

# Exhibit B

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MAR 21, 2019

## ACTION MEMO

Prepared by: James Ross, OASD(HD&GS)  
Phone Number: (571) 256-8325

**FOR:** ACTING SECRETARY OF DEFENSE

**FROM:** Kenneth P. Rapuano, Assistant Secretary of Defense, Homeland Defense & Global Security

**SUBJECT:** Department of Homeland Security Request for Department of Defense Support to Block Drug-Smuggling Corridors

**PURPOSE:** To obtain your approval of a Department of Homeland Security (DHS) request for certain assistance in blocking drug-smuggling corridors along the southern border; and for you to direct specific actions by the Under Secretary of Defense (Comptroller)/Chief Financial Officer (USD(C)/CFO) and the Secretary of the Army/Commander, U.S. Army Corps of Engineers.

**COORDINATION:** This action was coordinated with SecArmy, USD(C)/CFO, OGC, ASD(SO/LIC), and the Joint Staff.

**BLUF:** Approving this request will support DHS's efforts to secure the southern border by blocking drug-smuggling corridors. You have the authority under 10 U.S.C. § 284 to use certain DoD funds to construct roads and fences, and to install lighting, to block drug-smuggling corridors across international boundaries of the United States in support of counter-narcotics activities of Federal law enforcement agencies.

## DISCUSSION:

- On February 25, 2019, the Secretary of Homeland Security requested DoD assistance in blocking up to 11 specific drug-smuggling corridors on Federal land along the southern border of the United States. DHS requested that DoD provide this support in order of stated priority as DoD resources allow by (1) replacing existing vehicle barricades or dilapidated pedestrian barricades with construction of new pedestrian fences (i.e., fences that would block both vehicles and pedestrians), (2) constructing new and improving existing patrol roads, and (3) installing lighting. (TAB D). This support to DHS is consistent with the President's direction in his April 4, 2018, memorandum, "Securing the Southern Border of the United States" (TAB E).
- 10 U.S.C. § 284(b)(7) gives you the authority, using funds from the counter-narcotics support line in DoD's "Drug Interdiction and Counter-Drug Activities, Defense" appropriation, to construct roads and fences, and to install lighting, to block drug-smuggling corridors across international boundaries of the United States in support of counter-narcotic activities of Federal law enforcement agencies.
  - The requirements of Section 284 are met: DHS/Customs and Border Protection (CBP) is a Federal law enforcement agency; DHS has identified each project area as a drug-smuggling corridor; and the work requested by DHS falls within the scope of subsection 284(b)(7) in that it

SD CA		DSD SA	
SD SMA		DSD SMA	
SD MA		DSD MA	
CoS		DSD CA	
SD Action Grp			
ES		ESB Rvw	
ESR		ESD	

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Administrative Record - Section 284 Projects: 001



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involves construction of fences (including a linear ground detection system), construction of roads, and installation of lighting (supported by grid power and including imbedded cameras).

- Any support provided under Section 284, including under subsection (b)(7), is subject to 10 U.S.C. § 276, which provides that support may not be provided if the provision of such support would adversely affect the military preparedness of the United States.
- On March 1, 2019, you directed an evaluation of the DHS request for assistance (TAB F).
  - The Secretary of the Army/Commander, U.S. Army Corps of Engineers (USACE) provided preliminary cost estimates for the 11 DHS-requested border fencing construction projects, totaling \$4.47B (based on construction of a 30-foot bollard fencing) and covering 217.8 miles. If the height of the bollard were changed to 18 feet, the estimated cost would be \$3.7B. (TAB G)
  - To meet any level of the support requested by DHS, additional funds must be transferred into the "Drug Interdiction and Counter-Drug Activities, Defense" appropriation using DoD's general transfer authority (GTA), which is provided in Section 8005 of the Department of Defense Appropriations Act, 2019, and Section 1001 of the John S. McCain National Defense Authorization Act (NDAA) for Fiscal Year 2019. Together, these GTA provisions allow total transfers of up to \$4B. Congressional notification is required under both sections, but there is no statutory requirement to obtain prior congressional approval.
    - The Department may use GTA only upon a determination by the Secretary of Defense that such action is necessary in the national interest, and the transfer may only be used to provide funding for higher priority items, based on unforeseen military requirements, than those items for which funds were originally appropriated, and in no case for an item for which funds or authorization have been denied by Congress.
    - The USD(C)/CFO has identified \$1B of FY 2019 Army military personnel funds as excess to current military personnel requirements and available for transfer into the Drug Interdiction and Counter-Drug Activities, Defense, appropriation (TAB H).
    - You may determine that:
      - Use of GTA is necessary in the national interest (see April 4 memo);
      - Using funding to block drug smuggling corridors is a higher priority than the Army military personnel funds that have become excess to this fiscal year's Army military personnel programmatic requirement;
      - The military requirement for this increased support to DHS was unforeseen at the time of the budget request; and
      - Congress has not denied funding or authorization for support to DHS under Section 284(b)(7).
  - The CJCS indicates that reprogramming "of these funds into the Drug Interdiction and Counter-Drug Activities, Defense account will have no immediate negative impact on joint force readiness. However, if these funds were not reprogrammed they likely would be used to address currently unfunded DoD requirements" (TAB I). The Under Secretary of Defense for

