

EXHIBIT 2

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

SIERRA CLUB, *et al.*,

Plaintiffs,

v.

DONALD J. TRUMP, *et al.*,

Defendants.

No. 4:19-cv-00872-HSG

**DECLARATION OF ERIC M.
MCFADDEN**

I, Eric M. McFadden, pursuant to 28 U.S.C. § 1746, hereby declare as follows:

1. This declaration is based on my own 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 am currently the Commanding Officer for Task Force Barrier (“Task Force”) with the U.S. Army Corps of Engineers (“Corps”), South Pacific Division. I am stationed in Phoenix, Arizona.
3. The Task Force’s primary mission is to coordinate the construction of approved border barrier projects on the southern border of the United States.
4. In my capacity as the Commanding Officer of the Task Force, I have overall responsibility for, and authority over, the Task Force 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 Task Force’s mission.
5. In the course of my duties, I oversaw the award of contracts for El Paso Project 1, which involves the replacement of 46 miles of vehicle fence with pedestrian fencing in New Mexico (“El Paso 1”), and for Yuma Project 1, which involves the replacement of five miles of vehicle barrier fencing in the Yuma Sector (“Yuma 1”). I am currently overseeing the subsequent performance of work on these contracts. These awarded projects are collectively referred to as “Tranche 1.”

6. Approximately \$423,999,999 remains unobligated on the Tranche 1 projects and is expected to be needed to complete those projects: \$388,999,999 unobligated for El Paso 1 and \$35,000,000 unobligated for Yuma 1.

7. Amounts made available to the Corps to construct the Tranche 1 projects are from the fiscal year 2019 Operation and Maintenance, Army, appropriation. As provided in Section 8003 of the Department of Defense Appropriations Act, 2019, any unobligated amounts in the Operation and Maintenance, Army, appropriation, including the unobligated amounts described in paragraph six above, will no longer remain available for obligation after the fiscal year ends on September 30, 2019.

8. The contracting process necessary to completely obligate the full value of the contracts awarded for El Paso 1 and Yuma 1 (Tranche 1) is complex. These contracts are “undefinitized” contract actions, which is a type of contract for which the contract terms, specifications, or price are not agreed upon before performance begins, but which does establish an overall ceiling price pending definitization. “Definitization” occurs when the parties determine or agree on the contract terms, specifications, and price. *See* Defense Federal Acquisition Supplement (“DFARS”) SUBPART 217.74 –UNDEFINITIZED CONTRACT ACTIONS (JUN 2018). The definitization process includes extensive negotiation, audits of contractor accounting systems, and review of proposals by the Defense Contract Audit Agency (“DCAA”), as well as legal review, all prior to the contracting officer reaching a fair and reasonable pricing determination to finalize the contract pricing.

9. The Corps is subject to statutory restrictions on undefinitized contract actions. Title 10 U.S.C. § 2326 restricts the Corps from obligating more than 50 percent of the contract’s ceiling price upon award. If the contractor submits a qualifying proposal that contains sufficient information to enable the Corps to conduct a meaningful audit of the information contained in the proposal, the amount obligated may be increased to 75 percent of the negotiated overall ceiling price. Upon definitization, the Corps may obligate the remaining unobligated balance of the initial ceiling or such amounts as necessary to fully fund the contract’s final negotiated price. If an agreement is not reached on contractual terms, specifications, and price within the time specified by the contract, the Corps may unilaterally definitize those terms.

10. The terms of the Tranche 1 contracts require definitization not later than 100 days from the date of contract award (the award dates are April 9 for El Paso 1 and May 15 for Yuma 1). If the Corps does not have sufficient time available prior to September 30, 2019, to definitize these contracts and thereby obligate the balance of the contract price, the remaining unobligated funds will become unavailable for obligation, as described in paragraph seven above. As a consequence, the Corps will be unable to complete the projects as planned, and the contracts will have to be significantly de-scoped or terminated.

11. On May 24, 2019, in compliance with the District Court’s preliminary injunction, I directed the Task Force to cease all actions involved in constructing border barriers in the areas identified as El Paso 1 and Yuma 1 (Tranche 1). Accordingly, the contracting officers for the El Paso 1 and Yuma 1 contracts directed the respective contractors to suspend all work on those contracts

in the identified sectors, pursuant to Federal Acquisition Regulation (“FAR”) Clause 52.242-14, SUSPENSION OF WORK (APR 1984).

12. As the Commander of the Task Force, I have been made aware by the contracting officers that suspending work on the above-named contracts in response to the preliminary injunction will cause significant immediate and irreparable harm to the government as described below.

13. 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 the contract is 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 (*i.e.*, steel and concrete). The Corps will be obligated to reimburse these additional costs, which would not have been incurred but for the Court’s injunction. Moreover, the Corps will be obligated to reimburse these additional costs from funds that would otherwise be spent on actual barrier construction.

14. For El Paso 1, the costs expected to be incurred while the contract is suspended are currently estimated to be approximately \$195,000 per day (approximately \$5,460,000 per month).

15. For Yuma 1, the costs expected to be incurred while the contract is suspended are currently estimated to be approximately \$20,000 per day (approximately \$560,000 per month).

16. Additionally, both contractors have already incurred significant costs for their work on these projects. These are costs to the contractor that the government owes, but cannot pay because of the injunction, and they will result in additional costs to the government. The prompt payment interest penalty is 3.625 percent per annum, if the Corps does not pay invoices 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).

17. For El Paso 1, the contractor has already incurred approximately \$9,600,000 in material costs, \$785,000 in labor costs, \$250,000 in overhead, and \$150,000 in travel. The total estimated incurred costs to date are \$10,785,000. The estimated cost to the government for failure to timely pay any invoiced amounts for the above-related costs could reach approximately \$390,956 per year.

18. For Yuma 1, the contractor has already incurred approximately \$10,300,000 in material costs, \$200,000 in labor costs, \$50,000 in overhead, and \$15,000 in travel. The total estimated

incurred costs to date are \$10,565,000. The estimated cost to the government for failure to timely pay any invoiced amounts for the above-related costs could reach approximately \$382,981 per year.

19. Therefore, if these contracts remain suspended, the government could incur estimated additional expenses of \$6,020,000 monthly, plus any interest. These costs will quickly become unsustainable for the government, and if the contracts remain suspended for too long, the Corps will be forced to de-scope or terminate the contracts. Currently, the contracting officers estimate that if the contracts remain suspended for more than six months, the Corps will likely need to consider termination. The Corps estimates that the cost to terminate El Paso 1 will range between \$71,600,000 and \$101,600,000, and the cost to terminate Yuma 1 will range between \$8,600,000 and \$11,600,000.

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

Executed this 29th day of May, 2019.

MCFADDEN.ERIC.MI
CHAEL.1157309842

Digitally signed by
MCFADDEN.ERIC.MICHAEL.11573
09842
Date: 2019.05.29 05:58:38 -07'00'

Eric M. McFadden
Colonel, United States Army