



August 29, 2014

Office of General Counsel
Texas Water Development Board
1700 North Congress Ave.
Austin, Texas 78707

SENT VIA ELECTRONIC MAIL

RE: TWDB Proposed Amendments to 31 TAC §§363.1, 363.2, 363.33, 363.51, 363.731, 363.951, 363.953, and 363.955 and new §§363.1301 - 363.1312.

On behalf of the Texas Water Infrastructure Network (TxWIN) we appreciate the opportunity to provide additional commentary and recommendations on the proposed rules enacting HB 4 or the State Water Implementation Fund for Texas or SWIFT. Enacting the SWIFT and SWIRFT are key in addressing the short and long term water needs of communities across Texas and our membership looks forward to being part of the Texas water solution.

The Texas Water Infrastructure Network was founded by group of like-minded Texas construction companies in the fall of 2013 who agreed that there was a need to create a state-wide organization specifically focused on legislative and regulatory issues in the Texas water infrastructure market. Our membership is largely composed of family and employee owned companies, who are highly regarded amongst their industry peers and in the design and owner community for their skill, integrity and the quality of their work.

With annual project volumes ranging from \$5 million to over \$100 million annually, our members construct water projects for municipal water utilities, municipal utility districts, regional water authorities, in addition to military and industrial facilities. The majority of our general contractor members have significant self-performance capabilities and some of our members are also integrated firms with commercial and civil construction capabilities.

In addition to traditional general contractors, our membership also includes Texas' top water infrastructure material and equipment suppliers, specialty contractors, manufacturers and construction law firms. TxWIN was founded under the premise that competition is good, that a competitive market place drives innovation and value, and that public utility owners and the public benefit from a competitive and qualified Texas construction industry.

We highly value our partnership with the Texas Water Development Board and we are eager to work with you and the SWIFT Advisory Committee as this rule making process continues. One of our primary goals as an organization is to promote a transparent and competitive construction marketplace which provides value for water utilities owners and the public who ultimately rely on, and are responsible for the cost of providing our state's water infrastructure.

TxWIN members live here, work here and employ Texans all across the state. Our members care about our communities and we want to be a part of water solutions that will propel Texas into the future. Thank you for your consideration of the following comments and please do not hesitate to contact our Executive Director, Mr. Perry L. Fowler at (512) 550-2892 or plf@txwin.org with any questions comments or for further assistance.

Sincerely,



Kenneth D. Stringer

Chairman, Texas Water Infrastructure Network

KDS/plf

Cc: The Honorable Troy Fraser
Chairman, Texas Senate Natural Resources Committee
Chairman, State Water Implementation Fund for Texas Advisory Committee

The Honorable Allen Ritter
Chairman, Texas House Natural Resources Committee
Chairman, State Water Implementation Fund for Texas Advisory Committee

TxWIN Preamble Commentary

1. TWDB Oversight of the Construction and Bidding Process

Several items mentioned in the preamble of the proposed rule are of keen interest to TxWIN members. We are particularly appreciative that the TWDB has acknowledged our recommendations regarding “suggestions for changes to the board's oversight of political subdivisions in their bidding process and construction oversight on board-funded projects.” We have included several recommendations in our comments which reflect similar comments from our letter to TWDB dated March 26, 2014 providing feedback on the SWIFT rule prior to its publication.

As mentioned in our previous comments and discussions with TWDB staff and Directors, one of our primary goals as an organization is to promote a transparent and competitive construction marketplace which provides value for public owners and the public who ultimately are responsible for the cost of our state’s water infrastructure. Currently there are many different means and methods available to public owners in Texas in addition to the traditional “design-bid-build” also known as “hard bid” or “low bid” where price is the primary consideration in awarding construction projects.

These alternative procurement methods give public owners the ability to utilize qualifications in the selection process where price and qualifications are considered and are often used in tandem with alternative project delivery methods (APD) such as, Construction Manager at-Risk (CMAR) and Design-Build whose key feature is concurrent design and construction. Qualifications and price may also be used in the Competitive Sealed Proposals (CSP) method where designs are complete before pricing and qualifications are considered in the award of projects. All have their place and unique merits which may provide value and efficiencies for TWDB financial assistance recipients.

