



North Carolina Legislation Would Permit Bonds to be Waived

North Carolina HB 1024/ SB 932 would allow Union County to enter into build-to-suit capital leases with private developers for the construction of law enforcement and human services facilities when the cost exceeds \$300,000. The County Board of Commissioners (Board) would have the discretion to require the developer to provide a performance and payment bond for construction work as provided under the State’s Little Miller Act. The Board also could require the developer to provide a bond or “other appropriate guaranty” to cover any other guaranties, products, or services the developer provided. The Board also could require the private developer to provide an irrevocable letter of credit for the benefit of laborers and materialmen in an amount not less than 5% of the total cost of the improvements under the lease. The developer would have to maintain the letter of credit throughout the construction of the project and for six months thereafter.

North Carolina has a short session this year and everything is moving quickly in the legislature. There is a lot of support for this legislation and it already has passed the Senate. SFAA and AIA are working to amend the bill to require 100% payment and performance bonds as required under the State’s Little Miller Act.

SFAA believes that construction of law enforcement or human resources facilities is a public works project no matter how the project is delivered. Despite the involvement of private funds in build to lease contracts, the public interest in having a completed project is significant. Significant public funds are at stake in these contracts. The build to lease contract commits public funds to lease the facility for a long period of time. The build to suit lease method of construction simply is another new method of delivery of construction that may now have more appeal to state and local governments with limited budgets. The underlying project still is the construction of a new public facility. Moreover, subcontractor’s and supplier have the same interest in assuring that they are paid.

North Carolina already has the highest bond threshold in the nation at \$500,000. Counties and other public contracting entities already are permitted to assume the full exposure of any project under that amount. This bill would permit Union County to waive bonds on any project over

\$300,000. Union County would have the highest bond threshold in the nation for these projects--unlimited ability to waive bonds--e.g. on a \$10-\$20 million new facility.

The federal government protects itself and taxpayers with a bonding threshold of \$150,000. With significantly less financial resources at the State's disposal, assuring that bonding protection is in place is even more critical for the State and its political subdivisions.

SFAA also believes that the bill contains an ineffective payment remedy. It permits a 5% letter of credit (LOC) to be in place for the benefit of laborers and materialmen (suppliers). Why are subcontractors not protected as well? A bank will pay out on an LOC only to holder of the LOC, which would be Union County. Subcontractors, suppliers and workers cannot make a claim on the LOC like they can on a bond. If an LOC is required in lieu of a payment bond, Union County would need to get involved with the claims adjustment process as it will have to determine the validity of the payment claims of subcontractors, suppliers and workers

The LOC generally is a more expensive option for the contractor compared to the bond. LOCs generally expire annually and an evergreen clause adds to the cost. The bond remains in place for the duration of the project. Subcontractors, suppliers and workers on any public job in North Carolina in excess of \$500,000 work with a 100% payment bond in place. They should be given no less protection on projects in Union County

SFAA defeated substantially similar bills in Mississippi and Tennessee this year that would have allowed local school districts to enter into build-to-suit leases with a private developer for the new construction or renovation of existing schools. The legislation was defeated in Mississippi for the second year in a row. The Tennessee legislation was carryover from 2011. We defeated it in committee last year, and it did not move this year. This same bill now has been introduced in North Carolina only as applicable to law enforcement and human resources buildings.