



5001-06-P

**DEPARTMENT OF DEFENSE**

**Defense Acquisition Regulations System**

**48 CFR Parts 202, 216, 217, 225, 234, and 235**

**[Docket DARS-2019-0008]**

**RIN 0750-AJ32**

**Defense Federal Acquisition Regulation Supplement: Use of  
Fixed-Price Contracts (DFARS Case 2017-D024)**

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

**ACTION:** Proposed rule.

**SUMMARY:** DOD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to implement a section of the National Defense Authorization Act for Fiscal Year 2017 that requires the preference for the use of fixed-price contracts in the determination of contract type, requires review and approval for certain cost-reimbursement contract types at specified thresholds and established time periods, and requires the use of firm fixed-price contract types for foreign military sales unless an exception or waiver applies.

**DATES:** Comments on the proposed rule should be submitted in writing to the address shown below on or before **[Insert date 60 days after date of publication in the FEDERAL REGISTER]**, to be considered in the formation of a final rule.

**ADDRESSES:** Submit comments identified by DFARS Case 2017-D024, using any of the following methods:

- o *Federal eRulemaking Portal:* <http://www.regulations.gov>. Search for "DFARS Case 2017-D024." Select "Comment Now" and follow the instructions provided to submit a comment. Please "DFARS Case 2017-D024" on any attached documents.

- o *Email:* [osd.dfars@mail.mil](mailto:osd.dfars@mail.mil). Include DFARS Case 2017-D024 in the subject line of the message.

- o *Fax:* 571-372-6094.

- o *Mail:* Defense Acquisition Regulations System, Attn: Ms. Kimberly Bass, OUSD(A&S)DPC/DARS, Room 3B941, 3060 Defense Pentagon, Washington, DC 20301-3060.

Comments received generally will be posted without change to <http://www.regulations.gov>, including any personal information provided. To confirm receipt of your comment(s), please check [www.regulations.gov](http://www.regulations.gov), approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

**FOR FURTHER INFORMATION CONTACT:** Ms. Kimberly Bass, telephone 571-372-6174.

**SUPPLEMENTARY INFORMATION:**

**I. Background**

DoD is proposing to amend the DFARS to implement sections 829 and 830 of the National Defense Authorization Act (NDAA) for

Fiscal Year (FY) 2017. Section 829 of the FY 2017 NDAA requires contracting officers to first consider fixed-price contracts, to include fixed-price incentive contracts, when determining contract type and to obtain approval from the head of the contracting activity for—

- o Cost-reimbursement contracts in excess of \$50 million to be awarded after October 1, 2018, and before October 1, 2019; and
- o Cost-reimbursement contracts in excess of \$25 million to be awarded on or after October 1, 2019.

Section 830 provides requirements, exceptions, and waiver authority for the use of firm-fixed-price contracts for foreign military sales (FMS). It requires contracting officers to use firm fixed-price contracts unless specified exceptions or a waiver applies. Contracting officers are required to use a different contract type if the FMS customer has established in writing a preference for a different contract type or has requested in writing that a different contract type be used for a specific FMS. The waiver authorizes contracting officers the ability to use other than firm-fixed-price contract type on a case by case basis when determined it is in the best interest of the United States and American taxpayers.

## **II. Discussion and Analysis**

The following changes to the DFARS are proposed to implement sections 829 and 830 of the NDAA for FY 2017:

DFARS section 202.101 adds the definition of "milestone decision authority" since the definition is used in multiple DFARS parts.

DFARS 216.102(1) adds a reference to section 829 to inform contracting officers on the new requirements when selecting contract types and includes a reference to DFARS 216.301-3(2) for the approval requirements on the use of cost-reimbursement contracts. DFARS 216.102(3) is added to provide a reference to DFARS 225.7301-1 for the requirements on the use of fixed-price contracts for FMS sales in accordance with section 830 of the FY 2017 NDAA.

DFARS 216.104-70 includes a reference to DFARS 235.006(b) for the new research and development (R&D) contract type approval requirements.

DFARS 216.301-3(2) is added to incorporate the exception on the use of cost-reimbursement contracts for R&D as provided in DFARS 235.006(b). Paragraph (2) also provides the statutory requirements of section 829 on the use of cost-reimbursement contracts over the established thresholds and timelines and establishes the approval level on the use of cost-reimbursement contracts as the head of the contracting activity.

DFARS 217.202 incorporates PGI references for guidance on the use of options for FMS requirements and for sole source major systems for U.S. and U.S./FMS combined procurements.

DFARS 225.7301-1 is added to implement section 830 of the NDAA for FY 2017. Paragraph (a) incorporates a new requirement to use firm-fixed price contracts for FMS requirements unless a preference for a different contract type is established in writing or requests in writing that a different contract type be used for a specific FMS. It also provides a reference to guidance in DFARS PGI 217.202(2) on the use of priced options for FMS requirements. DFARS 225.7301-1(b) establishes a waiver process for the use of firm-fixed-price contract requirements if the chief of the contracting office determines a different contract type is in the best interest of the Government, on a case by case basis.