TxWIN acknowledges the merit of these alternative procurement and project delivery methods where additional selection criteria may be used in addition to price as a consideration awarding

construction contracts. However, it must be noted that these alternative contracting methods have only been available to public owners in the Texas civil construction arena since 2007.

As industry and public owners become more familiar with and utilize APD methods and qualifications in the selection process, it is critical that the integrity of the competitive process and public contracting law are observed and not manipulated to create artificial barriers to full and open competition. It is well documented that the advent of increased APD use has largely benefitted large national and international construction and design firms effectively creating artificial barriers to market entry for Texas domiciled construction and engineering firms.

While this trend may change over time, it is imperative that the TWDB and the Legislature acknowledge its duty to promote a transparent, and competitive bidding and procurement processes which provide value for public dollars spent investing in our water infrastructure which do not exclude Texas contractors and engineers.

As previously noted in our letter to the Texas Water Development Board dated March 26, 2014, language was included in HB 4's Advisory Committee Section which explicitly states that the SWIFT Advisory Committee will conduct "an evaluation of methods for encouraging participation in the procurement process by companies domiciled in this state or that employ a significant number of residents of this state"

To date neither the Advisory Committee nor TWDB has addressed this issue, nor does this rule making contemplate how to accomplish this.

As noted in our previous recommendations, and references in this rule-making's preamble, the vast majority of TxWIN's recommendations with regard to the construction and bidding process will ensure Texas domiciled businesses, including small and disadvantaged businesses, will be considered on a level playing field with national and international construction and engineering companies particularly in scenarios where financial assistance recipients elect to utilize alternative project delivery methods.

Our recommendations will assist in promoting objective and inclusive procurements and can be implemented without a formal rule-making or legislative action. They are based on principles of

common sense, transparency, competition and fairness. We are confident that our recommendations will promote a greater degree of accountability for public dollars spent and a level playing field to ensure that procurements enhance competition rather than to excluding qualified Texas construction and engineering firms.

SWIFT and all other financial assistance provided by the TWDB should be held to a higher standard, and in order for these programs to be successful, they must be inclusive of static Texas domiciled businesses that are owned by and employee Texas citizens. TxWIN members look forward to addressing this issue in earnest with TWDB and the SWIFT Advisory Committee in the near term.

2. HB 4 American Iron and Steel Requirements

“Buy American” may sound good on its face, however these policies ultimately fail to recognize our industry’s global supply chain. It must also be noted that prohibitions on material and equipment used for water infrastructure projects in Texas is not a substitute for failure to enforce international trade policy by the federal government.

With regard to TWDB’s reference to its decision not to “propose a rule related to a requirement that iron and steel products and manufactured goods used in board-financed projects be produced in the United States, under certain circumstances.” TxWIN would like to publicly acknowledge our gratitude to the TWDB leadership and staff for its consideration of TxWIN recommendations which were incorporated into TWDB’s guidance for both state and federal assistance programs.

While we generally disagree with these types of protectionist policies, we are committed to assisting our members and participants in TWDB funding to comply with the new HB 4 requirements. We are satisfied that the Board has made the effort to clarify responsibilities during the pre-construction, design and construction phases of projects including the requirement that that designs are compliant with AIS requirements, and that compliance has been properly noted in all design and bid documents.

We cannot stress enough how critical is is that proper consideration of U.S. Iron and Steel Requirements be addressed in the design phase of projects to minimize unnecessary risk. TxWIN maintains concerns that the self certification process in lieu of a more regimented policy may

result in varying interpretations on a project by project basis. As more projects are affected by this new requirement TxWIN is committed to working with TWDB and its financial assistance recipients to achieve compliance and work on additional guidance or rule makings should TWDB elect to do so. As we have previously discussed, there may be the need for TWDB to consider similar waiver processes to what the U.S. EPA has promulgated in its guidance including *di minimus* exceptions, and more prescriptive guidance with respect to achieving compliance.

