President Trump’s Executive Actions

President Trump, like his predecessor, is quickly taking action to implement his agenda via executive order, presidential memoranda and other directives. During this time, contractors must remember that such presidential directives—generally—do not instantaneously change the law. Rather, they direct federal agencies to make changes in their policies and regulations. Changing those policies and regulations often compels federal regulatory agencies to engage in the notice and comment rulemaking process. That process takes time. And, as we saw with many Obama administration executive orders and their implementing regulations, they are subject to legal challenge.

In this document, AGC will help the contracting industry keep tabs on various Trump administration executive directives, how they may impact AGC-member businesses, and their progress through the regulatory process. Below is a rundown of the specific items addressed in this document:

- **The Obamacare Executive Order**
  - Executive Order on Minimizing the Economic Burden of the Patient Protection and Affordable Care Act Pending Repeal

- **Immigration-Related Executive Actions**
  - Executive Order on Border Security and Immigration Enforcement Improvements
  - Executive Order on Enhancing Public Safety in the Interior of the United States

- **Environment-Related Executive Action**
  - Executive Order on Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the “Waters of the United States” Rule

- **Permit Streamlining & Regulatory Reduction for Construction Projects**
  - Executive Order on Reducing Regulation and Controlling Regulatory Costs (“2 for 1 EO”)
  - Executive Order on Expediting Environmental Reviews and Approvals for High Priority Infrastructure Projects
  - Presidential Memorandum on Streamlining Permitting and Reducing Regulatory Burdens for Domestic Manufacturing
  - Executive Order calling for a Comprehensive Plan for Reorganizing the Executive Branch

- **“Buy America” Executive Action**
  - Presidential Memorandum on Construction of American Pipelines

- **Specific Construction Project-Related Executive Actions**
  - Presidential Memorandum on the Construction of the Keystone XL Pipeline
  - Presidential Memorandum on the Construction of the Dakota Access Pipeline

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The Border Wall

First we’ll begin with overall project feasibility and then we will address the solicitations for contracts for building the project.

**Project Feasibility**

We begin with the costs and what border protections already exist. Reuters reported on February 9, 2017, that border protections would include series of fences and walls that would cost as much as $21.6 billion, and take more than three years to construct, based on a U.S. Department of Homeland Security internal report. According to the Washington Post, more than $7 billion has been spent to build what is now about 650 miles of Southwest border fencing — costing nearly $5 million per mile in some spots — nearly half in Arizona.

That stated, border wall’s construction is unlikely to begin immediately. Congress must specifically appropriate funds for its construction. That has not happened to date. However, Congressional Republicans are considering funding an unspecified amount towards 700 miles of “reinforced fencing” that was not completely funded under the Secure Fence Act of 2006. Such funding could be included in legislation necessary to fund the government for the remainder of fiscal year (FY) 2017 at the end of April. However, Democrats could derail that funding legislation and, in turn, threaten a shutdown of the federal government. The Trump administration released its plan for FY 2017 supplemental funding bill that includes—among other things—$2.6 billion for the border wall project.

Another potential roadblock is right-of-way approvals. Many private citizens own portions of land along the border. Additionally, tribal lands are found along the border as well. The administration will have to work with both private citizens and tribes in areas that it may want to place such a border protection. There is also a 47-year-old treaty with Mexico that dictates that no structure can interfere with the flow of cross-border waterways, such as the Rio Grande.

In addition, planning, design, and an array of federal permitting and construction approval requirements will be necessary before construction can begin.\(^1\) It may be possible, however, for the Trump administration to reprogram or allocate some funds to begin the various pre-construction actions necessary for constructing the wall. Undoubtedly, the administration will look for ways. Various interest groups could possibly undertake legal action challenging the

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\(^1\) For instance, one report indicates that over 100 endangered species could be negatively impacted by the wall. This could present an issue in the environmental review process.  
http://www.independent.co.uk/news/world/americas/us-politics/donald-trump-mexico-border-wall-us-threatens-111-endangered-animal-species-a7591206.html  See also  

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federal permitting approvals required and, perhaps, even the reprogramming of funds towards this effort without explicit congressional authorization.

Given the various regulatory barriers to construction, it may be reasonable—at least to suspect—that DHS will seek to begin construction along the border initially in areas with the least regulatory risks. Such a plan could allow for construction to begin in certain low regulatory risk areas, while other portions of the border with more regulatory risk undergo various permitting and approval processes that typically delay construction projects.

