**DFARS Case 2022-D007**

**(S) Repeal of Preference for Fixed-Price Contracts**

**Final Rule**

**PART 216—TYPES OF CONTRACTS**

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**SUBPART 216.1---SELECTING CONTRACT TYPES**

**216.102 Policies.**

~~(1) In accordance with section 829 of the National Defense Authorization Act for Fiscal Year 2017 (Pub. L. 114-328), the contracting officer shall first consider the use of fixed price contracts, including fixed-price incentive contracts, in the determination of contract type. See~~ [~~216.301-3~~](https://www.acq.osd.mil/dpap/dars/dfars/html/current/216_3.htm#216.301-3)~~(2) for approval requirements for certain cost-reimbursement contracts.~~

~~(2)~~ In accordance with section 811 of the National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112-239), use of any cost-reimbursement line item for the acquisition of production of major defense acquisition programs is prohibited**[,]** unless the exception at [234.004](https://www.acq.osd.mil/dpap/dars/dfars/html/current/234_0.htm#234.004)(2)(ii) applies.

~~(3) See~~ [~~225.7301-1~~](https://www.acq.osd.mil/dpap/dars/dfars/html/current/225_73.htm#225.7301-1) ~~for the requirement to use fixed-price contracts for acquisitions for foreign military sales.~~

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**216.104 Factors in selecting contract type.**

Contracting officers shall follow the principles and procedures in Director, Defense Procurement and Acquisition Policy memorandum dated April 1, 2016, entitled “[Guidance on Using Incentive and Other Contract Types](https://www.acq.osd.mil/dpap/policy/policyvault/USA001270-16-DPAP.pdf),” when selecting and negotiating the most appropriate contract type for a given procurement. See [PGI 216.104](https://www.acq.osd.mil/dpap/dars/pgi/pgi_htm/current/PGI216_1.htm#216.104).

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**216.104-70 Research and development.**

Follow the procedures at PGI 216.104-70 for selecting the appropriate research and development contract type, and see 235.006(b) for additional approval requirements.

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**SUBPART 216.3---COST-REIMBURSEMENT CONTRACTS**

**216.301-3 Limitations.**

~~(1)~~ For contracts in connection with a military construction project or a military family housing project, contracting officers shall not use cost-plus-fixed-fee, cost-plus-award-fee, or cost-plus-incentive-fee contract types (10 U.S.C. 2306(c)). This applies notwithstanding a declaration of war or the declaration by the President of a national emergency under section 201 of the National Emergencies Act (50 U.S.C. 1621) that includes the use of the Armed Forces.

~~(2) Except as provided in~~ [~~235.006~~](https://www.acq.osd.mil/dpap/dars/dfars/html/current/235_0.htm#235.006)~~(b), in accordance with section 829 of the National Defense Authorization Act for Fiscal Year 2017 (Pub. L. 114-328), approval of the head of the contracting activity is required prior to awarding cost-reimbursement contracts in excess of $25 million.~~

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**SUBPART 216.4---INCENTIVE CONTRACTS**

**216.401 General.**

(c) See [PGI 216.401](https://www.acq.osd.mil/dpap/dars/pgi/pgi_htm/PGI216_4.htm#216.401)(c) for information on the Defense Acquisition University Award and Incentive Fees Community of Practice.

(d)~~(i) Except as provided in paragraph (d)(ii), t~~**[T]**he determination and findings justifying that the use of an incentive- or award-fee contract is in the best interest of the Government, may be signed by the head of contracting activity or a designee—

(~~A~~**[i]**) No lower than one level below the head of the contracting activity for award**[-]**fee contracts; or

(~~B~~**[ii]**) One level above the contracting officer for incentive**[-]**fee contracts.

~~(ii) For cost-reimbursement incentive- or award fee contracts valued in excess of $25 million, the determination and findings justifying that the use of this type of contract is in the best interest of the Government shall be signed by the head of the contracting activity. See DFARS~~ [~~216.301-3~~](https://www.acq.osd.mil/dpap/dars/dfars/html/current/216_3.htm#216.301-3)~~(2).~~

(e) Award-fee plans required in FAR 16.401(e) shall be incorporated into all award-fee type contracts. Follow the procedures at [PGI 216.401](https://www.acq.osd.mil/dpap/dars/pgi/pgi_htm/PGI216_4.htm#216.401)(e) when planning to award an award-fee contract.

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**PART 235---Research and Development Contracting**

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**235.006 Contracting methods and contract type.**

(b)(~~i) Consistent with section 829 of the National Defense Act for Fiscal Year 2017 (Pub. L. 114-328), the Under Secretary of Defense for Acquisition and Sustainment (USD(A&S) has determined that the use of cost-reimbursement contracts for research and development in excess of $25 million is approved, if the contracting officer executes a written determination and findings that –~~

~~(A) The level of program risk does not permit realistic pricing; and~~

~~(B) It is not possible to provide an equitable and sensible allocation of program risk between the Government and the contractor.~~

~~(ii~~**[i]**) For major defense acquisition programs as defined in 10 U.S.C. 2430—

(A) Follow the procedures at [234.004](https://www.acq.osd.mil/dpap/dars/dfars/html/current/234_0.htm#234.004); and

(B) Notify the milestone decision authority of an intent not to exercise a fixed-price production option on a development contract for a major weapon system reasonably in advance of the expiration of the option exercise period.

~~(iii~~**[ii]**) For other than major defense acquisition programs—

(A) Do not award a fixed-price type contract for a development program effort unless—

(*1*) The level of program risk permits realistic pricing;

(*2*) The use of a fixed-price type contract permits an equitable and sensible allocation of program risk between the Government and the contractor; and

(*3*) A written determination that the criteria of paragraphs (b)(~~iii~~**[ii]**)(A)*(1)* and (*2*) of this section have been met is executed—

*(i)* By the USD(A&S) if the contract is over $25 million and is for: research and development for a non-major system; the development of a major system (as defined in FAR 2.101); or the development of a subsystem of a major system; or

*(ii)* By the contracting officer for any development not covered by paragraph (b)(~~iii~~**[ii]**)(A)*(3)(i)* of this section.

(B) Obtain USD(A&S) approval of the Government’s prenegotiation position before negotiations begin, and obtain USD(A&S) approval of the negotiated agreement with the contractor before the agreement is executed, for any action that is—

(*1*) An increase of more than $250 million in the price or ceiling price of a fixed-price type development contract, or a fixed-price type contract for the lead ship of a class;

(*2*) A reduction in the amount of work under a fixed-price type development contract or a fixed-price type contract for the lead ship of a class, when the value of the work deleted is $100 million or more; or

(*3*) A repricing of fixed-price type production options to a development contract, or a contract for the lead ship of a class, that increases the price or ceiling price by more than $250 million for equivalent quantities.

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