



**DEPARTMENT OF DEFENSE**

**Defense Acquisition Regulations System**

**48 CFR Part 236**

**[Docket DARS-2024-0019]**

**RIN 0750-AM16**

**Defense Federal Acquisition Regulation Supplement: Architect and Engineering Service Fees (DFARS Case 2024-D019)**

**AGENCY:** Defense Acquisition Regulations System, Department of Defense (DoD).

**ACTION:** Final rule.

**SUMMARY:** DoD is issuing a final rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a section of the National Defense Authorization Act for Fiscal Year 2024 that increases the statutory fee limit for architect and engineering services.

**DATES:** Effective **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

**FOR FURTHER INFORMATION CONTACT:** Mr. Jon Snyder, telephone 703-945-5341.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

This final rule revises the DFARS to implement section 2881 of the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2024 (Pub. L. 118-31). Section 2881 increases the statutory fee limitation at 10 U.S.C. 7540, 8612, and 9540 from

six to 10 percent that may be earned by contractors providing certain architect and engineering services under contracts with the Departments of the Army, Navy, and Air Force.

At DFARS 236.606-70, Statutory fee limitation, DoD increased the statutory fee that contractors may earn under contracts for architect-engineer services for the preparation of designs, plans, drawings, and specifications. The fee is increased to 10 percent of the project's estimated construction cost. Minor editorial revisions are made to the text of section 236.606-70 to comply with drafting conventions.

## **II. Publication of This Final Rule for Public Comment Is Not Required by Statute**

The statute that applies to the publication of the Federal Acquisition Regulation (FAR) is 41 U.S.C. 1707, Publication of Proposed Regulations. 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. This final rule is not required to be published for public comment, because the rule addresses internal operating procedures of the Government.

### **III. Applicability to Contracts at or Below the Simplified Acquisition Threshold (SAT), for Commercial Products (Including Commercially Available Off-the-Shelf (COTS) Items), and for Commercial Services**

This final rule does not create any new solicitation provisions or contract clauses. It does not impact any existing solicitation provisions or contract clauses or their applicability to contracts valued at or below the simplified acquisition threshold, for commercial products including COTS items, or for commercial services.

### **IV. Expected Impact of the Rule**

Architects and engineers are limited in the amount they can charge the Departments of the Army, Navy, and Air Force for producing and delivering designs, plans, drawings, and specifications. The limitation is a percentage of the architect and engineer's estimate of the construction costs for the project. The limitation is specified at 10 U.S.C. 7540, 8612, and 9540; the limitation has been 6 percent of the estimated construction costs. Section 2881 of the National Defense Authorization Act for Fiscal Year 2024 increases the percentage at 10 U.S.C. 7540, 8612, and 9540 to 10 percent of the estimated construction costs. This updated statutory limit only applies to requirements of the Departments of the Army, Navy, and Air Force; it does not apply to the rest of DoD or to civilian agencies.

Currently, DoD contracting officers evaluate architect and engineering proposals in accordance with FAR 36.602 and DFARS 236.602. Army, Navy, and Air Force contracting officers conduct an additional evaluation of proposals or portions of proposals for producing and delivering designs, plans, drawings, and specifications in accordance with DFARS 236.606-70, to ensure that the proposed price does not exceed the 6 percent statutory limit of the architect and engineer's estimated construction costs. The contracting officer divides the total proposed price for producing and delivering designs, plans, drawings, and specifications by the total estimated construction costs. The resulting percentage may not exceed the statutory limitation.

This rule, which implements section 2881, merely changes each of the occurrences of "six percent" in DFARS 236.606-70 to "10 percent." The way the contracting workforce implements the limitation will be unchanged, but the limitation will be a higher percentage.

This increase will allow architect and engineering entities, with particular benefit to those with smaller contracts, to cover labor, overhead, indirect, and other direct cost increases since the 6 percent rate was put in place over 80 years ago on contracts for producing and delivering designs, plans, drawings, and specifications. The increase will also benefit architect and engineering entities with contracts for producing and delivering designs, plans, drawings, and specifications for large horizontal and complex vertical construction projects.

While costs have increased for architects and engineers, construction costs have increased more dramatically, which results in a higher cost limit. For example, if a particular construction project in the past cost \$900,000, the statutory fee limit was \$54,000. If the same construction project today costs \$1.8 million, the prior statutory fee limit would be \$108,000 for the same effort, and with the increased statutory limit, the fee would be limited to \$180,000.

The implementation of this rule will increase the amount the Government will pay for contracts that include producing and delivering designs, plans, drawings, and specifications. However, this rule may also encourage more architect and engineering entities to submit proposals for DoD contracts.