The U.S. Army Corps of Engineers is the federal construction agency generally responsible for executing construction of border security walls and fences for the Department of Homeland Security’s Customs and Border Protection agency. However, to date, the Army Corps has not been officially tasked with executing this project. AGC will meet with the leaders of the Army Corps and discuss this project at its 2017 Federal Contractors Conference in May.

**Contract Solicitations**

On March 17, 2017, the Department of Homeland Security’s Office of Customs and Border Protection issued two requests for proposals (RFPs) on the southern border wall project: one for a “Solid Concrete Border Wall Prototype” and one entitled, “Other Border Wall Prototype.” The RFPs are both for design-build, multiple award indefinite delivery/indefinite quantity (IDIQ) task order contracts with a maximum value of $300 million over five years. The primary difference between them is that one asks for a solid concrete wall and the other for a “see-through” structure.

The solicitation specifically calls for “a see-through component/capability to the wall that facilitates situational awareness but does not negate the requirements listed” in other sections of the RFP. There have been reports that the request for this type of structure emanated from Border Patrol officers who want to watch activity on the other side of the border without the necessity of additional technology, such as aircraft or tower-based cameras.

The prototype project will move forward in two phases. Phase I requires the submission of concept papers to include qualifications statements. These are required to be submitted before 4 p.m. on March 29, 2017. Phase II begins after the government completes its Phase I evaluation. The RFP says the government will perform a down-select of Phase I concept papers/qualifications and request Phase II submissions from only those offerors who are deemed to be the most highly qualified. The DHS intends to invite up to 20 offerors from among those who submitted Phase I papers/qualifications into the Phase II proposal and evaluation process.
Border Detention Facilities

The executive order also calls for the construction of detention facilities along the southern border. Again, as with the border wall, construction of new facilities will require congressional authorization and funding. It is unclear if any such authorization or funding exists for new facilities.

The U.S. General Services Administration (GSA) is the federal construction agency generally responsible for building facilities for the Department of Homeland Security’s Customs and Border Protection (CBP) agency. GSA works closely with CBP to design, construct, maintain, and operate land ports of entry along more than 1,900 miles of border between the southern United States and Mexico and more than 5,500 miles of border between the northern United States and Canada. AGC will meet with the leaders of GSA and discuss these potential projects at its 2017 Federal Contractors Conference in May.

Law Enforcement Efforts Concerning Illegal Immigration

This executive order also includes a wide range of law enforcement directives to tighten efforts to carry out immigration laws. However, those directives are not directly related to construction and will not be addressed in this document at this time.

Executive Order on Enhancing Public Safety in the Interior of the United States ("Sanctuary City EO")

On January 25, 2017, President Trump signed an executive order that seeks to bring “sanctuary cities” in compliance with federal immigration enforcement law and efforts. Sanctuary cities offer safe harbor for undocumented immigrants who might otherwise be deported by federal immigration law enforcement officials. According to CBS News, there are over 140 sanctuary jurisdictions -- cities and counties -- across the U.S., including at least 37 cities -- San Francisco, New York, Chicago, Seattle, Miami and Los Angeles, among others.

The order indicates that sanctuary cities “that fail to comply with applicable Federal law do not receive Federal funds, except as mandated by law.” It specifically mandates that “the Attorney General and the [Homeland Security] Secretary, in their discretion and to the extent consistent with law, shall ensure that jurisdictions that willfully refuse to comply with 8 U.S.C. 1373 (sanctuary jurisdictions) are not eligible to receive Federal grants, except as deemed necessary for law enforcement purposes by the Attorney General or the Secretary.” Section 1373 mandates that “a Federal, State, or local government entity or official may not prohibit, or in any way restrict, any government entity or official from sending to, or receiving from, the Immigration and Naturalization Service information regarding the citizenship or immigration status, lawful or unlawful, of any individual.”

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How Could this Impact the Construction Industry?

Direct Impacts to Federal Construction Funding? Not Necessarily Likely.
One may speculate that only federal funds given directly to sanctuary cities in the form of a grant could be impacted under the order. An example of this could be a grant to a sanctuary city for a road or port project through U.S. DOT's TIGER grant program or such a grant for public housing construction through the U.S. Department of Housing and Urban Development. However, that remains unclear and purely speculative. We will have to wait for the Department of Justice and Homeland security to provide more details through regulation, on which AGC will comment accordingly.

