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House Government Transparency & Operations Committee

H.B. 2634 Relating to Construction Manager-At-Risk

by Rep. John Kuempel, Rep. Mando Martinez, and Rep. Wayne Smith

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Chairman Elkins, Vice Chairman Walle, and fellow distinguished Committee Members, my name is Perry Fowler and I am the Executive Director of the Texas Water Infrastructure Network (TxWIN), our website is txwin.org. We enthusiastically support the reforms proposed in HB 2634 by Representatives John Kuempel, “Mando” Martinez and Wayne Smith. We appreciate the opportunity to testify here for you today. I have already met personally with many of you and your staff regarding this issue and will keep my spoken testimony brief today. Please note that our written testimony includes a number of attachments that will help paint a more complete narrative demonstrating why this legislation is necessary. I am hopeful that the hearing today marks the next step forward in the promotion of ethical and competitive construction procurements for Construction Manager-At-Risk or CMAR projects.

Who is TxWIN and Why Do We Care?

TxWIN was founded by group of like-minded Texas construction companies in the fall of 2013 that agreed there was a need to create a statewide 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, many of whom have been building projects in Texas for over forty years and multiple generations. TxWIN contractor members are highly regarded amongst their industry peers and the design and owner community for their skill, integrity and 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, and 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 and healthy Texas construction industry. TxWIN members believe that a transparent and competitive construction marketplace provides value for water utilities owners and the public. It is after all the public, ratepayers and taxpayers, who ultimately rely on and are responsible for the cost of providing water infrastructure.

TxWIN members are keenly aware of how critical their role is in building the projects that maintain the health, safety and economic viability of Texas. TxWIN members live here, work here and employ Texans all across the state. Our members care about our communities they live and work in and want to be a part of water solutions that will propel Texas into the future.

TxWIN acknowledges the merit of procurement approaches that provide alternatives to traditional competitive bidding, which may include selection criteria regarding proposer's qualifications in addition to price as a consideration awarding construction contracts. TxWIN also acknowledges the potential benefits of alternative project delivery methods, which allow for concurrent design and construction such as Construction Manager-At-Risk know as "CMAR" and

Design-Build. However, we maintain grave concerns when these methods are utilized to manipulate outcomes using subjective and anti-competitive criteria that discourage rather than promote competition.

We also have significant concerns about the CMAR procurement process specifically being used as "de-facto" design-build in absence of the legal authority to do so without the benefit of a competitive procurement process, or controls which ensure the appropriate division of roles and responsibilities in the design and construction process. The CMAR process is not intended to be used to contravene the competitive process, or put off competition until later when it suits the owner or increases the bottom line of an integrated engineering firm. That is the issue that HB 2634 addresses by doing the following:

- Closes a loophole in Construction Manager at Risk (CMAR) contracting, which calls for the award of separate contracts for design and construction, but fails to explicitly do so by allowing the same or related entity to be awarded contracts for both design and contraction which is contrary to industry best practices.
- This loophole (unique to Texas) allows the procurement process to be administered in a manner which undermines competition by allowing qualifications to be prescriptively crafted in manner that favor the engineer/designer or its related "construction" entity thus predetermining, or influencing and undermining the competitive process.
- Ensures the separation of designer and contractor that have separate roles and responsibilities and ensures the integrity of the procurement process, which promotes value and competition while protecting the interests of owners and rate/taxpayers whom they serve.

What is CMAR?

The principal idea and function of the construction manager-at-risk or CMAR process is an owner hires an designer which may be an architect or engineer (AE) to serve as their advisor and advocate to develop the scope, function, budget and ultimately design a project not unlike the traditional approach to design. The AE also serves as the owner's agent during the construction process. The other key element of this process is the construction manager-at-risk, which is an actual separate function. The construction manager-at-risk is typically a general contractor responsible for what a contractor would normally do on any construction project. So CMAR refers to the process and the function of the contractor.

The difference between the function of the designer and the CMAR in this process is critical and are very relevant with respect to the reforms in HB 2634.
First, contrary to the traditional process where a designer completes the design before going out for construction bids, in the CMAR process the designer typically achieves a preliminary design and before design is complete the CMAR or contractor is selected through a competitive process, and brought on board to assist with constructability reviews, or value engineering to assist the designer in achieving efficiencies regarding design and project approach.

In other words, the CMAR is there to bring their practical construction know how into the equation. The designer and contractor have clearly defined roles and responsibilities for design and construction, but the idea is that collaboration can bring innovation and efficiencies to the process. In the process while design is still being developed, the CMAR and the owner will work to negotiate the guaranteed maximum price or GMP, and the CMAR also has the ability to start the actual

construction process as it works with the engineer to get to a complete and final design.

