

TREASURY INSPECTOR GENERAL FOR TAX ADMINISTRATION



Federal Acquisition Regulation Requirements Were Either Not Performed or Documented When Awarding and Administering Expert Witness Contracts

September 26, 2023

Report Number: 2023-IE-R012

This report has cleared the Treasury Inspector General for Tax Administration disclosure review process and information determined to be restricted from public release has been redacted from this document.

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HIGHLIGHTS: Federal Acquisition Regulation Requirements Were Either Not Performed or Documented When Awarding and Administering Expert Witness Contracts

Final Evaluation Report issued on September 26, 2023

Report Number 2023-IE-R012

Why TIGTA Did This Study

The IRS's Office of Chief Counsel (OCC) provides legal guidance and interpretive advice to the IRS. The OCC also represents the IRS in litigation and can obtain the services of expert witnesses. The primary consideration in selecting an expert witness is the degree to which a specific witness will be helpful to the Tax Court in understanding and determining the matter at issue.

The overall objective of this review was to assess the IRS's compliance with the Federal Acquisition Regulation (FAR) and IRS policies and procedures for awarding and administering expert witness contracts.

Impact on Tax Administration

During Fiscal Years (FY) 2018 through 2021, the IRS awarded over \$100 million in expert witness contracts.

What TIGTA Found

The IRS was not in compliance with all FAR and IRS requirements when awarding and administering expert witness contracts. These include performing a tax compliance check, obtaining the contractor's assertion regarding delinquent tax liability or a felony conviction, completing security awareness training, and considering an internal expert prior to seeking the services of an external expert. Our review of 27 expert witness contract files awarded during FYs 2019 through 2021, totaling nearly \$39 million, found that documentation supporting key required actions taken to award the contract were either not included in the contract file or the IRS was unable to provide documentation when requested. For those actions where documentation was not provided, TIGTA was unable to determine whether the required action was taken. These include that:

- 17 contracts had inadequate or no documentation to support the performance of the required market research survey.
- 3 contracts had no documentation showing the required tax compliance check was performed.
- 6 contracts had no documentation of contractor assertion of no delinquent tax liability or felony conviction.
- 9 contracts had no documentation supporting the preparation of the required Quality Assurance Surveillance Plan, which provides details of all work requiring surveillance and the method of surveillance.
- 19 contracts had no documentation supporting that the expert witness completed the required Security Awareness Training.
- 27 contracts had no documentation to support the IRS's decision to use an external expert.
- 21 contracts had no documentation detailing the rationale to substantiate that the expert witness's proposed hourly rate was fair and reasonable.

In addition, all 27 contracts were classified as Firm-Fixed-Price in the Government's Federal Procurement Data System but managed like Labor-Hour contracts. Finally, for 16 (59 percent) of the 27 contracts reviewed, the IRS did not provide evidence to support its oversight and/or monitoring of the expert witness's performance and compliance with contract terms.

What TIGTA Recommended

TIGTA made six recommendations, including that the Chief Procurement Officer comply with the FAR requirement that documentation in the contract file be sufficient to constitute a complete history of all actions taken to award and administer an expert witness; ensure that the acquisition plan includes the evaluation of an internal expert to support the need to procure the services of an external expert; and ensure that the rationale to support the Contracting Officer's determination that the expert witness's proposed hourly rate is fair and reasonable is documented and included in the contract file.

IRS management agreed with five recommendations. The IRS disagreed with our recommendation to review all closed expert witness contracts to determine if the contract type should be corrected in the IRS procurement system and the Federal Procurement Data System.



TREASURY INSPECTOR GENERAL
FOR TAX ADMINISTRATION

U.S. DEPARTMENT OF THE TREASURY
WASHINGTON, D.C. 20024

September 26, 2023

MEMORANDUM FOR: COMMISSIONER OF INTERNAL REVENUE

FROM: Russell P. Martin 
Deputy Inspector General for Inspections and Evaluations

SUBJECT: Final Report – Federal Acquisition Regulation Requirements Were Either Not Performed or Documented When Awarding and Administering Expert Witness Contracts (Evaluation # IE-22-002)

This report presents the results of our review to assess the Internal Revenue Service's (IRS) compliance with the Federal Acquisition Regulation and IRS policies and procedures for awarding and administering expert witness contracts. This review was part of our Fiscal Year 2022 Annual Program Plan and addresses the management and performance challenge of *Increasing Domestic and International Tax Compliance and Enforcement*.

Management's complete response to the draft report is included as Appendix II. If you have any questions, please contact me or James A. Douglas, Director, Inspections and Evaluations.

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Background

The Internal Revenue Service's (IRS) Office of Chief Counsel (OCC) provides legal guidance and interpretive advice to the IRS, Department of the Treasury, and to taxpayers. The mission of the OCC is to serve taxpayers fairly and with integrity by providing correct and impartial interpretation of the Internal Revenue laws and the highest quality legal advice and representation for the IRS. As such, the OCC represents the IRS in litigation as well as providing all other legal support needed by the IRS. Accordingly, the OCC can obtain the services of expert witnesses if scientific, technical, or other specialized knowledge would assist the court in understanding the matter at issue.¹ Expert witnesses can also assist by recommending matters for discovery, identifying other potential witnesses, and evaluating and analyzing a petitioner's² expert and a petitioner's expert's report. A witness is qualified as an "expert" by knowledge, skill, experience, training, or education. Expert witnesses hired by the OCC can specialize in issues such as valuation of tangible or intangible assets, of services, or the working needs of a corporation. Experts can also be used to explain a particular occupation or industry not commonly known to the average person.