Nevertheless, based on U.S. Supreme Court case law, Trump administration attempts to withhold federal construction funding of any sort would be constitutionally problematic. First, longstanding Supreme Court precedent mandates that the federal government may not impose conditions on grants to states and localities unless the conditions are “unambiguously” stated in the text of the law “so that the States can knowingly decide whether or not to accept those funds.”2 It is unlikely that any federal construction grants to sanctuary cities are explicitly conditioned on compliance with Section 1373 of federal immigration code.

In addition, any such condition must be passed by Congress, and may only apply to new grants, not ones that have already been appropriated. The president and executive agencies cannot simply make up new conditions and impose them on state and local governments. Such an action would infringe upon Congress’s power of the purse vested in Article 1 of the U.S. Constitution.3

The may also be a problem with the constitutionality of Section 1373 itself. The Supreme Court has frequently ruled4 that the federal government may not “commandeer” state and local officials by compelling them to enforce federal law. Such policies violate the Tenth Amendment. Section 1373 attempts to evade this prohibition by prohibiting higher-level state and local officials from mandating that lower-level ones refuse to help in enforcing federal policy. Arguably, this law could fall victim to the Court’s anti-commandeering doctrine and, therefore, be unconstitutional.

In sum, while the Trump administration could try to unilaterally block federal construction funding to sanctuary cities, those attempts would be met by legal challenges strongly supported by U.S. Supreme Court precedent.

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3 See Article I, Section 9, Clause 7 (the Appropriations Clause) and Article I, Section 8, Clause 1 (the Taxing and Spending Clause).
That stated, there is at least one effort within Congress to provide President Trump with the authority necessary to prohibit federal transportation funding to sanctuary jurisdictions. Rep. Jason Smith (R-Mo.) introduced a bill on February 2, 2017, that would prohibit federal transportation grants for sanctuary jurisdictions. AGC has long opposed restrictions on federal transportation funding to states and municipalities for their non-compliance with federal mandates. This restriction is no different. AGC has notified Rep. Smith of its opposition and has actively engaged key leaders on Capitol Hill on this issue.

**Indirect Impacts to Federal Construction Funding? Possibly.**

Assuming that this executive order and its pending regulations withstand legal challenge, there is the possibility that some law enforcement federal grants could be cut to sanctuary jurisdictions. Such jurisdictions—whether state or local—will have to decide whether they: (a) sustain the loss of the funds without consideration for replacement funding; (b) raise taxes to cover the lost federal funds; or (c) cut from other programs to cover the loss. It is conceivable that sanctuary jurisdictions could cut construction programs to cover the lost funds.

**Environment-Related Executive Action**

*Executive Order on Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the “Waters of the United States” Rule*

Following AGC’s recommendation to the presidential transition team in December, President Trump issued an executive order (EO) on Feb. 28, 2017, that begins the process of unwinding the “Waters of the United States” (WOTUS) rule. Also in line with AGC’s recommendation, the EO calls for a new “review” of the WOTUS rule, stating that for any revised proposed rule, the EPA and Corps shall consider interpreting the term ‘navigable waters’ in a manner consistent with the opinion of the late Justice Antonin Scalia in the 2007 Supreme Court case, *Rapanos v. United States*. In keeping with the EO, EPA and the Corps have issued a notice of intent to review/revise the WOTUS rule.

The EO in and of itself does not remove the WOTUS rule from the books. Rather it merely directs the U.S. Environmental Protection Agency and U.S. Army Corps of Engineers — who issued the rule in 2015 — to begin the lengthy and complex regulatory process necessary to rescind or revise the rule. That process will take time, as it is subject to the same notice and comment rulemaking process that the rule underwent when it was written. It will also be subject to legal challenge by environmental groups, which may use the government reports and documentation that the agencies used to justify the rule as ammunition against any changes.

The EO also directs the agencies to notify the U.S. Attorney General about the pending review of the WOTUS rule so he may take any such measures as he deems appropriate concerning any
pending litigation related to the rule. But, at this point, it remains unclear how this EO will impact current litigation. In the midst of this uncertainty, the Corps continues to use the 1986 regulations and applicable jurisdictional guidance (status quo as it existed before the new rule) in making jurisdictional determinations or taking other actions based on the definition of WOTUS.

AGC has been advocating on behalf of its members on this issue since the beginning. AGC submitted four sets of comments on the agencies’ 2014 proposed rule on the scope of their jurisdiction. The agencies finalized a modestly improved rule in May 2015 and scheduled it to take effect in August 2015. Many states and others challenged the rule in court. The U.S. Court of Appeals for the Sixth Circuit has at least temporarily blocked the agencies’ implementation of the rule. There is no deadline for the Sixth Circuit to make a final decision. AGC has spoken about the implementation of the 2015 rule with EPA and the Corps, including its potential impact on Clean Water Act permitting.