DFARS 225.7301-2 provides guidance on the review requirements, prior to issuing a solicitation for a sole source contract for U.S./FMS combined requirements for a major system with a contract value exceeding \$500 million, in accordance with the Defense Pricing and Contracting (DPC) (formerly Defense Procurement and Acquisition Policy) policy memorandum dated June 28, 2018. It also includes a reference link to PGI 216.403-1(1)(ii)(B) and (C) for procedures on the use of fixed-price incentive (firm target) (FPIF) contracts.

DFARS 234.004(2)(ii)(A) revises "USD(AT&L)" to reflect the new organization Under Secretary of Defense for Acquisition and Sustainment (USD(A&S)) (throughout the proposed rule text) and

clarifies the existing approval and certification requirements for contract type selection and determination in the acquisition strategies and acquisition plans for MDAPs, which include the milestone decision authority (MDA) when the MDA is the service acquisition executive of the military department managing the program, as specified in section 848 of the NDAA for FY 2017. DFARS 234.004(2)(iii) provides a reference to DFARS 216.301-3 for the additional approval requirements on cost-reimbursement contracts for major system acquisitions. DFARS 234.004(2)(iv) provides a reference to PGI 216.403-1(1)(ii)(B) and (C) for procedures on the use of FPIF contracts.

DFARS 235.006(b)(i) incorporates the approval by USD(A&S) on the authority to use cost-reimbursement contracts for R&D in excess of \$25 million if the contracting officer executes a written determination and findings that the risk level does not permit realistic pricing and it is not possible to allocate that risk equitably between the Government and the contractor. Risks associated with a program is a major factor and consideration point for choosing the contract type. Since development efforts are inherently risky and do not lend themselves to a fixed-price type of contract; a cost-reimbursement contract is more appropriate and customary for most development programs. DFARS 235.006(b)(i)(B) is revised to reflect the revision to the notification requirements of an intent not to exercise a fixed-

price production option on a development contract for a major weapon system prior to expiration of the option period; updated to reflect the MDA instead of the former USD(AT&L) now USD(A&S).

**III. Applicability to Contracts at or Below the Simplified Acquisition Threshold and for Commercial Items, Including Commercially Available Off-the-Shelf Items**

This rule does not propose to create any new DFARS clauses or amend any existing DFARS clauses.

**IV. 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 not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

**V. Executive Order 13771**

This proposed rule is not expected to be an E.O. 13771 regulatory action, because this rule is not significant under E.O. 12866.

## **VI. Regulatory Flexibility Act**

DoD does not expect this proposed rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, et seq., because the rule is mainly impacting the internal operations of the government for review and approval on the use of certain contract types. However, an initial regulatory flexibility analysis has been performed and is summarized as follows:

DOD is proposing to amend the Defense Federal Acquisition Regulation Supplement (DFARS) to implement sections 829 and 830 of the National Defense Authorization Act for Fiscal Year 2017 that requires the preference for the use of firm fixed-price contract types for foreign military sales (FMS) with exceptions and waiver authority in accordance with sections 830(b) and (c). Section 829 requires review and approval for certain cost-reimbursement contract types at specified thresholds and established time periods.

The objective of this proposed rule is to require contracting officers to establish a preference for fixed-price and fixed-price incentive contracts during the consideration of contract

type and require the use of firm fixed-price contracts for FMS, unless an exception applies or a waiver is executed.

Small business statistics were obtained from the Federal Procurement Data System for fiscal year 2017 data identifying the DoD cost-reimbursement awards issued, including task and delivery orders under single award indefinite delivery indefinite quantity (IDIQ) contracts as of August 8, 2018.

Of the 2,120 contract awards over \$25 million (includes \$50 million), only 206 awards, or approximately ten percent, were made to unique small business entities.

This proposed rule does not include any new reporting, recordkeeping, or other compliance requirements for small businesses. The proposed rule does not duplicate, overlap, or conflict with any other Federal rules.

There are no known significant alternative approaches to the proposed rule that would meet the proposed objectives.

DoD invites comments from small entities and other interested parties on the expected impact of this rule on small entities.

DoD will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (DFARS Case 2017-D024), in correspondence.

## **VII. Paperwork Reduction Act**

The 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 Parts 202, 216, 217, 225, 234, and 235** Government procurement.

**Jennifer Lee Hawes,**

*Regulatory Control Officer, Defense Acquisition Regulations System.*

Therefore, 48 CFR parts 202, 216, 217, 225, 234, and 235 are proposed to be amended as follows:

1. The authority citation for 48 CFR parts 202, 216, 217, 225, 234, and 235 continues to read as follows:

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

**PART 202—DEFINITION OF WORDS AND TERMS**

2. Amend section 202.101 by adding in alphabetical order a definition for "Milestone decision authority" to read as follows:

**202.101 Definitions.**

\* \* \* \* \*

*Milestone decision authority*, with respect to a major defense acquisition program, major automated information system, or major system, means the official within the Department of Defense designated with the overall responsibility and authority

for acquisition decisions for the program or system, including authority to approve entry of the program or system into the next phase of the acquisition process (10 U.S.C. 2431a).