Expert witnesses provide unique assistance to the IRS in Tax Court cases

External experts can provide unique assistance in a case, as they may have more industry or issue-specific expertise. They can also provide an objective view of a case and may be less likely to be perceived as biased in matters that are more complex. Internal OCC guidelines state that the primary consideration in selecting an expert witness is the degree to which a specific witness will be helpful to the Tax Court in understanding and determining the matter at issue.³ The expert must be qualified to testify on the specific matters the court is considering and express the facts and opinions. Consideration must be given as to the expert's overall qualifications, demeanor and professional appearance, experience as a witness relating to the specific matter at issue, professional books or articles written, and how they might react to cross-examination. Other factors evaluated when considering the services and selection of an expert witness include the individuals:

- Education level.
- Professional experience.
- Prior courtroom or similar experience.
- Proposed fees and cost.
- Willingness to sign a non-disclosure agreement.⁴

¹ 28 U.S.C., Appendix, Federal Rules of Evidence, *Rule 702 – Testimony by Experts* (Jan. 2011).

² A petitioner is a taxpayer bringing a case before the Tax Court.

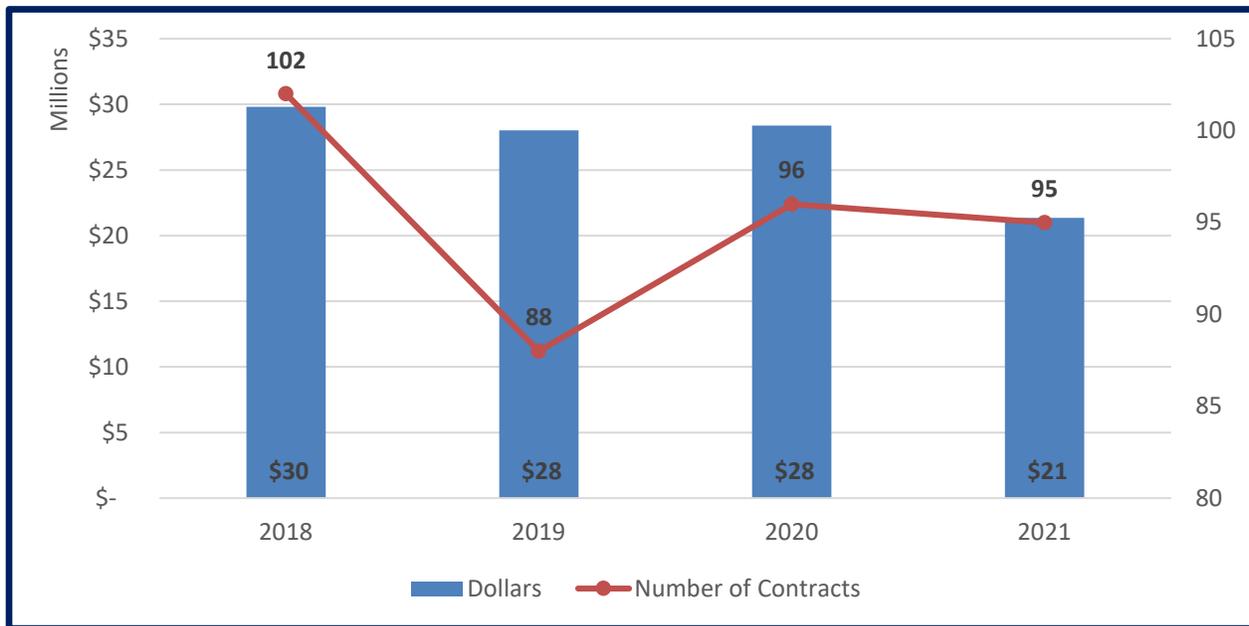
³ Chief Counsel Directives Manual 35.4.4, *Pre-Trial Activities, Gathering Information from Third Parties* (Aug. 2014).

⁴ A non-disclosure agreement is a legally binding contract executed by an individual to protect U.S. Government sensitive information and taxpayer information from unauthorized disclosure.

Process to hire an external witness

The IRS Office of the Chief Procurement Officer (OCPO) processes all OCC expert witness contracts under the requirements of the Federal Acquisition Regulation (FAR). Once a qualified expert is identified, a Contracting Officer's Representative (COR)⁵ assists the OCC attorney in obtaining the necessary documents for the procurement package and coordinating with the OCPO to fund and award the expert witness contract. CORs are usually paralegals who work directly with attorneys. The COR is responsible for preparing the paperwork necessary to request expert witness services, assisting the OCC attorney in vetting the expert, and reviewing the expert witness contract or purchase order for accuracy. Upon completion of the procurement package, the OCC attorney and manager review the package to ensure the need for the expert, the reasonableness of the requested funds, and conformity of the package requirements. During Fiscal Years (FY) 2018 through 2021, the OCPO awarded over \$100 million in expert witness contracts for the OCC. Figure 1 shows the value and number of expert witness contracts awarded during this period.

Figure 1: Expert Witness Contracts Awarded During FYs 2018 Through 2021 (Dollars in Millions)



Source: Treasury Inspector General for Tax Administration (TIGTA) analysis of the IRS's Procurement for Public Sector System.

The work of an expert witness is divided into five general phases:

- *Preliminary Evaluation* – Expert reviews pertinent information and documents to become familiar with the case.
- *Consultation and Report Preparation* – Expert consults with the attorney as needed, researches and analyzes materials, and prepares a letter and/or report that conforms with

⁵ A COR is an individual, including a contracting officer's technical representative, designated and authorized in writing by the contracting officer to perform specific technical or administration functions.

Tax Court Rule 143(g)⁶ to assist the Tax Court in understanding the issue.

- *Pre-Trial Work and Trial Preparation* – Expert assists the attorney in preparing for trial in the Tax Court and, if requested, prepares a rebuttal report addressing the petitioner’s expert report.
- *Trial* – Expert is available to testify in Tax Court and review, analyze, and comment on the testimony given by other witnesses.
- *Post-Trial* – Expert is available to assist the attorney in evaluating the evidence presented at trial and in preparing any post-trial brief.

