



Audit of the Environment and Natural
Resources Division's Procurement and
Administration of Expert Witness Contracts



AUDIT DIVISION

20-108

SEPTEMBER 2020



EXECUTIVE SUMMARY

Audit of the Environment and Natural Resources Division's Procurement and Administration of Expert Witness Contracts

Objectives

The Department of Justice (DOJ) Office of the Inspector General (OIG) conducted an audit of the Environment and Natural Resource Division's (ENRD) procurement and administration of expert witness contracts. These contracts are funded through the Fees and Expenses of Witnesses (FEW) Appropriation, which is administered by the DOJ's Justice Management Division (JMD). The FEW Appropriation provides funding for expenses related to the provision of testimony in federal court.

The objectives of this audit were to assess: (1) ENRD's acquisition planning and procurement policies and procedures for expert witness contracts; and (2) ENRD and contractor compliance with contract terms and conditions. To accomplish these objectives, we reviewed eight time and materials expert witness contracts totaling approximately \$52 million.

Results in Brief

Overall, we determined that ENRD contracting officers inappropriately delegated significant contracting duties to its litigation staff, such as the negotiation of pay rates and contractor oversight. While JMD policy authorizes litigation staff to conduct some contracting activities, this authorization is not compliant with the FAR requirements related to delegation of duties. We also found that ENRD did not complete significant acquisition planning steps, such as justifications for pay rates and the use of sole source contracting.

Additionally, we found that ENRD did not properly review contractor invoices or properly authorize contractor personnel. For example, we identified 15 invoices totaling \$3.7 million that did not contain adequate supporting information, and 5 invoices totaling \$1.2 million that were not approved by an ENRD contracting officer.

Finally, while we generally found that each contractor completed the deliverables under each award, we identified areas where we believe ENRD's internal controls related to compliance with each contractor's Statement of Work (SOW) could be improved.

Recommendations

Our report contains eight recommendations for ENRD and one recommendation for JMD.

Audit Results

The eight expert witness contracts we reviewed pertain to litigation in areas such as: tribal land appraisals; natural disasters; federal emission standards; water and hydrology rights; and the civil rights of children on tribal lands. As of July 1, 2020, approximately \$38 million had been expended under the contract awards.

	Total Award	Expended
Contractor A	\$27,335,997	\$25,609,462
Contractor B	\$9,572,940	\$5,163,353
Contractor C	\$8,024,365	\$6,319,179
Contractor D	\$6,568,300	\$50,320
Contractor E	\$505,378	\$266,529
Contractor F	\$226,212	\$224,964
Contractor G	\$150,000	\$124,850
Contractor H	\$100,000	\$27,918
Total:	\$52,483,192	\$37,786,575

In order to ensure proper use of the FEW Appropriation, JMD issued the Expert Witness Instruction to assist DOJ components in the administration of expert witness funding. According to JMD, prior to the implementation of any version of the Expert Witness Instruction, a congressional inquiry found that the DOJ's expert witness contracts were inappropriately administered through DOJ litigation staff. As a result, the Expert Witness Instruction directs DOJ litigating components to administer expert witness contracts through a contracting office. JMD also explained that these guidelines are intended to minimize the potential misuse of the FEW Appropriation by DOJ litigation staff.

Acquisition and Procurement

The FAR requires numerous planning activities be completed prior to an acquisition. We found that none of the following activities were adequately completed by ENRD.

Acquisition Documentation Not Completed for Each Expert Witness Contractor
Written Acquisition Plan
Determination for Time and Materials Contracts
Adequate Justification for Pay Rates
Adequate Justification for Use of Sole Source Contracts
Evaluations of Past Performance
Whistleblower Protection Clause



EXECUTIVE SUMMARY

Audit of the Environment and Natural Resources Division's Procurement and Administration of Expert Witness Contracts

Specifically, we determined that the ENRD contracting office did not adequately evaluate the reasonableness of contractor pay rates prior to the acquisition of each contract. As a result, we identified extreme inconsistencies in contractor pay rates. For instance, we found one contractor that was being paid \$725 per hour, while the rate identified in ENRD's SAFARI database — a system used to track previously used expert witness contractors — was listed at \$585. Similarly, the ENRD contracting office only developed a rate justification for 3 out of the 114 expert witness contractor employees. We found these rate justifications to be inadequate. For example, in one case, we found that the rate proposed by the potential expert witness contractor was nearly 90 percent greater than the average rates for that service in the SAFARI database, yet ENRD still considered the rate justifiable.