\* \* \* \* \*

**PART 216—TYPES OF CONTRACTS**

3. Amend section 216.102 by—
  - a. Designating the text as paragraph (2); and
  - b. Adding paragraphs (1) and (3).

The additions read as follows:

**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(2) for approval requirements for certain cost-reimbursement contracts.

\* \* \* \* \*

(3) See 225.7301-1 for the requirement to use fixed-price contracts for acquisitions for foreign military sales.

**216.104-70 [Amended]**

4. Amend section 216.104-70 by removing “contract type” and adding “contract type and see 235.006(b) for additional approval requirements” in its place.
5. Amend section 216.301-3 by—

- a. Designating the text as paragraph (1); and
- b. Adding paragraph (2).

The addition reads as follows:

**216.301-3 Limitations.**

\* \* \* \* \*

(2) Except as provided in 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 the following:

(i) Cost-reimbursement contracts in excess of \$50 million to be awarded after October 1, 2018, and before October 1, 2019.

(ii) Cost-reimbursement contracts in excess of \$25 million to be awarded on or after October 1, 2019.

**PART 217—SPECIAL CONTRACTING METHODS**

6. Amend section 217.202 by adding paragraphs (1)(i) and (ii) to read as follows:

**217.202 Use of options.**

(1) \* \* \*

(i) See PGI 217.202(1) for guidance on the use of options with foreign military sales (FMS).

(ii) See PGI 217.202(2) for the use options with sole source major systems for U.S. and U.S./FMS combined procurements.

\* \* \* \* \*

**PART 225—FOREIGN ACQUISITION**

7. Add section 225.7301-1 to read as follows:

**225.7301-1 Requirement to use firm-fixed-price contracts.**

(a) *Requirement.* In accordance with section 830 of the National Defense Authorization Act for Fiscal Year 2017 (Pub. L. 14-328), a firm-fixed-price contract shall be used for FMS, unless the foreign country that is the counterparty to FMS—

(1) Has established in writing a preference for a different contract type; or

(2) Requests in writing that a different contract type be used for a specific FMS. See PGI 217.202(2) on the use of priced options for FMS requirements.

(b) *Waiver.* The requirement in paragraph (a) of this section may be waived, if the chief of the contracting office determines, on a case-by-case basis, that a different contract type is in the best interest of the United States and American taxpayers.

8. Add section 225.7301-2 to read as follows:

**225.7301-2 Solicitation approval for sole source contracts.**

The contracting officer shall coordinate through agency channels with the Principal Director, Defense Pricing and Contracting, prior to issuing a solicitation for a sole source contract for U.S./FMS combined requirements for a major system that has an

estimated contract value that exceeds \$500 million. See also 201.170 and PGI 216.403-1(1)(ii)(B) and (C).

**Part 234—MAJOR SYSTEM ACQUISITION**

9. Amend section 234.004—

- a. In paragraphs (2)(i)(A) and (2)(i)(C) introductory text, by removing “Milestone Decision Authority” and adding “milestone decision authority” in both places;
- b. By revising paragraph (2)(ii)(A) introductory text;
- c. In paragraph (2)(ii)(A)(2), by removing the word “when”; and
- d. By adding paragraphs (2)(iii) and (2)(iv).

The revision and addition read as follows:

**234.004 Acquisition strategy.**

\* \* \* \* \*

(2) \* \* \*

(ii) \* \* \*

(A) Not use cost-reimbursement line items for the acquisition of production of major defense acquisition programs, unless the Under Secretary of Defense for Acquisition and Sustainment (USD(A&S)), or the milestone decision authority when the milestone decision authority is the service acquisition executive of the military department that is managing the program, submits to the congressional defense committees—

\* \* \* \* \*

(iii) See 216.301-3 for additional contract type approval requirements for cost-reimbursement contracts.

(iv) For fixed-price incentive (firm target) contracts, contracting officers shall comply with the guidance provided at PGI 216.403-1(1)(ii)(B) and (C).

#### **PART 235—RESEARCH AND DEVELOPMENT CONTRACTING**

10. Amend section 235.006—

a. By redesignating paragraphs (b)(i) and (b)(ii) as paragraphs (b)(ii) and (b)(iii);

b. In newly redesignated paragraph (b)(ii)(B) introductory text, by removing “Under Secretary of Defense (Acquisition, Technology, and Logistics (USD(AT&L)))” and adding “milestone decision authority” in its place;

c. In newly redesignated paragraphs (b)(iii)(A)(3) introductory text and (b)(iii)(A)(3)(i) and (ii), by removing “(b)(ii)(A)(1)”, “USD(AT&L)”, and “(b)(ii)(A)(3)(i)” and adding “(b)(iii)(A)(1)”, “USD(A&S)”, and “(b)(iii)(A)(3)(i)” in their places, respectively;

d. In the newly redesignated paragraph (b)(iii)(B) introductory text, by removing “USD(AT&L)” and adding “USD(A&S) in two places; and

e. By adding new paragraph (b)(i).

The addition reads as follows:

**235.006 Contracting methods and contract type.**

(b) (i) Consistent with section 829 of the National Defense Authorization 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.

\* \* \* \* \*

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