For most contracts, the Government uses competitive procedures, which provide full and open competition where all responsible sources are permitted to compete.⁷ However, there is a statutory exemption that permits the use of noncompetitive bidding procedures for the procurement of expert witnesses.⁸ Noncompetitive procedures allow contracting without providing for full and open competition when it is necessary to award the contract to a particular source.⁹ To use this type of procurement, a written justification for acquiring an expert using other than full and open competition is required. Internal guidelines also require the attorney to consider three or more qualified experts. Once the procurement package is complete and approved, it is sent to the OCC Finance and Management and OCPO, where a Contracting Officer (CO) is assigned to negotiate and finalize the terms of the contract. Only the CO has the authority to negotiate the price and terms of the contract and to enter into a contract on behalf of the OCC. Once the CO has finalized the terms of the contract, the contract is awarded.

Results of Review

Our review of 27 expert witness contract files¹⁰ awarded during FYs 2019 through 2021, totaling nearly \$39 million, found that the OCC and the OCPO were not in compliance with all FAR and IRS requirements when awarding and administering these contracts. Specifically, we found that documentation supporting key required actions taken to award and administer the contract were either not included in the contract file or the OCC and/or the OCPO were unable to provide documentation supporting the performance of the required action when requested. For those actions where documentation was not provided, we were unable to determine whether the required action was in fact taken. These actions include performing a tax compliance check, obtaining the contractor’s assertion regarding delinquent tax liability or a felony conviction, completing security awareness training, and considering an internal expert prior to seeking the services of an external expert.

⁶ Tax Court Rule 143 (g) requires an expert witness to prepare a written report for submission to the Court and to the opposing party. The rule details what the written report should contain.

⁷ FAR subpart 6.1 (2021).

⁸ 41 U.S.C., Public Contracts, § 3304(a)(3)(C) *Use of noncompetitive procedures*.

⁹ FAR 6.302-3 (2021).

¹⁰ A contract file is a file that documents the basis for the acquisition and the award, the assignment of contract administration (including payment responsibilities), and any subsequent actions taken by the contracting office per FAR 4.802(a).

In addition, for some contract files we reviewed, the OCC and/or the OCPO were unable to provide sufficient documentation to support the conclusions in the market research survey. The market research survey or other contract-related documents did not include the rationale to support the CO's determination that the expert witness's proposed hourly rate was fair and reasonable. Finally, our review determined that the OCC did not always provide evidence to support its oversight and/or monitoring of the expert witness's performance and compliance with contract terms, and all 27 contracts were classified as Firm-Fixed-Price (FFP) in the IRS's procurement system and in the Federal Procurement Data System (FPDS) but were managed like Labor-Hour (LH) contracts.

Required Documentation to Support Contract Actions Was Not Always Provided or Included in Contract Files

Our review of the 27 expert witness contract files determined that the required documentation to support contract actions was not always provided by the OCC and/or the OCPO when requested or included in the contract file. The FAR requires contract files to include documents that are sufficient to constitute a complete history of the contract action by providing:

- A complete background as a basis for informed decisions made at each step in the acquisition process.
- Support for the contract actions taken.
- Information for reviews and investigations.
- Essential facts in the event of litigation, contract disputes, or congressional inquiries.¹¹

Documentation to support the market research survey results were not included in the contract files

For all 27 contracts, documentation to support the statements and decisions made in the market research survey were not included in the contract file as required. When TIGTA requested these documents, the OCC was able to provide sufficient documentation to support that the required market research survey was performed for only 10 (37 percent) of the 27 contract files. For the remaining 17 contract files (63 percent), the OCC was unable to provide enough or any documentation supporting the performance of the required market research survey.

According to FAR Subpart 7.102(a), market surveys and/or research must be performed for all acquisitions to determine if the services needed are available to meet the Government's needs. The market survey and/or research must be included in the contract file along with any supporting documentation as it provides a basis for the decisions made in the acquisition process. Further, the contract file should include the price analysis and any data and information related to the CO's determination of a fair and reasonable price.¹² In the case of the expert witness contracts we reviewed, the results of the market survey and/or research were also used for the CO's price analysis to support their fair and reasonable price determination;

¹¹ FAR 4.801(b) (2021).

¹² FAR 4.803(a)(17) and (19) (2021).

thus, the supporting documentation should be included in the contract file as required by the FAR.

We informed OCPO officials that the contract files were missing supporting documentation for the statements and decisions made in the market research survey, and they stated that this information is not included in the contract file because the procurement of an expert witness is sole source. As such, the supporting documents included in the contract file are for the selected expert witness only. Further, the supporting documentation may contain sensitive information related to the case. We disagree with the OCPO's assertion as the FAR requires contract files to include documents that are sufficient to constitute a complete history of the contract actions taken and decisions made.

Tax compliance checks were not always completed and/or included in contract files

For 12 (44 percent) of the 27 contract files, evidence of the OCPO tax compliance check was not included in the contract file to confirm the check was performed and completed. TIGTA requested evidence of the required OCPO tax compliance check; however, the OCPO was unable to provide evidence of the check for three of the 12 contracts.¹³ The *Consolidated and Further Continuing Appropriations Act of 2019* and subsequent appropriations acts have specified that the Government will not enter into a contract with any corporation that has any unpaid Federal tax liability that has been assessed, unless an agency has considered suspension or debarment of the corporation and made a determination that this action is not necessary to protect the interests of the Government.¹⁴

The contractor's assertion of no delinquent tax debt or felony conviction was not always documented or completed

For 15 (56 percent) of the 27 contract files we reviewed, the contract file did not include the contractor's assertion that they had no delinquent tax liability or were convicted of a felony. TIGTA requested the assertion form for these 15 contract files, and the OCC and/or the OCPO were unable to provide the form for nine of the contracts. Of the nine contracts, we reviewed the System for Award Management document included in the contract file for the contractor's entity structure and determined if it included the contractor's assertion. Based on our review, six of the nine contracts did not include the contractor's assertion. The remaining three were partnerships and were not required to complete the assertion; however, [REDACTED]. The FAR requires the corporate contractor's assertion regarding delinquent tax liability or a felony conviction under any Federal law.¹⁵ According to OCC guidelines, this form is not required as part of the procurement request package to the OCPO.

