

February 27, 2024

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: Support S. 2928, The Water Infrastructure Subcontractor and Taxpayer Protection Act

Dear Chairman Carper and Ranking Member Capito,

As the Environment and Public Works (EPW) Committee looks at legislation in the second session of the 118th 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. The bipartisan legislation introduced by Sen. Mark Kelly (D-AZ) and Sen. Cramer (R-ND), S. 2928 *The Water Infrastructure Subcontractor and Taxpayer Protection Act*, would accomplish this policy goal with a simple solution that we urge the Committee to advance.

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% of all public projects require bonding under either the Federal Miller Act or state-law equivalents (collectively the Miller Acts). However, the applicability of the Miller Acts' bonding requirements is not always clear on newer forms of project procurement, including public-private partnerships (P3s). Therefore, due to the increasing trend of using P3s to procure and deliver water infrastructure, there is a risk of a substantial amount of Federally-financed projects that do not maintain the same level of protections that have been required on public infrastructure projects over the past century.

This gap would leave 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 are then forced to absorb additional costs of rebidding and completing the project. We propose to amend WIFIA to adopt a policy solution, such as S.2928, which would ensure all forms of project procurement for water infrastructure using WIFIA-authorized financing, including P3s, utilize the traditionally required protections for workers, subcontractors, suppliers, and taxpayers, ensuring parity for all infrastructure projects.

This 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.

This policy solution is currently applied to transportation projects that use the Transportation Infrastructure Finance Innovation Act (TIFIA) program. Congress overwhelmingly supported the adoption of the policy for

TIFIA as shown by way of a unanimous floor vote, 97 – 0, to include the provision in the Infrastructure Investment and Jobs Act (IIJA). S.2928 mirrors the TIFIA solution, and would thereby maintain parity between the two programs.

Finally, aside from performance and payment security, surety bonding provides several additional benefits to public infrastructure projects. Ernst and Young performed a study, “The Economic Value of Surety Bonds,” that highlighted a number of these additional benefits, which include, but are not limited to:

- Bonded projects are more likely to be completed on time or ahead of schedule than unbonded projects. What’s more, unbonded projects are 10 times more likely to default than bonded projects.
- Bonded projects cost less than unbonded projects. 75% of project owners report that surety bonding reduces contractor pricing by an average of 3.2%.
- If a contractor defaults on a bonded project, surety companies intervene, lowering the cost of project completion by 85% and reducing the time to complete by two times.

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

Best regards,

American Property and Casualty Insurance Association
American Subcontractors 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 Minority Contractors
National Association of Mutual Insurance Companies
National Association of Surety Bond Producers
National Electrical Contractors Association
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