



Construction Industry Round Table

June 1, 2012

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The Honorable Darrell E. Issa
Chairman
U.S. House of Representatives
Committee on Oversight and Government Reform
2157 Rayburn House Office Building
Washington, DC 20515-6143

Dear Chairman Issa:

On behalf of the Construction Industry Round Table (CIRT)¹, I want to thank you for renewing your request for the Round Table to participate in the critically important effort to identify existing and proposed regulations that have or may negatively impacted job growth in our industry.

Introduction

The design and construction industry – is a highly labor intensive endeavor that provides good paying jobs in communities across the country. Given the work is highly decentralized the firms tend to be small and/or operate in a locale even if they are part of a larger organization. As such, the industry provides vital job opportunities in many locations and participates as a critical member of its community. Just as important as the *direct* employment opportunities created – the design/construction community also plays a vital role in supporting the nation's ability with respect to global competitiveness, economic activities, and national security, as well as impacting the extraordinary quality of life enjoyed by all Americans.

So, when the design/construction industry is burdened with unnecessary or ineffective mandates that often take valuable time they also cost jobs² . . . thus, regulatory delays, redundancies, inefficiencies, and red tape collectively have a direct impact on costs and therefore the vitality and ability of our industry to remain profitable and hire more people.

¹ *The Construction Industry Round Table (CIRT) strives to create one voice to meet the interest and needs of the design and construction community. CIRT supports its members by actively representing the industry on public policy issues, by improving the image and presence of its leading members, and by providing a forum for enhancing and/or developing strong management approaches in an ever changing environment through networking and peer interaction.*

The Round Table is composed of approximately 110 CEOs from the leading architectural, engineering, and construction firms in the United States. Together these firms deliver on billions of dollars of public and private sector infrastructure projects that enhance the quality of life of all Americans while directly employing half-million Americans.

² *Unemployment in the construction industry remains one of the highest, averaging **16.4% in 2011, and 16.6% so far in 2012.** [Source: Table A-14, BLS].*



Design and Construction Community

The process of designing and constructing is one of man's most complex and daunting endeavors. This complexity is borne not just from the number of parties and interested players that may have a hand in or influence over a given project, but also from the number of layered jurisdictions (federal, state, local, etc.) that are involved. Taken together, it's easy to understand the countless places and opportunities where delays and/or redundancies can creep into the process through unnecessary red tape.

It's not that the design/construction community can't find "work-arounds" and ways to achieve the end goal (notwithstanding the burdens); it's that this endless dumping-on of new requirements can sap the "can-do-spirit" and "know-how" that exists. The mountains of laws, regulations, and rules that we insist on heaping on our private sector job creators is **unprecedented** and their **cumulative burden** is not really known or fully appreciated.

To expect the private sector firms (including those in the design/construction industry) to spur economic growth and employment in the face of this "regulatory complex" onslaught – is to expect something that never was and never will be.

"Regulatory Complex" Overall Burden

In an effort to better understand the general impact or burden created by the "regulatory complex" on the design/construction industry, CIRT undertook a series of steps to try to quantitatively measure the costs with its members.

The 1st-Quarter 2011 CIRT Sentiment Index, conducted among the Round Table's 110 members, gathered and analyzed information with respect to the burden placed upon the industry by the regulatory complex.³

The findings are extraordinary – when the answers were weighed the additional costs and *time* incurred as the result of "red tape" was **10 percent**.⁴ If extrapolated out to cover the annual dollar activities of the industry (even at the depressed level seen in the past few years)⁵ – it still amounts to somewhere around **\$75-80 billion dollars in waste and inefficiency** (per year) for infrastructure related projects.

³ CIRT conducts a quarterly sentiment index among its 110 members to gauge their views on the direction of the overall economy, specific market areas, and with respect to current or topical policy/business issues of interest. ["Attachment A"](#) covers the results of the questions with respect to the impact/cost of red tape.

⁴ To arrive at the overall 10 percent figure, the responses in Exhibits 3 were weighed from among the individual findings. [\[See, Attachment A\].](#)

⁵ "Construction Put in Place" data provided by the U.S. Census Bureau on total dollar expenditures in the industry are: \$787.9B (2010), \$816.4B (2011), and so far \$808B (2012), for an average of \$804 Billion.