Quality Assurance Surveillance Plans (QASP) were not always completed

For nine (43 percent) of the 21 contract files we reviewed, the QASP was not included in the contract file nor were the OCC and/or the OCPO able to provide them when requested by

¹³ According to the OCPO, due to the sudden passing of an employee, they were unable to obtain all contract documents, including the tax compliance checks for the three contracts.

¹⁴ Pub. L. No. 116-6, 133 Stat. 13 (2019).

¹⁵ FAR 52.209-11 (2021).

TIGTA. Internal OCC guidelines state that a QASP must be completed for all procurements with an amount over \$300,000. The QASP provides details of all work requiring surveillance and the method of surveillance.¹⁶ Further, the FAR states that a QASP should be prepared in conjunction with the Statement of Work.

Required Security Awareness Training was not always completed and/or included in contract files

Documentation supporting that the expert witness completed the required Security Awareness Training was not included for all 27 contract files we reviewed. TIGTA requested documentation to validate the required initial and annual training was completed by the expert. The OCC and/or OCPO were unable to provide evidence that the expert completed the required training for 19 (70 percent) of the 27 contracts. Specifically:

- Internal guidelines state that contractor employees who require staff-like access to IRS-owned or controlled facilities, information technology systems, sensitive but unclassified information, or security items or products, regardless of location, must complete mandatory security awareness training upon on-boarding and yearly thereafter.¹⁷
- Terms in the contracts state that all new contractor/subcontractor personnel complete all assigned IRS Security Awareness Training before being granted access to sensitive but unclassified data. For contracts/orders/agreements exceeding one year in length, either on a multiyear or multiple year basis, the contractor must ensure that personnel complete assigned Security Awareness Training mandatory briefings annually no later than October 31st of the current calendar year.¹⁸

Recommendation 1: The Chief Procurement Officer should ensure that all required documentation is in the contract file and is sufficient to constitute a complete history of all actions taken to award and administer an expert witness, including complete market research surveys with supporting documentation, tax compliance checks, security awareness trainings, contractors' assertions, and QASPs.

Management's Response: IRS management agreed with the recommendation. The IRS has drafted an Office Instruction addressing the findings outlined in the report and the need for the contract file to fully document decisions and tell the complete story of the acquisition.

Expert witness contractors are exempt from required background investigations

For all 27 contracts we reviewed, no documentation was included in the contract file confirming the performance of the required background investigation. Internal guidelines require contractors undergo a background investigation to access sensitive but unclassified information and/or require staff-like access.¹⁹ In September 2005, the Department of the Treasury granted

¹⁶ FAR 46.401 (2021).

¹⁷ Internal Revenue Manual 10.23.2 *Contractor Investigations* (Apr. 2022).

¹⁸ IR1052.224-9001 Mandatory IRS Security Training for Information Systems, Information Protection and Facilities Physical Access (June 2021).

¹⁹ Treasury Security Manual – TD P 15-71 (2011).

the OCC a waiver for the requirement that expert witness contractors undergo a background investigation. The waiver was granted to allow timely award of expert witness contracts and was also based on the OCC's procedures for identifying and procuring an expert witness, which include a background check. OCC guidelines require that as part of the selection process, the OCC performs a background check to vet the potential expert to ensure that they are qualified and that there is nothing in the potential expert's background that could damage their credibility. Vetting procedures require verifying all items on the potential expert's resume, social media check, an Internet search for all materials on the expert, researching cases the expert has testified in, and interviewing the expert. The waiver requires the COs to include applicable IRS Acquisition Policy disclosure safeguard clauses in all expert witness solicitations, contracts, and/or orders. We reviewed all 27 contracts and found the appropriate contract clause for safeguards against unauthorized disclosure was included in all contracts.

Documentation Was Not Provided to Support the Office of Chief Counsel's Decision to Use an External Expert

For the 27 contracts we reviewed, documentation was not included in the contract file nor provided to support the OCC's decision to use an external expert. For example, the IRS's Engineering Program, in its Large Business and International Division, includes a team of professionals with expertise in a variety of areas including performing many of the services (*i.e.*, valuation of intangible assets or property appraisal) the OCC seeks from an expert witness.

To procure the services of an external expert, an acquisition plan must be completed. The acquisition plan must include a statement of need that summarizes the technical and contractual history of the acquisition and discusses feasible acquisition alternatives, the impact of prior acquisitions on those alternatives, and any related in-house effort.²⁰ Internal OCC guidelines note that in some instances an IRS employee may qualify to act as an expert witness and recognize the potential bias when using an IRS employee as an expert witness. However, the attorney must be satisfied that they can minimize the allegations of bias. Accordingly, the acquisition plan should include documentation that an internal IRS employee/expert was considered to support the OCC's need to procure the services of an external expert.

In our discussion with OCC officials, they stated that internal experts are typically not used on cases that are complicated and involve significant dollars because it is usually difficult to match an internal expert's qualifications to the petitioner's expert's qualifications. We requested documentation supporting the basis for their statement that internal experts do not have the qualifications needed for complicated cases involving significant dollars. OCC officials could not provide support for their conclusion, but stated that it is nearly impossible to match the petitioner's expert's qualifications with an internal expert at the IRS because they are some of the most respected individuals in their field. They almost always have PhDs and are authors of articles that are relied upon in the field of study. OCC officials stated that the internal experts do not have this level of expertise, and the OCC would be at a significant disadvantage if it did not find an expert comparable to the petitioner's expert.