There are bound to be issues with this policy which will create additional costs, and administrative burdens for all parties involved in the construction process. As we have noted on numerous occasions, these policies are particularly costly and problematic for advanced systems which are incorporated into water and wastewater treatment plants. One key difference between the current federal requirements and those included in HB 4 is the exemption for equipment incorporated into water and wastewater facilities including such items as pumps, UV and reverse osmosis systems, instrumentation, SCADA and other highly technical and advanced systems. Likewise there are also many small incidental items incorporated into facilities which may prove to be difficult to document or acquire for compliance purposes.

As the new requirement impacts more projects funded by the TWDB, TxWIN is eager to work with you and the legislature to examine the administrative and hard costs to your financial assistance recipients, as well as the administrative burdens, and associated liabilities for industry. It is our view that this particular policy should be examined and discussed by the SWIFT Advisory Committee and ultimately amended or repealed by the legislature.

Manipulating market share and picking winners and losers prior to engaging in a competitive process under any circumstances is bad public policy, as is allowing for increased project costs up to 20% to comply with this requirement.

Again, TxWIN appreciates both the TWDB and the EPA's previous consideration of our views on this topic and appreciate TWDB's consideration in incorporating a number of our recommendations and best practices into your guidance. TxWIN members look forward to revisiting these issues with the SWIFT Advisory Committee, TWDB, the Legislature and the water community at large in the future.

Section-by-Section Commentary and Recommendations on Selected Subject Matter

1. Inspection, Certification and COA in DIVISION 5. CONSTRUCTION PHASE 31 TAC §363.51

Language in HB 4 referencing inspection and certification of projects was very limited in scope and deleted language referring to sound engineering principles and replaced that language with a reference to plans and specifications which are defined in contract and design documents and are much less subjective in nature than “sound engineering principals”.

It is our understanding that legislative intent of this language was to enable a project engineer to sign off on and approve a project as ready for Certificate of Approval or “COA” based on construction being performed according to plans and specifications, which is the last step by TWDB to certify and close out a project including release of final retainage, which can constitute up to 5% of the total contract awards and is of great significance to contractors, their vendors and subcontractors.

The intent of the language in HB 4 was to clarify responsibilities of the engineer of record on projects to certify compliance with plans and specifications to the Executive Administrator to avoid a long and drawn out and duplicative project close out and review processes by TWDB. Again this language change was intended to place the onus on an the engineer of record in the COA process to certify that a project has or has not been constructed according to plans and specifications, also eliminating vague references to “sound engineering principles” rather adding additional layers of review by TWDB.

The legislative language was limited in scope and did not raise any red flags for industry during session or in the preliminary in the pre-rule-making phase on this section because it was viewed as non-controversial. In addition to implementing the language change to the COA process in Section 17.183, and 17.187of the Water Code, TWDB has elected to make additional changes in the proposed rule that were not included in the legislation some of which are extraneous in our view. TxWIN understands the intent of TWDB to “clean up” certain aspects of the Water Code in this rule making, but we respectfully request that you consider the following items.

COA Language changes in HB 4 were as follows:

SECTION 2.08. Section 17.183, Water Code, is amended to read as follows:

Sec. 17.183. CONSTRUCTION CONTRACT REQUIREMENTS. (a) The governing body of each political subdivision receiving financial assistance from the board shall require in all contracts for the construction of a project:

- (1) that each bidder furnish a bid guarantee equivalent to five percent of the bid price;
- (2) that each contractor awarded a construction contract furnish performance and payment bonds:
 - (A) the performance bond shall include without limitation guarantees that work done under the contract will be completed and performed according to approved plans and specifications and in accordance with sound construction principles and practices; and
 - (B) the performance and payment bonds shall be in a penal sum of not less than 100 percent of the contract price and remain in effect for one year beyond the date of approval by the engineer of the political subdivision;[and]
- (3) that payment be made in partial payments as the work progresses;
- (4) that each partial payment shall not exceed 95 percent of the amount due at the time of the payment as shown by the engineer of the project, but, if the project is substantially complete, a partial release of the five percent retainage may be made by the political subdivision with approval of the executive administrator;
- (5) that payment of the retainage remaining due upon completion of the contract shall be made only after:
 - (A) approval by the engineer for the political subdivision as required under the bond proceedings;
 - (B) approval by the governing body of the political subdivision by a resolution or other formal action;and
 - (C) certification by the executive administrator in accordance with the rules of the board that the work to be done under the contract has been completed and performed in a satisfactory manner and in accordance with approved plans and specifications ~~sound engineering principles and practices~~;
- 6) that no valid approval may be granted unless the work done under the contract has been completed and performed in a satisfactory manner according to approved plans and specifications;[and]....

