

EXHIBIT 2

**UNITED STATES DISTRICT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION**

STATE OF CALIFORNIA, *et al.*,

Plaintiffs,

v.

DONALD J. TRUMP, *et al.*,

Defendants.

No. 4:20-cv-01563-HSG

DECLARATION OF ANDREW J. SHORT

I, Andrew J. Short, pursuant to 28 U.S.C. § 1746, hereby declare as follows:

1. This declaration is based on my personal knowledge and information made available to me in the course of my official duties.
2. I am a Colonel in the United States Army, and I am currently the Commanding Officer for the South Pacific Border District (“Border District”) for the U.S. Army Corps of Engineers (“Corps”), South Pacific Division. I am stationed in Phoenix, Arizona.
3. The Border District’s primary mission is to plan, design, and construct Department of Defense-approved border barrier projects on the southern border of the United States.
4. In my capacity as the Commanding Officer of the Border District, I have overall responsibility for, and authority over, the Border District and its operations, consistent with relevant policy, regulations, and laws. In this respect, my responsibilities include providing oversight, direction, and management of all systems and personnel, including contracting officers involved in executing the Border District’s mission. In particular, I currently oversee performance of work on border barrier construction projects either under contract or soon to be awarded, and that are funded under the authority of 10 U.S.C. § 284.

I. Background

5. In response to requests for assistance from the Department of Homeland Security (DHS), the Secretary of Defense has approved 31 projects and segments for construction of bollard-style barrier along the United States’ southern border pursuant to 10 U.S.C. § 284. In Fiscal Year 2020 (FY20), \$3.831 billion was transferred into the Drug Interdiction and Counter-Drug Activities, Defense, account for barrier construction. The funds were allocated to the Department of the Army, and further allocated to the Corps to undertake initial project scoping, contracting for

construction, construction management, and necessary Corps' management and oversight expenses for projects in FY20.

6. The amounts made available to construct these projects and segments are from the FY20 Operation and Maintenance, Army, appropriation. As provided in Section 8003 of the Department of Defense Appropriations Act, 2020, any unobligated amounts described here will no longer remain available for obligation after the fiscal year ends on September 30, 2020.

7. I understand that Plaintiffs have challenged the following 10 FY20 barrier construction projects and segments out of the 31 approved by the Secretary of Defense: Yuma B (Segments 1 and 2), El Centro A, San Diego A (Segments 1 through 3), El Paso B (Segment 6), El Paso C (Segments 1 and 2), and El Paso D (Segment 4).

a. *Yuma B (Segments 1 and 2)* are being undertaken through modifications to a FY19 284 contract known as "Yuma 1/El Centro 1."

(1) A negotiated contract modification, awarded on March 24, 2020 in the amount of \$55,792,980, added 1.5 miles of border barrier, and included design and construction efforts necessary to erect new or replacement 30 foot primary and secondary pedestrian border barrier with mitered tops, covers, and anti-climb plate, as well as gates, roads, and drainage improvements.

(2) Another modification, estimated at \$50,000,000, will add fiber optic cables, a three-phase power distribution system, lighting and all necessary supports, closed circuit TV (CCTV), a Linear Ground Detection System (LGDS), electronic equipment shelters, and signage (collectively known as "attributes") to Yuma B (Segments 1 and 2). A request for proposal was sent to the contractor on April 15, 2020, and award is scheduled for May 24, 2020.

b. *El Centro A* and *San Diego A (Segments 1 and 3)* are being undertaken through a modification to the FY19 284 Yuma 1/El Centro 1 contract. The modification was awarded on April 11, 2020 in the amount of \$569,000,000 (San Diego A (Segment 2) was not included in this modification, and no contract has yet been awarded for construction). The modification added 17.17 miles of border barrier, gates, roads, and drainage improvements. On April 15, 2020, a request for proposal was sent to the contractor to include authorized attributes for these three segments.

c. *El Paso B (Segment 6)* is being undertaken through a modification awarded on April 3, 2020, to a FY19 284 contract known as "El Paso 1." This \$61,427,312 modification included design and construction efforts necessary to erect 2.4 miles of new or replacement 30 foot primary border barrier with mitered tops, covers, and anti-climb plate. The modification provided replacement for existing primary, secondary, or vehicle fence, construction of new border barrier where none currently exists, gates, roads, drainage improvements, and attributes.

d. *El Paso C (Segments 1 and 2)* and *El Paso D (Segment 4)* will be included in a new contract, currently scheduled for award on May 7, 2020. Contractor proposals were received on April 15, 2020. The anticipated contract value of these three segments is \$272,000,000. El Paso C (Segments 1 and 2) will replace existing primary fence with approximately 13 miles of new 30 foot border barrier within the Roosevelt Reservation, near the Santa Teresa Port of Entry (POE).