Further, OCC officials stated that the court may perceive internal experts as biased. We also requested documentation from the OCC to support the basis for their statement that internal

²⁰ FAR 7.105(a)(1) (2021).

experts may be perceived by the court as biased. OCC officials referenced internal guidelines that recognize the potential bias and provided excerpts from a transcript of a case in which the IRS used both an internal and external expert. Although OCC officials believe an internal employee may provide an unbiased and independent analysis, external experts are generally hired.

Recommendation 2: The Chief Procurement Officer should ensure that the required acquisition plan is completed and included in the contract files. For expert witness contracts, the statement of need in the acquisition plan should document the consideration of feasible acquisition alternatives, the impact of prior acquisitions on those alternatives, and any related in-house effort, such as internal experts.

Management's Response: IRS management agreed with the recommendation and through the issuance of the Office Instruction, the OCPO's COs will be reminded to complete and file an acquisition plan in accordance with procurement policies and to ensure that the statement of need includes consideration of feasible acquisition alternatives, the impact of prior acquisitions on those alternatives, and any related in-house efforts as appropriate.

Fair and Reasonable Price Determinations Were Inadequate

For 21 (78 percent) of the 27 contract files we reviewed, the rationale to support the CO's determination that the expert witness's proposed hourly rate was fair and reasonable was not documented in the market research survey or other contract-related document. For most of the cases, information included in the contract file used standard or similar language, such as "The selected expert was willing to perform the work necessary for a fair and reasonable price" or "The standard rate is reasonable in relation to his/her qualifications and what similar experts charge for comparable work."

However, nothing was included in the contract file that explained how the previously cited determination was in fact made. For example, [REDACTED]

[REDACTED] We requested additional documentation on how the rates associated with these contracts were determined to be fair and reasonable. OCPO officials did not provide any additional documentation supporting their rationale.

The FAR requires COs to procure supplies and services from responsible sources at fair and reasonable prices.²¹ Further, the elements of the written justification for using noncompetitive procedures must include a determination that the anticipated cost is fair and reasonable. Internal guidelines require the OCC to consider three or more qualified experts. Based on discussions with OCPO officials, the market research provides rates for similar experts and assists in determining that the selected expert's hourly rate is in line with similar experts and therefore

²¹ FAR 15.402(a) (2021).

fair and reasonable. However, as previously stated, our review of the market research surveys did not include the rationale or evidence of an applicable price analysis technique showing how the proposed hourly rate was determined to be fair and reasonable.

Some COs may use a price reasonableness determination form going forward

The FAR requirement for COs to perform and document a price reasonableness determination was also identified in an OCPO internal contract review. Specifically, during an August 2022 meeting with the OCPO, a CO stated that an internal review of expert witness contract files found that fair and reasonable price determinations were not documented and included in the case files. In response, some COs may use a price reasonableness determination form that can assist with these determinations.

We were provided this form for two of the 27 contracts we reviewed. Our review of these two price reasonableness determination forms found that they included similar language to what the OCC includes in the market research survey and still did not include the rationale for why the proposed rate was fair and reasonable.

Recommendation 3: The Chief Procurement Officer should ensure that the rationale to support the CO's determination that the expert witness's proposed hourly rate is fair and reasonable is documented and included in the contract file.

Management's Response: IRS management agreed with the recommendation. The Office Instruction will clearly describe the need to include supporting documentation in the contract file that definitively supports and explains the rationale used to determine price reasonableness in support of each expert witness. The OCPO will work with the OCC to prepare and document the file with adequate market research to support the determination.

Contracts Were Classified As Firm-Fixed-Price in the Government's Federal Procurement Data System but Managed Like Labor Hour Contracts

For the 27 contracts we reviewed, all were classified as FFP contracts in the IRS's procurement system and the FPDS.²² However, we believe the expert witness contracts should have been classified as LH because the contract requirements cannot be well defined.²³ More specifically, OCPO management stated that it is difficult to estimate how much work is needed on an expert witness contract and/or tax court case because not all cases are taken to court. As a result, a LH contract is more suitable than a FFP for expert witness contracts.²⁴ In addition, all 27 contracts included contract terms that are applicable to Time-and-Material and LH contracts²⁵ and were administered like a LH contract, as the CO increased and/or decreased the contract amount and contractors were paid based on detailed invoices that included the fixed hourly rate and hours

²² The FPDS is the Federal Government's database for Government contracting transactions.

²³ FAR 16.202-2.

²⁴ FAR 16.601(c) states that a LH contract may be used when it is not possible at the time of placing the contract to accurately estimate the extent or duration of the work with any reasonable degree of confidence.

²⁵ For example, FAR 52.232-7 Payments under Time-and-Materials and Labor-Hour Contracts and FAR 52.246-6 Inspection – Time-and-Material and Labor-Hour.

performed.²⁶ The IRS administered these previous FFP contracts as if they were LH contracts. For example, the IRS did not always pay out the entire amount of the contract as would be expected in a FFP contract, and in some cases, the IRS modified the contract to increase the contract amount.

When we discussed the classification of these contracts with an applicable CO, they noted that prior to late 2019, expert witness contracts were classified as LH contracts. However, around 2020, COs were advised to classify expert witness contracts as FFP contracts. OCPO officials were unable to provide the reason for the change in contract type. In fact, according to this CO, an internal review by the OCPO also questioned the classification of the contract type of the expert witness contracts and determined they should be classified as LH contracts instead of FFP. In response to this internal review, OCPO management changed their position and classified expert witness contracts as LH contracts at the end of FY 2021. However, in our discussions with OCPO management, they continue to believe the above-mentioned contracts should not be classified as LH contracts but rather FFP.

The Federal Funding Accountability and Transparency Act of 2006 requires agencies to publicize unclassified Federal award data.²⁷ To comply with this requirement, agencies use the FPDS, which is a comprehensive web-based tool for reporting contract actions. The contract data in the FPDS are used to create recurring and special reports to the President, Congress, Government Accountability Office, Federal executive agencies, and the general public. As such, the accuracy of the reported contract data is of particular importance as it is used to measure and assess the impact of Federal procurement on the Nation's economy, the impact of full and open competition, and the effects of policy and management initiatives. Inaccurate information in the IRS's procurement system and in the FPDS could hinder the ability to assess the IRS's compliance with applicable laws and regulations and reduce the reliability of FPDS data used by the Federal Government and general public.

