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The Honorable John McCain
Chairman
The Honorable Daniel K. Inouye
Vice Chairman
Committee on Indian Affairs
United States Senate

The Honorable Don Young
Chairman
The Honorable George Miller
Ranking Minority Member
Committee on Resources
House of Representatives

Subject: Contracts Under the Indian Self-Determination and Education Assistance Act

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 the Interior, Bureau of Indian Affairs and the Department of Health and Human Services, Indian Health Services, entitled "Contracts Under the Indian Self-Determination and Education Assistance Act" (RINs: 1076-AD21 and 0905-AC98). We received the rule on June 21, 1996. It was published in the Federal Register as a final rule on June 24, 1996. 61 Fed. Reg. 32481.

The joint rule is issued to permit the Departments to award contracts and grants to Indian tribes without the confusion associated with having two sets of rules for a single program.

This is the second attempt by the Departments to issue such a rule. In 1988, Congress directed the two Departments to develop regulations to implement amendments to the Indian Self-Determination Act (Pub. L. 93-638) contained in the Indian Self-Determination and Education Assistance Act Amendments of 1988

(Pub. L. 100-472). Those amendments were intended to increase tribal participation in the management of Federal Indian Programs and to help ensure long-term financial stability for tribal-run programs. When the proposed regulation was published for public comment (59 Fed. Reg. 3166), reaction was critical over the lack of tribal participation in the latter stages of the drafting process and the overall length of the proposed regulation.

A Congressional reexamination of the regulation drafting process led to the passage of the Indian Self-Determination Act Amendments of 1994 (Pub. L. 103-413). This Act removed Congress' prior delegation of the Departments' general legislative rulemaking authority under the Act and limited it to certain subject matter areas enumerated in the Act. Moreover, the Act required the Departments, in issuing any new rules in those areas, to utilize the Negotiated Rulemaking Act of 1990 as a guide with the direct participation of tribal representatives in the rulemaking.

The Departments chartered a negotiated rulemaking committee under the Federal Advisory Committee Act to develop this rule. The Committee had 63 members including 48 members representing Indian tribes. The Committee met between April 1995 and May 1996.

The rule is the result of consensus by the Committee except in four areas: internal agency procedures, contract renewal procedures, conflicts of interest and construction management services. A delegation of tribal representatives met with the Chiefs of Staff of the two Departments to present the tribal views of the unresolved areas and the rule incorporates the decisions made based on that meeting.

Enclosed is our assessment of the Department of the Interior and the Department of Health and Human Services' compliance with the procedural steps required by section 801(a)(1)(B)(i) through (iv) of title 5 with respect to the rule. Our review indicates that the Departments complied with the applicable requirements.

If you have any questions about this report, please contact James W. Vickers, Senior Attorney, at (202) 512-8210. The official responsible for GAO evaluation work relating to the Department of the Interior, Bureau of Indian Affairs is Victor S. Rezendes, Director for Energy, Resources, and Science Issues. Mr. Rezendes can be reached at (202) 512-3841. The official responsible for GAO evaluation work relating to the Department of Health and Human Services, Indian Health Services is

David P. Baine, Director of Health Care Delivery and Quality Issues. Mr. Baine can be reached at (202) 512-7101.

Robert P. Murphy
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Enclosure

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ENCLOSURE

ANALYSIS UNDER 5 U.S.C. § 801(a)(1)(B)(i)-(iv) OF A MAJOR RULE
ISSUED BY
THE DEPARTMENT OF THE INTERIOR, BUREAU OF INDIAN AFFAIRS AND THE DEPARTMENT OF HEALTH AND HUMAN SERVICE, INDIAN HEALTH SERVICE
ENTITLED
"CONTRACTS UNDER THE INDIAN SELF-DETERMINATION AND EDUCATION ASSISTANCE ACT"
(RINs: 1076-AD21 and 0905-AC98)

(i) Cost-benefit analysis

The Departments have advised our Office that they were not required to prepare and did not prepare a cost-benefit analysis of the rule.

