

State Water Implementation Fund for Texas Advisory Committee

Testimony of Perry L. Fowler of behalf of



Texas Water Infrastructure Network (TxWIN)

July 15, 2016

Chairman Perry, Chairman Larson and other distinguished members of the SWIFT Advisory Committee, my name is Perry Fowler and I am the Executive Director of the Texas Water Infrastructure Network (TxWIN), our website is txwin.org. We appreciate the opportunity to provide testimony before you here today.

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 that impacting water infrastructure markets. Our membership is largely composed of family and employee owned companies. 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, TxWIN 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 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 the public and water utilities benefit from a healthy Texas construction marketplace. TxWIN members believe that transparent and competitive construction contracting practices provide value for water utilities and the communities who are ultimately impacted by the cost, function and quality of our infrastructure.

TxWIN appreciates the opportunity to discuss several policy items included in HB 4 and it is our goal to be a resource for the SWIFT Advisory Committee.

Recommendations on “Additional HB 4 Issues to be addressed by TWDB and the SWIFT Advisory Committee” in Water Code 15.438(b)(7)

HB 4 included language instructing the SWIFT Advisory Panel to examine and develop recommendations for “encouraging participation in the procurement process by companies domiciled in this state or that employs a significant number of residents of this state.” This language was the result of discussions centering on various alternative contracting and project delivery methods available to public owners which are increasingly using qualifications and other subjective selection criteria in addition to cost in the award projects for water infrastructure projects. The TWDB and SWIFT Advisory Committee have yet to address this directive from HB 4 and TxWIN would like to work with you to remedy this.

The proliferation and use of alternative procurement and project delivery methods including Construction Manager-at-Risk and Design-Build to a more limited extent, has been a more recent occurrence in our industry particularly in civil works or public works construction. Often these methods award projects under the auspices of qualifications rather than cost, and are characterized by integration and collaboration of construction and design teams. While these methods have their place, they are not appropriate for all projects although you would not know that if you were on the receiving end of various organizations marketing and promotional efforts.

The increase in the use of these methods in water markets have seem to be concurrent with and increase in contract awards to large national construction companies and integrated engineering and “construction” firms. TxWIN has documented a significant decrease in competition, and a disparity in awards on certain types of projects which favor experience with a particular “type” of project delivery which appear to coincide with increased trends in marketing and business development efforts to encourage owners to use these methods in which methodology and subjective qualification criteria, not cost as not the primary consideration of project awards.

In 2015 TxWIN worked to pass HB 2634 authored by Chairman John Kuempel with Representatives Mando Martinez, Cecil Bell, Kyle Kacal and Wayne Smith and Senate Sponsors Senator Zaffirini and Hinojosa. I am pleased to state that the rest of you also voted in support of this legislation which our members greatly appreciate. HB 2634 eliminated the anti-competitive practice particularly prevalent in water markets which allowed engineers to broker Construction Manager-at-Risk projects to related construction “construction” entities completely undermining the competitive process and placing public dollars at risk.

The abuse of the CMAR process addressed in HB 2634 was a significant improvement for our industry in the promotion of competition, transparency, and responsible stewardship of public funds, but Texas still has a long way to go. Unfortunately we still continue to see instances where qualifications appear to benefit certain companies while effectively diminishing, and discouraging competition by companies who are experienced and qualified.

Without going into too much additional detail today I would like to share some recommendations which TxWIN has previously shared with TWDB and the SWIFT Advisory Committee with the goal of working with you in the promotion of a more competitive, inclusive and responsible stewardship of TWDB administered financial assistance specifically as it applies to non-traditional procurement and project delivery methods available to political subdivisions.

Background

TxWIN has documented significant disparities in projects awarded through means other than competitive bidding to non-Texas domiciled construction and design firms. This has coincided with the increased utilization of Construction Manager at Risk (CMAR) and Design-Build for civil works projects, which have largely favored and awarded projects to large national and international construction and engineering firms.

Research and testimony presented during the 2013 Legislative session that resulted in the language instructing the SWIFT Advisory Committee to make recommendations for participation in the procurement process by companies domiciled in Texas showed that approximately 85% of design contracts and approximately 93% of construction contracts utilizing CMAR and Design-Build in water projects have been awarded to prime general contractors or construction managers domiciled outside the State of Texas. We are presently updating these statistics but I can tell you that there has not been a significant improvement to date.

The disparity in contract awards to Texas companies has largely occurred due to overly restrictive Requests for Qualifications (RFQs) and Requests for Proposals (RFPs) in addition to limited project information and bid notices. Rather than evaluating companies based on actual pre-construction, construction management, and self-performance capabilities, in many instances qualifications have been and continue to be shaped in a manner that favor companies with specific CMAR or Design-build experience which largely diminishes competition for and participation by Texas contractors. There are some instances where very large complex or time sensitive projects are good candidates for alternative project delivery, but more often than not we see the procurement process being used to justify selection of a particular contractor on small to medium sized projects resulting in a lack of competition which is not appropriate for publicly funded construction projects.