In addition to participating in the project in a collaborative fashion, the CMAR is responsible for competitively bidding out work packages which it may elect to compete for and self-perform. These may be items typically performed by general contractor, a specialty contractor, or on a large project it may be an entire sub-set of the project. There are times when a self-performing CMAR will bring efficiencies to the process with greater control over construction cost and schedule factors. The CMAR is also responsible for maintaining the project schedule and managing the construction process, schedule and budget – hence the term "at-risk".

Withstanding the concurrent or collaborative design and construction aspect CMAR is very similar to traditional construction, which makes it for an attractive option for owners who still want to have their designer acting in its traditional role as a trusted advisor. The difference on the construction side of the equation is utilizing qualifications in addition to cost factors in the contractor selection process and contractor innovation and collaboration with the designer.

So what is the problem HB 2634 seeks to resolve? Is there a problem? It depends on whether you believe the Texas CMAR procurement process should used as industry best practices dictate, where separate entities are performing separate functions, that owners and the public interest are maintained using the process correctly, and that an actual objective competitive process is used to evaluate CMAR contractors. Should CMAR be used correctly in Texas in a way that promotes competition and value or misused to manipulate competition? When CMAR is used correctly and in a competitive manner will HB 2634 inhibit the

ability of the process to be used correctly? Is competition, objectivity and fairness in the procurement process optional, a burden perhaps, or something to avoid?

Current Texas Law and Why we Need HB 2634

Texas law for Construction Manager at Risk (CMAR) projects is presently structured in a way, which allows it to be used in a manner which is contrary to industry best practices allowing the same, or related entities to be awarded design and construction contracts. Although current law and industry best practices requires the award of separate contracts, roles and responsibilities for design and construction in CMAR contracting, there is a loophole that is unique to Texas law which fails to ensure that separation. For companies that may have "construction" capabilities or a related entity that is a "contractor" this opens the door for significant conflicts of interest which may (and has) resulted in anti-competitive procurements which also may have serious implications for the way projects are administered and placing the public interest in jeopardy.

The current loophole in Texas CMAR law allows qualifications in requests for proposals (RFQ) or requests for proposals (RFP), to be shaped in ways that allows qualifications to be established that virtually eliminate all competition for the CMAR contract. Although legal, allowing this practice under current law is harming experienced and capable Texas contractors, particularly in water infrastructure markets. Industry best practices and current law have clearly defined roles and separate contractual responsibilities for designers and CMAR contractors. As we have already mentioned, the CMAR process is not intended to be used as de-facto design build, or to subvert the selection process. The purpose of

CMAR is to draw on the strengths of all project participants and appropriately allocate risk in order to deliver a successful project.

Under current law there is nothing that prohibits a designer or AE from influencing qualifications that may benefit specific and or related companies by placing greater emphasis on certain qualifications such as experience on CMAR projects. For instance, a Request for Qualifications or (RFQ) may state that twenty five of one hundred points will be based on the respondent's past performance specifying that they must have completed five wastewater treatment plants using the CMAR method in the last five years, rather than five projects of similar size and scope. Given the relative newness of CMAR to the Texas market this approach has been effectively used to disqualify the majority of Texas construction firms. What almost always happens in a situation like this is the only CMAR that happens to score well on an RFQ or RFP happens to meet the exact criteria laid out in the procurement documents is related to the engineer.

When the proposing CMAR/contractor is the same as, or related to the engineer and qualifications are geared to benefit that company it absolutely undermines what is supposed to be a competitive process. No rational person would think that a public owner responsible for public funds that are being invested in water infrastructure would want to decrease rather than increase competition for projects, but this simply has not been the case.

Presently this behavior, which constitutes a clear conflict of interest is allowed by current law, it is shameful. The fox is guarding the henhouse.

Rather than narrowing the competitive field, the purpose of utilizing qualifications in the selection and evaluations process should be an objective assessment of a company's skill and construction experience rather than a process that singles out or favors a particular entity. The ability to award both design and CMAR contracts to related entities is harming competition and blurring the line between designer and contractor thus effectively eliminating all protections for owners and taxpayers which start with the procurement process. What this process does is allow the engineer to be a project broker increasing their bottom line through their contractor usually through inflated general conditions, getting a cut in their "management fee" of every subcontract that is awarded.

In addition to harming competition, awarding CMAR and design contracts to related companies with what are supposed to be distinctly different contractual roles and responsibilities can and does lead to inflated project costs and inefficiencies.

What is there to stop an engineer with a related CMAR from inflating project budgets and building in incentives to maximize their overall profit? What is there to stop a CMAR that is not performing any physical work on a project from placing unreasonable demands on subcontractors, or cutting corners to maintain and enhance the bottom line?