Recommendation 4: The Chief Procurement Officer should review all open expert witness contracts and determine if the contract type should be corrected in the IRS procurement system and the FPDS.

Management's Response: IRS management agreed with the recommendation and conducted a review of the expert witness contracts and determined that the contract types were appropriately designated in the FPDS at the time of contract award in accordance with the award document. Additionally, the Office Instruction will be distributed to staff to reiterate proper contract type designation to ensure consistency across future expert witness contracts.

Office of Inspections and Evaluations Comment: We continue to disagree with management's assertion that expert witness contracts are being correctly classified. Management's unwillingness to address these misclassifications is in direct contradiction to an internal review they performed to address concerns as to the classification of these types of contracts. This internal review determined

²⁶ According to FAR 16.202-1 and 16.601(b), a FFP contract provides for a price that is not subject to any adjustment on the basis of the contractor's cost experience in performing the contract, whereas, a LH contract provides services based on direct labor hours at a specified fixed hourly rate.

²⁷ Pub. L. No. 109-282, 120 Stat. 1186 (2006).

that these types of contracts should be classified as LH contracts instead of FFP. In fact, in response to this internal review, IRS management changed their position and classified expert witness contracts as LH contracts at the end of FY 2021. Each of the 27 contracts we reviewed included contract terms applicable to Time-and-Material and LH contracts and were administered as such. As a result, we believe the information included in the FPDS for these contracts remains inaccurate.

Recommendation 5: The Chief Procurement Officer should review all closed expert witness contracts and determine if the contract type should be corrected in the IRS procurement system and the FPDS.

Management's Response: IRS management disagreed with the recommendation and determined that the contract type was appropriate at the time of contract award for all closed contracts under review.

Office of Inspections and Evaluations Comment: We continue to disagree with management's assertion that expert witness contracts are being classified correctly. Management's unwillingness to address these misclassifications is in direct contradiction to an internal review they performed to address concerns as to the classification of these types of contracts. This internal review determined that these types of contracts should be classified as LH contracts instead of FFP. In fact, in response to this internal review, IRS management changed their position and classified expert witness contracts as LH contracts at the end of FY 2021. Each of the 27 contracts we reviewed included contract terms applicable to Time-and-Material and LH contracts and were administered as such. As a result, we believe the information included in the FPDS for these contracts remains inaccurate.

Required Documentation Was Not Provided or Sufficient to Support Compliance With Contractor Monitoring Requirements

For 16 (59 percent) of the 27 contracts we reviewed, the OCC did not provide any documentation to support its oversight and/or monitoring of the expert witness's performance and compliance with contract terms. For another five contracts (18 percent), the documentation provided by the OCC was not sufficient to demonstrate the expert witnesses were in compliance with contractor monitoring requirements. For example, the [REDACTED]. In another instance, the attorney was not even aware of the requirement to monitor contractor performance. According to the FAR, a Time-and-Material or LH contract provides no positive incentive to the contractor to control costs; therefore, Government oversight of contractor performance is required to give reasonable assurance that efficient methods and effective cost controls are being used.²⁸

Internal OCC guidelines require contractors to report the number of hours expended on a weekly basis to the IRS attorney they are working with, as well as requiring the contractor to

²⁸ FAR 16.601(c)(1) (2021).

Federal Acquisition Regulation Requirements Were Either Not Performed or Documented When Awarding and Administering Expert Witness Contracts

provide written notice when 75 percent of the contracted hours have been expended on each of the five phases for which expert witnesses are paid.

When we discussed our concern with OCC officials, they noted that this requirement has not been enforced because the attorneys are typically in regular communication with the contractor and have relied on a monthly billing process. Our concern with the OCC not adhering to the FAR and its own contractor monitoring requirement is that the contractor's performance may result in cost overruns and the IRS receiving services not in accordance with the contract terms and conditions listed in the statements of work. Further discussions with OCC officials disclosed that the current requirement may not be cost-effective and that the CORs use spreadsheets to monitor costs. OCC officials also stated that they are reviewing their guidelines and planning to make various revisions to include revisions to their contractor monitoring requirements.

Recommendation 6: The Deputy Chief Counsel should ensure that guidelines detail actions taken to monitor expert witness contract requirements.

Management's Response: IRS management agreed with the recommendation. The IRS has drafted revisions to internal guidelines to align the OCC's procedures with current practices.

Appendix I

Detailed Objective, Scope, and Methodology

The overall objective of this review was to assess the IRS's compliance with the FAR and IRS policies and procedures for awarding and administering expert witness contracts. To accomplish our objective, we:

- Reviewed the FAR, Department of the Treasury and IRS policies and procedures, instructions, and other guidelines for the acquisition, procurement, and administration of contracts, such as expert witness contracts.
- Interviewed appropriate IRS officials to obtain an understanding of the process for requesting expert witness services and the procurement and award of an expert witness contract.
- Performed an analysis of IRS procurement data to identify expert witness contracts awarded during FYs 2019 through 2021.
- Reviewed a judgmental sample of 27 of 279 expert witness contract files to determine if the award and administration of the contract was in accordance with the FAR, Department of the Treasury, and IRS policies and procedures.¹ This included all 19 contracts with an initial purchase order of over \$1 million and eight that were randomly selected from the remaining population.

Performance of This Review

This review was performed with information obtained from the IRS OCC and OCPO during the period September 2021 through May 2023. We conducted this evaluation in accordance with the Council of the Inspectors General for Integrity and Efficiency Quality Standards for Inspection and Evaluation.

Major contributors to the report were James Douglas, Director; Frank O'Connor, Supervisory Evaluator; and Anna Orrico, Lead Evaluator.