Evaluating companies based on their experience with projects of similar type, size and scope is the most appropriate and objective method to evaluate qualifications, rather than evaluation of experience with a particular delivery methods that have only been allowed in the Texas market over the course of the last decade. Overly restrictive RFQs and RFPs allow for arbitrary and subjective evaluation factors which stifle competition.

For example, to qualify to bid on some projects, a 100 point evaluation system may be used to determine whether a bidder is “qualified to bid” which may or may not be used in conjunction with actual cost factors. Thirty points may be assigned for a number of CMAR

projects completed often ranging from five to seven projects which effectively disqualifies the majority of potential qualified Texas companies who cannot meet this standard. Qualifications such as this that are not a significant measure of companies' capabilities and are creating artificial barriers to market access for Texas contractors large and small.

To date, this trend has largely continued with only marginal improvements in the market for Texas contractors and engineers. In practice, these methods can be used to pick winners and losers effectively prescribing which contractor will be selected for a project prior to advertisement of bids and submission of proposals based on relationships. Often times hand picked firms have access to project information before public notice and solicitations are made and heavily lobby owners to use certain methods which benefit them.

To be clear this does not happen on all projects, many owners who elect to use alternative project delivery and qualification based selection processes are conducting open and transparent procurements and understand the value of competitive procurements. In some instances owners who want to consider factors other than cost alone are opting to pre-qualify contractors and competitively bid projects, or use the Competitive Sealed Proposal method to award contracts which allow them to take qualifications and price into consideration.

There is also significant debate about the actual cost and time savings offered by some of these alternative project approaches which are often marketed as superior alternatives to traditional design-bid-build or competitive bidding. There can be legitimate benefits in the use of alternative contracting and project delivery methods, but they must be used properly, in a competitive and transparent manner.

This practice of picking winners and losers based on subjective evaluation criteria undermines fair and open competition on projects with public funds and is contrary to the interests of the public and the State of Texas. Again using qualifications to pre-determine outcomes prior to actual solicitations and formal procurement processes is contrary to the intended use and purported benefits of these contracting tools.

Presently the TWDB does not have any discretion or standards regarding use of these procurement or project delivery methods for state financial assistance programs including SWIFT.

TWDB Should Consider Development of Alternative Project Delivery Guidance

TWDB presently has Alternative Project Delivery Guidance that was developed for use in conjunction with the state administered and federally funded EPA State Revolving Loan Fund or “SRF” program that provide guidance for the utilization of CMAR and Design Build in conjunction with SRF funds. These standards were developed with public and industry input at the direction of the EPA and adopted at the discretion of individual states to ensure these contracting tools and project delivery methods are used properly. There is no such guidance for non-SRF funded state provided financial assistance for projects including the SWIFT.

RFP and RFQ Reviews

Until standards are developed, prior to publicly advertising projects, all projects receiving TWDB funds that utilize methods other than competitive bidding (design-bid-build) should be reviewed by appropriate TWDB legal staff or procurement experts from the Texas State Comptroller or third party subject matter experts to ensure that Requests for Proposals (RFP) and Request for Qualifications (RFQ) are inclusive and promote competition rather utilizing overly prescriptive qualifications.

Solicitation and Bid Notices

Accurate, transparent and timely bid information ensures maximum competition and value for the Texas public dollars and should be a top priority for all water infrastructure projects utilizing TWDB funds. The best way to ensure meaningful participation by Texas companies in SWIFT and other TWDB funded projects is through the promotion of a transparent and competitive bidding and procurement practices.

Presently § 2269.052 of the Government Code requires that a public entity advertise bids and requests for proposals twice in a two week period before bids or proposals are due. Please note that § 2269.052 advertising requirements are minimal and in many cases insufficient to maximize competition. This is the bare minimum requirement for public construction projects. Projects utilizing SWIFT and other TWDB funds should be held to a higher standard to ensure maximum transparency, competition and value for state and local dollars.

TxWIN has documented instances where competition has been stifled where limited notice is made, and some instances where invitations to bid and propose on projects that utilize alternative project delivery methods are made to select contractors and engineers in advance of, and outside of the scope of the required public notice period. Again, limited bid notices and the short timeframe for advertisement and publication requirements under current law may not provide an adequate amount of notice to ensure an inclusive and competitive bidding process which harms Texas companies, including small and disadvantaged businesses. Proposals for these types of project can be very costly and time consuming.

Failing to adequately advertise projects places other potential bidders at a competitive disadvantage. This anti-competitive practice harms Texas companies and undermines the integrity of the public procurement process and should be discouraged by the Advisory Board and TWDB.

Recommendations

TWDB and the Advisory Committee should re-visit existing SRF guidance with a group of industry stakeholders in relation to the SWIFT and other TWDB administered non-federal funding programs with the goal of providing a framework to ensure that these methodologies are being used correctly by financial assistance recipients in a responsible and informed manner that maximizes competition for projects and value for the Texas public.

Require requests for proposals (RFP), requests for qualifications (RFQ) and bid notices for prime contracts meet certain basic criteria 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 recipients do maintain publicly available bid advertising on their website, a link to that information in addition to basic project information should be adequate.