Combining these findings (of 10 percent burden) with studies conducted by the federal agencies that attempt to identify the number of jobs supported (directly in construction) by “a dollar” of construction activity – the magnitude in **loss job opportunities** is truly staggering at approximately: **894,000**.⁶

These findings are not unique to the design/construction industry as shown by other measures and studies that compare different U.S. States and how they create favorable or unfavorable job expanding environments. A recent analysis by *Investor’s Business Daily* of Bureau of Labor Statistics figures found that only 16 states since 2009 have enjoyed job growth.⁷ Not surprisingly, most of these states all had some common business friendly attributes, such as: tax rates, regulatory constraint, tort reform, and the size of state government.⁸

Specific Regulatory Burdens

The comments/examples raised herein are not related to “building codes/standards” that some 44,000 jurisdictions, all 50 states, several territories, and the federal government each amend, adopt, interpret, and enforce with five major sets of construction codes and over 2,000 *technical* standards governing the site selection, design, and construction of *buildings* (NOTE: just “buildings” is being considered here – in other words “vertical construction” – not roads, bridges, environmental remediation, etc. etc.).⁹ These codes, etc. are unique to the design and construction industry’s work process.

⁶ *This estimate is based on a study conducted by the USDOT, “Employment Impacts of Highway Infrastructure Investment” (April 2008). The 2008 report reviewed and revised earlier work, concluding that approximately 11,920 “construction oriented employment person-years” were supported/impacted by an additional \$1.0 Billion dollars of expenditures.*

While it is the true the 894,000 number of loss jobs could be off-set by productivity gains through less waste and costs associated with “red tape,” it is nevertheless true that some very large number of jobs are not supported or created as the result of this inefficiency. Even offsetting the total figure by using magnitudes of 50% (amounts to 447,000 loss jobs), 67% (amount to 298,000 loss jobs), or 75% (amounts to 223,000 loss jobs), any or all of which are unconscionable.

⁷ *“Jobs Up in Just 16 States Since Obama Took Office” Investor’s Business Daily, at page A-1 (05/18/2012), by John Merline.*

⁸ *IBD also examined state business friendliness rankings from Forbes, CNBC, George Mason University’s Mercatus Center, the Tax Foundation, and Chief Executives magazine – again, the states ranked at the top of two or more of these lists enjoyed nearly twice the job growth of those states in the bottom 10 of two or more of the lists. Id.*

⁹ *See, NCSBCS and its 54 national partners [hereinafter “Alliance”] web site entitled: Streamlining the Nation’s Building Regulatory Process (www.ncsbc.org/newsite/Streamline/Stream.htm)*



The examples of “red tape” found in procurement of services, environmental requirements, public safety, financial requirements (FinReg), project delivery, payment systems, benefit mandates (health care reform), taxes, and other related areas – are the subject of the comments below.

The more general burdens facing the design and construction industry are not necessarily unique, but rather all too common place and frustrating. Some examples that have been identified by CIRT members include:

- Abolish Insourcing Rules. The federal government should rely on the private sector for services readily available (the “Yellow-Pages Test”) – eliminating elaborate requirements, insourcing, cross-agency services, and competition with firms.
- Restrict Abusive Litigation to Force Rulemakings. Constrain the abusive use of litigation by certain groups to force federal agencies into settlements in order to achieve their goals. This practice has been particularly egregious with respect to EPA rulemakings whereby special interest groups have, with “a wink and a nod” from EPA, brought a lawsuit which the agency quickly seeks to settle without key parties in interest having any say as to the final contours of the agreement. Thus armed with a “court ordered settlement,” the agency can then go about its desired rulemaking without having to follow the normal public comment process. [CIRT supports passage of **H.R. 3862**, the "*Sunshine for Regulatory Decrees and Settlements Act of 2012*" to address this matter].
- Prevent Politicization of Federal Procurement Decisions. The numerous restrictions and new reporting requirements in a formerly proposed *draft* Executive Order (that was floated last year) only apply to private sector companies competing for Federal contracts—ignoring like activities by government employee unions. The draft proposes to require all firms to include in their bids or proposals a listing of contributions to political organizations. There is no reason a Federal government contracting officer needs this information. To do so will only result in undesirable and inappropriate political pressure on contracting officers to use such information in making contract award decisions. Rather than resulting in a fairer and unbiased procurement system, this will result in favoritism to bidders who contribute to the party in power. Such a 'pay to play' system would overturn 90 years of reform efforts and return the Federal government to the days of Teapot Dome. [Should this effort be renewed, CIRT will oppose it in whatever form it takes].
- Eliminate Mandatory Project Labor Agreements (PLA). Allow the marketplace to effectively determine how the work should be performed – regardless of whether one is a union or non-union contractor. A PLA negotiated by the owner provides no benefit to the industry. Contractors are continually being asked to