SECTION 2.08.AA Section 17.183, Water Code, is amended to read as follows:

(C) certification by the executive administrator in accordance with the rules of the board that the work to be done under the contract has been completed and performed in a satisfactory manner and in accordance with approved plans and specifications

SECTION 2.09. Section 17.185(a), Water Code, is amended to read as follows:

- (a) The board may inspect the construction of a project at anytime to assure that:
- (1) the contractor is substantially complying with the approved engineering plans and specifications of the project; ~~and~~
 - (2) ~~the contractor is constructing the project in accordance with sound engineering principles.~~

SECTION 2.10. Section 17.187, Water Code, is amended to read as follows:

Sec. 17.187. CERTIFICATE OF APPROVAL. The executive administrator may consider the following as grounds for refusal to give a certificate of approval for any construction contract:

- (1) failure to construct the project according to approved plans and specifications; or
- (2) failure to construct the works in accordance with sound engineering principles; or
- (3) failure to comply with any term of the contract.

TWDB Proposed Amendments to [§363.51](#) (relating to Inspection during Construction)

are as follows:

The proposed amendments to [§363.51](#) (relating to Inspection during Construction) adds the phrase "provisions for environmental mitigative measures," in order to be consistent with §363.731. The requirement that the project engineer give assurance that the project is constructed in accordance with engineering principles is deleted for consistency with [Texas Water Code](#) §§17.183(a)(5)(C), 17.185(a), and 17.187. The amendment also adds that the project is constructed in accordance with sound construction principles for consistency with [Texas Water Code](#) §17.183(a)(2)(A). "

TxWIN would like to make note of the fact that TWDB language adding "provisions for environmental mitigation measures" to [§363.51](#) in the "Inspection Authority" which is a reference to storm water controls presently only applies in the Code to one emergency program found in [§363.731](#). While this change is outside of the scope of HB 4 we do not object to the addition of this language since storm water protection plans and mitigation measures are in fact standard for all projects.

We do respectfully request that the TWDB delete the extraneous language adding the language "that the project is constructed in accordance with sound construction principles", added to [§363.51](#), [§363.731](#).

Due to the deletion of language TWDB has elected to add the term "sound construction principles" to accompany the deletion of "sound engineering principles" to conform with its appearance in one other instance with the Water Code and language deleted in HB 4. This appears to be extraneous and unnecessary as it is vague, and references meeting obligations of the performance bonds in only one instance in the water code.

Legal counsel has advised that "Sound Construction Principles" is not legally enforceable contract language, does not reflect accepted industry language or contract law. Rather than

adding extraneous language TxWIN recommends that TWDB change the proposed to reflect changes outlined in SECTION 2.09 and 2.10 of HB 4 to read as follows:

§363.953. Inspection of Projects.

~~[(a)]~~ After a construction contract is awarded, the rural community shall provide for adequate inspection of the project by a registered professional engineer and require the engineer's assurance that the work is being performed in a satisfactory manner in accordance with the approved plans and specifications, other engineering design or permit documents, approved alterations, provisions for environmental mitigative measures, and **according to the approved plans and specifications** ~~in accordance with sound [engineering principles and] construction principles and practices.~~ The executive administrator is authorized to inspect the construction and materials of any project at any time, but such inspection shall never subject the State of Texas to any action for damages. The political subdivision shall take corrective action as necessary to complete the project in accordance with approved plans and specifications.