El Paso D (Segment 4) calls for approximately 0.63 miles of new 30 foot border barrier within the Roosevelt Reservation. All segments include gates, roads, drainage improvements, and attributes.

8. As of April 17, 2020, \$1,327,409,770 has been obligated on contracts for FY20 Section 284 construction projects, leaving an unobligated balance of approximately \$2,503,590,230 that will be needed for the Yuma B (Segments 1 and 2) attributes, El Paso C (Segments 1 and 2), El Paso D (Segment 4), and the remaining 21 projects and segments approved by the Secretary of Defense. The FY20 Section 284 funds will no longer be available for obligation after the fiscal year ends on September 30, 2020.

II. Harms to the Government

9. The Government will suffer irreparable harm from an injunction. Contractors and Government personnel are actively working on extensive construction and pre-construction activities in the project areas, but an injunction immediately stops those activities and prevents the Government from taking necessary steps to complete the barrier construction projects. Additionally, each day an injunction continues and contract performance on the Section 284 projects is suspended, the Government will be required to pay costs incurred by the contractors during the period of inactivity – costs that the Government would not have to pay but for an injunction. Further, the contractors have incurred significant costs for work already undertaken on the Section 284 projects, but an injunction would prevent the Government from paying those costs. The inability to pay the contractors for the work undertaken to date will result in additional costs to the Government in the form of penalty fees and harm the Government's ability to secure future contractors for important Federal contracts. These costs and fees will quickly become unsustainable for the Government, and if the contracts remain suspended for too long, the Government will be forced to reduce the scope or terminate the contracts. Moreover, even if an injunction were to be lifted at the conclusion of litigation, the Government would then face additional costs for re-procuring new contracts to complete the unfinished work left after termination. The Government will have to pay these additional, unnecessary costs from the finite funds available for Section 284 border barrier construction, thus diminishing the money available for actual border barrier construction and irreparably harming the Government's ability to complete the border barrier construction projects.

A. Harms from Contract Suspension

10. As the Commander of the Border District, I have been made aware by construction personnel and contracting officers that suspending work on the above-named projects and segments will cause significant immediate and irreparable harm to the Government as described below.

11. Should the Court enjoin construction of these FY20 284 projects and segments, I will immediately direct the District to cease all actions involving construction of the border barrier in those areas. The contracting officers for the projects would then direct the respective contractors to suspend all work on these projects and segments, pursuant to Federal Acquisition Regulation ("FAR") Clause 52.242-14, SUSPENSION OF WORK (APR 1984).

12. Pursuant to FAR 52.242-14, the contractor is entitled to an adjustment for any increase in the cost of performance of the contract (excluding profit) necessarily caused by an unreasonable period of time during which these projects and segments are suspended or delayed. The reasonableness of a suspension or delay is determined based upon the totality of the circumstances, including the duration of the delay. In this case, despite the suspension of work, the contractors will nevertheless continue to incur costs for every day that the contracts are suspended. The Corps estimates that these costs are likely to include significant costs for equipment the contractor must keep ready for use at multiple locations, costs for security to keep the equipment and materials from being stolen or vandalized, labor costs for the personnel managing the contract, labor costs for the personnel who have been trained and are dedicated to execute the tasks under the contract (workers whom the contractor would be reluctant to release due to the risk of not being able to rehire them), and potential costs associated with storing construction materials. Further, there will likely be increased market prices on labor, materials, and equipment (*e.g.*, steel and concrete). The Corps will be obligated to reimburse these additional costs, which would not have been incurred but for a Court injunction. Moreover, the Corps will be obligated to reimburse these additional costs from funds that would otherwise be spent on actual barrier construction.

13. The contractors have already incurred substantial costs on the awarded projects and segments. These are costs to the contractors that the Government will owe, but could not pay because of an injunction, and they will result in additional costs to the Government. The prompt payment interest penalty is 2.125 percent per annum on invoices that are not paid within 30 days of certification and submission. *See* FAR 52.232-27 PROMPT PAYMENT FOR CONSTRUCTION CONTRACTS (JAN 2017) (citing to 5 C.F.R. Part 1315).

14. Yuma B (Segments 1 and 2), El Centro A, and San Diego A (Segments 1 and 3) are under contract to BFBC, LCC.

a. *Yuma B (Segments 1 and 2)*. The contractor is currently working on design and construction submittals for the eastern segments of the project. Geotechnical exploration and design survey plans have been submitted to the Corps for review. The initial site survey and aerial survey have been completed. The contractor is coordinating with the Quechan Tribe on permitting and Tribal Employment Rights Office (TERO) plan approvals prior to onsite work. As soon as Tribal permits and TERO plans are approved, geotechnical exploration and onsite mobilization/setup will begin. The contractor plans to submit its 60% design package on April 30, 2020. As of April 17, 2020, the contractor has expended \$260,943 for bonds, \$145,779 on labor, \$16,130 on initial site surveys, \$156,309 for mobilization, \$125,000 for travel, and \$955,118 for design costs. Overhead costs presently total \$306,135. Standard bollard fence steel for the project's approved segments has been ordered, at a cost of \$2,424,794. Deliveries are scheduled to begin on or before April 27, 2020 with all ordered material delivered by May 1, 2020. The estimated interest cost to the Government for failure to timely pay invoices for these costs could reach \$89,144 per year.

