



April 25, 2022

Ms. Jennifer Jones
Executive Director
Sunset Advisory Commission
P.O. Box 13066
Austin, Texas 78711

RE: Texas Water Development Board & SWIFT Committee Sunset Review & Recommendations

Dear Ms. Jones:

On behalf of the members of the Texas Water Infrastructure Network (TXWIN), a 501C-6 non-profit trade association representing construction companies and related businesses in the Texas water infrastructure sector since 2013, I would like to submit the following commentary on the Sunset Committee staff recommendations for the Texas Water Development Board. TXWIN members are presently working on and successfully delivered water projects across the state of Texas with and without funding from the Texas Water Development Board. Our members run the full spectrum of companies in the Texas water construction marketplace ranging from multi-generation family and employee owned general and specialty contractors to large multi-national and national integrated companies, law firms, suppliers, manufacturers, and fabricators.

Our primary function as an organization is to promote good public policy to promote a healthy and competitive Texas water infrastructure construction market. We appreciate the opportunity to submit the following comments on behalf of the TXWIN membership. Since the inception of TXWIN our organization has focused on procurement law and funding. TXWIN generally agrees with the recommendations of the Sunset Staff Report and TWDB self-evaluation report and would like to offer the following commentary prefaced with some additional comments and observations.

We are presently experiencing extraordinary market conditions in a robust construction market. Our industry is facing unprecedented challenges with respect to supply chain constraints, inflation, and price volatility. Since early 2021 our members started experiencing significant cost escalation for project inputs which were largely driven by the pandemic. Most of these projects had been previously awarded under more stable market conditions. Unforeseen supply chain disruptions were largely unanticipated conditions which started affecting availability of key commodity driven project inputs. We now find ourselves in a position where uncertainty driven by inflation supply chain issues and pricing volatility is the norm.

TXWIN has worked to communicate these issues to TWDB engaging in meetings with TWDB leadership and staff to discuss what our members were experiencing and discussing different ways to mitigate project and cost risk. We also cautioned TWDB that they should expect that previous project estimates were likely no longer valid. Many projects currently in cycle may require



additional financial assistance. We also indicated that there was a strong likelihood that projects with TWDB financial assistance commitments which had not already advertised and awarded bids, or those in the pipeline for the upcoming SRF cycle likely needed to be revised to adjust to market conditions.

In the third special call of the 87th Texas Legislature, TXWIN submitted testimony to the Legislature specifically asking for consideration to direct ARPA funds to the TWDB for this specific purpose although it elected not to do so in anticipation of forthcoming federal funds.ⁱ

To its credit in addition to conducting multiple meetings with Board staff, the TWDB assisted in furthering this dialogue on March 3, 2022, where TWDB conducted a Work Session with stakeholders to discuss these issues with the broader water community. We are grateful that TWDB has acknowledged the unprecedented issues we have outlined and taken affirmative steps to address them. Attached to this document is a letter capturing some of the takeaways from the work session sent to TWDB and other participating organizations.ⁱⁱ

TXWIN values our partnership and ongoing dialogue with the TWDB and have been generally pleased with the responsiveness and engagement our organization has experienced with TWDB over the years. Like any organization there is always room for improvement. To deliver the water projects Texas needs, it is critical that we all need to proceed with eyes open, working together to share and mitigate risks to successfully deliver projects. The need for shared responsibility for all stakeholders in the water infrastructure market has never been greater.

Issue 1: TWDB's Inefficient Review Process Contributes to Project Delays and Increased Costs

We agree that there is a need to address process as it pertains to the administration of projects especially in the current environment. TXWIN agrees that processes as related to project administration specifically have become somewhat cumbersome when time, process and efficiency are critical. TWDB has acknowledged many of the issues and the opportunity to improve processes.

Many of our concerns around timely and inefficient reviews are related to larger projects with more moving parts. Our members have noted that projects utilizing “alternative delivery” have been particularly challenging. When we discuss “alternative delivery” we are specifically referencing Construction Manager-at-Risk or “CMAR”, and to a lesser extent Design-build. These projects differ significantly from projects using more traditional delivery methods where designs are not typically complete as construction commences.

Speed, and assumption of design and construction risk by the private sector are key aspects of using these delivery methods. Unfortunately, as the first issue by Sunset staff notes, there are sometimes overly complicated, cumbersome, and inefficient processes. Lost time, or the ability to meet critical schedule goals costs money. Presently it is even more crucial that design reviews,



procurement and payment approvals for key project milestones become more efficient. In the current business environment speed, efficiency and flexibility are key.

Regarding the comments submitted to the Sunset Staff from the TWDB regarding upcoming changes to Alternative Project Delivery guidance for CMAR and Design-Build. TXWIN has submitted comments on every iteration of the guidance at TWDB since our organization was founded. We have always been grateful that TWDB has been responsive to our concerns which have been given appropriate consideration. At the end of the day notwithstanding some special consideration for compliance with Federal rules as they pertain to the SRF programs, there is a relatively easy solution here which is to ensure that the guidance promotes compliance with Texas Government Code 2269 which provides the legal framework for the majority of public works construction in Texas including alternative delivery projects.

Government Code 2269 provides a sufficient legal and procedural roadmap to ensure projects are procured and executed in a manner which conforms with state law. Contractors, engineers and TWDB financial assistance are the entities bearing and sharing project design and construction risk. TWDB carries financial risk as the provider and guarantor of various loans and grants.