The language change in HB 4 deleting “sound engineering principles” and adding compliance with plans and specifications should be adequate to clarify duties of the engineer and the contractor in the inspection and COA process.

2. Prioritization Criteria §363.1304

In the rule-making preamble and on several occasions TWDB has publicly stated that “readiness to proceed” and projects being “shovel ready” is very significant in terms of securing financing through the sale of TWDB bonds and in the closing financial assistance applications. TxWIN provided comments in the pre-rule-making period through participation in public meetings and in written comments regarding what typically constitutes “readiness to proceed”, and generally the Board’s proposed criteria follows our recommendations.

TxWIN recommends that TWDB further define types of information required to constitute readiness to proceed in addition to 30% of design achieved and consider similar criteria TWDB has proposed in §363.1307 d(1) of this proposed rule which may also prove to be a useful means of defining readiness to proceed as laid out in the Pre-design funding option as follows:

“construction cost, preliminary engineering feasibility data which will include at minimum: a description and purpose of the project; area maps or drawings as necessary to fully locate the project area(s); a proposed project schedule; estimated project costs and budget including sources of funds; current and future populations and projected water needs and sources;”

Due to TWDB's repeated emphasis on timing of projects in public venues and in the preamble language relative to securing funding for projects and the sale of bonds, TxWIN recommends that TWDB consider awarding additional points for projects which have completed or substantially complete design as an additional criteria in this section category. Projects with complete designs and funding expended for the planning of capital projects should be eligible for additional points and given higher priority in the evaluation process.

Additionally, we presume that 18 months to award contracts and begin projects falls within the requirements to close financial assistance agreements, and in instances where assistance takes shape in the pre-design category, which may include funds for design, and or construction the 18 month period seems reasonable. We must note that this 18 month period seems to be in conflict the the 12 month requirement in the proposed language for the Participation program in §363.1308 (g)(3).

We also respectfully ask that TWDB clarify what constitutes "planning not required in §10.A, and whether this refers to non-capital projects or other circumstances.

3. Pre-design Funding Option §363.1307

This section lays out basic requirements for the Pre-design funding option and language for the SWIFT is essentially the same as current TWDB programs which allows financial assistance recipients to apply for funds for design and construction concurrently.

Proposed language in §363.1307(b) states;

"Reservoir projects are eligible for a board commitment to fund planning, permitting, acquisition, and design costs under this option. Applicants for reservoir construction funds must complete planning, permitting, acquisition, and design before receiving a commitment to fund reservoir construction costs."

If TWDB does not intend to award financial assistance for reservoir construction projects without completed designs this would negate the use of at least two project delivery methods including Construction Manager at-Risk and Design Build in which construction and design are performed

concurrently. Both are legally available means to political subdivisions in the State of Texas under Government Code §2269.

We respectfully request that TWDB clarify this particular language, or reconsider language which appears to explicitly prohibit alternative project delivery methods to be used which is often the case on large scale multiple phase projects where concurrent design and construction and or phased project approaches are appropriate.

Further §363.1307 (e)3 also discusses TWDB's approval of bid documents prior to award of funds. It is critical that TWDB takes an active role in the approval of bid documents as outlined in the proposed rule.

TxWIN would like to the reference to our comments acknowledged in the preamble of this rule making regarding our desire to partner with TWDB on SWIFT and other programs to implement our recommendations on the "bidding and construction oversight process" to establish guidelines and best practices to encourage transparent and competitive bidding and procurement processes starting with the review of procurement methodologies and project advertising requirements.

We are cognizant that these recommendations may be more appropriately dealt through other administrative actions and partnering efforts with industry, however we fee that it is appropriate to repeat our recommendations to promote a transparent use of funds and . ways to ensure competitive bidding and procurement processes by TWDB financial assistance recipients.

- Require requests for proposals (RFP), requests for qualifications (RFQ) and bid notices for prime contracts meet criteria in Texas Government Code §2269.052 and be posted on Texas Water Development Board website and, or the Texas Comptroller's [Electronic State Business Daily \(ESBD\) website](#). Presently political subdivisions in Texas can post project information on the ESBD website at no cost.
- In the event that financial assistant recipient's do maintain publicly available bid advertising on their website a link to that information in addition to basic project information contained in bid notices should be adequate.