Data was obtained from the Federal Procurement Data System (FPDS) on Army, Navy, and Air Force construction contracts awarded for the last three fiscal years. FPDS data shows that from FY 2021 through FY 2023, there was an average of 1,857 construction contracts awarded with an average annual value of approximately \$25 billion for all of the contracts. DoD subject matter experts established that DoD considers projects valued at less than \$5 million as small projects and projects over \$5 million as large projects. Data obtained from FPDS shows that from FY 2021 through FY 2023, there was an average of 1,420 small construction contracts awarded with an average annual value of approximately \$1.4 billion. Information obtained from DoD subject matter experts establishes that the historical

average price for architect and engineering entities to produce and deliver designs, plans, drawings, and specifications is 3.25 percent of the estimated construction costs. DoD expends on average approximately \$811 million ( $\$25 \text{ billion} \times 3.25 \text{ percent}$ ) annually for producing and delivering designs, plans, drawings, and specifications.

Once section 2881 is implemented, the statutory limit for architects and engineers to produce and deliver designs, plans, drawings, and specifications will be raised to 10 percent of the estimated construction costs. The historical average architect and engineer's price for producing and delivering designs, plans, drawings, and specifications is 45 percent less than the statutory limit, at 3.25 percent of the estimated construction costs. This is because, architects and engineers must justify their proposed costs to accomplish the work. They cannot simply state in their proposals that the fee is 6 percent; they must negotiate the fee with the contracting officer. Given this historical average while the statutory limit was 6 percent, it is unlikely that the price for this work would increase to the new statutory limit of 10 percent of the estimated construction costs. According to DoD subject matter experts, the statutory increase will have the greatest benefit to projects involving large horizontal projects and complex vertical projects with multi-disciplinary teams.

DoD expects that architect and engineering contracts associated with large construction projects (i.e., estimated

construction costs of more than \$5 million) will experience only a small increase within the range of about 3.25 percent to about 3.75 percent of the estimated construction costs, based on information provided by DoD subject matter experts. From FY 2022 to FY 2023, the military departments' spending on construction projects more than doubled, mainly due to inflation in construction costs, and most of the dollars spent were for large construction projects. As a result, even at 3.25 percent of the estimated construction costs, the price for architect and engineering contracts associated with large construction projects is substantially more today than it was three or more years ago. While costs have also increased for architects and engineers, construction costs have increased more dramatically, which results in a substantially higher fee limit. For example, if a particular construction project in the past cost \$6 million, the statutory fee limit was \$360,000. If the same construction project today costs \$10 million, the prior statutory fee limit would be \$600,000 for the same architect and engineering effort. As this example demonstrates, architect and engineering entities have already seen an increase in the fee limit due to the dramatic increase in the estimated construction costs.

Based on information provided by DoD subject matter experts, DoD expects architect and engineering contracts associated with smaller construction projects (i.e., estimated construction costs of less than \$5 million) to increase from 3.25 percent to

5.42 percent of the estimated construction costs for producing and delivering designs, plans, drawings, and specifications. DoD calculated that 3.25 percent is about 54.16 percent of the statutory fee limit of 6 percent ( $3.25/6 = 0.54166$ , or 54.16 percent). If DoD continues to pay about 54.16 percent of the statutory fee limit (i.e., 54.16 percent of the new 10 percent limit), the resulting fee would be 5.42 percent. DoD expects this increase will be driven by the small-dollar contracts that would hit the 6 percent limit without this rule, but with this rule would be between 6 percent and 10 percent. The construction projects associated with these architect and engineering contracts are much smaller, but may require more architect and engineering effort due to the complexity even though the construction project is relatively small. For example, a simple renovation project may require architects and engineers to produce drawings of the existing space, demolition plans and drawings, plans and drawings for structural modifications, etc., in addition to producing the drawings for the renovation. Even with inflation in the cost of construction, 3.25 percent of a small construction project may not be enough for the architects and engineers to cover anticipated costs. Therefore, DoD expects to see a larger increase in the amount paid to architects and engineers for smaller contracts.

Based on an increase in smaller architect and engineering contracts to 5.42 percent of the estimated construction costs

and an increase in larger architect and engineering contracts to 3.6 percent of the estimated construction costs, DoD estimates an average annual economic impact of approximately \$110 million. This amount was calculated using FPDS data on construction contracts awarded in FY 2021 through FY 2023. The construction contracts awarded during this 3-year period were valued at an annual average of \$24,359,067,619, of which large construction contracts were \$22,965,495,843 per year and smaller construction contracts were \$1,393,571,776 per year.