Validity and Reliability of Data From Computer-Based Systems

We performed tests to assess the reliability of data from the IRS's procurement system. We evaluated the data by (1) performing electronic testing of required data elements and (2) reviewing existing information about the data and the system that produced them. We determined that the data were sufficiently reliable for purposes of this report.

¹ A judgmental sample is a nonprobability sample, the results of which cannot be used to project to the population.

Management's Response to the Draft Report



OFFICE OF THE CHIEF COUNSEL

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

August 30, 2023

MEMORANDUM FOR RUSSELL P. MARTIN
DEPUTY INSPECTOR GENERAL FOR INSPECTIONS AND
EVALUATIONS

FROM: Drita Tonuzi Digitally signed by Drita Tonuzi
Date: 2023.08.30 09:19:52 -0400
Deputy Chief Counsel (Operations)

SUBJECT: Draft Audit Report – Federal Acquisition Regulation
Requirements Were Either Not Performed or Documented When
Awarding Expert Witness Contracts (TIGTA Audit #IE-22-002)

Thank you for the opportunity to review and comment on the subject draft report and address the observations with the audit team. The Internal Revenue Service (IRS) appreciates all opportunities to improve internal controls and processes related to procurement activities.

Expert witness service contracts are needed to support the IRS in current or anticipated litigation because of a particular dispute between the IRS and a taxpayer. Specifically, as needed, expert witnesses provide support to the IRS in the areas of preliminary evaluations, consultation with attorney and preparation of a report, pre-trial support and trial preparation, trial, and post-trial litigation support.

The Office of the Chief Procurement Officer (OCPO) has drafted an Office Instruction (OI) addressing the findings outlined in the above referenced audit report and the need for the contract file to fully document decisions and provide the complete story of the acquisition. The OCPO intends to release the final OI no later than the end of the second quarter of FY2024. Additionally, the OCPO plans to incorporate the OI into the existing IRS Acquisition Procedures on expert witness contracts. When released, the OCPO will train members of the acquisition team, including those Contracting Officer's Representatives (CORs) within the Office of Chief Counsel (OCC), on the new procedures and reiterate the need to fully document each procurement action.

As noted in the subject draft report, the IRS's OCC provides legal guidance and interpretive advice to the IRS, represents the IRS in litigation, and provides all other legal support the IRS needs. When representing the IRS in litigation or providing other legal support, the OCC may choose to obtain the services of an expert witness, either an internal expert witness or an external expert witness, as appropriate. The OCC attorneys responsible for litigating cases consider many factors before making the final selection of a particular expert witness for a particular case. The primary consideration

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for the OCC attorneys making the selection of the expert witness in their particular case is the degree to which a specific witness will be helpful to the court in understanding the matter at issue. The OCC attorneys also consider carefully whether the expert witness will be both able and willing to provide evidence that supports the IRS's theory of a case. Neither the Federal Acquisition Regulation nor the OCC internal guidelines, the Chief Counsel Directives Manual (CCDM), require consideration of an internal expert witness. The CCDM provides only that an internal expert witness may be an option for the OCC attorneys to consider, see CCDM 35.4.4.8.1, Identifying the Expert Witness. The CCDM guidelines regarding selecting an expert witness give the OCC attorneys the flexibility to use their judgement in selecting the services of an expert, either internal or external, that supports the IRS's theory of a case and with whom the attorney can develop an appropriate and productive working relationship. For expert witness service contracts, the OCC plans to work with OCPO to prepare and document the file with adequate market research that supports the acquisition of external expert witness services.

The OCPO values TIGTA's continued support and the assistance your organization provides to procurement.

Attached is our response to your recommendation(s). If you have any questions, please contact me, or members of your staff may contact Judith Kindell or Christine Ellison, at 202-317-3379 or 202-317-4796.

Attachment(s): 1

Federal Acquisition Regulation Requirements Were Either Not Performed or Documented When Awarding and Administering Expert Witness Contracts

RECOMMENDATION 1

The Chief Procurement Officer should ensure that all required documentation is in the contract file and is sufficient to constitute a complete history of all actions taken to award and administer an expert witness including complete market surveys with supporting documentation, tax compliance checks, security awareness trainings, contractor's assertions, and quality assurance surveillance plans.

CORRECTIVE ACTION

The Internal Revenue Service (IRS) agrees with this recommendation. The OCPO has drafted an Office Instruction (OI) addressing the findings outlined in the audit report and the need for the contract file to fully document decisions and tell the complete story of the acquisition, including market surveys with supporting documentation, tax compliance checks, proof of security awareness trainings, contractor assertions, and quality assurance surveillance plans (when required). Additionally, the OCPO will work with the OCC to ensure that the CORs within that office are fully aware of, and understand, their responsibilities with regard to tracking and submitting documentation of security awareness trainings.

The OCPO Office of Procurement Policy and the Acquisition Operation Division will continue to drive process enhancements to ensure file documentation contains all required documents and constitutes a complete history of all procurement actions required to award expert witness contracts.

IMPLEMENTATION DATE

March 15, 2024

RESPONSIBLE OFFICIAL

Office of the Chief Procurement Officer

CORRECTIVE ACTION MONITORING PLAN

The OCPO will issue the OI to all OCPO staff and the OCC CORs. The OCPO Quality Assurance Branch will develop a targeted review plan of expert witness contracts that will take place over the next three years. The reviews will focus on ensuring contract files are fully documented in accordance with the OI and any trends will be noted and addressed. After the third year, Quality Assurance will consult with the Chief Procurement Officer to determine whether further reviews of expert witness contracts or refresher training are required.

RECOMMENDATION 2

The Chief Procurement Officer should ensure that the required acquisition plan is completed and included in the contract files. For expert witness contracts, the statement of need in the acquisition plan should document their consideration of feasible acquisition alternatives, the impact of prior acquisitions on those alternatives, and any

Federal Acquisition Regulation Requirements Were Either Not Performed or Documented When Awarding and Administering Expert Witness Contracts

related in-house effort, such as internal experts.

