



Construction Industry Round Table

Press Release

A force for positive change in the design / construction industry

Fatally Flawed "Blacklisting" Rule Amounts to a Departing Blow from the Clinton Administration for Federal Design and Construction Contractors

WASHINGTON, DC— December 20, 2000—Notwithstanding feedback from the design and construction industry's top CEO opinion makers, represented by the Construction Industry Round Table (CIRT), indicating their strong opposition to the so-called "blacklisting" rule, the Clinton Administration has finalized the controversial proposal in the closing days of its term. "When a rulemaking, such as this one, has been roundly criticized as vague, unenforceable, unclear, and politically inspired – it is clearly flawed beyond repair" contends Mark A. Casso, CIRT President.

The Administration's announcement finalizing the proposed changes to the Federal Acquisition Regulation (FAR) regarding contractor responsibility consideration and eligibility findings (otherwise known as the "blacklisting" rule), comes after nearly two years of deliberation in which private sector firms vigorously opposed the suggested changes to FAR 9.104-1(d) and (e).

"The rule change is **not** merely a common sense extension of 'if you violate the law, you can't do business with the federal government,' as former OFPP Administrator Steve Kelman and others supporting the rule have tried to insinuate" says Mr. Casso. The Round Table believes that the current regulations on the books already adequately establish such a rule. "In reality, the new rule making abrogates the delicate balance between the contractors, employees/unions, and federal government agencies as well as doing violence to the adjudicative process."

CIRT's CEOs reacted to the original rulemaking proposal and its philosophy in an exclusive poll conducted by the Round Table. For example, the proposed rule expected contracting officers to base adverse *pre-award responsibility determinations* on allegations, claims, or evidence of noncompliance of such complex matters as tax, labor, employment, environmental, antitrust, or even consumer protection laws.

- *When CIRT's CEOs were asked how comfortable they were with contracting officers having sufficient knowledge or understanding of complex laws to make an adverse determination – the overwhelming majority of nearly 90 percent said they had little or no level of confidence in the contracting officers' ability to handle the complexity and nuances expected of them.*

The rulemaking also proposed requiring contracting officers to base adverse *pre-award responsibility determinations* on vague and non-measurable allegations, claims, or evidence of insufficient "workplace practices addressing matters such as training, worker retention, and legal compliance to assure a skilled, stable and productive workforce."

- *When CIRT's CEOs were surveyed on this issue, more than 63 percent said such criteria were inappropriate and not measurable standards for an adverse pre-award determination.*

Finally, the rulemaking would amend current language to allow contracting officers to make an adverse *pre-award responsibility determination*, **without the benefit of a final adjudication by a competent authority** concerning the underlying charge.

- *Not surprisingly, almost three-quarters (73.7%) of CIRT's CEOs did not believe allegations and claims of violations should be sufficient for an adverse determination.*

While attempts were made during the last year to clarify or remedy the glaring weaknesses of this ill-advised rulemaking from its original version, Mr. Casso notes that "these modifications have been mostly window dressing doing little or nothing to eliminate the basic shortcomings of the proposal." Even contracting officers in a number of federal agencies agree that the rule is unworkable and unmanageable.

Moreover, the final rulemaking does not direct the contracting officers to consider or weigh the relevance of any of the alleged claims with respect to the contractor's ability to perform the work in a safe, competent, and/or timely manner. Nor are the consequences to a firm of an adverse *pre-award responsibility determination* sufficiently considered so as to give due diligence and due process their appropriate weight in the contracting officers' decisions.

"It is our hope, that a new Bush Administration will conduct a careful assessment of this ill-advised rule and take steps to return the FAR to its former balance and integrity as it relates to this matter."

The Construction Industry Round Table (CIRT) is a national business trade association composed of approximately 100 CEOs from the leading architectural, engineering, and construction companies doing business in the United States. The firms represented by these CEOs are responsible for a large portion of the overall industry's 8-10% of GDP activities. These activities include billions of dollars in both public and private infrastructure projects that improve the quality of life for all Americans.

For CIRT's "Blacklisting Opinion Poll Results" [CLICK HERE.](#)