- If project information is not publicly available on the financial assistance recipient's website, then contact information and links to information (including project information hosted by engineers, or any third-party vendors providing bid advertisement or procurement administration services) should also be provided by the financial assistance recipient to the TWDB or ESBD.
- In addition to basic information describing when and where bids and proposals are due, information should include and voluntary or mandatory pre-bid meetings, and links to additional relevant project information including plans and specifications.
- Assistance recipients should be prohibited from using commercial electronic bid advertising services which charge a fee to prospective bidders for access to basic project and pre-bid information that would normally be included in a public bid notice.
- Projects that elect to utilize methods other than traditional competitive bidding should be strongly encouraged as a best practice to place bid notices online well in advance of the minimum time requirements in to promote competition, transparency and value for public dollars invested in projects.

TxWIN would like also like to see the following steps taken to promote responsible stewardship of public funds and a level playing field for Texas Companies through the promotion of competitive and transparent procurements including:

- Guidelines should be developed to assist TWDB financial assistance recipients in selecting procurement methodologies which are appropriate for their particular project taking such factors as experience, size, scope, complexity, schedule, and maximizing competition into consideration.
- Prior to publicly advertising projects, all projects receiving TWDB funds and utilizing methods other than competitive bidding (design-bid-build) must be reviewed appropriate TWDB legal staff or procurement experts from the Texas State Comptroller to ensure that Requests for Proposals (RFP) and Request for Qualifications (RFQ) do not discriminate

against Texas companies by utilizing overly prescriptive qualifications. Financial assistance recipients should be encouraged to take appropriate corrective measures and modify procurements to ensure that they are inclusive and competitive.

TxWIN is willing to participate in additional discussions with the Advisory Committee, TWDB and the Comptroller's office to identify what might be viewed as non-inclusive or anti-competitive by Texas industry standards.

Additionally, TWDB presently has [Alternative Project Delivery Guidance](#) that were developed in conjunction with the state administered and federally funded EPA State Revolving Loan Fund or "SRF" program which provide guidance for the utilization CMAR and Design Build in conjunction with SRF funds. There is no such guidance presently for non-SRF funded projects including projects the funded by SWIFT.

TxWIN recommends that TWDB re-visit this guidance with a group of industry stakeholders in relation to the SWIFT and other programs to assist the TWDB in developing additional guidance in relation to non-federal financial assistance programs to ensure that these methodologies are being used correctly and in a manner which reflect industry best practices.

4. Participation Program §363.1308

TxWIN provides the following commentary in reference to **"assur(ing) that proper procedures are observed in advertising for bids and selecting a bidder to construct the project"**.

TxWIN recommends that TWDB insert a reference the Texas Government Code § 2269 with regard to public notice requirement and construction selection requirements for the various different procurement and selection methods available to political subdivisions.

TxWIN proposed language changes to §363.1308 (d) are as follows:

(d) Master Agreement. The board and the political subdivision shall enter into and execute a master agreement the text of which shall include, but not be limited to, the responsibilities, duties, and liabilities of each party, including the responsibility of a designated political subdivision to assure that proper procedures in are observed in advertising for bids and selecting a bidder to construct the project according to **Government Code Chapter 2269**; the board's cost of acquisition; procedures for disbursement of board

funds for the project; recognition of a political subdivision's right of first refusal prior to any sale of the board's interest in the project; a non-competitive clause; a schedule for purchase of the board's interest in the project by the political subdivision; and any other provisions deemed appropriate and necessary by the board.

Additional observations on §363.1308 (g)(3) regarding award of financial assistance and commencement of construction which is as follows:

(3) The application shall be scheduled on the board's agenda, and representatives of the prospective purchaser and other interested parties shall be notified of the time of the meeting. At the conclusion of the meeting to consider the project, the board may resolve to approve, disapprove, approve with conditions, or continue consideration of the application. A commitment will include a date after which the financial assistance will no longer be available. That date shall be the end of that month which is twelve months from the month of board commitment.

