

DECISION

Case Number: 392738

The mandate of the Fairness and Transparency Advisor (FTA) is to ensure that various processes associated with the Core Area Sewage Water Treatment project are fair, transparent, impartial and objective. In this capacity, the FTA is an observer of, and commentator on, process. The FTA has no remedies.

BACKGROUND

The Issue as Raised in the Complaint:

The issue in the complaint centres on the type of estimate to be provided by the consultants as part of the Independent Engineering and Costing Analysis.

Summary of Issue

In the October 2015 Technical Memo No.1, the consultants have proposed using order-of –magnitude costing estimates with an accuracy of +/- 50%. However, in May 2015, the CALWMC approved the Terms of Reference (TOR) for the Engineering and Costing Analysis with an accuracy range of +/- 15% to 25%.

Questions /proposed resolutions as put forward in the Complaint:

- Does the proposed change from use of Class B estimates to use of Class D estimates result in a fundamental change to the costing analysis?;
 - a. If so, must this change be approved by the CRD Board as a specific revision to the Terms of Reference?;
- If approved, should this change be publically announced as soon as possible in order to inform on-going consultations?;
- Would it be fair to consign a Class D cost estimating decision to a “Costing Procedures” appendix in a large technical report in December 2015?;
- The complaint raises issues with the overall project timelines and submits that a substantial time extension for an improved independent costing analysis should be contemplated;
- The complaint suggests that the Eastside and Westside committees be excluded from direct involvement in the Phase 2 costing analysis; and
- The complaint suggests having the Regional Water Commission prepare a report on water supply and costs, as requested by the Technical Oversight Panel (TOP), to assist in defining sewage water recycling benefits.

As summarized in the initial screening of this complaint, the complainant does raise procedural issues which could have the potential, if supported by the evidence, to affect the fairness and transparency of

the process. As such, it was determined by the FTA that this issue would precede to investigation. Specifically, the investigation would focus on potential discrepancies between the cost estimation accuracy as defined in the May 2015 Terms of Reference for Independent Engineering and Costing Analysis, and the cost estimation accuracy as proposed by the consultants in the Technical Memo No. 1 presented at the October 14th meeting of the CALWMC.

There were aspects of the complaint which, in the opinion of the FTA, were not supported by evidence which would point to a procedural breach and which were deemed tangential. The following issues did not proceed to investigation:

- *Suggested remedies relative to the overall timelines associated with this project:* The FTA has no authority to make recommendations on the deadlines which have been imposed by external bodies. As such, this issue was excluded.
- *Concerns relative to consigning Class D cost estimating decision to a “Costing Procedures” appendix in a large technical report in December 2015:* This is a rather broad issue and the complaint as drafted did not sufficiently link this issue to the central issue of the estimation accuracy level. As such it was excluded.
- *The exclusion of the East and Westside Committees from direct involvement in the Phase 2 costing analysis:* The complaint does not raise a specific procedural fairness issue relative to the involvement of these committees in the costing aspects of the projects. In the FTA’s view, this is a “remedy” and as such, it was not included as part of the investigation.
- *Having the Regional Water Commission prepare a report on water supply and costs, as requested by the TOP, to assist in defining sewage water recycling benefits:* There were no specific procedural fairness issues raised in connection with this issue and as such, it was excluded from the investigation.

FINDINGS

The analysis is focused on the following questions:

- 1. Does the proposed change from use of Class B estimates to use of Class D estimates result in a fundamental change to the costing analysis?**

In order to answer this, we must first look to where the CALWMC originally set standards relative to the cost estimation process.

Terms of Reference for Feasibility and Costing Analysis

The Terms of Reference was adopted by resolution at the CALWMC May 27th, 2015 meeting. These TOR use an accuracy range of -15% to +25%.

Following the CALWMC meeting of May 27th, the TOR was incorporated into RFP 15-1834 which was issued on May 28th. The Terms of Reference was not forwarded to the CRD Board. Below is an excerpt from the May Terms of Reference used to secure the services of a consultant for independent costing analysis. The Terms of Reference leave no doubt as to the prescribed level of accuracy (-15% - +25%).

10. The costing analysis shall be based on both a 30- and 50-year life cycle, including capital, operating and maintenance costs. The capital cost estimates developed as part of this analysis shall use costing criteria consistent with previous CRD costing analysis work to date, to allow direct comparison with the established project budget. These factors include but are not limited to design and construction contingencies, indirect costs, administration costs, interim financing and inflation costs to mid-point of construction, project management costs, environmental impact study costs, site contamination costs, and the consistent use of discount rates for life cycle analysis of costs, revenues from certain resource recovery and carbon credits. **The capital cost estimates developed will have an accuracy range of -15% to +25%.**

At the October 14th meeting of the CALWMC, the consultants however, presented Technical Memo No. 1 in which they suggest that they will be using an order-of magnitude estimate with an accuracy of +/- 50%. This is a clear departure from the agreed upon Terms of Reference.

The complainant points out that the CALWMC received the consultants' Technical Memo No. 1 **“for information”** without any discussion of the proposed change from the approved Class B cost estimates to Class D cost estimates. During this same October 14th public meeting, the public commented on this issue and drew the committee's attention to the difference in the class of estimates.

It follows that the relevant issue with regard to this matter is not that the Committee accepted the report “for information” but rather - what actions (or direction) will be taken by the CALWMC and/or the CRD Board moving forward, and what considerations will be given in the decision process to the change in terms.

A change in the Terms of Reference at this juncture, does, in my opinion, give rise to some practical difficulties. This is where substance and procedure intersect. In this instance, a decision pertaining to the substantive aspects of the process (whether to use an accuracy level of -15% - +25% or conversely, of +/-50%,) could be criticised on procedural grounds, should it not be made with proper regard for process-related matters. In moving forward, it would be necessary for the CALWMC/CRD to give regard to the change; make a determination as to whether or not it is an acceptable change; and determine how and when this information will be communicated to the public.

The next meeting of the CALWMC is scheduled for Wednesday October 28th and the next meeting of the TOP is scheduled for Thursday October 22nd. The agenda for the October 20th TOP meeting included consideration of Technical Memo No. 1. Presumably, the TOP and the CALWMC will address the issues associated with the discrepancy at their next meetings.

2. If the proposed change represents a fundamental change to the project costing analysis, must this change be approved by the CRD Board as a specific revision to the Terms of Reference?

If the Terms of Reference was approved by the CRD Board and such Terms of Reference clearly state a Class B estimate is what is required, then any deviation from this would require the approval of the Board unless there is a motion to the contrary. In this instance, the Terms of Reference was not approved by the CRD Board and were approved by the CALWMC. I am of the view that the CALWMC remains responsible for changes to the Terms of Reference. They should turn their minds to this change

and provide clear direction on how they wish the consultants to move forward. Any course of action contrary to this, in my view, would fall short of reasonableness and would subject the process to concerns related to procedural fairness – ultimately frustrating the attainment of stated fairness objectives.

3. If approved, should this change be publically announced as soon as possible in order to inform on-going consultations?

Yes, any change to the Terms of Reference for the costing should be made publically available in a timely fashion. The dangers associated with not making publically-known the new accuracy range of costing estimates are those associated with diminished and possibly impaired transparency.