DoD calculated the value of the architect and engineering contracts associated with large construction projects using the historical average price of 3.25 percent of estimated construction costs for producing and delivering designs, plans, drawings, and specifications by multiplying the annual average value for large construction contracts by 3.25 percent. This results in architect and engineering contracts valued at \$746,378,615 ( $\$22,965,495,843 * 0.0325 = \$746,378,615$ ). DoD also calculated the value of the architect and engineering contracts associated with large construction projects using higher prices in the range of 3.25 percent to 3.75 percent of estimated construction costs, which DoD expects to pay as a result of this rule. This results in architect and engineering contracts valued in the range of \$746,378,615 to \$861,206,094 ( $\$22,965,495,843 * 0.0325 = \$746,378,615$  and  $\$22,965,495,843 * 0.0375 = \$861,206,094$ ). The difference between the value of the architect and engineering contracts calculated using the higher

percentage and those calculated using the lower percentage is \$80,379,235 ( $\$861,206,094 - \$746,378,615 = \$114,827,479$ ). DoD expects to pay up to \$114,827,479 more for architect and engineering contracts associated with large construction projects as a result of this rule.

DoD calculated the value of the architect and engineering contracts associated with smaller construction projects using the historical average price of 3.25 percent of estimated construction costs for producing and delivering designs, plans, drawings, and specifications by multiplying the annual average value for smaller construction contracts by 3.25 percent. This results in architect and engineering contracts valued at \$45,291,083 ( $\$1,393,571,776 * 0.0325 = \$45,291,083$ ). DoD also calculated the value of architect and engineering contracts associated with smaller construction projects using the higher price of 5.42 percent of estimated construction costs, which DoD expects to pay as a result of this rule. This results in architect and engineering contracts valued at \$75,531,590 ( $\$1,393,571,776 * 0.0542 = \$75,531,590$ ). The difference between the value of the architect and engineering contracts calculated using the higher percentage and those calculated using the lower percentage is \$30,240,507 ( $\$75,531,590 - \$45,291,083 = \$30,240,507$ ). DoD expects to pay that much more for architect and engineering contracts associated with smaller construction projects as a result of this rule.

Therefore, as a result of this rule, DoD expects to pay up to approximately \$145,021,999 (\$114,827,479 + \$30,194,520 = \$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.

#### **V. Executive Orders 12866 and 13563**

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is a significant regulatory action and, therefore, was subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, as amended.

#### **VI. Congressional Review Act**

As required by the Congressional Review Act (5 U.S.C. 801-808) before an interim or final rule takes effect, DoD will submit a copy of the interim or final rule with the form, Submission of Federal Rules under the Congressional Review Act, to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States. A major rule under the Congressional Review Act cannot take effect until 60 days after it is published in the Federal Register. The Office of

Information and Regulatory Affairs has determined that this rule is a major rule as defined by 5 U.S.C. 804.

#### **VII. Regulatory Flexibility Act**

The Regulatory Flexibility Act does not apply to this rule because this final rule does not constitute a significant DFARS revision within the meaning of FAR 1.501-1, and 41 U.S.C. 1707 does not require publication for public comment.

#### **VIII. Paperwork Reduction Act**

This final rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

#### **List of Subjects in 48 CFR Part 236**

Government procurement.

**Jennifer D. Johnson,**

*Editor/Publisher, Defense Acquisition Regulations System.*

Therefore, the Defense Acquisition Regulations System amends 48 CFR part 236 as follows:

#### **PART 236—CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS**

1. The authority citation for 48 CFR part 236 continues to read as follows:

**Authority:** 41 U.S.C. 1303 and 48 CFR chapter 1.

2. Revise section 236.606-70 to read as follows:

#### **236.606-70 Statutory fee limitation.**

(a) The statutes at 10 U.S.C. 7540, 8612, and 9540, for the Departments of the Army, Navy, and Air Force, respectively, limit

the contract price (or fee) for architect-engineer services for the preparation of designs, plans, drawings, and specifications to 10 percent of the project's estimated construction cost.

(b) The 10 percent limit also applies to contract modifications, including modifications involving—

(1) Work not initially included in the contract; apply the 10 percent limit to the revised total estimated construction cost; and

(2) Redesign work; apply the 10 percent limit by—

(i) Adding the estimated construction cost of the redesign features to the original estimated construction cost;

(ii) Adding the contract cost for the original design to the contract cost for redesign; and

(iii) Dividing the total contract design cost by the total estimated construction cost. The resulting percentage may not exceed the 10 percent statutory limitation.

(c) The 10 percent limit applies only to that portion of the contract (or modification) price attributable to the preparation of designs, plans, drawings, and specifications. If a contract or modification also includes other services, the part of the price attributable to the other services is not subject to the 10 percent limit.