Overall, in our judgment, not completing these procurement activities increases the risk of contractor non-compliance and misuse of contract funds, as well as the risk that ENRD has overpaid for expert witness services.

Billings and Payments

We determined that ENRD did not complete a sufficient review and approval of expert witness contract invoices. Out of our judgmental sample of 22 invoices, we identified: 15 invoices totaling \$3.7 million that did not contain adequate supporting information; 5 invoices totaling \$1.2 million that were not properly approved by an ENRD contracting officer; 10 invoices where ENRD paid the contractor in violation of the Prompt Payment Act; and 22 invoices that did not contain proper invoice elements. Additionally, we identified \$71,815 in unallowable personnel costs that were not authorized in the SOW.

Contract Oversight, Monitoring, & Administration

We determined that ENRD's contracting office did not develop a required quality assurance surveillance plan for its expert witness contracts or adequately monitor the contractors under our review. We also found that ENRD did not maintain all required documentation in each contract file, as shown in the following table.

Total Sampled	Documentation Missing in Contract Files		
	Resumes	Travel Authorizations	Confidentiality Agreements
35	5	4	8

Further, ENRD did not conduct an analysis of pricing for any increase in contract ceiling price as required by the FAR. Lastly, we found that the JMD Expert Witness Instruction incorrectly directed ENRD not to complete performance evaluations in the Contractor Performance Assessment Reporting System for expert witness contractors.

Contractor Performance

We generally found that each expert witness contractor completed the deliverables under each award. However, we found that six of the contractors did not maintain a list of information sources used under the contract, as required by ENRD. We also found that three contractors conducted work not approved in the SOW.

Use of FEW Appropriation

While we did not express an opinion on the allowability of ENRD's expert witness contracts as it relates to compliance with JMD's Expert Witness Instruction, we identified areas of concerns related to ENRD's internal controls around the FEW Appropriation. For example, due to the ambiguity of deliverables in certain contractor's SOW, there were indications that a portion of the work to be completed may be prohibited by the Expert Witness Instruction.

**AUDIT OF THE ENVIRONMENT AND NATURAL RESOURCES
DIVISION'S PROCUREMENT AND ADMINISTRATION OF
EXPERT WITNESS CONTRACTS**

TABLE OF CONTENTS

INTRODUCTION	1
Fees and Expenses of Witnesses Appropriation.....	1
ENRD Expert Witness Contracts	2
OIG Audit Approach	3
AUDIT RESULTS.....	4
ENRD's Contracting Office Responsibilities	4
Acquisition and Procurement	5
Acquisition Planning	5
Market Research.....	6
Evaluating Expert Witness Contractors.....	7
Justification for Other than Full and Open Competition	9
Whistleblower Protections	10
Billings and Payments	11
Invoice Support and Reasonability	12
Unauthorized Invoices and Contractor Payments.....	13
Compliance with the Prompt Payment Act	15
Other Invoicing Requirements	16
Contract Oversight, Monitoring, and Administration	17
Contractor Oversight and Monitoring	17
Contract Administration.....	18
Subcontractor Agreements.....	19
Contractor Performance.....	21

Contractor Bibliographies	21
Contractor Compliance with SOW	21
Use of FEW Appropriation	22
Prior OIG Audit	22
Internal Control Weaknesses	23
CONCLUSION AND RECOMMENDATIONS	25
APPENDIX 1: OBJECTIVES, SCOPE, AND METHODOLOGY	28
APPENDIX 2: SCHEDULE OF DOLLAR RELATED FINDINGS	32
APPENDIX 3: ADDITIONAL FAR INSTRUCTION	33
APPENDIX 4: ENVIRONMENT AND NATURAL RESOURCES DIVISION RESPONSE TO THE DRAFT REPORT	36
APPENDIX 5: JUSTICE MANAGEMENT DIVISION RESPONSE TO THE DRAFT REPORT	42
APPENDIX 6: OFFICE OF THE INSPECTOR GENERAL ANALYSIS AND SUMMARY OF ACTIONS NECESSARY TO CLOSE THE REPORT	45

