

February 17, 2022

The Honorable Tom Carper
Chairman
Senate Environment and Public Works Committee
410 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Shelly Moore Capito
Ranking Member
Senate Environment and Public Works Committee
456 Dirksen Senate Office Building
Washington, D.C. 20510

Re: Protections for Workers, Small Business Subcontractors, and Taxpayers on Federally-Financed Water Infrastructure Projects—Providing Parity with TIFIA-Financed Projects.

Dear Chairman Carper and Ranking Member Capito,

As the Environment and Public Works (EPW) Committee looks at legislation in the second session of the 117th Congress to continue the important work of addressing our nation’s water infrastructure, we urge the Committee to amend the Water Infrastructure Finance and Innovation Act (WIFIA) program to help protect taxpayer funds, workers, subcontractors and suppliers, including Small and Disadvantaged Business Enterprise (DBE) Program participants and subcontractors, who build water infrastructure especially in at-risk low income communities.

For over 80 years, surety bonds have played a vital role in ensuring subcontractors and workers on public works projects receive compensation and projects are completed within budget and on time if the lead contractor encounters financial distress. Over 95% or more of all public projects require bonding under the Federal Miller Acts and state “Little Miller Acts” in every state. However, these bonding requirements are many times not clear on public-private partnerships (P3s), a relatively new construction delivery method, and therefore, P3s often do not maintain the same level of protection that have been required on all other public infrastructure projects over the past century. This loophole/gap leaves workers, subcontractors, small business and taxpayers exposed to unnecessary risks. Without these protections, in the event of a contractor default, the project is halted, and can be terminated, leaving subcontractors, including small, minority and women owned construction subcontractors, and workers without pay. Additionally, states and taxpayers then are forced to absorb additional costs of rebidding and completing the project.

To address this shortcoming, we are advocating for legislation to amend the WIFIA program to ensure WIFIA-financed P3 infrastructure projects have adequate protections for workers, subcontractors, suppliers, and taxpayers. This same loophole was identified in the Transportation Infrastructure Finance and Innovation Act (TIFIA) program, which was the model for the WIFIA program. Congress corrected this problem in the bipartisan infrastructure bill, the Infrastructure Investment and Jobs Act (IIJA), by way of an amendment adopted in a unanimous Senate floor vote, 97 – 0. Additionally, this language was included in the House transportation bill after the policy was adopted in a bipartisan en bloc amendment that passed by voice vote. Our proposed solution mirrors this TIFIA correction and would maintain parity between the TIFIA program and WIFIA program.

In summary, our proposed solution would have the Secretary of the Army or the EPA Administrator, as appropriate, ensure water infrastructure projects carried out with WIFIA financing have appropriate payment

and performance security protections by requiring a surety bond if the project is not subject to State or local payment and performance security requirements. If a State has requirements for security protections, the Secretary or the Administrator could then accept the State requirements if the Federal interest with respect to Federal funds and other project risks related to design and construction are adequately protected. It is a commonsense solution to a complex problem.

As the EPW Committee continues to address our nation's water infrastructure needs, we urge the Committee to pursue this policy fix to maintain program parity with TIFIA and provide these vital protections to for small businesses and workers who build the nation's vital infrastructure.

Best regards,

American Property and Casualty Association
American Subcontractor Association
Business Coalition for Fair Competition
Council of Insurance Agents and Brokers
Finishing Contractors Association International
International Union of Operating Engineers
Mechanical Contractors Association of America
National Association of Electrical Contractors
National Association of Minority Contractors
National Association of Mutual Insurance Companies
National Association of Surety Bond Producers
Sheet Metal and Air Conditioning Contractors' National Association
The Association of Union Constructors
The Construction Employers of America
The Surety & Fidelity Association of America
Women Construction Owners and Executives