If project information is not publicly available on the financial assistant 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 availability of plans and specifications.

Assistance recipients should be prohibited from using commercial electronic bid advertising services that 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.

Concerns and Observations Regarding HB 4 Construction Material Requirements

While well intended, protectionist policies requiring the use of U.S. Iron and Steel and manufactured goods for public works construction projects are contrary to free market principles, and have the effect of diminishing competition, that create unnecessary liabilities, may artificially inflate project costs and increase regulatory burdens. Texas law specifically limits choices for material and equipment incorporated into water infrastructure while creating unfunded mandates for local governments seeking financial assistance from the Texas Water Development Board.

Unlike current federal policy which exempts incidental components, project specific equipment, materials and other broad categories of items incorporated into highly advanced water and wastewater treatment facilities, requirements included in HB 4 or “SWIFT” legislation passed in 2013 apply more broadly, and are more onerous than federal “Buy American” that apply to the TWDB administered EPA SRF financial assistance programs.

Legislative Background

In 2013 language based on HB 558 modeled after similar requirements in the American Recovery and Reinvestment Act of 2009 commonly referred to as “Stimulus” was added by amendment to HB 4 on the House floor despite its failure to advance through the regular legislative process. Although this language was subsequently rejected and removed by the Texas Senate Natural Resources Committee, the language re-appeared in conference which the Senate subsequently attempted and failed to remove.

Due to a language drafting error rather than applying iron and steel requirements to the SWIFT, the requirement ultimately applied to all other TWDB state financial assistance programs including the Water Infrastructure Fund, Rural Water Assistance Fund, Texas Water Development Fund II, Water Financial Assistance Account (DFund), and the Economically Distressed Areas Program Account.

In 2015 there were also attempts to expand the requirement to apply to broader categories of state and local project funds in HB 1007 which would have also included SWIFT. This legislation was supported by labor and steel interests and opposed by business groups, construction, manufacturing and technology interests. HB 1007 subsequently died in the House Calendars Committee. Again, language to expand the application to SWIFT was attached by amendment on the House floor via amendment to SB 1337 which passed the House and subsequently did not make the Calendar for reconsideration in the Senate.

Federal vs. State Requirements

The key differences between the current Federal requirements applicable to the SRF programs and Texas law in the Water Code 17.183, is the lack of discretionary project and item specific waiver authority, and waivers for small incidental items incorporated into facilities, which may prove to be difficult or impossible to source domestically or document for compliance purposes. Federal law also contains additional exemptions for highly technical systems incorporated into water and wastewater facilities. These waivers are crucial in recognizing the reality of how materials and equipment are sourced, manufactured and purchased. These waivers and exceptions exist because the EPA engaged in dialogue with industry through formal and informal rulemaking processes to ensure that compliance to these onerous requirements was achievable. As a subject matter expert at the request of TWDB I personally worked with the EPA Office Of Water to ensure compliance was achievable with the federal requirements when the policy was expanded to the SRF programs. The result of the EPA's outreach was a regimented but clearly defined regulatory compliance regime.

Unfortunately, TWDB elected not to engage in rulemaking authority in the context of the SWIFT rulemaking to implement the policy instead opting for a self-certification compliance regime which is much less prescriptive and more broadly applied without the safe harbor offered by waivers and exceptions in the EPA SRF requirements. The resulting policy in Texas is a more restrictive and broadly applied requirement than federal law with minimal compliance guidance. The result of this policy is increased cost regulatory uncertainty and

liability for all parties involved in projects. Failure to comply with state requirements may result in loss of project funding, criminal and civil penalties or final release of Certificates of Approval “COA” which allows releases final payment and release of retainage payments to contractors.

Summary and Recommendations

- Texas iron and steel requirements may partially negate or decrease project savings.
- Texas iron and steel requirements are more restrictive and less than those governing federal financial assistance programs administered by the TWDB in SRF programs.
- Restrictive material requirements create unnecessary liability, cost and regulatory burdens on financial assistance recipients, design consultants and contractors and fail to recognize the global supply chain.
- Restrictive material requirements place unfunded mandates on local ratepayers and increase the cost of projects for local communities.
- The lack of waivers and exceptions in Texas law is particularly problematic for water and wastewater treatment plant construction.
- Exceptions in Texas law are vague and the 20% project cost increase and trade law exceptions are virtually impossible to invoke.
- Political subdivisions can specify certain material and equipment characteristics for individual projects if they deem that is the best use of their resources or have legitimate concerns about the quality or performance of construction materials and equipment incorporated into projects.
- Attempts to expand these types of requirements should be rejected, and the Texas Legislature should amend the requirement to track more closely with federal SRF requirements and, or repeal or this requirement.
- Texas law should promote should promote competition and should not be used to pick winners and losers.

We appreciate the opportunity to work with the SWIFT Advisory Committee and the Texas Water Development Board. For additional information please contact Perry Fowler at plf@txwin.org or (512) 810-3969.