

The Surety & Fidelity Association of America

1101 CONNECTICUT AVENUE, NW, SUITE 800, WASHINGTON, DC 20036 TEL: (202) 463-0600 – FAX: (202) 463-0606
website: <http://www.surety.org>
E-mail: information@surety.org

LYNN M. SCHUBERT
President

EDWARD G. GALLAGHER
General Counsel
LENORE MAREMA
Vice President of Government Affairs
ROBERT J. DUKE
Director of Underwriting / Assistant Counsel
BARBARA FINNEGAN REIFF
Director-Regulatory Affairs
ALAN CLARK, A.C.A.S., M.A.A.A.
Actuary

July 14, 2009

The Honorable John Sampson
Legislative Office Building Room 409
Albany, New York 12247

New York Senate Bill 5987—Bond Waivers for Small Contractors

Dear Senator Sampson:

S. 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. The executive director of MTA would be permitted to waive bid, payment and performance bond requirements for small businesses participating in this mentoring program. In the first year, the aggregate amount of contracts for which bonds are waived cannot be less than \$10 million or more than \$100 million.

The Surety & Fidelity Association of America (SFAA) is a trade association of approximately 450 insurance companies that are licensed to provide surety and fidelity bonds. We are writing to state our opposition to this legislation because waiving bonds could hurt the small contractors intended to be helped, and will increase the financial risk of the MTA and state taxpayers, who ultimately pay for public construction projects. In addition, a surety mentoring program for small contractors has been on-going in New York for almost two years and could be expanded to meet your needs without the necessity of legislation. Even if the Senate takes no action on S. 5987 this year, we would like to meet with you and discuss what is being done to assist small contractors in New York and to examine the merits of this legislation.

The surety industry already is engaged actively in small contractor issues in the State of New York. A program is in place and is working, which could be tailored to address your concerns. In 2007, SFAA signed a memorandum of understanding with the Empire State Development Corporation, the objective of

which was to address the issues of access to bonding for minority and women owned businesses (M/WBEs) in New York. Through its Model Contractor Development Program, SFAA, working in conjunction with local surety and construction professionals, has implemented a New York State Bonding Initiative to assist small contractors to become bondable by providing them the tools, resources and mentoring to help them qualify for bonding. The New York Insurance Department is a partner in this Bonding Initiative, along with the Empire State Development Corporation. So far the Bonding Initiative has resulted in more than \$30 million in bonding offered or underwritten.

The Bonding Initiative began with a program in New York City in February 2008 and was expanded to include programs in Buffalo, Rochester, Albany and Syracuse. At each site, between 10 and 30 small and emerging contractors attended educational workshops, undergoing initial intake and follow-up interviews as to their bondability. The contractors then had or are in the process of having “prescriptive plans” developed by volunteer surety professionals that are specifically tailored to the needs of each contractor in addressing potential denial factors in bonding. Despite the downturn in the economy and the resultant decrease in contracting opportunities for many of our participating contractors, we have made significant progress on achieving bond readiness for New York State’s small and emerging contractors.

We also have continued to broaden our outreach to a number of contractors who were not among the original program participants. Other state and regional agencies – notably the Dormitory Authority of the State of New York (DASNY) and The Port Authority of New York and New Jersey – now are looking to put money and other resources into targeted bonding assistance efforts that are perfect complements to our broader Bonding Initiative with the Empire State Development Corporation and the New York State Insurance Department. We think that the MTA also should be looking in this direction as well.

In the past year, SFAA has been recognized in New York for its work with small and emerging contractors through formal awards from the Women’s Building Council and the Jamaica Business Resource Center.

Beyond the mentoring program proposed by S. 5987, waiving the protections of bonding is unsound public policy. Under New York law, contractors must provide performance and payment bonds for all public construction projects in excess of \$100,000, or in excess of \$200,000 for contracts not subject to state requirements for multiple award requirements (Wicks Act). A performance bond secures the contractor’s obligation to perform the contract. A payment bond secures the contractor’s obligation to pay subcontractors and suppliers. In determining whether to write a bond for a contractor, a surety reviews the experience, capability, and financial strength of the contractor, and provides a

bond only if it believes that the contractor is capable of performing the contract. It is not the size of the contractor that determines if a surety bond is available, but the capability of the contractor to fulfill its contract obligations.

If performance bond requirements are waived on MTA construction projects, the MTA and state taxpayers will bear the full financial risk of contractor nonperformance – that is, contractors failing to complete needed infrastructure projects. Given the aggregate amounts of contracts intended to be let without bonding in just the initial year of this program, the State and its taxpayers are subject to considerably more financial risk at a time when the current budget is least able to handle the additional costs to complete if a contractor defaulted.

Further, waiving payment bonds on infrastructure projects will harm the numerous small businesses that serve as subcontractors and suppliers on these projects. Subcontractors and suppliers performing public construction work do not have mechanic's lien rights against public property. Under New York law, the subcontractor or supplier can only lien the project's funds held by the owner. Such recourse could be problematic if the public owner has paid the funds to the prime contractor. A payment bond provides recourse to an unpaid claimant, even if the owner has paid the prime contractor. For the above reasons, we believe that S. 5987 is not good public policy.

We would like to meet with you at your convenience to discuss the important issue of small business participation in public construction and ways we might assist in addressing your concerns.

Sincerely,

A handwritten signature in black ink, appearing to read "Lynn M. Schubert", written in a cursive style.

Lynn M. Schubert