

Contractors Should Prepare For Border Wall Reallocation

By **Lucas Hanback** (February 25, 2019, 4:05 PM EST)

On Feb. 15, 2019, President Donald Trump declared a national emergency in order to break an impasse in his attempts to secure funding for the border wall he promised as part of his 2016 election campaign.[1] The White House estimates that it can use up to \$8.1 billion in funding, of which \$3.6 billion will be reallocated from military construction projects.[2]



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So far, there has been no indication as to how the president would prioritize the reallocation of funds, or which or how many projects may be impacted, but the potential impact could be quite large. In a recent analysis of construction cost estimates, the U.S. Government Accountability Office identified a universe of 690 defense construction projects for which funds were appropriated between fiscal years 2005 and 2016.[3]

Much of the commentary and analysis of the declaration has focused on whether it will survive challenges in the courts[4] or efforts to overrule it in Congress.[5] If these efforts fail, however, the president's declaration would likely continue until he issues a proclamation to terminate the emergency.[6] In light of this possibility, smart contractors would be well advised to prepare for the worst, consider the possible impacts to their contracts as a result of the resolution and act now to protect their interests.

The impacts are already being felt as it was reported by National Public Radio and others recently that planned construction on Joint Base Andrews and a new high school on Fort Meade may be halted as those funds are redirected to fund the border wall effort.[7] Given that construction projects often involve multiple tiers of subcontractors, the universe of projects and contractors that could be affected by reallocation of funds under the president's declaration could be quite large. Contractors and subcontractors with existing contracts on military construction projects should act now to assess what can be done to protect their interests.

The President's Powers Under the National Emergencies Act

Trump's declaration invokes powers granted to him under Sections 201 and 301 of the National Emergencies Act.[8] Section 301 of the act requires the president to specify the emergency statutory authorities under which he proposes to act.[9] As relevant here, Trump's declaration invokes the powers granted under two statutes.[10] The first authorizes the president to mobilize the ready reserve of the military for up to 24 months in a time of declared national emergency.[11] The second authorizes military construction projects in the event of a national emergency that requires the use of the armed forces.

[12] These construction projects are those “not otherwise authorized by law” and for which funds have been appropriated but “have not been obligated.”[13]

As to the possible funds available for use under Trump’s emergency, on Sept. 21, 2018, Congress appropriated funds for military construction for fiscal year 2019.[14] In total, \$8.2 billion was appropriated for various military construction activities under the law that would fall within the president’s emergency construction powers.[15]

Additional funds were provided for defense construction on Sept. 28, 2018.[16] The summary of this second appropriation indicates that the funds are separate from those provided for military construction under the earlier appropriation. The Sept. 28 defense appropriation provides discretionary funds that can be used in limited ways for military related construction in various sections.

For example, the nearly \$4.3 billion was appropriated to the Army for aircraft procurement, which could include “expansion of public and private plants, including the land necessary therefor, for the foregoing purposes, and such lands and interests therein, may be acquired, and construction persecuted thereon prior to approval of title.”[17] All provisions for the U.S. Army and the U.S. Navy contain such clauses. Other provisions for the U.S. Air Force are similarly worded and also expressly mention “erection of structures.”[18]

Because these funds are intermixed with funds appropriated for other discretionary purposes, it is not clear how much of this funding would be subject to use under the president’s emergency powers. Additionally, the president may only use funds that have “not been obligated.” Accordingly, the total funding available, and the projects from which it can be drawn, is not immediately clear, but the White House’s current estimate of \$3.6 billion shows the potential for wide ranging impacts.

Contractors and subcontractors with existing contracts on military construction projects should act now to assess what can be done to protect their interests. Similarly, it is reasonable to expect that the wall construction that will be undertaken with the reallocated funds may provide other opportunities for contractors, and contractors should consider whether the typical competitive requirements will be applicable to those projects.

Impacts to Existing Contracts

Contractors and subcontractors with existing contracts should assess whether their projects depend on funds that have not yet been obligated and are thus subject to reallocation under the president’s declaration. This will likely require coordination with the contracting officer, and contractors should seek to determine how the government intends to proceed in the event that their project is impacted and what the contractors can do to protect their interest.