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Policy (USD(P)) concurs that there is no reduction in readiness. Because there is no adverse effect on readiness and the source funds are excess to need, providing the recommended support would not adversely affect the military preparedness of the United States.

- The Secretary of the Army requests that if the full \$1B is not used for support of DHS under Section 284, the remainder be returned to the Army for reprogramming and funding of unfunded Army requirements.
- During the USD(C)/CFO's mid-year review, additional funds may be identified that are excess to need or are lower-priority programmatic requirements that will not adversely affect military preparedness. The USD(C)/CFO and the USD(P) will coordinate with the CJCS and the heads of other appropriate DoD Components to provide a recommendation regarding construction of additional DHS-requested projects under Section 284.

#### OPTIONS:

- DHS's request for assistance includes approximately 218 miles of road construction, lighting installation, and fencing construction, set out as 11 distinct projects. DHS specifically requested "that DoD's support under 10 U.S.C. § 284 address the requirements in order of priority as DoD resources allow."
- All projects require that the Secretary of Homeland Security use her authority to waive such legal requirements (including environmental laws) as she determines are necessary to waive to ensure expeditious construction. Prior to executing such a waiver, the Secretary of Homeland Security must consult with relevant governmental officials, Indian tribes, and property owners to minimize effects on the environment, culture, commerce, and quality of life. The DHS request provides that DHS will be responsible for applicable environmental planning and compliance, including stakeholder outreach and consultation.
- CBP has indicated that the timeline to complete consultations and execute waivers will be longer if multiple projects are undertaken.
- We also considered USACE's ability to undertake projects using its multiple award task order contract (MATOC), which was developed as a contracting vehicle for border-fencing construction and has a limit of \$350M per individual task order. USACE could propose a task order in excess of \$350M under Federal Acquisition Regulation Part 16.5 procedures. Although a contractor would have to agree to a task order above \$350M, we believe that contractors will agree to larger task orders. Using the MATOC improves contract management and may reduce legal challenges to the projects since it was competitively bid.
- Although the MATOC is not currently available because it is under protest, USACE anticipates that the bid protest will be resolved in time to support DHS. If the protest is not resolved as quickly as anticipated, USACE can use a new sole-source contract, which has somewhat higher legal risk.

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- With the constraint of \$1B in available resources, USACE would be able to construct approximately 57 miles of 18-foot or 46 miles of 30-foot bollard fencing. The CBP Commissioner confirmed that CBP still strongly prefers 30-foot bollard fencing.
- The DHS order of priority, mileage, and estimated cost for each project are as follows:

DHS Priority	Project Name	Cost / Miles (\$17M/mile) 18-foot bollard	Cost/Miles (\$20.5/ mile) 30-foot bollard
1	Yuma Sector Project 1	\$ 85M / 5 miles	\$103M / 5 miles
2	Yuma Sector Project 2	\$102M / 6 miles	\$123M / 6 miles
3	El Paso Sector Project 1, segment 1	\$255M / 15 miles	\$308M / 15 miles
	El Paso Sector Project 1, segment 2	\$527M / 31 miles	\$636M / 31 miles
4	El Centro Sector Project 1	\$259M / 15.25 miles	\$313M / 15.25 miles
5	Tucson Sector Project 1	\$646M / 38 miles	\$779M / 38 miles
6	Tucson Sector Project 2	\$ 85M / 5 miles	\$103M / 5 miles
7	Tucson Sector Project 3	\$340M / 20 miles	\$410M / 20 miles
8	Tucson Sector Project 4	\$442M / 26 miles	\$533M / 26 miles
9	Yuma Sector Project 3	\$527M / 31 miles	\$636M / 31 miles
10	El Paso Sector Project 2	\$400M / 23.51 miles	\$482M / 23.51 miles
11	Tucson Sector Project 5	\$ 34M / 2 miles	\$41M / 2 miles

