

STEPHEN E. SANDHERR, Chief Executive Officer

February 21, 2019

The Honorable Patrick M. Shanahan
Acting Secretary of Defense
1000 Defense Pentagon Washington
DC 20301-1000

Dear Secretary Shanahan,

On behalf of the Associated General Contractors of America (AGC) and its 27,000 commercial construction company members, I would like to bring to light a couple items for your consideration as you implement the president's national emergency proclamation concerning the nation's southern border. Specifically, as you contemplate reprogramming unobligated funds from Department of Defense (DOD) construction programs, I urge you to: (1) avoid redirecting funds from long-anticipated or active construction contract solicitations; and (2) ensure fair and open competition rules remain in place for any contracts utilizing reprogrammed or transferred funds.

Defense construction contractors expend tremendous resources tracking and bidding federal construction contracts for DOD agencies, including the U.S. Army Corps of Engineers (USACE) and U.S. Naval Facilities Engineering Command (NAVFAC). The tracking process can begin long before contracts are awarded—oftentimes many years—as contractors begin with following completed DD Form 1391s requesting authorization and funding through the legislative and executive processes. Contractors must begin tracking DD Form 1391s early to anticipate how they will have to shift their resources (contract proposal teams, project teams, bonding capacity, etc.) to meet the project's needs, while balancing existing backlog or other owners' anticipated projects.

That stated, entrance into the formal contract solicitation phase presents even more significant costs on defense construction contractors. Teams of contractor employees review the solicitation, undertake design requirements, and estimate construction, labor, and material costs as well as evaluate legal and practical risks. To prepare bids, contractors may have to prepare a wide area of materials specific to the contract solicited, including: prequalification packages (noting relevant experience in the federal or defense market within a finite time), designs of 35 percent or more of a project, and project price estimates (based in part on bids solicited from sometimes hundreds of subcontractors that must be reviewed). Depending on the contract, contractors can invest millions of dollars during the solicitation process. In both cases, AGC urges you to avoid reprogramming or transferring funds from contracts long under consideration or—most critically—actively under solicitation.

AGC has long held that the taxpayer and government agency receive the best value and construction project when it is procured through fair and open competition. The Competition in Contracting Act, Federal Acquisition Regulation, and other procurement laws provide acquisition flexibilities in the event of emergency declarations. Nevertheless, to the greatest extent possible, we urge you to continue to ensure that fair and open competition remain a part of the contracting process for contracts utilizing reprogrammed or transferred funds, as USACE is the construction contracting and executing agency for the U.S. Customs and Border Patrol for border security infrastructure.

Thank you for your consideration of these important items with the potential to significantly impact our defense construction contractor membership.

Sincerely,



Stephen E. Sandherr
Chief Executive Officer