The Board may wish to reconsider changing scoring the prioritization criteria from 18 to 12 months in proposed §363.1304 as these appear to be in conflict with respect to what constitutes readiness to proceed to maintain financial assistance.

5. §363.1310 Action of the Board on Application

In TWDB's summary of this section feedback has been solicited about the feasibility of segmented funding over multiple years stating, "multi-year take downs will be a beneficial option for funding larger projects with high capital costs and longer construction schedules".

TxWIN would like to raise the following issues for TWDB's consideration as this may have unintended consequences on contract administration and construction activities. We acknowledge the potential benefit of allowing more and larger projects to be funded simultaneously and it is not uncommon for construction to occur on large capital projects over multiple years as opposed to lump sum financial assistance commitments.

The Board must be cognizant that any project delays associated with splitting or phasing funding over multiple years could potentially impact or interrupt construction schedules creating delays

resulting in liquidated damages for contractors, or potentially creating additional project costs to demobilize and remobilize projects. This could also potentially have impacts on performance bonds, the ability to pre-purchase and utilize materials and install equipment, payment draw schedules, cash flow and payments to subcontractors, suppliers and manufacturers.

With phased funding will the Board still make a commitment for the project in its entirety?

Would this necessitate multiple construction and engineering packages? What if the construction schedule exceeds the ability of the financial assistance recipient to pay invoices and billings? Will this cause or complicate the ability to administer change orders?

The proposed language does not directly address this, unless it is considered a special “condition”. TxWIN recommends additional discussions with industry and financial assistance recipients on this particular topic to minimize any potential unintended consequences which violate prompt payment laws, transfer risk, negatively impact cost, liability or the hamper the ability to compensate contractors, engineers, suppliers or vendors.

6. §363.1312 Reporting Requirements Regarding Historically Underutilized Businesses.

Proposed §363.1312 HUB reporting requirements state that the financial assistance recipient entity must report HUB participation before the Certificate of Approval will be released. HB 4 requires this reporting, but not as a condition of release of the COA and retainage, and we feel that this is an inappropriate and outside the scope of legislation and legislative intent.

Language in HB 4 regarding HUB Reporting is as follows:

HB 4 §15.437

(n) The executive administrator shall provide an annual report to the advisory committee on:

(1) the board's compliance with statewide annual goals relating to historically underutilized businesses; and

(2) the participation level of historically underutilized businesses in projects that receive funding related to a bond enhancement agreement under this subchapter.

(o) If the aggregate level of participation by historically underutilized businesses in projects that receive funding related to a bond enhancement agreement under this subchapter does not meet statewide annual goals adopted under Chapter 2161, Government Code, the advisory committee shall make recommendations to the board to improve the participation level.

The HUB Program as referenced in HB 4 applies very specifically to direct state agency procurements and contracts and services. HB 4 does not apply and did not extend application of the HUB Program to contracts funded through the SWIFT financial assistance awards to local political subdivisions which have varying requirements based on local assessments.

References to applicable requirements of the HUB Program in the Texas Administrative Code Title 34 Part I Chapter 20 Subchapter B RULE §20.13 can be accessed here:

[http://info.sos.state.tx.us/pls/pub/readtac\\$ext.TacPage?sl=R&app=9&p_dir=&p_rloc=&p_tloc=&p_ploc=&pg=1&p_tac=&ti=34&pt=1&ch=20&rl=13](http://info.sos.state.tx.us/pls/pub/readtac$ext.TacPage?sl=R&app=9&p_dir=&p_rloc=&p_tloc=&p_ploc=&pg=1&p_tac=&ti=34&pt=1&ch=20&rl=13).

Under HB 4 the scope and application of the HUB program has not changed and state HUB goals only to apply to the Board's agency wide goals for direct services and contracts are which outlined in §20.13 b :

Again, the Texas HUB program defines HUB criteria only applies to direct state agency bids and procurements.

TWDB is already subject to HUB requirements with respect to compliance with reporting goals as required in § 15.438(n)(1), TWDB should be able to capture and report direct expenditures for goods and services.

