

EXHIBIT 4

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

SIERRA CLUB, *et al.*,

Plaintiffs,

v.

DONALD J. TRUMP, *et al.*,

Defendants.

No. 4:20-cv-01494-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 barrier fencing 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 barrier fencing 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 fencing along the United States’ southern border pursuant to 10 U.S.C. § 284. In Fiscal Year 2020 (FY20), the Department of Defense transferred \$3.831 billion was into the Drug Interdiction and Counter-Drug Activities, Defense, account for barrier

construction and then allocated those funds to the Department of the Army. The Department of the Army further allocated the funding to the Corps to undertake initial project scoping, contracting for construction, construction management, and necessary Corps' management and oversight expenses for the 31 projects and segments.

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 all 31 FY20 Section 284 barrier construction projects approved by the Secretary of Defense.

a. *Yuma A (Segment 1)*). USACE has not yet contracted for construction of this segment.

b. *Yuma A (Segment 2)* and *Yuma B (Segments 1 and 2)* are being undertaken through modifications to a Fiscal Year 2019 (FY19) Section 284 contract known as "Yuma 1/El Centro 1."

(1) A negotiated contract modification, awarded on March 24, 2020 in the amount of \$173,982,458, added 10.4 miles of barrier fencing, and included design and construction efforts necessary to erect new or replacement 30 foot primary and secondary pedestrian barrier fencing with mitered tops, covers, and anti-climb plate, as well as gates, roads, and drainage improvements.

(2) Another modification 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 "electrical attributes") to *Yuma A (Segment 2)* and *Yuma B (Segments 1 and 2)*. A request for proposal (RFP) was sent to the contractor on April 15, 2020, and award is scheduled for May 24, 2020.

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

d. *Tucson A (Segments 1 through 5)*. This project is being undertaken through a modification to an FY19 Section 284 contract known as "*Tucson 1, 2, 3*." A negotiated contract modification, awarded on March 23, 2020, in the amount of \$524,000,000, includes design and construction efforts necessary to erect 24.5 miles of replacement 30 foot primary and secondary pedestrian barrier fencing with mitered tops, covers, and anti-climb plate. The project provides replacement for existing primary and secondary fence.

Tucson A (Segment 5), which consists of 4.5 miles of new 30 foot primary barrier fencing, was not awarded but is included in this modification as an option to be awarded if funding allows. An RFP to add electrical attributes was issued to the contractor on April 23, 2020.

e. *Tucson B (Segments 1, 3, 4, and 5) and Tucson C (Segments 1, 3, and 4)* will be included in a new contract currently scheduled for award on May 14, 2020. Contractor proposals were received on April 29, 2020, and proposal evaluation will be complete on May 5, 2020. This project includes design and construction efforts necessary to erect approximately 42.5 miles of new 30 foot primary barrier fencing including gates, roads, drainage improvements, and electrical attributes.

f. *Tucson B (Segment 6)* consists of approximately 2.1 miles of new 30 foot primary barrier fencing. It is currently included as an option in the modification to the FY19 Section 284 "Tucson 1, 2, 3" contract, and has not been awarded yet.

g. *El Paso A* will be undertaken through a new contract that will be awarded on May 2, 2020.

h. *El Paso B (Segment 6)* is being undertaken through a modification awarded on April 3, 2020, to an 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 30 foot primary barrier fencing with mitered tops, covers, and anti-climb plate. The modification provided for new barrier fencing where none currently exists, gates, roads, and drainage improvements. An RFP was issued to the contractor on April 9, 2020, to provide electrical attributes for this section of the barrier.

i. *El Paso C (Segments 1 and 2) and El Paso D (Segments 1 through 4)* are being undertaken through a new contract awarded on April 22, 2020, in the amount of \$267,960,000. El Paso C (Segments 1 and 2) will replace existing primary fence with approximately 13 miles of new 30 foot primary barrier fencing within the Roosevelt Reservation, near the Santa Teresa Port of Entry (POE) and Columbus POE. El Paso D (Segments 1 through 4) calls for approximately 22 miles of new 30 foot primary barrier fencing within the Roosevelt Reservation. Approximately 12.4 miles of El Paso D (Segment 3)'s 17 miles are included as an option item in this contract, and are not yet awarded. All segments include gates, roads, and drainage improvements. Electrical attributes for all segments within this contract were included as options and have not yet been awarded.

j. *Del Rio A and B*. This project includes design and construction efforts necessary to erect approximately four miles of new 30 foot primary barrier fencing with mitered tops, covers, and anti-climb plate, and includes gates, roads, drainage improvements, and electrical attributes. The new barrier fence will replace existing barrier fence. This contract is expected to be awarded in May 2020.

8. As of May 1, 2020, \$1,595,369,770 has been obligated on contracts for FY20 Section 284 construction projects, leaving an unobligated balance of approximately \$2,235,630,230 that will be needed for Yuma A (Segment 1), Yuma A (Segment 2) electrical attributes, Yuma B (Segments 1 and 2) electrical attributes, El Centro A and San Diego A (Segments 1

and 3) electrical attributes, Tucson A (Segment 5) barrier and electrical attributes, Tucson B (Segment 6) barrier and electrical attributes, El Paso B (Segment 6) electrical attributes, El Paso C (Segments 1 and 2) electrical attributes, El Paso D (Segments 1 through 4) electrical attributes (and the unawarded 13 mile barrier fencing option for Segment 3), and Del Rio A and B. 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 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 barrier fencing construction, thus diminishing the money available for actual barrier fencing construction and irreparably harming the Government's ability to complete the barrier fencing 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 barrier fencing 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 A (Segment 2), 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 A (Segment 2) and 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 May 1, 2020, the contractor has expended \$794,100 for bonds, \$528,525 on geotechnical investigations and initial site surveys, \$2,903,404 for mobilization, and \$4,798,882 for design costs. Standard bollard fence steel for the project's approved segments has been ordered, at a cost of \$25,220,836. Deliveries are scheduled to begin on or before April 27, 2020 and continue for approximately three months. The estimated interest cost to the Government for failure to timely pay invoices for these costs could reach \$617,855 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 May 1, 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. The estimated interest cost to the Government for failure to timely pay invoices for these costs could reach \$573,462 per year.