CORRECTIVE ACTION

The IRS agrees with this recommendation. Through the issuance of the OI, OCPO's Contracting Officers (CO) will be reminded to complete and file an acquisition plan in accordance with procurement policies and to ensure that the acquisition plan statement of need includes consideration of feasible acquisition alternatives, the impact of prior acquisitions on those alternatives, and any related in-house efforts as appropriate. The OCPO will work with OCC to prepare and document the file with adequate market research to support the acquisition of expert witness services.

IMPLEMENTATION DATE

March 15, 2024

RESPONSIBLE OFFICIAL

Office of the Chief Procurement Officer

CORRECTIVE ACTION MONITORING PLAN

The OCPO will issue the OI to all OCPO staff and the OCC CORs. The OCPO Quality Assurance Branch will develop a targeted review plan of expert witness contracts that will take place over the next three years. The reviews will focus on ensuring contract files are fully documented in accordance with the OI and any trends will be noted and addressed. After the third year, Quality Assurance will consult with the Chief Procurement Officer to determine whether further reviews of expert witness contracts or refresher training are required.

RECOMMENDATION 3

The Chief Procurement Officer should ensure that the rationale to support the CO determination that the expert witness's proposed hourly rate is fair and reasonable is documented and included in the contract file.

CORRECTIVE ACTION

This IRS agrees this recommendation. The OI will clearly describe the need to include supporting documentation in the contract file that definitively supports and explains the rationale used to determine price reasonableness in support of each expert witness. The OCPO will work with OCC to prepare and document the file with adequate market research to support the determination. While the OCPO Office of Procurement Policy previously conducted a workshop to reinforce these requirements in March 2023, additional sessions will be held as deemed needed in the future.

IMPLEMENTATION DATE

March 15, 2024

Federal Acquisition Regulation Requirements Were Either Not Performed or Documented When Awarding and Administering Expert Witness Contracts

RESPONSIBLE OFFICIAL

Office of the Chief Procurement Officer

CORRECTIVE ACTION MONITORING PLAN

The OCPO will issue the OI to all OCPO staff and the OCC CORs. The OCPO Quality Assurance Branch will develop a targeted review plan of expert witness contracts that will take place over the next three years. The reviews will focus on ensuring contract files are fully documented in accordance with the OI and any trends will be noted and addressed. After the third year, Quality Assurance will consult with the Chief Procurement Officer to determine whether further reviews of expert witness contracts or refresher training are required.

RECOMMENDATION 4

The Chief Procurement Officer should review all open expert witness contracts and determine if the contract type should be corrected in the IRS procurement system and the FPDS.

CORRECTIVE ACTION

The IRS agrees with this recommendation. The OCPO conducted a review of the expert witness contracts and determined that the contract types were appropriately designated in FPDS at the time of contract award in accordance with the award document. Additionally, the OI will be distributed to staff to reiterate proper contract type designation to ensure consistency with the COs across future expert witness contracts.

IMPLEMENTATION DATE

March 15, 2024

RESPONSIBLE OFFICIAL

Office of the Chief Procurement Officer

CORRECTIVE ACTION MONITORING PLAN

The OCPO will issue the OI to all OCPO staff and the OCC CORs. The OCPO Quality Assurance Branch will develop a targeted review plan of expert witness contracts that will take place over the next three years. The reviews will focus on ensuring contract files are fully documented in accordance with the OI and any trends will be noted and addressed. After the third year, Quality Assurance will consult with the Chief Procurement Officer to determine whether further reviews of expert witness contracts or refresher training are required.

RECOMMENDATION 5

The Chief Procurement Officer should review all closed expert witness contracts and determine if the contract type should be corrected in the IRS procurement system and the FPDS.

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CORRECTIVE ACTION

The IRS disagrees with this recommendation. The OCPO COs determined which contract type was appropriate at the time of contract award for all closed contracts under review. While the OCPO agrees that the accuracy of the reported contract data is of particular importance in measuring and assessing impact on the nation's economy, contract type has little to no bearing on those metrics.

IMPLEMENTATION DATE

N/A

RESPONSIBLE OFFICIAL

N/A

CORRECTIVE ACTION MONITORING PLAN

N/A

RECOMMENDATION 6

The Deputy Chief Counsel should ensure guidelines detail actions taken to monitor expert witness contract requirements.

CORRECTIVE ACTION

The Deputy Chief Counsel, Office of Chief Counsel, has drafted revisions to Chief Counsel Directives Manual (CCDM) 35.4.4.8.2.3(6) to align the Office of Chief Counsel's procedures with current practices. Those provisions are currently awaiting publication in the CCDM.

IMPLEMENTATION DATE

December 15, 2023

RESPONSIBLE OFFICIAL

Deputy Associate Chief Counsel (Procedure and Administration)

CORRECTIVE ACTION MONITORING PLAN

Procedure and Administration staff will monitor the review and clearance of the revised procedures until publication.

Appendix III

Abbreviations

CO	Contracting Officer
COR	Contracting Officer's Representative
FAR	Federal Acquisition Regulation
FFP	Firm-Fixed-Price
FPDS	Federal Procurement Data System
FY	Fiscal Year
IRS	Internal Revenue Service
LH	Labor-Hour
OCC	Office of Chief Counsel
OCPO	Office of the Chief Procurement Officer
QASP	Quality Assurance Surveillance Plan
TIGTA	Treasury Inspector General for Tax Administration



**To report fraud, waste, or abuse,
contact our hotline on the web at www.tigta.gov or via e-mail at
oi.govreports@tigta.treas.gov.**

**To make suggestions to improve IRS policies, processes, or systems
affecting taxpayers, contact us at www.tigta.gov/form/suggestions.**

Information you provide is confidential, and you may remain anonymous.