- Addressing the DHS request in order of priority results in the following options:
  - **Option 1:** DHS “Top 3” Priorities: \$969M; 57 miles of 18-foot bollard fencing (\$17M/mile).  
**PRO:** This course of action provides the most mileage for \$1B and meets DHS’s “Top 3” Border Fencing counter-drug priorities. By building to the 18-foot bollard standard, sufficient savings will be realized to complete all 3 projects for \$1B. El Paso Sector Project 1 would tie into existing fencing that is 18-feet high. All projects may be undertaken using the USACE MATOC, thereby limiting the number of contractors able to mount protests.  
**CON:** Does not meet DHS’s desire for 30-foot bollard fencing. USACE would have to justify exceeding the MATOC’s normal \$350M ceiling and would have to obtain concurrence of the contractor awarded with a task order for Segment 2 of El Paso Sector Project 1. Additionally, there is a greater risk of being unable to execute the projects this fiscal year due to CBP capacity issues in completing multiple environmental consultations and waivers. Requires USACE to manage more projects.
  - **Option 2:** El Paso Sector Project 1: \$943M; 46 miles of 30-foot bollard fencing (\$20.5M/mile).  
**PRO:** Highest-priority single project within available funding. Requires only one use of DHS’s waiver authority. Meets DHS’s desire for 30-foot bollard fencing.  
**CON:** Does not account for DHS’s two highest priority projects. USACE may award both segments of this project using the MATOC, but Segment 2 (which is above the \$350M ceiling) requires contractor consent.
  - **Option 3:** DHS Priorities 1, 2, 3 (segment 1), 4, and 6: \$948M; 46.25 miles of 30-foot bollard fencing.

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**PRO:** Fully funds the two highest and four of the top six DHS priority projects. Meets DHS's desire for 30-foot bollard fencing. All projects may be undertaken using the USACE MATOC, thereby limiting the number of contractors able to mount protests.

**CON:** Funds only one segment of DHS Priority 3. Fewer miles than Option 1. Additionally, there is a greater risk of being unable to execute projects this fiscal year due to CBP capacity issues in completing multiple environmental consultations and waivers. In particular, DHS Priority 6 includes an environmentally sensitive area, which could further extend the time required for consultations and delay issuance of a waiver for that specific project. Requires USACE to manage more projects.

## RECOMMENDATIONS:

1) Determine, in light of the views of the CJCS and the USD(P), that providing up to \$1B in support does not adversely affect the military preparedness of the United States because there is no adverse effect on readiness and the source funds are excess to need.

Approve: HMS Disapprove: \_\_\_\_\_ Other: \_\_\_\_\_  
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2) Approve Option 1 -- immediate DoD support to DHS's Priority Projects 1, 2, and 3 (57 miles of 18-foot bollard fence), and sign the letter to the Secretary of Homeland Security at TAB A. This option meets DHS's top 3 priority projects and provides the maximum mileage of 18-foot bollard fencing for \$1B.

Approve: HMS Disapprove: \_\_\_\_\_ Other: \_\_\_\_\_  
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3) Determine that transferring \$1B in funds for this support is in the national interest and that the other requirements of Section 8005 of the Department of Defense Appropriations Act, 2019, and Section 1001 of the John S. McCain NDAA for FY 2019 are met (i.e., that the item to be funded is higher priority than the item for which funds and authority are transferred, that the increase in Section 284(b)(7) support is based on unforeseen military requirements, and that the programmatic increase in Section 284(b)(7) support to DHS has not been denied by Congress).

Approve: HMS Disapprove: \_\_\_\_\_ Other: \_\_\_\_\_  
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4) Sign the memorandum to the USD(C)/CFO at TAB B -- authorizing the transfer of up to \$1B of FY 2019 Army military personnel funds into the "Drug Interdiction and Counter-Drug Activities, Defense" appropriation, and direct the USD(C)/CFO, upon approval of the transfer by the Office of Management and Budget, to notify Congress promptly of the transfer.

Approve: HMS Disapprove: \_\_\_\_\_ Other: \_\_\_\_\_  
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5) Sign the memorandum to the Secretary of the Army at TAB C, authorizing the Commander, U.S. Army Corps of Engineers, to undertake DHS Priority Project 3.

Approve: HMS Disapprove: \_\_\_\_\_ Other: \_\_\_\_\_  
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COORDINATION: TAB J

Attachments: As stated

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