b. *El Centro A*. The contractor is currently working on design and construction submittals, many of which have already been submitted to the Corps. The contractor is in the process of mobilizing personnel and equipment to the site. The survey and mapping team is already onsite, and geotechnical investigation is planned to begin on April 22, 2020. Site access improvements

will begin as soon as geotechnical investigation and surveying is completed. As of April 17, 2020, the contractor has expended \$635,387 for bonds, \$670,351 on surveying and geotechnical investigation, \$889,201 for mobilization, and \$3,019,810 for design costs. Steel for the project has been ordered at a cost of \$18,931,025 and shipments of bollard steel will begin arriving the week of April 27, 2020 with miscellaneous steel deliveries beginning the week of May 4, 2020. Panel fabrication will begin as soon as the contractor has enough steel components on hand.

c. San Diego A (Segments 1 and 3). The contractor is currently working on design and construction submittals, and workers are in the process of mobilizing to the site. A temporary office will be set up on site on April 27, 2020, and geotechnical investigation and surveying is planned to begin that same day. As of April 17, 2020, the contractor has expended \$1,913,643 for bonds, \$660,753 on surveying and geotechnical investigation, \$2,747,095 for mobilization, and \$3,422,656 for design costs. Steel for the project has been ordered at a cost of \$58,285,210, and shipments of bollard steel will begin arriving the week of April 27, 2020 with miscellaneous steel deliveries beginning the week of May 4, 2020. Panel fabrication will begin as soon as the contractor has enough steel components on hand.

d. Additionally, the contractor has already incurred approximately \$368,671 in labor costs, \$774,209 in overhead, and \$125,000 in travel for El Centro A and San Diego A (Segments 1 and 3). Failure to timely pay the contractor's invoices for El Centro A and San Diego A (Segments 1 and 3) could cost the Government an estimated \$284,630 per year.

e. If BFBC, LCC's performance is suspended, it is estimated the contractor's costs will accrue at the rate of \$289,814 per day and \$8,810,346 per month.

15. El Paso B (Segment 6) is under contract to SLSCO, Ltd.

a. As of April 17, 2020, the contractor has incurred material and design costs of approximately \$2,504,539. The contractor has also expended \$125,427 in labor costs, \$263,397 in overhead, and \$125,000 in travel. The total estimated incurred costs to date are \$3,658,699. The estimated cost to the Government for failure to timely pay any invoiced amounts for the above-related costs could reach approximately \$86,894 per year.

b. If SLSCO, Ltd.'s performance is suspended, it is estimated the contractor's costs will accrue at the rate of \$102,915 per day and \$3,128,617 per month. These are best estimates based on peak production rates, as the contract was awarded so recently.

B. Harms from Contract Termination

16. These suspension costs will quickly become unsustainable for the Government, and if work on the projects included in the contract modifications remains suspended for too long, the Corps will be forced to de-scope or partially terminate the contracts. The affirmative responsibility to mitigate cost impacts to protect the best interests of the United States and the best interests of our contractors would require to the Corps to consider de-scoping or partially terminating Yuma B (Segments 1 and 2), El Centro A, San Diego A (Segments 1 and 3), and El Paso B (Segment 6) within a matter of weeks or months, rather than leaving the contracts in a suspended status. Standby costs alone are estimated to be approximately \$1,346,029 per day, or \$40,919,281 per month.

a. Currently, the contracting officers estimate that if work on the projects remains suspended for more than six months, the Corps will likely need to consider termination. The Corps estimates that the termination and demobilization cost for Yuma B (Segments 1 and 2) would be approximately \$2,299,304. For El Centro A and San Diego A (Segments 1 and 3), termination and demobilization would cost approximately \$26,961,968. El Paso B (Segment 6) termination and demobilization costs would be an estimated \$2,262,675.

b. The Corps has contracted for Quality Assurance (QA) services at the construction sites in issue. As of April 17, 2020, 10 contractor personnel are serving as QA representatives. The cost to terminate this support contract for QA representatives is estimated at \$751,934.

17. In the event the Government must terminate for convenience work being performed on Yuma B (Segments 1 and 2), El Centro A, San Diego A (Segments 1 and 3), and El Paso B (Segment 6), fiscal laws may prevent later re-use of FY20 Section 284 funds for any purpose other than a replacement contract for the same border infrastructure. If these funds are unused or unusable, they would automatically return to the Treasury.

