If You Build It, They May Come After You: Blacklists for Those Who Bid and Build President Trump’s Border Wall?

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Speculation abounds as to whether President Trump’s campaign promise of building a wall between the United States and Mexico will ever come to fruition. During the last week of April, amidst wide-ranging commentary concerning the various failures and accomplishments of President Trump’s first 100 days in office, the President removed funding for the proposed border wall from the federal budget in an effort to avoid a Government shutdown. Although officials, buoyed by the border wall’s exclusion from budget discussion, were able to reach a short-term budget funding agreement, the collective wisdom is that the border wall will continue to be a paramount issue for the President and be part of a revised budget plan come September. See Erica Werner and Andrew Taylor, Trump backs away from border wall money demand as shutdown showdown looms (visited April 30, 2017).

Despite the politically tumultuous nature of this project, numerous contractors and design professionals have expressed interest in bidding on and ultimately building the border wall. In fact, prior to the President’s decision to remove the border wall from budget discussions in April, between 200 to 400 EPC firms registered to potentially perform the necessary construction services for the border wall. Indeed, from a financial perspective, it is easy to understand why—construction estimates for the border wall project range from $21 billion to as high as $38 billion. See Richard Gonzales, Bidding Closes for Building Trump’s Border Wall (visited April 30, 2017)

Regardless of any financial incentive, there are a multitude of political, ethical, and economic obstacles that interested contractors and
design professionals will encounter in bidding on and ultimately building the border wall. Despite those very real concerns, those topics are not the subject of this piece. Rather, this piece focuses on the proposed blacklists for contractors who work on the border wall project. For instance, a Colorado-based company’s design side was forced to cease its bidding efforts towards securing border wall work so that its construction arm could move forward on a contract with a California municipality without fear of reprisal. This illustrates the blacklist problem.

The proposed border wall spans the southern border of four states—California, Arizona, New Mexico, and Texas. Of these four border wall states, two currently have legislation pending that would ban vendors who accept work on the border wall from performing work on any state projects. In California, cities such as San Francisco, Oakland, and Berkeley first proposed laws that would prohibit state-funded projects to be let to vendors who perform work on the border wall. Seizing on the bans put forth by its municipalities, California legislators quickly proposed a state-wide ban—Senate Bill 30—that would ban new or renewal contracts between the State and border wall contractors. See John Myers, Build it and be banned: Lawmakers move to block state contracts for any builders of Trump’s border wall (visited May 1, 2017).

At least one law professor at Berkeley, Professor John Yoo, has disclaimed such proposed blacklist legislation as unconstitutional, arguing that the “City of Berkeley should not be discriminating based on political views,” and that the proposed bans “may violate the Dormant Commerce Clause, which prevents cities from discriminating against outside companies.” See Hillary Vaugh, Berkeley’s Border Wall Blacklists ‘Illegal’: Berkeley Law Professor (visited May 1, 2017). Professor Yoo continued that “[n]ot only should the companies sue Berkeley, Berkeley should lose.” Id. Legal scholars agree that “the feds will have the legal advantage in this dispute, because a desire simply to frustrate federal policy doesn’t seem like a legitimate state goal under the Supremacy Clause.” T. Lindsay (personal communication, May 4, 2017).

Others in California, including a former Democratic Assemblyman, echo Professor Yoo’s sentiments. “What we’re doing here is very dangerous in that we’re creating a slippery slope and hand-picking projects that are not politically favorable to the California legislature.” See Ben Adler, Blacklisted For Building Trump’s Wall? California Considers It (visited May 2, 2017). “[I]f we have jobs or contracts that are out to bid for prisons, or for Planned Parenthood clinics -- at what point do we stop hand-picking projects and put them in the crosshairs of these political conversations?” Id.

Arguing for blacklist legislation, the Mayor of Berkeley has claimed that whether a contractor participates in the border wall construction is an indication of whether that company should be considered a “responsible bidder” on future public construction projects. See Vaugh, supra. California jurisprudence is currently silent as to whether participation in a project such as the border wall is an appropriate factor in determining whether a bidder is responsible. Nonetheless, at least one contractor has faced public derision related to its participation on an existing public contract in California because of its border wall participation. See Wendy Fry, Barrio Logan Contractor’s Work Called Into Question Over Bid to Build Border Wall (visited May 2, 2017). In this instance, the lowest responsible bidder had its award of a government contract pulled from the agency’s consent agenda because the contractor had submitted itself for consideration of border wall work. Id.

Proposed blacklists are a phenomenon affecting states nationwide. Illinois, for example, recently proposed a divestment of public pension
funds from companies working on the border wall. See Narasha Korecki, *Illinois lawmaker proposed divestment from firms that build Trump’s wall* (visited May 3, 2017). HB6628 seeks to amend “the Illinois Procurement Code [to prohibit] a State agency from entering into a contract subject to the [Illinois] Code with a business that contracts with the federal government to build a wall along the border of Mexico and the United States of America.” (visited May 3, 2017). The bill has been tabled *sine die*, meaning without a date for further meeting or hearing assigned. *Id.* Similarly, in New York, Public Advocate, Letitia James, has indicated that she intends to propose a bill that would prohibit the New York City government from entering into a public contract with any company working on the border wall.

The major question from the proposed blacklists remains, are they constitutional? As none of the proposed legislation has been enacted into law, legal challenges are not yet ripe. It is likely, however, that contractors, design professionals, and public owners alike will seek judicial interpretation to determine whether such bans are legal. Proponents of such bans will likely argue that the bans are an appropriate method to identify “responsible bidders,” while opponents will undoubtedly focus on the punitive aspects of such blacklists as unconstitutional discrimination based on political beliefs and affiliation.

**Conclusion**

The President’s push for a wall between the United States and Mexico does not appear to be fading, and neither does the potential that certain states will attempt to enforce bans against vendors working on the border wall. There are a multitude of legal issues, obstacles, and challenges that lie ahead for those interested bidders on the border wall. For instance, what type of indemnities will be provided by the federal government in response to attacks? How will delay claims be handled, or more specifically, what will be considered an excusable delay for this type of project? Many of these issues will be dealt with through contractual provisions. Still others will remain unanswered for the foreseeable future, at least until border wall funding is approved and design and construction contracts are negotiated. But the impact of potential “blacklists” resulting from bidding on the wall is a consideration that contractors must grapple with, even in the earliest stages of the potential project.

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