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## MEMORANDUM

**Date:** June 12, 2017

**To:** The Honorable Mick Mulvaney, Director Office of  
Management and Budget (OMB)

**From:** Mark A. Casso, Esq. NAC, President CIRT

**Re:** Comprehensive Plan for Reforming the Federal Government  
and Reducing the Federal Civilian Workforce

### Introduction

The Construction Industry Round Table (CIRT)\* strongly supports and has been a long-time advocate for the “comprehensive” plan envisioned by President Trump’s Executive Order (March 13, 2017) which calls upon OMB to submit a proposal to reorganize Executive Branch departments and agencies.

CIRT is composed of CEOs from the top firms in the design and construction community, as such: it is very common, if not absolutely necessary, for these business leaders to regularly challenge their organizations to reinvent themselves with an eye towards efficiency and responsiveness to their client needs. As a result, we applaud this effort at the federal level, and view it as long overdue.

### Discussion

Specifically, we believe the “core or heart” of the President’s charge comes down to: Preventing agencies from duplicating each other, but also to prevent agencies from duplicating and directly competing with the private sector for those activities already performed in and best left to the private sector. The portion of the E.O. that sums it up best, states:

*“(d) In developing the proposed plan described in subsection (c) of this section, the Director shall consider, in addition to any other relevant factors: (i) whether some or all of the functions of an agency, a component, or a program are appropriate for the Federal Government or would be better left to State or local governments or to the private sector through free enterprise;”*

### Specific Matters/Recommendations

In keeping with Director Mulvaney’s instructions as to how to submit comments and/or recommendations, the remainder of our views will be specific as to these matters.

The governmental 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 (apply the “Yellow-Pages Test”) – eliminating elaborate requirements, insourcing, cross-agency services, that compete with private-sector 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.
- Prevent Politicization of Federal Procurement Decisions. The numerous restrictions and new reporting requirements threatened in the past by a *draft* Executive Order only apply to private sector companies competing for Federal contracts—ignoring like activities by government employee unions.
- 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 can be 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 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; and what standards exceptions need to meet.
- 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. This results in 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. 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.

- 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.
- 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.<sup>1</sup>

### **Possible Solutions**

Beyond listing individual examples of problems with regulations and over complex jurisdictional matters, are there any larger solutions to consider?

Congress has offered a series of bills that deserve passage to address the many of the concerns of returning some accountability and balance to the regulatory process. Beyond these proposals other potential approaches can, and should, be explored. For example:

**(1) Monetary: There should be financial penalties on agencies (just as they seek to levy on individuals and businesses) when they are found to overreach or abuse their authority or power through regulatory heavy-handedness.**

This represents a potentially effective way to at least make some of the agencies “pause” before attempting to double-down on their expansive or otherwise unjustified rulemakings. Currently, EVEN IF an agency loses a case (or multiple cases) interpreting vast grants of authority to themselves there are NO CONSEQUENCES (a hand slap at best) even when losing their arguments in court! BIG DEAL, the next day the agency can return right-back to interpreting another or next new rule in the same unreasonable self-aggrandizing expansive manner.

*“When regulators lose court cases, it does not hurt them. Sure, they’re probably angry at being told “no” but that’s it. There are no penalties for grabbing unwarranted power and mistreating citizens. An adverse court decision, or even a series of them, has no deterrent effect.”* [See, Thanks, EPA: Your New ‘Navigable Waters’ Rule Strengthens The Case Against Administrative Law, by George Leef, Law & Regulation article (2/6/2015); [www.forbes.com](http://www.forbes.com)].

THIS NEEDS to change – there should be a MAJOR MONETARY COST to the agencies – [especially considering the heavy fines they impose on the private sector, which can run into the billions as demonstrated by recent DOJ cases/settlements]. The court imposed fines vs. federal agencies bring accountability and *could be* returned to the GENERAL TREASURY.

**(2) Limit Agency Waiver Authority:** Another area that Congress should consider constraining is the recent approach of crafting the regulations so burdensome, so costly, and so unmanageable that they necessitate – waivers or so-called “Requests for Exemptions.” This opens the entire process up to potential cronyism, favoritism, and political shake-downs.<sup>2</sup>

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<sup>1</sup> 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.

<sup>2</sup> Generally speaking this goes to the “evils” the Founders saw in “royal prerogatives” where the monarchs or their minions acted as lawmaker, enforcer, and judge all in one. [See points attributed to Columbia Law School professor

**(3) Accountability: A FULL disclosure and accounting of all funds collected by settlements.** It is critical to reestablish credibility and honesty in the governmental system that an exhaustive accounting been undertaken to identify where the *billions of dollars* collected in fines (e.g., Department of Justice) has gone or been spent. [Congress should be particularly interested in this matter since the funds are spent outside the appropriation process].

**Conclusion**

In addition to the specific views submitted; the above comments are not about abandoning a role for the federal government -- but rather, putting balance back into the equation: Administration and Congress, and more importantly: between Citizen and Government.

Beyond taking steps to reorganize and/or eliminate excessive agencies and overlapping jurisdictions, redundant and wasteful regulations and rules, as well as elimination of public sector employees who are undertaking essentially private sector jobs; -- monetary penalties that curb excessive activity by impacting funding holds a yet unexplored avenue to rein in the federal leviathan.

Something must be done to redress the imbalance so that *American lives, lands, and liberties*, which seem to be at the whim and caprice of faceless, nameless, unaccountable bureaucrats – are protected. Otherwise, government interests will grow unchecked strangling economic activity and shackle our freedoms – to the point where “WE THE PEOPLE . . .” becomes a meaningless set of words, ignored and trampled by the “elitist running government.”

Sincerely,



Mark A. Casso, Esq., NAC  
President

*\* 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 115-120 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. [For more information visit: [www.cirt.org](http://www.cirt.org).]*