For more AGC information on the WOTUS rule and where it generally stands, click here and here, respectively.

Permit Streamlining & Regulatory Reduction for Construction Projects

Executive Order on Reducing Regulation and Controlling Regulatory Costs (“2 for 1 EO”)

On January 30, 2017, President Trump issued an executive order setting forth an ambitious regulatory reduction plan. Among other mandates for federal regulatory agencies, the order requires agencies to identify for elimination at least two prior regulations for every new regulation issued. That requirement is even more stringent with regards to the current fiscal year 2017. For a new rule issued in FY 2017, the agency must not only identify two rules for repeal, but also the total cost of the new rule must be zero when netted with the costs of the identified rules for repeal.

Theoretically, the concept of requiring federal agencies to review and eliminate obsolete, overly burdensome, and duplicative regulations is a good one. However, in practice, it may be legally complex. Eliminating rules that have undergone notice and comment rulemaking processes entail a number of processes, which take time and are subject to legal challenge and review.

As it stands, federal agencies are generally perplexed with the order. The White House Office of Management and Budget on February 2, 2017, issued interim guidance to help federal agencies comply with the order.
Executive Order on Expediting Environmental Reviews and Approvals for High Priority Infrastructure Projects

On January 24, 2017, President Trump signed an executive order setting forth a roadmap for streamlining and expediting federal government environmental reviews and approvals for all infrastructure projects. That roadmap outlines the following process:

- Upon request by the governor of a state or the head of any federal agency, the White House Council on Environmental Quality (CEQ) must within 30 days decide whether an infrastructure project qualifies as a “high priority.”
- The CEQ determination will be made based on a number of factors: the project’s importance to the general welfare, value to the nation, environmental benefits, and other factors CEQ deems relevant.
- CEQ must coordinate with other federal agencies to expedite procedures and deadlines for completion of environmental reviews and approvals for high priority projects.
- Federal agencies must give the highest priority to meeting the deadlines set by CEQ. Failure to meet a deadline will require written explanation from the head of an agency explaining its delay.

CEQ will now work to put in place a detailed process to implement this order. The agency may establish more formal parameters for its determinations of “high priority” projects and articulate how it will set deadlines with its federal agency partners. This may also include laying out a more specific definition of what infrastructure projects may be considered for this designation or ones that may be of higher importance. As it stands, the order places highest emphasis on improving the electric grid and telecommunications systems and repairing and upgrading critical port facilities, airports, pipelines, bridges and highways. In addition, CEQ will have to explain which environmental reviews and approvals for which it will expedite/streamline processes (NEPA process, wetlands permits, stormwater permits, and so forth).

To clarify all of this will likely take CEQ a number of months—or longer. To date, President Trump has not appointed a head of CEQ. AGC will work with CEQ to highlight areas construction contractors would like the agency to focus its efforts.

Presidential Memorandum on Streamlining Permitting and Reducing Regulatory Burdens for Domestic Manufacturing

On January 24, 2017, President Trump executed a presidential memorandum directing federal agencies to expedite reviews of and approvals for proposals to construct or expand manufacturing facilities. To do so, the directive calls for reductions in burdens affecting domestic manufacturing, including the construction of manufacturing facilities. There are essentially no other details regarding this initiative in the EO itself. The president leaves that to the Secretary of the Department of Commerce Wilbur Ross to execute.

For more information, contact Jimmy Christianson at 703-837-5325 or christiansonj@agc.org.
On March, 7, 2017, the Commerce Department issued a request for information soliciting feedback on the EO. In that request, the term “domestic manufacturers” refers to private businesses located in the United States (and its territories) engaged in the mechanical, physical, or chemical transformation of materials, substances, or components into new products, consistent with the 2017 North American Industry Classification System (NAICS) definition of Sector 31–33: Manufacturing. Responses to the RFI will inform the Secretary’s report to the President which will set forth guidelines for Federal permitting and regulatory agencies to streamline Federal permitting processes for domestic manufacturing and reduce regulatory burdens affecting domestic manufacturers.

**Executive Order calling for a Comprehensive Plan for Reorganizing the Executive Branch**

On March 13, 2017, the president issued an executive order aiming to merge duplicative agencies and eliminate unnecessary agencies. The “Comprehensive Plan for Reorganizing the Executive Branch” Executive Order calls on the Office of Management and Budget to develop a plan to achieve the order’s goals. The plan may consider whether some or all functions of a federal agency would be better left to state or local governments or the private sector; whether the federal agency operating costs are justified by the public benefits it provides; and whether federal agency mission redundancies can be eliminated or streamlined.