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 onsite office will be set up on April 27, 2020, and geotechnical investigation and surveying is planned to begin that same day. As of May 1, 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. The estimated interest cost to the Government for failure to timely pay invoices for these costs could reach \$1,591,947 per year.

d. If BFBC's performance is suspended, it is estimated the contractor's costs will accrue at the rate of \$409,235 per day and \$12,440,744 per month.

15. *Tucson A (Segments 1 through 4)* is under contract to Southwest Valley Constructors Co.

a. The contractor is currently working on mobilizing and starting design. As of May 1, 2020, the contractor has mobilized and started the design effort.

b. If Southwest Valley Constructors' performance is suspended, it is estimated the contractor's costs will accrue at the rate of \$877,907 per day and \$26,688,377 per month.

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

a. As of May 1, 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'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 so recently awarded.

17. *El Paso C (Segments 1 and 2)* and *El Paso D (Segments 1 through 4)* are under contract

to SLSCO, Ltd.

a. As of May 1, 2020, the contractor is estimated to have incurred bonding costs in the amount of \$1,338,450 and mobilization costs in the amount of \$1,070,760. The total estimated incurred costs to date are \$2,409,210. The estimated cost to the Government for failure to pay any invoiced amounts for the above related costs could reach approximately \$57,219 per year.

b. If SLSCO's performance is suspended, it is estimated the contractor's costs will accrue at the rate of \$448,487 per day and \$13,633,992 per month. These are best estimates based on peak production rates, as the contract was so recently awarded.

B. Harms from Contract Termination

18. These suspension costs will quickly become unsustainable for the Government, and if work on the projects and segments included in the contract and 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 A (Segment 2) and Yuma B (Segments 1 and 2), El Centro A, San Diego A (Segments 1 and 3), Tucson A (Segments 1 through 4), El Paso A, El Paso B (Segment 6), El Paso C (Segments 1 and 2), and El Paso D (Segments 1 through 4) 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 and segments remains suspended for more than six months, the Corps will likely need to consider partial termination. The Corps estimates that the termination and demobilization costs for Yuma A (Segment 2) and Yuma B (Segments 1 and 2) would be approximately \$6,914,413. For El Centro A and San Diego A (Segments 1 and 3), termination and demobilization would cost approximately \$22,346,860. Tucson A (Segments 1 through 4) termination and demobilization costs are estimated at \$19,301,540. El Paso B (Segment 6) termination and demobilization costs would be an estimated \$2,262,675. El Paso C and El Paso D termination and demobilization costs are estimated to be \$9,860,361.

b. The Corps has contracted for Quality Assurance (QA) services at the construction sites at issue. As of May 1, 2020, 14 contractor personnel are serving as QA representatives. The cost to terminate this support contract for QA representatives is estimated at \$487,921.

19. In the event the Government must terminate for convenience work being performed on Yuma A (Segment 2), Yuma B (Segments 1 and 2), El Centro A, San Diego A (Segments 1 and 3), Tucson A (Segments 1 through 4), *El Paso A (Segment 5)*, El Paso B (Segment 6), El Paso C (Segments 1 and 2), and El Paso D (Segments 1 through 4), fiscal laws may prevent later re-use of FY20 Section 284 funds for any purpose other than a replacement contract for the

same barrier fencing. If these funds are unused or unusable, they would automatically return to the Treasury.

20. 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 the mileage of barrier fencing constructed, modifying barrier fencing design to eliminate features (such as lighting, cameras, or sensors), or cancelling Section 284 projects.

C. Harms from Contract Reprocurement

21. 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.

22. 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 the mileage of barrier fencing constructed, or modifying barrier fencing projects by eliminating features (such as electrical attributes) or cancelling Section 284 projects that have not yet been awarded.

III. Demobilization and Caretaker Activities

23. If enjoined, the Government will not use unobligated Section 284 funds for further barrier fencing 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.

24. 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 A (Segment 2), Yuma B (Segments 1 and 2), El Centro A, San Diego A (Segments 1 and 3), Tucson A (Segments 1 through 4), *El Paso A (Segment 5)*, El Paso B (Segment 6), El Paso C (Segments 1 and 2), and El Paso D (Segments 1 through 4) 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 temporary duty (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 three RFPs in various stages of preparation and negotiation for Section 284 projects, which, in terms of a projected rough order of magnitude, could have combined value of \$1,400,000,000. 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 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.

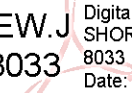
¹ The Resident Management System is a comprehensive system for the expedient and effective management of construction contracts through tracking and documentation of all facets of a contract by Corps of Engineers' field offices and contractors.

25. The only source of funds available for these demobilization 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 1st Day of May 2020.

SHORT.ANDREW.J
ACOB.1082408033



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Andrew J. Short
Colonel, United States Army