Statistics on local goals can be reported to TWDB prior to construction and compiled upon completion of projects including good faith efforts achieved. These figures could then be used to compile reports on an annual basis and provided to the Advisory Committee per the legislature's direction.

The only time when "non-local" state HUB or federal disadvantaged business contracting requirements could potentially apply to SWIFT financial assistance would be instances where direct federal dollars or federal assistance administered by TWDB are combined with SWIFT or SWIRFT funds in which case the federal regulations would conceivably supersede state law.

TWDB projects that currently receive money through the Clean Water and Drinking Water State SRF programs must comply with TWDB and EPA DBE or “Fair share” goals. Presumably any SWIFT funds combined with SRF dollars would be subject to SRF DBE contracting requirements as a condition of federal primacy.

Additionally, reporting fair share goals achieved as a condition of federal assistance through the SRF program is already required and should satisfy any reporting requirements necessary if federal assistance and SWIFT funds are combined.

See the following for additional information on the EPA DBE program as administered by TWDB.

<https://www.twdb.texas.gov/financial/instructions/doc/TWDB-0210.pdf>

http://www.twdb.state.tx.us/financial/programs/DBE/doc/DBE_Compliance_Policy.pdf

http://www.epa.gov/osbp/pdfs/share_goals.pdf

The only scenario where Texas HUB program requirements could apply to SWIFT projects would be under circumstances where TWDB is given the authority to directly fund, contract for construction and design services, own and operate facilities. TWDB does not presently have this authority.

Presently, the [State Participation Program](#) in which TWDB may have partial ownership in projects explicitly delegates contracting authority to local political subdivisions that are responsible for construction management and contracting activities and ultimate ownership of projects. Presently the State HUB program does not apply to the State Participation Program.

Please see following the following links to the Texas Administrative Code which governs the State Participation Program, including terms of master agreements and construction administration.

[http://info.sos.state.tx.us/pls/pub/readtac\\$ext.ViewTAC?tac_view=5&ti=31&pt=10&ch=363&sch=J&rl=Y](http://info.sos.state.tx.us/pls/pub/readtac$ext.ViewTAC?tac_view=5&ti=31&pt=10&ch=363&sch=J&rl=Y)

[http://info.sos.state.tx.us/pls/pub/readtac\\$ext.TacPage?](http://info.sos.state.tx.us/pls/pub/readtac$ext.TacPage?)

sl=R&app=9&p_dir=&p_rloc=&p_tloc=&p_ploc=&pg=1&p_tac=&ti=31&pt=10&ch=363&rl=1009

[http://info.sos.state.tx.us/pls/pub/readtac\\$ext.TacPage?
sl=R&app=9&p_dir=&p_rloc=&p_tloc=&p_ploc=&pg=1&p_tac=&ti=31&pt=10&ch=363&rl=1010](http://info.sos.state.tx.us/pls/pub/readtac$ext.TacPage?sl=R&app=9&p_dir=&p_rloc=&p_tloc=&p_ploc=&pg=1&p_tac=&ti=31&pt=10&ch=363&rl=1010)

Regarding the proposed language in §363.1312 “Reporting Requirements Regarding Historically Underutilized Businesses”, we recommend the following changes to adhere with legislative intent and the current scope of the HUB program.

“The political subdivision receiving financial assistance from the board shall report to the executive administrator the amounts of project funds, if any, which were used to compensate historically underutilized businesses that worked on the project. ~~The executive administrator shall not issue a certificate of approval on a project until this report has been received.~~”

Creating additional conditions on the COA process placing additional requirements on release of retainage is outside of the scope of legislative intent. Only local requirements may be applied which must align with state and federal HUB/DBE definitions. If good faith efforts demonstrated are adequate for financial assistance recipients there cannot be any legal consequence or withholding of COA/retainage that may occur if there is a failure to meet specific goals. TWDB can collect this information to fulfill reporting requirements to the Advisory Committee without making this a condition of the COA process and we respectfully request that TWDB make the change requested.