This shifts the entire dynamic of the CMAR process into a something very different than it is suppose to be, effectively making CMAR a design-build process without any of the controls that would otherwise be in effect starting with a flawed and anti-competitive procurement process.

Texas CMAR law fails to ensure fair the appropriate separation of entities and the lack of fair and open competition we are presently experiencing in industry and threatens the integrity of the public procurement system by allowing designers to establish qualifications that favor related entities. The changes in HB 2634 ensure that the CMAR process cannot be misused stifling competition placing owners and the public interest in jeopardy by ensuring competition and the separation of construction and design entities.

The Learning Curve Utilizing Alternative Project Delivery in Texas Civil Construction Markets

APD procurement and project delivery in Texas markets has only been available to public owners in the Texas civil construction arena since 2007, and there is still a degree of inexperience by owners and the construction and design community in Texas with certain contracting methodologies. As industry and public owners become more familiar with and utilize alternative project delivery or "APD" methods it is critical that the integrity of the competitive process and public contracting law are observed.

It has been well documented that the advent of increased APD use in the water and transportation arena has largely benefitted large national and international construction and integrated design firms who have effectively utilized these methods to create market share in Texas while simultaneously creating artificial barriers to market entry for Texas domiciled construction and engineering firms participating as prime designers and contractors. While this trend may change over time, it is imperative the law does not further harm Texas contractors and engineer

or the political subdivisions that hire them by being manipulated in such a way that competition is eliminated for profit or convenience sake.

HB 2634 codifies and acknowledges our responsibility to promote inclusive, fair, objective, transparent, and competitive bidding and procurement processes which provide value for public dollars spent investing in our infrastructure. It is imperative that the legislatures address the CMAR loophole that is shutting Texas companies out of competition and allowing projects to be awarded to related entities of engineers with the inside track on the job due to qualifications that eliminate rather than promote competition.

Although we are seeing slight improvements in the competitive arena, in our view there is still a tremendous learning curve for public owners and industry with regard to how these contracting vehicles can and should be used in a manner that is inclusive and promotes competition. Unfortunately, it has been the experience of the vast majority of local and Texas owned companies that rather than creating an level playing field and creating opportunities for experienced Texas contractors, many traditional players in Texas infrastructure markets have found themselves on the outside looking in as owners seek to utilize different means of procuring and delivering construction projects.

I want to be absolutely clear that TxWIN as an organization does not object to the use of Alternative Project Delivery methods whether that be CMAR, design-build or other means. To the contrary, we acknowledge the merit of these various alternatives if they are done correctly starting with objective evaluations of qualifications in the selection process.

There is merit in evaluating companies past performance, personnel and capabilities. We also acknowledge the benefit of engaging experienced contractors in constructability reviews early in the design process and the prospect of contractors working in a collaborative manner with owners and designers. All of these aspects of alternative project delivery or APD can be beneficial for projects. What we do not support is using APD to pick winners and losers by artificially manipulating competition and market share to predetermine winners and losers excluding qualified Texas firms in the process.

In closing, there are numerous means and methods available to pubic owners in Texas which can integrate additional aspects into the design, selection and construction process which may result in better projects. Arguably the quality of design and construction and the ability to adhere to budgets is the unifying and critical factor to success with all of these methods where precious state and local dollars are being utilized to build our infrastructure. There is absolutely nothing inefficient about fully designing a project and going out for bids from qualified contractors, and there is no one size fits all approach.

We strongly object to using CMAR as de-facto design build especially in cases where competition is stifled by overly prescriptive selection and qualification criteria. This committee should favorably report out HB 2634 and the legislature must pass meaningful CMAR reforms to address the current loophole which allows related firms to be awarded design and construction contracts. The CMAR process can be beneficial to owners if the procurement process is conducted properly and in a manner that promotes competition.

No one particular construction or procurement method is best, will reduce costs, conflicts or shorten schedules, even though entire national organizations have been established around promoting these various alternative techniques.

Owners need to be aware of what they are getting into with respect to alternative procurement and project delivery methods. If public owners elect to utilize CMAR they should consider how to promote competition and be inclusive of static Texas owned companies. Manipulating results, and minimizing rather than promoting a competitive market hurts Texas and Texas companies. This is wrong and public dollars used for public construction and design projects should be held to a higher standard. Failing to do so harms the integrity of the public procurement process.

I am happy to answer any questions you may have and on behalf of TxWIN we appreciate the opportunity to continue working with the Committee in support of HB 2634 and the promotion of a competitive and dynamic Texas marketplace founded on principles of fairness and completion.

Attachments:

Perry L. Fowler Bio
HB 2634 One Pager
Articles and Previous Testimony
Attorney General Documents
Letters to Owners
RFQ Documents

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