is, in fact, “non-responsible.” Contractors deemed “non-responsible” are added to a public list available on the New York Office of General Services’ (OGS) website.

The Executive Order then imposes a reciprocal debarment requirement, where all state agencies must rely on any one state agency’s finding that a contractor is “non-responsible,” debarred, or ineligible for current or future procurements. In certain instances, construction contracts specify that termination for cause may be taken if a serious or compelling question of the contractor’s “responsibility” is raised during contract performance. If this broad prerogative is used as a basis for termination, the “non-responsible” finding would be reported and used as a basis for future bidding debarment, and other contracts could be terminated for cause.

SFAA staff participated in a conference call with certain industry representatives, including the AGC, AGC – NYS, and NASBP regarding a response to the Executive Order. The opinion of the AGC’s counsel is that this Executive Order will cause a cascading series of for-cause terminations set into motion by a single “non-responsible” finding that will cause the principal’s surety to be called upon to complete multiple projects.

SFAA is currently assessing the impact of the Executive Order and evaluating next steps.

Local Governments Pressuring
on State Bond Thresholds

Some local governments believe that state procurement rules impose unnecessary financial burdens on them, including bond thresholds. A bill to raise the local government threshold from $25,000 to $100,000 is on the Governor’s desk in Kentucky. The state bond threshold remains at $40,000. In North Dakota, local governments were behind a push to increase several procurement thresholds, including the state bond threshold, from $150,000 to $250,000. The view was that the state threshold for the use of architects and engineers was too low and added unnecessary costs to many local projects. Stakeholders reached an agreement to leave the state bond at $150,000, and negotiations are ongoing to determine how to give the local government more discretion in using architects and engineers. Just last year, local governments in New Hampshire raised the bond threshold to $125,000, while the state bond threshold remains at $35,000.

In Pennsylvania, legislation is pending that would amend the Little Miller Act bond threshold to eliminate the discretion that local governments have to use any type of security in lieu of bonds, but also would set the local government bond threshold at $500,000. We believe that a local government issue is behind this bill.

Other pending bond threshold legislation:
- Rhode Island: increase from $50,000 to $150,000.
- South Carolina: increase from $50,000 to $100,000.
- Texas: payment bond increase from $25,000 to $100,000 to match the performance bond threshold.
- Bills failed to pass in Mississippi to increase the state bond threshold from $25,000 to $50,000, and from $50,000 to $150,000 in Montana.