AUDIT OF THE ENVIRONMENT AND NATURAL RESOURCES DIVISION'S PROCUREMENT AND ADMINISTRATION OF EXPERT WITNESS CONTRACTS

INTRODUCTION

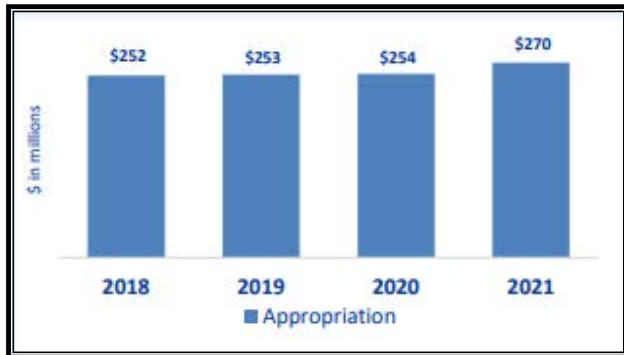
The Environment and Natural Resources Division (ENRD) is one of the litigating components of the Department of Justice (DOJ). Its mission is to enforce civil and criminal environmental laws, such as the Clean Air Act, Clean Water Act, and hazardous waste laws. ENRD is also responsible for the protection of natural resources and handling of cases relating to tribal trust rights. ENRD employs hundreds of attorneys and litigating staff to represent federal agencies in cases throughout the country. ENRD often partners with the Environmental Protection Agency and the Department of Interior for litigation involving the federal government.

Fees and Expenses of Witnesses Appropriation

On an annual basis, the DOJ receives a Fees and Expenses of Witnesses (FEW) Appropriation, which provides funding for fees and related expenses incurred by individuals who provide factual or opinion testimony in federal judicial proceedings. In 2018, as a result of a previous DOJ Office of the Inspector General (OIG) audit, the Justice Management Division (JMD) issued DOJ Instruction 1300.01.02 *Use of the Fees and Expenses of Witnesses Appropriation for Expert Witnesses and Other Services Related to Litigation and Mediation* (Expert Witness Instruction) that establishes the procedures and guidelines governing use of the FEW Appropriation to acquire expert witness

services and other litigation related services.¹ As shown in Figure 1, the DOJ has received approximately \$759 million in FEW Appropriation funding since Fiscal Year (FY) 2018, which remains available until expended. Approximately 80 percent of this funding is allocated for the fees and expenses of witnesses, whereas the remaining 20 percent is allocated for items including: the protection of witnesses; private counsel for government officials; foreign counsel for government officials in foreign countries; and alternative dispute resolution.

Figure 1
FEW Appropriation
Funding (FY 2018-2021) *



* FY 2021 reflects requested funding, not actual
Source: FY 2021 Congressional Budget Request

¹ See U.S. Department of Justice Office of the Inspector General, [Audit of the Department of Justice's Oversight of Costs Incurred Through the Fees and Expenses of Witnesses Appropriation](#), Audit Report 14-32 (September 2014).

According to a JMD official, prior to the implementation of the Expert Witness Instruction, a congressional inquiry found that expert witness contracts were administered through DOJ litigation staff. As a result, the Expert Witness Instruction directs DOJ litigating components to administer expert witness contracts through a contracting office. The official also explained that these guidelines are intended to minimize the potential misuse of the FEW Appropriation by DOJ litigation staff. This guidance states that the FEW Appropriation can only be used for costs in preparation for expert witness testimony. Table 1 below outlines the approved and prohibited uses of the FEW Appropriation as stated in the JMD Expert Witness Instruction.