18. In addition, if an injunction is vacated after the contractors have demobilized, the costs of remobilizing manpower and resources will be significant. For example, contractors may face difficulties restoring manpower levels, and market prices for labor, supplies, materials, and equipment will likely increase. The Government will be obligated to reimburse these additional costs, which would not have been incurred but for a Court injunction. To compensate for these additional costs, the Government will suffer the irreparable harm of reducing barrier mileage, modifying barrier design to eliminate features (such as lighting, cameras, or sensors), or deferring Section 284 projects.

C. Harms from Contract Reprocurement

19. In the event a final judicial ruling favors the Government but comes after partial termination of these contracts, the Government would also face onerous administrative costs for procuring new contracts to complete the unfinished work left after partial termination. The Corps estimates the reprocurement cost would be approximately \$89,555 per contract, in addition to any market escalations in the cost for construction services.

20. The Government expects the costs of any reprocured contracts to be significantly greater than the original contract costs, in part because the price of compensating replacement contractors willing to take the proven risk of project suspension and non-payment will be high. Prices for reprocurement contracts will likely reflect increased market prices for labor, materials, and equipment (e.g., steel and concrete). The Government's need to pay these higher costs would be a burden that the Government would not have incurred but for a Court injunction. Moreover, the Government will be obligated to pay for these additional costs by reducing barrier mileage, or modifying barrier design to eliminate features (such as lighting, cameras, or sensors).

III. Demobilization and Caretaker Activities

21. If enjoined, the Government will not use unobligated Section 284 funds for further border barrier construction on the specified projects and segments. In order to comply with a Court injunction, however, the Government must incur considerable overhead costs associated with

demobilization. Once that process is complete, the Government must expend funds to maintain a minimal level of basic operations to prevent irreparable loss to the Government and ensure compliance with a Court order. The Government is required to fund these costs with available unobligated Section 284 funds.

22. Once the primary demobilization effort is complete, the Government will need to expend funds to maintain a minimal level of basic operations associated with the specified projects and segments. Specifically, the Government must continue to expend funds to perform a small number of functions that are essential to protect Government assets already on the ground, to minimize loss to the Government associated with existing assets and those anticipated for delivery, to ensure site safety and site security, and, consequently, to mitigate irreparable harm to the Government. The Corps expects to use personnel for the following caretaker activities as long as necessary while an injunction is in effect:

a. Construction personnel will monitor the Yuma B (Segments 1 and 2), El Centro A, San Diego A (Segments 1 and 3), and El Paso B (Segment 6) worksites, and be available to accept materials that are in transit to the sites and cannot be returned; document and monitor site conditions to assure safety and ensure contractors do not perform any work while suspended; provide security to prevent theft and vandalism; and perform associated reporting in connection with such activities. In the absence of such personnel, there would also be unquantifiable costs associated with the absence of construction site security to protect the Government from potential liabilities on the construction sites and to preserve Government construction assets already onsite. The Corps will retain at least 15 individuals to perform the functions listed above. This is the minimal office and field staff necessary to perform caretaker functions. The District's TDY and labor costs will be approximately \$264,096 per week, or approximately \$528,192 for each bi-weekly pay period in a calendar year.

b. The Border District currently has five Requests for Proposal in various stages of preparation and negotiation for Section 284 projects, with a combined value of approximately \$1,787,000,000. Contract management personnel will monitor acquisition activities that have been interrupted to avoid or mitigate waste in the procurement process; ensure compliance with suspension or termination requirements; respond to requests for information from contractors; and perform Resident Management System¹ reporting.

c. Program and resource management personnel will resource essential positions; provide oversight of spending to ensure that no funds are expended improperly, including in violation of an injunction; process and reconcile Corps expenses incurred prior to the injunction (e.g., employee labor corrections, travel vouchers, and cardholder charges); and otherwise assure fiscal compliance.

d. Internal review personnel will provide auditing oversight to ensure fiscal security and propriety. This includes personnel needed to comply with any ongoing DoD Inspector General and General Accountability Office audits. The labor costs of Corps personnel who respond to

¹ The Resident Management System is a comprehensive system for the expedient and effective management of construction contracts through tracking and documentation of all facets of a contract by Corps of Engineers' field offices and contractors.

these audits must be paid from unobligated 10 U.S.C. § 284 Drug Interdiction and Counter-Drug Activities funds.

e. Legal personnel will respond to legal inquiries and otherwise provide legal oversight to ensure compliance with the law, including a Court injunction.

23. The only source of funds available for these wind-down and caretaker activities is the Drug Interdiction and Counter-Drug Activities, Defense account, from which funds are transferred to Operation and Maintenance, Army for execution pursuant to 10 U.S.C. § 284.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Executed this 17th Day of April 2020.

SHORT.ANDREW.J
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Andrew J. Short
Colonel, United States Army