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

Pursuant to section 605(b) of the Act, the Departments certified in the preambles to both the proposed rulemaking (61 Fed. Reg. 2038, 2044 (January 24, 1996)) and the final rulemaking (61 Fed. Reg. 32481, 32500 (June 24, 1996)) that the rule would not have a substantial effect on a significant number of small entities. Therefore, they were not required to prepare an initial or final regulatory flexibility analysis under sections 603 or 604 of the Act. For the same reason, section 607 is inapplicable. While section 609 likewise is inapplicable, the preamble in the Federal Register notes that the Departments wanted to afford public participation to the maximum extent and, therefore, the negotiated rulemaking committee meetings were open to the public and all sessions were announced in the Federal Register.

According to an official at the Department of the Interior, publication of the certifications in the Federal Register was treated as providing notice under section 605(b) to the Small Business Administration's (SBA) Chief Counsel for Advocacy. The SBA has confirmed that some agencies follow this practice without objection from SBA.

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

According to the Departments, this rulemaking action does not impose unfunded mandates under the Unfunded Mandates Reform Act of 1995. 61 Fed. Reg. 32500.

(iv) Other relevant information or requirements under Acts and Executive orders

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

The rule was promulgated through the notice and comment rulemaking procedures of the Act, 5 U.S.C. § 553. The Departments afforded interested persons the opportunity to comment on the proposed rule, and evaluated and responded to the comments in connection with publication of the final rule.

Paperwork Reduction Act, 44 U.S.C. §§ 3501-3520

The rule contains information collection requirements regarding contract proposal contents, programmatic reports and data requirements, property donation procedures and construction contracts. The requirements were negotiated and agreed upon by the Departments and the tribal representatives during the negotiated rulemaking process.

The preamble to the proposed rulemaking set forth the reasons for collecting the information and the burden estimates and solicited comments regarding the collection to be submitted to both the Departments and the Office of Management and Budget (OMB). The Departments submitted the proposed collection requirements to OMB as required by the Paperwork Reduction Act and OMB has approved the information collection requirements and assigned control number 1076-0136.

Statutory authorization for the rule

Section 107(a)(1) of the Indian Self-Determination Act, as amended by the Indian Self-Determination Contract Reform Act of 1994 (Pub. L. 103-413) authorized the Departments to jointly promulgate regulations limited solely to self-determination contracts or the approval, award or declination of such contract regarding the Federal Tort Claims Act, the Contract Disputes Act, declination and waiver procedures, appeal procedures, reassumption procedures, discretionary grant procedures, property donation procedures, internal agency procedures relating to implementation of the Act, retrocession and tribal organization relinquishment procedures, contract proposal contents, conflicts of interest, construction, programmatic reports and data requirements, procurement standards, property management standards and financial management standards. Section 107(d)(2)(A) required that the Departments use the negotiated rulemaking procedures contained in the Negotiated Rule Making Act of 1990 (5 U.S.C. §§ 561-570).

Executive Order No. 12866

The rule was determined to be a "significant regulatory action" under Executive Order 12866 requiring review by the Office of Management and Budget, Office of Information and Regulatory Affairs (OIRA). OIRA approved the final rule on June 19, 1996 as complying with the requirements of the Order based on the information supplied by the Departments, including a planned regulatory action document describing the reason for the rule and an assessment of the costs and budgetary impact of the rule.

Other Executive Orders and Statutes

The preamble to the final rule states that the rule is not subject to review under Executive Orders 12630 (Property rights) and 12612 (Federalism). Also, the rule does not significantly affect the quality of the human environment and no detailed statement is required under the National Environmental Policy Act of 1969. 61 Fed. Reg. 32500. Further, the rule is not subject to the requirements of Executive Orders 12606 (family issues), 12875 (intergovernmental partnership), 12988 (civil justice reform) and 12948 (environmental justice).

The Departments did not identify any other statute or executive order imposing procedural requirements relevant to the rule.