



441 G St. N.W.
Washington, DC 20548

B-336520

July 17, 2024

The Honorable Jack Reed
Chairman
The Honorable Roger F. Wicker
Ranking Member
Committee on Armed Services
United States Senate

The Honorable Mike Rogers
Chairman
The Honorable Adam Smith
Ranking Member
Committee on Armed Services
House of Representatives

Subject: *Department of Defense, Defense Acquisition Regulation Systems: Defense Federal Acquisition Regulation Supplement: Architect and Engineering Service Fees*

Pursuant to section 801(a)(2)(A) of title 5, United States Code, this is our report on a major rule promulgated by the Department of Defense, Defense Acquisition Regulation System (DoD) titled "Defense Federal Acquisition Regulation Supplement: Architect and Engineering Service Fees" (RIN: 0750-AM16). We received the rule on July 9, 2024. It was published in the *Federal Register* as a final rule on June 27, 2024. 89 Fed. Reg. 53502. The stated effective date of the rule is August 26, 2024.

According to DoD, this final rule amends the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a section of the National Defense Authorization Act for Fiscal Year 2024, which increased the statutory fee limit for architect and engineering services from 6 percent to 10 percent. See *generally* Pub. L. No. 118-31, 137 Stat. 136 (Dec. 22, 2023).

The Congressional Review Act (CRA) requires a 60-day delay in the effective date of a major rule from the date of publication in the *Federal Register* or receipt of the rule by Congress, whichever is later. 5 U.S.C. § 801(a)(3)(A). The House received the rule on July 2, 2024. 170 Cong. Rec. H4525 (daily ed. July 09, 2024). The *Congressional Record* does not yet reflect the date of receipt by the Senate; however, DoD provided proof of delivery showing the Senate received the rule on July 11, 2024. Email from Director of the Regulatory Directorate, DoD, to Senior Staff Attorney, GAO, RE: *Department of Defense/Defense Acquisition Regulations System final rule, "Defense Federal Acquisition Regulation Supplement: Architect and Engineering Service Fees (DFARS Case 2024-D019)"* (July 15, 2024). The final rule was published in the *Federal Register* on June 27, 2024. The rule has a stated effective date of August 26, 2024. Therefore, the stated effective date is less than 60 days from the date of receipt by Congress.

Enclosed is our assessment of DoD's compliance with the procedural steps required by section 801(a)(1)(B)(i) through (iv) of title 5 with respect to the rule. If you have any questions about this report or wish to contact GAO officials responsible for the evaluation work relating to the subject matter of the rule, please contact Charlie McKiver, Assistant General Counsel, at (202) 512-5992.

A handwritten signature in black ink that reads "Shirley A. Jones". The signature is written in a cursive style with a large initial 'S' and 'J'.

Shirley A. Jones
Managing Associate General Counsel

Enclosure

cc: Aaron T. Siegel
Alternate OSD, FLRO
Department of Defense

REPORT UNDER 5 U.S.C. § 801(a)(2)(A) ON A MAJOR RULE
ISSUED BY THE
DEPARTMENT OF DEFENSE,
DEFENSE ACQUISITION REGULATION SYSTEMS
TITLED
“DEFENSE FEDERAL ACQUISITION REGULATION SUPPLEMENT:
ARCHITECT AND ENGINEERING SERVICE FEES”
(RIN: 0750-AM16)

(i) Cost-benefit analysis

The Department of Defense, Defense Acquisition Regulation System (DoD) prepared an analysis of the costs and benefits of this final rule. According to DoD, the implementation of the rule will increase the amount the government will pay for contracts that include producing and delivering designs, plans, drawings, and specifications. However, DoD stated that the rule may also encourage more architect and engineering entities to submit proposals for DoD contracts. DoD also stated that as a result of the rule, it expects to pay up to approximately \$145,021,999 more per year than it has paid in recent years for architect and engineering contracts associated with both large and smaller construction projects.

(ii) Agency actions relevant to the Regulatory Flexibility Act (RFA), 5 U.S.C. §§ 603–605, 607, and 609

According to DoD, the Act does not apply to this final rule because it does not constitute a significant Defense Federal Acquisition Regulation Supplement revision within the meaning of Federal Acquisition Regulation 1.501-1, and 41 U.S.C. § 1707 does not require publication for public comment.

(iii) Agency actions relevant to sections 202–205 of the Unfunded Mandates Reform Act of 1995, 2 U.S.C. §§ 1532–1535

In its submission to us, DoD indicated that the Act is not applicable to this final rule.

(iv) Agency actions relevant to the Administrative Pay-As-You-Go-Act of 2023, Pub. L. No. 118-5, div. B, title III, 137 Stat 31 (June 3, 2023)

Section 270 of the Administrative Pay-As-You-Go-Act of 2023 amended 5 U.S.C. § 801(a)(2)(A) to require GAO to assess agency compliance with the Act, which establishes requirements for administrative actions that affect direct spending, in GAO’s major rule reports. In guidance to Executive Branch agencies, issued on September 1, 2023, the Office of Management and Budget (OMB) instructed that agencies should include a statement explaining that either: “the Act does not apply to this rule because it does not increase direct spending; the Act does not apply to this rule because it meets one of the Act’s exemptions (and specifying the relevant exemption); the OMB Director granted a waiver of the Act’s requirements pursuant to section 265(a)(1) or (2) of the Act; or the agency has submitted a notice or written opinion to the OMB Director as required by section 263(a) or (b) of the Act” in their submissions of rules to GAO under the Congressional Review Act. OMB, *Memorandum for the Heads of Executive Departments and Agencies*, Subject: Guidance for Implementation of the Administrative

Pay-As-You-Go Act of 2023, M-23-21 (Sept. 1, 2023), at 11–12. OMB also states that directives in the memorandum that supplement the requirements in the Act do not apply to proposed rules that have already been submitted to the Office of Information and Regulatory Affairs, however agencies must comply with any applicable requirements of the Act before finalizing such rules.

DoD did not discuss the Act in this final rule. In its submission to us, DoD indicated that the Act is not applicable to the rule.

(v) Other relevant information or requirements under acts and executive orders

Administrative Procedure Act, 5 U.S.C. §§ 551 *et seq.*

DoD stated that 41 U.S.C. § 1707 applies to the publication of the Federal Acquisition Regulation (FAR). According to DoD, subsection (a)(1) of the statute requires that a procurement policy, regulation, procedure, or form (including an amendment or modification thereof) must be published for public comment if it relates to the expenditure of appropriated funds, and has either a significant effect beyond the internal operating procedures of the agency issuing the policy, regulation, procedure, or form, or has a significant cost or administrative impact on contractors or offerors. DoD stated that this final rule is not required to be published for public comment, because the rule addresses internal operating procedures of the government.

Paperwork Reduction Act (PRA), 44 U.S.C. §§ 3501–3520

DoD determined that this final rule does not contain any information collection requirements.

Statutory authorization for the rule

DoD promulgated this final rule pursuant to section 1303 of title 41, United States Code.

Executive Order No. 12866 (Regulatory Planning and Review)

DoD determined that this final rule is significant under the Order.

Executive Order No. 13132 (Federalism)

In its submission to us, DoD indicated that the Order is not applicable to this final rule.