simultaneously price the project on a union and merit shop basis which is adding cost to overhead – and time consuming.

- Revise the FARS (Federal Acquisition Regulations) to allow for Qualifications Based Selection (QBS) of Construction Managers at Risk and Design Build Teams. All of the branches of the government are still trying to impose Design-Bid-Build rules and regulations to alternative forms of procurement inhibiting the chances for success. A number of industry studies have shown that alternative delivery methods (CMAR or CM/GC, DB, etc.) provide greater value relative to cost, schedule, quality, etc. in a teaming, collaborative environment. The government allows Qualifications Based Selection for the procurement of architectural and engineering services but insist on a pricing component for the selection of the builder. As industry utilizes more and more teaming methodologies is it imperative that the entire design and construction team be selected simultaneously prior to the initiation of drawings and specifications. Enabling legislation to allow early selection of the entire team would greatly enhance the utilization of ever changing technology, such as Building Information Modeling (BIM).
- Allow lower tier (Subcontract) Disadvantage Business Enterprise (DBE) to count towards the scores established for the project. Establish realistic minority and DBE goals on a project by project basis. In many cases, the current minority and DBE goals are unrealistic and create havoc within the industry because the scope of work is incompatible with the skill sets of the minority contractors available in the local marketplace.
- Simplify the Buy America Act. Create one “Buy America Act” for all federal agencies to reflect what can be reasonably procured in the United States.
- Better Define the Qualifications for Quality Control Personnel. Reduce the emphasis that quality control personnel must have an engineering degree in lieu of practical experience in many cases. We are removing the “builder” from a QA/QC career path in construction firms because of our insistence upon a college degree when it is not necessary. Some agencies require a significant number of specialized people on site during construction beyond the traditional QA/QC, Safety and Superintendent. An example is requiring a registered mechanical engineer be on site during all work related to mechanical systems. This is not cost efficient nor does it add value.
- Institute standard procurement policies for all federal agencies. NAVFAC, USACE, AFCEE, VA, GSA, NIH, NSA, CIA, etc. Every agency has a procurement group and all of them interpret and use the FAR in their own unique way. One set of consistent rules would



be much better. If construction procurement was centralized, it would eliminate a lot of the duplication of effort and positions in the federal government and simplify the ability of industry to respond. Having all of this redundancy drives up cost as most agencies add cost for their group in the construction funding requests.

- Create a consistent policy among federal agencies for LEED certification levels. Some agencies are concerned about first cost and operational savings and other agencies are still interested in a LEED rating but it may have little to do with savings or measurable value.

Tax Related Burdens

In addition to the specific regulatory matters there are tax related issues that also create unnecessary or costly burdens (arising from both the code itself and enforcement rules) to U.S. businesses, including design and construction firms.

Tax Simplification

The U.S. tax code is too complex – even the IRS agrees. The IRS Taxpayer Advocate Service routinely cites complexity of the tax code as the most serious problem facing taxpayers and the IRS alike and recommends that Congress substantially simplify the Internal Revenue Code. Tax complexity creates a substantial economic burden which effectively “de-stimulates” economic growth. The annual cost of U.S. income tax compliance alone is estimated to be \$431.1 billion. These excessive, non-productive compliance costs are dollars diverted from productive activities and investments that would promote economic growth and jobs creation.