Table 1
Uses of the FEW Appropriation

Approved by JMD	Prohibited by JMD
Expert Witness: Testifies or prepares to testify.	Litigative Consultants: Not expected to testify.
Fact Witness: Recites facts in court.	Translator: Converts written court documents from one language to another.
Alternative Dispute Resolution Neutral: Third party mediator who assists in resolution of dispute.	Enhancement of Evidence: Services that enhances video or audio evidence.
Medical Examiner: A licensed physician in court.	Review of Agreements or Judgments: Services to review settlement arrangements.
Interpreter: Converts oral communication from one language to another.	Payment to Federal Government Employees: Additional fees paid to current or former federal government employees for expert services.
Expert Witness Research Services: Fee-based services used to identify a potential expert witness.	Court Appointed Special Masters: Appointed by judge to perform special functions in a case.
Expert Witness Locator Services: A contractor retained to locate expert witness services.	Qui Tam Matters: Reimbursement of fees recovered by the federal government to a witness.
Trial Preparation Services: Assists with the preparation of testimony of expert witnesses.	Fees for Service of Process: A notice of legal action to a specific party.
Administrative Support Services: Provides expert witness contract administration functions.	Expert Witness for Indigent Defendant: Fees for defendant who cannot afford legal counsel.

Source: JMD Expert Witness Instruction

Additionally, the Expert Witness Instruction states that all uses of the FEW Appropriation that result in contract action are governed by the Federal Acquisition Regulation (FAR). It also states that a contracting officer is the only official who has the authority to enter in to, administer, and/or terminate contracts. Attorneys or other administrative personnel do not have the authority to enter in to or modify contractual agreements, including the period of performance.

ENRD Expert Witness Contracts

We found that ENRD has hundreds of expert witness contracts funded by the FEW Appropriation. We asked ENRD to provide a list of all of its expert witness contracts that: (1) were funded through ENRD's FEW Appropriation; (2) were ongoing at the time of our request; and (3) had a contract value that was greater than or equal to \$100,000. ENRD provided a list of approximately 300 unique expert witness contracts that met these attributes. From that list, we judgmentally selected a sample of eight time and materials expert witness contracts to review,

totaling approximately \$52 million, which are outlined in Table 2 below.

Table 2
Sampled ENRD Expert Witness Contracts

OIG Sampled Contractor	Total Award	Amount Expended as of July 1, 2020	Contract Start	Contract End
Contractor A	\$27,335,997	\$25,609,462	10/12/2011	2/22/2024
Contractor B	\$9,572,940	\$5,163,353	9/11/2014	6/30/2022
Contractor C	\$8,024,365	\$6,319,179	1/22/2018	6/30/2023
Contractor D	\$6,568,300	\$50,320	9/25/2015	6/30/2020
Contractor E	\$505,378	\$266,529	3/31/2017	6/30/2022
Contractor F	\$226,212	\$224,964	4/5/2011	4/30/2020
Contractor G	\$150,000	\$124,850	9/16/2016	6/30/2021
Contractor H	\$100,000	\$27,918	6/3/2016	6/30/2021
Total:	\$52,483,192	\$37,786,575		

Source: ENRD

The eight expert witness contracts outlined above were awarded to large corporations, as well as to small businesses and individuals. The contracts cover a wide array of tribal trust and environmental issues, including litigation concerning: tribal land appraisals; natural disasters; federal emission standards; water and hydrology rights; and the civil rights of children on tribal lands.

OIG Audit Approach

The objectives of this audit were to assess: (1) ENRD’s acquisition planning and procurement policies and procedures related to expert witness contracts; and (2) ENRD and contractor compliance with contract terms and conditions. We reviewed ENRD and contractor compliance with the FAR, as well as ENRD and JMD policies and procedures related to expert witness contracting. As summarized in Table 3, we conducted our review in the areas of acquisition and procurement; contract administration, oversight, and monitoring; billings and payments; and contractor performance. Additional information about our approach to this audit can be found in Appendix 1.

Table 3
OIG Audit Approach

Subject Area	Methodology
Acquisition & Procurement	Interviewed ENRD contracting officers and executive staff; reviewed internal expert witness contractor data; reviewed internal policy related to acquisition; reviewed contractor pay rate justifications, when available; and reviewed contractor Statements of Work (SOW).
Contract Administration, Oversight, & Monitoring	Reviewed contract file documentation and ENRD contract file checklists; reviewed quality assurance procedures; and conducted surveys of each contractor on nature and content of contract.
Billings & Payments	Reviewed ENRD adherence to SOW regarding pay rates; reviewed authorization of payments; reviewed ENRD compliance with Prompt Payment Act; and traced contractor invoices to source documentation.
Contractor Performance	Reviewed contract deliverables as stated in the SOW; and interviewed ENRD attorneys on contractor progress for each contract.