AGC will further review the order and provide suggestions.

**“Buy America” Executive Action**

**Presidential Memorandum on Construction of American Pipelines**

On January 24, 2017, President Trump signed a presidential memorandum instructing the Secretary of the Department of Commerce to develop a plan ensuring all new pipelines built within the U.S., use materials and equipment domestically produced. This requirement essentially instates—through executive decree—“Buy America” provisions to pipeline construction.

The directive defines “produced in the United States” to mean:

- With regard to iron or steel products, that all manufacturing processes for such iron or steel products—from initial melting stage through the application of coatings—occurred in the United States;
- Steel or iron material or products manufactured aboard from semi-finished steel or iron from the United States are not “produced in the United States”; and
- Steel or iron material or products manufactured in the United States from semi-finished steel or iron of foreign origin are not “produced in the United States.”
The directive does not provide significant clarity as to what types of “pipelines” will fall under these requirements. It does state that “new pipelines” include retrofitted, repaired or expanded pipelines. However, it remains a question as to whether it will apply to water pipelines, gas pipelines, oil pipelines, and so forth. Presumably, this requirement only applies to pipelines that cross state borders and/or pipeline projects that receive federal funding. Unfortunately, again, that too is unclear.

On March 16, 2017, the Department of Commerce issued a request for comments to better understand: Current pipeline construction technology and requirements; potential advances in pipeline technology; domestic and foreign supply chain for pipeline materials; and all other information respondents consider pertinent to the development of the domestic sourcing plan. AGC will provide comments before the due date of April 7, 2017.

AGC generally opposes Buy America requirements for construction projects. For more AGC information on Buy America / Buy American laws in place, click here.

**Specific Construction Project-Related Executive Actions**

*Presidential Memorandum on the Construction of the Keystone XL Pipeline*

On January 24, 2017, President Trump issued a directive to the Secretaries of State, the Army and Interior to help move the Keystone XL Pipeline project approval process forward. The presidential memorandum does not automatically grant any federal approvals for the project. It does, however, invite TransCanada Keystone Pipeline, L.P., to resubmit its application to the Department of State; require the Secretary of State to issue a final permitting decision within 60 days of TransCanada’s application; instructs the U.S. Army Corps of Engineers to expedite the process for a Section 404, Clean Water Act nationwide permit; and directs the Secretary of the Interior to expedite requests for right-of-ways, among other things.

On January 26, 2017, TransCanada resubmitted its application to the Department of State and that application is pending approval. On February 16, 2017, TransCanada filed an application for a pipeline route through Nebraska, following the same route that state regulators had approved in 2013. The application by Trans-Canada sets up a review by the Nebraska Public Service Commission (NPSC) that may take up to a year. Activists that want to thwart the project are mobilizing to do so through the case review before the NPSC.

On March 3, 2017, the White House announced that this pipeline project will not be subjected to the January 24, 2017, Presidential Memorandum requiring all new pipelines built within the U.S., use materials and equipment domestically produced. Because this pipeline is not new and already under construction, it falls outside the reach of that memorandum’s requirements.

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Presidential Memorandum on the Construction of the Dakota Access Pipeline

On January 25, 2017, President Trump issued a presidential memorandum directing the Secretary of the Army and U.S. Army Corps of Engineers to take all lawful actions necessary to move forward with the Dakota Access Pipeline. As with the Keystone presidential memorandum, this one does not automatically grant any federal approvals for the Dakota Access Pipeline project. Rather, the document instructs the Army Corps to expedite various permits reviews for the project and to consider modifying or rescinding Obama administration directives delaying project approvals, among other things.

On February 8, 2017, the Army Corps granted the final easement needed to finish construction of the Dakota Access Pipeline. The granting of the easement followed a decision on Feb. 7 by Robert Speer, the acting secretary of the Army, to terminate the notice of intent to perform an environmental impact statement and to notify Congress of the Army’s intent to grant permission for the crossing under Lake Oahe. As of March 22, 2017, the U.S. Court of Appeals for the District of Columbia Circuit has yet to rule on the Standing Rock Sioux and Cheyenne River Sioux tribes’ claims that the Army Corps of Engineers violated environmental, historic-preservation and religious-freedom laws in its approval of the pipeline. A ruling is likely still several weeks away. Dakota Access, LLC, announced that it expects oil to flow through the pipeline the week of March 20, 2017.

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