The main role and goal of the Board should be to assist with facilitating the planning it is tasked with coordinating, get customers in the door, and help as needed and to conduct compliance assistance and oversight. Unless circumstances dictate that there is a higher risk profile the Board should focus on compliance and moving money rather than engaging in project management and design duties relegated to contractually obligated private sector companies.

TWDB has a duty to inform financial assistance recipients of their obligations and compliance with 2269, and there should be a strong emphasis on this in the pre-construction and procurement phase of projects. The Alternative Delivery Guidance from TWDB should clearly articulate the fundamentals of the process, and future iterations of the guidance should accompany streamlined internal TWDB processes especially for design submittals, procurement, and payment approvals. TWDB should encourage all its customers regardless of delivery method to conduct fair and competitive procurements especially when qualifications and other technical aspects are considered in the procurement phase in addition to cost considerations.

It is also noteworthy and should be acknowledged that the TWDB is already undertaking efforts to improve efficiency and streamline projects management processes. TWDB has indicated that it is working with a vendor to create a more user-friendly project management platform. We are hopeful this new project and program management system results in better more efficient processes, and we look forward to providing input on the preconstruction project execution elements of the new system as appropriate.

TXWIN does not agree with the findings of Commission staff that additional FTEs are not necessary especially with the impending influx of additional federal funds and new programs such as the Flood Infrastructure Funds which TWDB is administering. TWDB is best suited to articulate



what those staffing needs may be, and it is fair to speculate that some of these issues we have highlighted may improve by directing additional financial resources or FTE's to TWDB. We do not dispute that some of these issues of efficiency are a matter of process.

Issue 2: A More Strategic, Comprehensive Evaluation of Programs and Outreach Efforts Would Benefit TWDB and Entities Eligible for Financial Assistance.

We agree with the assessment of the Sunset Staff and TWDB acknowledgement that there could perhaps be better metrics employed at the Board. However, it should be noted that in our view TWDB has done an outstanding job engaging in outreach and education to the water community. The fact that TWDB has identified and has applications for programs such as the SRF for billions of dollars annually which are well more than their financial capabilities is a testament to TWDB's outreach and the awareness level in the Texas water community of TWDB programs. This has been an area where the Board has exceeded since significant changes were introduced to the governance structure of the Board and the development of the SWIFT program. The Board should be lauded for its efforts to reach out to new and existing customers. If additional technical assistance is needed to familiarize potential customers with TWDB programs and processes, there are ways to accomplish that.

Issue 3: TWDB's Outdated Statute and Policies Should Be Updated to Eliminate an Unnecessary Advisory Committee and Reflect Some Standard Elements of Sunset Reviews.

We agree with the Sunset staff's assessment. While the SWIFT Committee served a purpose in the formative development and execution of the SWIFT program, it has matured to the extent that additional oversight of the Texas Legislature beyond committees with jurisdictional authority in the Texas House and Senate seem largely unnecessary. The SWIFT program has been successful in providing billions of dollars towards projects and strategies in the State Water Plan which has adequate transparency and financial oversight.

In closing we would like to make the following observations:

Our greatest concern is not the past but the future of the Board. As new and enhanced federal funds become available through the ILJA speed, efficiency and communication are key. We maintain significant concerns that new, arbitrary, and overly cumbersome domestic sourcing requirements applicable to federal finance assistance programs will further exacerbate the supply chain and related issues we are experiencing presently.

TXWIN supports American manufacturers and worked with stakeholders on SB 1289 which applied "Buy American" requirements to state funded construction and financial assistance programs, with reasonable exceptions for certain items and waiver authority. While we support the goal of supporting domestic manufacturers, without adequate flexibility and reasonable processes to respond to market conditions and supply chain issues, these policies can be harmful and antithetical to successfully delivering cost effective projects. What looks to be coming down the road with EPA and OMB is going to be very problematic especially as it applies to certain



mechanical and electrical manufactured goods such as highly specialized process and treatment equipment which are crucial to treat and move water.

In the coming weeks and months is critical that the Texas Water Development Board asserts its position and authority with the U.S. EPA and groups like the Council of Infrastructure Financing Authorities (CIFA) to ensure reasonable rules and processes are adopted at the state and federal level with the goal of successful project execution in mind. As one of the leading and most successful SRF program administrators in the nation the Texas Water Development Board has a duty to promote and encourage the adoption of reasonable processes and waivers as necessary to respond to current and future market conditions.

The greater water infrastructure community understands that we should expect current market conditions to continue for some time and there is a cost in delaying projects. It is imperative that we all do our best to acknowledge the environment we are presently in, and to work together to mitigate risk to fund and deliver successful projects. TXWIN members believe that it is imperative that TWDB and the owner community focus on fundamentals such as promoting full and open competition, especially in situations where qualifications are considered in addition to pricing or cost in the evaluation and award process.

The Texas Water Development Board has been a truly outstanding organization which has had a profound impact on facilitating and promoting investment in Texas water infrastructure. TWDB leadership and staff have demonstrated their commitment to promoting a strong Texas water future and should be lauded for doing so. TXWIN is committed to continue working with TWDB, our industry colleagues, the Legislature, and the Sunset Commission to provide common sense, constructive recommendations to get the job done building Texas' water future

Thank you for considering our views and your service to the State of Texas. Please contact me directly if I can be of service at plf@txwin.org or (512) 810-3969.

Sincerely,

Perry L. Fowler
Executive Director
Texas Water Infrastructure Network

ⁱ TXWIN SB * Testimony Senate Finance Committee, October 4, 2021

ⁱⁱ TXWIN Letter to TWDB, March 14, 2022