Source: OIG, ENRD, Expert Witness Contractors

AUDIT RESULTS

Throughout the course of our audit, we identified concerns that significant contracting duties, such as the negotiation of pay rates, invoice review, and the oversight and monitoring of contractors were not adequately accomplished by ENRD. This contributed to concerns we identified related to ENRD contracting office compliance with the FAR, the Expert Witness Instruction, and other ENRD policies. In our judgment, these concerns increase the risk that ENRD has not received expert witness contracting services at a fair and reasonable price or in accordance with the terms and conditions of the contracts. We make nine recommendations in this report to improve ENRD's contracting process.

ENRD's Contracting Office Responsibilities

Overall, we determined that ENRD contracting officers inappropriately delegated significant contracting duties to its attorneys and litigation staff. While JMD policy authorizes litigation staff to conduct some contracting activities, this authorization is not compliant with the FAR requirements related to the delegation of duties. According to FAR Subpart 1.602-2, contracting officers are responsible for ensuring all necessary actions for effective contracting are completed, as well as ensuring compliance with the terms and conditions of the contract. Contracting officers are required to designate and authorize a contracting officer's representative (COR) in writing on all contracts unless the contracting officer retains and executes the COR duties. A COR is required to maintain a certification on the Federal Acquisition Certification for CORs and must be trained and experienced on the responsibilities delegated in accordance with agency procedures.

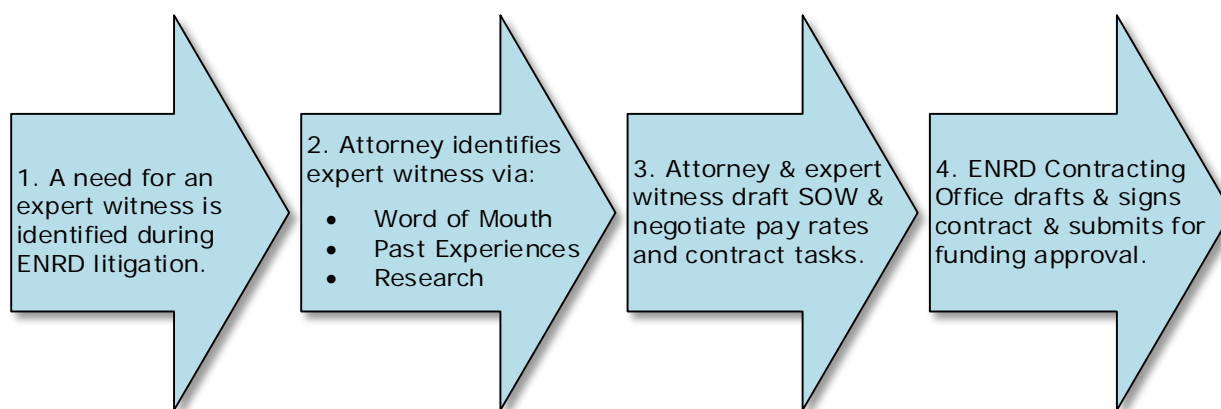
We found that ENRD did not use CORs when managing its expert witness contracts. However, significant contracting duties, such as the negotiation of pay rates, the review of invoices, and the oversight and monitoring of each contractor were not properly retained or delegated by the contracting officers in accordance with the FAR. The attorneys and litigation staff that completed many of these duties were not issued a contracting officer delegation letter, and did not receive training commensurate of the duties being delegated. As a result, we found that ENRD's contracting office was generally not compliant with FAR requirements in numerous areas of our audit. We found that these concerns increase the risk that the government was not receiving expert witness services at a fair and reasonable price or in accordance with the terms and conditions of the contracts.

As a result of the thematic concerns identified above, we recommend that ENRD implement policies and procedures to ensure that contracting duties are: (1) retained by ENRD contracting officers; or (2) appropriately delegated to other qualified ENRD officials that have received a written delegation letter and training commensurate of the duties being delegated. We further discuss the contracting duties that we determined were inappropriately delegated in the following sections.

