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United States Senate

COMMITTEE ON
HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS

WASHINGTON, DC 20510-6250

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July 28, 2021

The Honorable Isabel Casillas Guzman
Administrator
U.S. Small Business Administration
409 3rd Street, S.W.
Washington, D.C. 20416

The Honorable Mina Wales
Deputy National Ombudsman
U.S. Small Business Administration
409 3rd Street, S.W.
Washington, D.C. 20416

Dear Ms. Guzman and Ms. Wales:

I write to bring to your attention unfair impacts on small businesses related to the implementation of Presidential Proclamation 10142, which terminated the national emergency declared along the U.S. Southwest border and suspended all construction on the border wall system, including fencing, roads, and technology.¹ I have specifically become aware of at least one small business that is at risk of suffering irreparable harm due to the U.S. Army Corps of Engineers' (USACE) mandate to remain in standby mode for an indefinite period. The U.S. Department of Homeland Security (DHS) has declined to answer my questions regarding their plans for border wall contractors and subcontractors. In light of your statutory mission to serve as a voice and advocate for small businesses, I ask that you work with DHS to address unfair impacts of its implementation of Presidential Proclamation 10142 on contractors and subcontractors who work on border barrier projects.

A recent report by the Government Accountability Office (GAO) details that the Office of Management and Budget (OMB) has placed National Environmental Policy Act (NEPA) and similar reviews on existing border wall contracts funded by DHS appropriations, even though those reviews had been initially waived for certain projects.² A DHS press release in June 2021 noted, "DHS will first engage in a comprehensive review that includes detailed environmental impact analysis and remediation and a robust and substantive engagement with relevant stakeholders, including border community residents, their elected representatives, tribal communities, and environmental and other interested non-governmental organizations and advocates."³ Notably, the contractors and subcontractors themselves were not listed as a group with whom DHS has engaged.

¹ Termination of Emergency With Respect to the Southern Border of the United States and Redirection of Funds Diverted to Border Wall Construction, 86 Fed. Reg. 7225-27 (Jan. 20, 2021).

² U.S. Government Accountability Office. Office of Management and Budget and U.S. Department of Homeland Security—Pause of Border Barrier Construction and Obligations (B-333110; June 15, 2021).

³ Press Release, Dep't of Homeland Sec., DHS Releases Plan for Use of Border Barrier Funds (June 11, 2021).

Last week, DHS announced that it was terminating two border barrier contracts funded by DHS Fiscal Year 2020 appropriations. DHS' communications with Congressional offices noted that "CBP anticipates [the termination] process may take between nine to fifteen months, with contractors being paid for work performed, in accordance with the contract language."⁴ A press release announcing DHS' decision to terminate these contracts stated, "DHS continues to review all [...] paused border barrier projects [...]."⁵

I am aware of at least one border wall subcontractor that has been ordered by USACE to remain in "standby" status pursuant to FAR 52.242-14, which requires that the subcontractor keep its workforce and capital investments ready for use by the Federal government. The subcontractor had originally understood that they should remain in standby status for 60 days; however, by the time I learned of this situation, the subcontractor had remained in standby status for more than 100 days. During this time, the subcontractor incurred carrying costs for two \$700,000 concrete plants and seven concrete trucks. For the duration of these 100 days, the subcontractor was unable to sell off or unwind its investments due to USACE's standby order. As of the drafting of this letter, USACE and the prime contractor would not accept the subcontractor's invoices or respond to the subcontractor's inquiries.⁶

I am concerned that the implementation of the DHS "Plan for Use of Border Barrier Funds" is having an unfair impact on small businesses who have entered into contracts for or are serving as subcontractors on projects related to the border wall. As demonstrated by the subcontractor with whom my staff spoke, the burdens of remaining in standby mode while DHS and/or USACE impose NEPA and other environmental reviews and work toward exiting these contracts may be too much for many small businesses to bear. Due to the pause and affiliated standby order, these reviews and the "pause" on border barrier projects are likely to cause irreparable harm to small businesses who are serving as contractors or subcontractors on border wall projects. Furthermore, USACE and the contractor's unwillingness to accept the subcontractor's invoices or respond to the subcontractor's inquiries raises significant questions about whether or not, as DHS has claimed, contractors will be paid for work performed.

As you are aware, Congress established the Small Business Administration (SBA) to "advocate for small businesses." Congress established the Office of the National Ombudsman within the SBA to "assist [small businesses] with excessive Federal regulatory issues." I am concerned that small businesses who have entered into agreements with the Federal government to build the border barrier are facing unfair Federal regulatory enforcement and compliance actions due to the implementation of Presidential Proclamation 10142 by DHS, USACE, and U.S. Department of Defense (DOD).

⁴ Email from U.S. Customs and Border Protection (July 12, 2021) (sent to the U.S. Senate Committee on Homeland Security and Governmental Affairs).

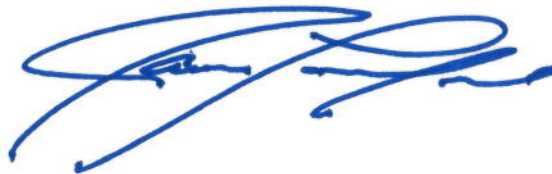
⁵ Press Release, Dep't of Homeland Sec., DHS to Cancel Laredo Sector Border Barrier Contracts (July 23, 2021).

⁶ Information provided to Committee staff on July 2, 2021. See also Subcommittee on Government Operations and Border Management. U.S. Senate Committee on Homeland Security and Governmental Affairs. "President Biden is Wasting Billions by not Building the Border Wall." (Interim Minority Staff Report; July 21, 2021).

In light of these concerns, I ask that you work with DHS, USACE, DOD, and OMB to determine the extent to which the Federal government has consulted with affected small businesses in its implementation of Presidential Proclamation 10142. I also ask that you work with the small businesses affected by the pause on border wall construction to ensure that these businesses receive compensation for all costs incurred during and after the Federal government's implementation of Presidential Proclamation 10142. If you determine that the Federal government's implementation of Presidential Proclamation has imposed unfair Federal regulatory enforcement or compliance actions on these small businesses, I ask that you use every resource afforded to you under law to provide remedies to these small businesses.

Please keep my staff updated regarding your efforts to ensure that border barrier and technology contractors are not subject to unfair enforcement actions or compliance actions. You may contact Jacob Stubbs on my staff at (202) 224-5754 with any questions. Please do not hesitate to reach out if we can provide any additional information that would assist you in this matter.

In God We Trust,



James Lankford
Ranking Member
Subcommittee on Government Operations and
Border Management

cc: Major L. Clark, III
Acting Chief Counsel
Office of Advocacy
U.S. Small Business Administration

Kyrsten Sinema
Chair
Subcommittee on Government Operations and
Border Management