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SFAA and AIA Have Legislation to Address Case Law on Bonding for Public Works Projects in Missouri Filed

SFAA and AIA identified a bill sponsor in Missouri and SB 167 has been filed for 2019 to address a Missouri Supreme Court case. The case ruled that the bonding requirements of the Little Miller Act are not applicable when a public owner contracts with another entity to develop public property on its behalf and arranges for construction. Under such arrangements, the public owner does not directly hire a general contractor. However, the court found that the consultant did not “provide” construction services, but merely “arranged” for them. Consequently, the court held that the consultant was not required to furnish Little Miller Act bonds.



This decision possibly creates an unintended loophole to the Little Miller Act under which any public

entity that wants to avoid bonding could simply hire another entity for the project development.

Our amendment clarifies that when a public contracting entity uses such private entities to arrange for construction, the resulting project still is a public works project that must be bonded. SFAA and AIA will build on the groundwork we achieved last year in the House to move this bill in 2019.



SFAA Addresses Proposed Changes to Federal Broker and Freight Forwarder Bond Requirements

SFAA submitted comments to the Federal Motor Carrier Safety Administration (FMCSA) regarding the financial responsibility requirements for brokers and freight forwarders, who must provide a bond or a trust fund for \$75,000. SFAA submitted comments on FMCSA's consideration of definition of "financial failure or insolvency." The statute permits group surety bonds and trust funds, and FMCSA was seeking guidance in implementing the statute.

- SFAA recommended using bankruptcy filings to define "financial failure or insolvency" as a bright line test. FMCSA's proposed definition based on claims history and responsiveness likely is an incomplete picture.
- Surety bonds should be required for each principal rather than group surety bonds because they are not commonly written due to the underwriting difficulty. FMCSA also believes there would be a significant burden in implementing these kinds of bonds.
- For trust funds, FMCSA should follow the Federal Acquisition Regulation standard for contractors depositing their own assets to secure a public contract with cash, a letter of credit, or U.S. bonds or notes. Federal oversight and state licensure for the trusts should be required.
- FMCSA questioned the capacity in the surety industry given a "cash-only" standard and the impact on costs due to the increased demand. We believe there is sufficient capacity for this type of surety credit with no impact on costs for qualified applicants.

Incoming Chair of US House Budget Committee Proposes a \$300 Billion Infrastructure Bill

Rep. John Yarmuth (D-KY) believes that an infrastructure bank could be capitalized with 40-year federal Rebuild American Bonds. The downside is that this will add to the nation's debt, but the plan is that state and local pension plans would invest. Another proposal is to raise the gas tax by 1.5 cents to fund 30-year bonds.



Key Bills Affecting Surety Bonds in Ohio Legislature

SFAA worked with the Ohio Insurance Institute (OII) to seek amendments to Ohio SB 255, which is an occupational regulation measure requiring the State to use the least restrictive form of regulation for occupational regulations to protect consumers. The bill follows the American Legislative Exchange Council's model in that bonding or insurance, registration, certification, and licensing would be considered more restrictive. The bill would establish procedures for reviewing and



evaluating the need for occupational regulations based on these standards. Our amendments were not included in the bill as the sponsor did not believe that they were necessary. The bill sponsor appreciates the need for surety bonds as protection, but both the sponsor and Senate leadership believe that bonds were addressed in the bill and that bonding will be the result of this legislation. While we have been told that bonding will be a preferred approach, the bill now includes new license requirements for home inspectors that contains a recovery fund. OII reports that the bill passed the House with amendments that the Senate is expected to approve. OII also expects the Governor to sign the bill.

SFAA also worked with the OII to address HB 668, which would authorize the State, local governments, and educational institutions to enter into public-private partnerships (P3) for public facility projects. SFAA sought to revise the bonding provisions in the bill to require bonds in an amount equal to the contract price rather than allowing the contracting authority to determine the amount. The bill is not expected to pass this year.

Recent New Bonding Opportunities

In one recent action, Pennsylvania SB 764 requires recreational vehicle dealers conducting shows, off-premises sales, exhibitions, or rallies to post a \$30,000 surety bond, unless the dealer already has posted a minimum \$30,000 bond with the Department of Transportation.

The 2018 sessions are over in the vast majority of states, but state agencies are issuing regulations to implement legislation enacted with bonding requirements.

- The Alabama Home Builders Licensure Board adopted regulations requiring residential roofers to post a minimum \$10,000 license bond.
- The California Department of Industrial Relations adopted regulations requiring foreign labor contractor to register and post a surety bond in an amount based on the contractor's annual gross receipts that ranges from \$50,000 to \$150,000.
- The Iowa Division of Banking adopted regulations for debt management businesses requiring them to post a \$25,000 license bond.
- The Oregon Department of Transportation adopted temporary regulations for a statewide ignition interlock device oversight program that require a service center provider for the device to post a \$100,000 bond.

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