Acquisition and Procurement

We found that the ENRD contracting office did not develop an acquisition plan to ensure that the procurement of expert witness contracts would meet agency needs in the most effective, economical, and timely manner. Without an acquisition plan, ENRD did not properly conduct numerous acquisition planning requirements in the areas of market research, justifications for contractor pay rates, and justifications for the use of sole source contracting. Further, we determined that certain acquisition planning was inappropriately completed by ENRD litigation staff. We outline ENRD's acquisition process in Figure 2 below.

Figure 2
ENRD Acquisition Process



Source: ENRD Contracting and Litigation Staff

ENRD uses an internal database, called the Supplemental Application for Financial Analysis and Reporting Information (SAFARI) to document previously used expert witness contractors, including pay rates, area of expertise, location, and other expert witness information.² ENRD officials explained that this database should be used to ensure contract pricing is fair and reasonable. However, in one example, we found a contractor that was being paid \$725 per hour, while the rate identified in ENRD's SAFARI database was listed at only \$585. We also found that the SAFARI database is not consistently updated or reviewed during acquisition. As a result of ENRD's acquisition process, we determined that there is an increased risk that ENRD has overpaid for expert witness services. We further discuss our concerns in the following sections.

Acquisition Planning

FAR Subpart 6.302 states that full and open competition is not required when acquiring the services of an expert or neutral person for any current or anticipated litigation. However, FAR Subpart 7.102 states that when competition is not required, agencies shall still perform acquisition planning and conduct market

² According to an ENRD official, while there is a feature in SAFARI that allows users to input, maintain, and report contractor rates, SAFARI is principally a contract, obligation, and invoice management system, not an expertise tracking system.

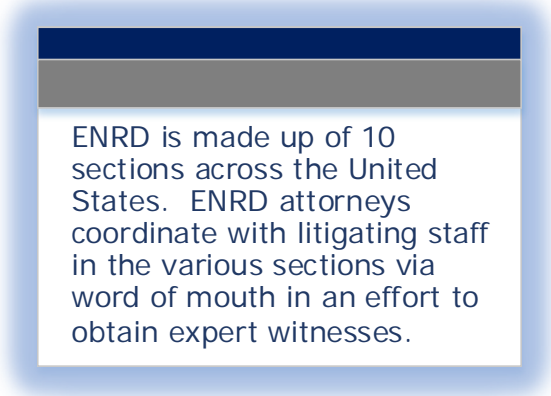
research. Acquisition planning should ensure that the government meets its needs in the most effective, economical, and timely manner. A written acquisition plan shall be prepared to include the milestones of the acquisition, as well as the technical, business, management, and other significant considerations that will control the acquisition. Acquisition requirements for services should be stated in terms of the performance required. Finally, the head of each agency is responsible for writing acquisition plans on either a system basis, on an individual contract basis, or on an individual order basis, depending on the acquisition.

We found that ENRD did not develop an acquisition plan for any of the contracts we reviewed. ENRD stated that it uses Performance Work Statements, or Statements of Work (SOW) for each contract. Each SOW outlines the tasks to be completed by each contractor. In our judgment, a SOW is not an effective tool to adequately plan for an acquisition, as each SOW was prepared after the contractor is already selected. For instance, a SOW does not outline the government's needs or requirements for the project, and does not identify the information required to be in the contractor's proposal. As a result, ENRD did not complete a majority of the required elements of a written acquisition plan prior to awarding each contract we reviewed, as outlined in FAR Subpart 7.105. We summarize these requirements in Appendix 3.

Next, FAR Subpart 16.601 states that a time and materials (T&M) contract may be used only if the contracting officer prepares a determination and findings that no other contract type is suitable. We found that all the expert witness contracts in our sample were T&M contracts. However, we found that ENRD did not complete a determination that T&M contracts were the most suitable contracting vehicle for any of the contracts we reviewed. In our judgment, not completing these acquisition planning steps increases the risk of misuse of contract funds. Additionally, because T&M contracts allow for contractors to incur costs that are not contingent on performance, this also presents an increased risk to the government.

Market Research

FAR Subpart 10.001 states that agencies shall conduct market research before soliciting offers for acquisitions. The FAR states that market research involves documenting information specific to the service being acquired and should include requirements of laws or regulations unique to the service being acquired.