Key areas of inquiry will include whether the government intends to suspend the contract or terminate it, and if suspended, whether the government will require the contractor to stand ready to perform immediately or whether the government will allow the contractor to demobilize and reallocate resources elsewhere.

Contractors should begin to consider how they will capture and quantify any costs and delays associated with the reallocation of funds. Additionally, they should consider the challenges that could arise in conjunction with the presentment limitation under the Contract Disputes Act, or CDA, should the emergency continue indefinitely.[19] Contractors should not assume that the declaration will be short lived. Currently, there are 59 declared national emergencies, with the longest standing dating back to the Carter administration.[20]

The CDA generally requires contractors to present their claims to the contracting officer for decision within six years of accrual.[21] If Trump prevails in the courts, and vetoes the current Congressional bill to block his declaration, he could conceivably extend the emergency in the face of a hostile Congress. If he wins reelection in 2020, the continuing reallocation could start to create accrual problems for claims on affected construction projects, especially for contractors who are not diligent now.

Considerations for Wall Construction Contracts

Regarding the reallocated funds, the National Emergencies Act expressly says that "[t]he provisions of this chapter shall not apply to the following provisions of law, the power and authorities conferred thereby, and actions taken []under... Section 2304(a)(1) of Title 10." [22] Section 2304 is the provision that mandates full and open competition. The invocation of the president's emergency powers thus does not automatically render competitive requirements inapplicable to any procurements conducted in order to obtain construction services for the border wall.

There are, however, limited exceptions in Section 2304 that also may be used in national emergencies to exclude particular sources from a procurement [23] or to procure through other than competitive procedures. [24] It is not clear if — or how — the president will seek to invoke these authorities also in connection with the declaration and construction of the wall. But contractors who decide to compete for these projects should carefully consider whether competition is required and whether the typical protest procedures are available.

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[1] See Presidential Proclamation on Declaring a National Emergency Concerning the Southern Border of the United States (Feb. 15, 2019), 84 Fed. Reg. 4949.

[2] See <https://www.whitehouse.gov/briefings-statements/president-donald-j-trumps-border-security-victory/>, last visited Feb. 22, 2019.

[3] See GAO-18-101, Defense Infrastructure, Action Needed to Increase the Reliability of Construction Cost Estimates (March 2018) at 4.

[4] See *State of Cal., et al. v. Trump, et al.*, Case No. 4:19-cv-00872-HSG (N.D. Cal., 2019)

[5] See H. J. Res. Relating to a national emergency declared by the president on Feb. 15, 2019.

[6] 50 U.S.C. Section 1622(a)(2).

[7] <https://wamu.org/story/19/02/25/trumps-border-wall-could-cut-funding-to-marylands-largest-military-base/>.

[8] See declaration; see also 10 U.S.C.

[9] 50 U.S.C. Section 1631.

[10] See Declaration (invoking 10 U.S.C. Sections 12302 and 2808).

[11] 10 U.S.C. Section 12302(a).

[12] See 10 U.S.C. Section 2808(a).

[13] Id.

[14] See Pub. L. 115-244, Energy and Water, Legislative Branch, and Military Construction and Veterans Affairs Appropriations Act, 2019 (Sept. 21, 2018).

[15] See Id. at Division C-Military Construction, Veterans Affairs, and Related Agencies Appropriations Act, 2019.

[16] See Pub. L. 115-245, Department of Defense and Labor, Health and Human Services, and Education Appropriations Act, 2019 and Continuing Appropriations Act, 2019 (Sept. 28, 2018).

[17] Id. at Title III, Procurement, Aircraft Procurement, Army.

[18] See, e.g., id. at Aircraft Procurement, Air Force.

[19] There have been 58 declared emergencies, and the oldest is:

[20] See E.O. 12170 (Nov. 14, 1979).

[21] See 41 U.S.C. Section 7103(a)(4)(A).

[22] 50 U.S.C. Section 1651(a)(5).

[23] See 10 U.S.C. Sections 2304(b)(1)(B) and (F).

[24] See id. at Section (c)(3).