The AICPA has argued that tax complexity undermines the principles of a sound tax system by eroding:

- (1) *Equity and fairness*: Complexity contributes to the public’s perception that the tax law is unfair.
- (2) *Certainty*: Complexity caused by constant changes and delays in administrative guidance heightens taxpayer uncertainty.
- (3) *Neutrality*: Complexity can cause similarly-situated taxpayers to pay different amounts of tax.
- (4) *Transparency and visibility*: Complexity leaves taxpayers perplexed about how the tax applies to them.
- (5) *Economy of collection*: Complexity increases the costs of tax administration, i.e. the costs of collecting taxes, examining returns and resolving disputes.
- (6) *Minimum tax gap*: Complexity increases the size of the tax gap, the difference between taxes actually owed and taxes that are voluntarily paid, by making taxpayers less willing and able to comply.

Eliminate the Burdensome Look-Back Calculation Requirement for Long-Term Contracts

The look-back calculation determines the amount of interest that needs to be paid to (or refunded by) the IRS on the income from long-term contracts.



Look-back interest is calculated once a job has been completed and the final contract revenue and total contract costs are known.¹⁰

Reasons to Eliminate the Requirement:

Look-back does not change the contractor's tax liability. It only requires a contractor to pay or receive interest and to spend thousands of dollars in tax and accounting resources to perform the required interest calculations.

Look-back requires taxes to be recalculated multiple times. First, for each year of a long-term contract, a contractor must calculate, under an IRS prescribed approach, the amount of tax owed. Then, at the end of the project, under the look-back rules, the contractor must go back to each year's tax return and recalculate prior taxable income amounts, replacing IRS prescribed estimates with actual figures.

To further increase the compliance burden, in addition to the initial application of the look-back calculation, reapplication is required whenever a contract has post-completion changes to contract revenue or costs. The look-back recalculations often go back double digit years, but in the end the same amount of tax is paid.¹¹

Look-back is exceedingly burdensome and complex. The IRS's Construction Industry Audit Technique Guide has identified look-back as a very complex area of tax law which is causing many errors in compliance.¹² Even using technology to its fullest, it can take a company in excess of 200 hours to comply with the look-back requirements for the most recent tax year. [What other industry is required to "square-up" past year tax payments with eventual contract outcomes – reapplied to the original agreement?]

¹⁰ Contract revenue reported under the percentage-of-completion method is based on estimates. Look-back calculations determine whether the estimates that were used produced understatements or overstatements of taxable income in each open year of the contract. Look-back calculations are intended to ensure that neither the taxpayer nor the IRS will lose the "time value of money" on the income taxes that should or should not have been paid on income from long-term contracts.

¹¹ Now double the required number of calculations because a contractor must perform the look-back calculations under the AMT rules as well as under the regular tax rules.

¹² The AGC's website indicates that even the IRS is encountering difficulty auditing look-back (more than) 20 years after its adoption. AGC's website further states that the IRS is currently undergoing its own internal evaluation of look-back to determine whether to audit look-back for contracts under a certain length of time and how to change their current methods.



Conclusion

There is any number of examples and experiences over the years where one can focus on the clear unmistakable lessons learned in the design/construction arena and put them to work across the board on a spectrum of public projects so as to obtain the benefits of efficient, science-based, and cost/time sensitive regulations without the unnecessary and wasteful burdens. Or we can ignore them and continue with wasteful inefficient procedures.

This is not about regulatory abandonment -- but rather, about spending both government and private sector dollars wisely. (This point was illustrated by Linda Figg's testimony before this committee a little over a year ago with respect to infrastructure projects).¹³

Short of outright repeal and/or elimination of excessive regulations and rules, streamlining them whereby actions are done concurrently and shared among and between jurisdictions/agencies¹⁴ so that a project may move forward in a timely manner devoid of unnecessary delays would greatly improve the ability of design/construction firms to complete work and gainfully employ more Americans.

The Construction Industry Round Table stands ready and willing to assist in whatever capacity available to achieve this end.

Sincerely,

A handwritten signature in black ink, appearing to read "Mark A. Casso".

Mark A. Casso, Esq.
President

¹³ Linda Figg, former CIRT Chair, testified on such an example with respect to the I-35W Bridge replacement project. [See Figg's (March 16, 2011) testimony before U.S. House of Representatives Committee on Oversight & Government Reform, Subcommittee on Regulatory Affairs, Stimulus Oversight and Government Spending].

¹⁴ Title III of H.R. 7 "The American Energy & Infrastructure Jobs Act of 2012" did propose steps to streamline some regulatory rules so as to make more efficient use of transportation dollars.