ENRD is made up of 10 sections across the United States. ENRD attorneys coordinate with litigating staff in the various sections via word of mouth in an effort to obtain expert witnesses.

We determined that market research is completed by ENRD litigation staff. One attorney explained that potential market research techniques include: (1) identifying expert witnesses used in previous cases; (2) using recommendations for expert witnesses from others; and (3) researching expert witnesses used in similar cases or

identifying experts online. Ultimately, we found that market research was not documented by ENRD for any of the contracts we reviewed.

ENRD contracting officers have access to an internal database called SAFARI that has the capability to track previously used expert witness contractors. The SAFARI database identifies the number of contracts that have been awarded to each individual expert witness or contractor employee, as well as the rate of pay for that individual. However, the ENRD attorneys that we interviewed stated that they were unaware of the SAFARI database. We sampled 114 contractor employees paid under the 8 contracts we reviewed and found that 100 of those employees, or approximately 88 percent, were not listed in the SAFARI database. Therefore, this database does not appear to be a useful resource to provide accurate historical information. Overall, we believe that SAFARI could provide ENRD baseline data on historical rates used for expert witness contractors if properly utilized by ENRD contracting officers.

Evaluating Expert Witness Contractors

We determined that the ENRD contracting office did not fully assess the reasonableness of cost for each contract that we reviewed. FAR Subpart 15.304 states that cost to the government should be evaluated in every acquisition, as well as non-cost factors such as past performance and prior experience. FAR Subpart 15.402 states that contracting officers are responsible for evaluating the reasonableness of offered prices. In establishing reasonableness, the contracting officer shall obtain pricing data to establish a fair price.

After ENRD litigation staff identify an expert witness, they work with the contractor to develop a SOW to include rates of pay. ENRD provided no information to demonstrate that the rates were negotiated. Furthermore, ENRD contracting officers stated that they do not decide pay rates because the ENRD litigation staff are more knowledgeable on the appropriateness of rates. Once funding is approved, ENRD contracting staff are instructed to input data from the contract package into the SAFARI database. We compared the rate paid to each sampled contractor employee to the associated entry in the SAFARI database. These comparisons are outlined in Table 4 below.

Table 4
SAFARI Database Comparisons

OIG Sampled Contractors	Number of Employees Paid	Number of Employees in SAFARI	Number of Matches ^a	Number of Employees Not Listed in SAFARI	No. of Rates Paid Greater Than Rate in SAFARI
Contractor A	34	16	3	31	1
Contractor B	38	12	5	33	3
Contractor C	23	13	1	22	1
Contractor D	2	1	1	1	0
Contractor E	9	3	1	8	1
Contractor F	6	2	1	5	1
Contractor G	1	1	1	0	0
Contractor H	1	1	1	0	0
Total:	114	49	14	100	7

^a A match is a sampled employee identified on a contractor invoice that was listed in SAFARI.

Source: ENRD SAFARI Database, ENRD Expert Witness Contractor Invoices

As shown above, out of 114 sampled employees identified as paid on a contractor invoice, only 14 of those employees were also listed in the SAFARI database. Of these 14 employees, only 7 had contracted rates that matched or were less than the rate approved in the database. Based on this data, we found that the database is not consistently updated by ENRD contracting officials.

Despite no involvement in price negotiations, we found that ENRD's contracting office put together a rate justification for only 3 out of the 114 expert witness contractor employees identified in Table 4. No additional support for price justifications was provided for the additional 111 expert witness contractor employees. Therefore, there is limited assurance that the prices listed in SAFARI are fair and reasonable.

We identified additional concerns within the three justifications that were developed. For example, these three justifications were developed by an employee in the contracting office that did not have contracting officer delegation letters or a warrant on behalf of the federal government, and therefore did not have the training necessary to complete rate justifications. In each justification, the employee searched the SAFARI database to identify previously used expert witnesses with similar scopes of work. From that list of expert witnesses, the employee determined the mean, median, mode, and standard deviation of the pay rates that were previously used. The employee then assessed whether the rate currently proposed for the contractor was justifiable from that data. The three rate justifications we identified were then signed by the contracting officer.

ENRD did not document the information from the database to support the analysis performed by the contracting office employee for the 3 expert witnesses identified above. Further, we do not believe this analysis provides sufficient rationale to support the determination of reasonability. In fact, in one case, we found that the rate proposed by the potential expert witness contractor was nearly 90 percent greater than the average rates for that service in the SAFARI database, yet ENRD still considered the rate justifiable. Further, based on our review, there is no indication that ENRD initially performed the proper acquisition planning steps for the existing contractors listed in the database.

- 3 percent of individual contractors had required rate justifications.
- 0 percent of contract prices were negotiated.
- No method for tracking past performance of contractors.

Last, ENRD contracting officials stated that past performance of expert witness contractors is not documented or considered by the contracting officers. Additionally, several ENRD attorneys stated that there was no method for tracking expert witness past performance, and that the majority of the decision-making simply comes from past experience or word of mouth.

Overall, it does not appear ENRD contracting officials adequately evaluate the rate and cost justifications or past performance for its expert witness contracts to ensure pricing is fair and reasonable. In our judgment, ENRD contracting personnel should determine the current market value for each service and provide rationale as to why certain rates are paid. The shortfalls we identified around pricing further increases the risk that ENRD may overpay for expert witness services.

Justification for Other than Full and Open Competition

FAR Subpart 6.303-1 states that a contracting officer shall not commence negotiations for a sole source contract unless the contracting officer justifies the use of such actions in writing. FAR Part 6.303-2 states that each justification shall contain sufficient facts and rationale to justify the use of the specific authority that allows the contracting officer to sole source the contract. We identify the information required in a justification for other than full and open competition (JOFOC) in Appendix 3.

The FAR also states that sole source contracting shall not be justified on the basis of a lack of advance planning. The contracting officer shall solicit offers from as many potential sources as is practicable. In our judgment, the absence of full and open competition can increase the risk that the government contracts with a vendor at a rate higher than market value.

ENRD contracting officials stated that JOFOCs are required for all expert witness contracts. We found that JMD created its own JOFOC form for expert services that addresses many of the requirements listed in Appendix 3. This form also requires the approval of: (1) the ENRD attorney on the case; (2) the ENRD or

JMD contracting officer; (3) the Deputy Director of the Procurement Service Staff at JMD; and (4) the DOJ's Acting Competition Advocate.

We determined that ENRD did not complete a JOFOC for seven of the eight ENRD expert witness contracts we selected for review. For the single contract that did contain an accompanying JOFOC, several elements, such as a description of the market research conducted, were not included, and the justifications provided related to the contractor were vague. Additionally, only one of the four required approvals identified above were included on the JOFOC. In our judgment, not completing this significant contracting step further increases the risk that the government may not receive the best services at the best price.

Whistleblower Protections

FAR Subpart 3.908-9 states that contracting officers should insert FAR Clause 52.203-17 in all contracts that exceed \$250,000.³ This clause states that contract workers are entitled to whistleblower protections and requires the contractor to inform its workers in writing of their whistleblower rights. Specifically, the DOJ issued guidance in 2016 that requires DOJ contracting officers to:

- Provide contractors with a "Whistleblower Information for DOJ Contractors, Subcontractors, and Grantees" document;
- Direct the contractors and subcontractors to distribute this document to their employees; and
- Direct the contractor to provide an affirmative response notifying the DOJ of their successful distribution of this document to its employees, which should be added to the contract file.⁴

This requirement applies to both new and existing DOJ contracts. We found that none of the contracts in our sample that exceeded \$250,000 included this clause. Additionally, ENRD did not provide evidence that it received written notification from each applicable contractor that it informed its employees of their whistleblower rights.

Overall, we determined that ENRD was not compliant with the FAR during the acquisition and procurement of the eight expert witness contracts we reviewed. Ultimately, these inadequacies resulted in extreme inconsistencies in contractor pay rates as well as an increased risk that ENRD overpaid for expert witness services. As a result, we recommend that ENRD implement policies and procedures to ensure that the acquisition and procurement of expert witness contracts is compliant with the FAR, including ensuring that ENRD contracting officials: (a) create and implement a written acquisition plan for expert witness contractors; (b) maintain a determination and findings for time and materials contracts; (c) conduct and document market

³ FAR Clause 52.203-17: *Contractor Employee Whistleblower Rights and Requirement to Inform Employees of Whistleblower Rights*

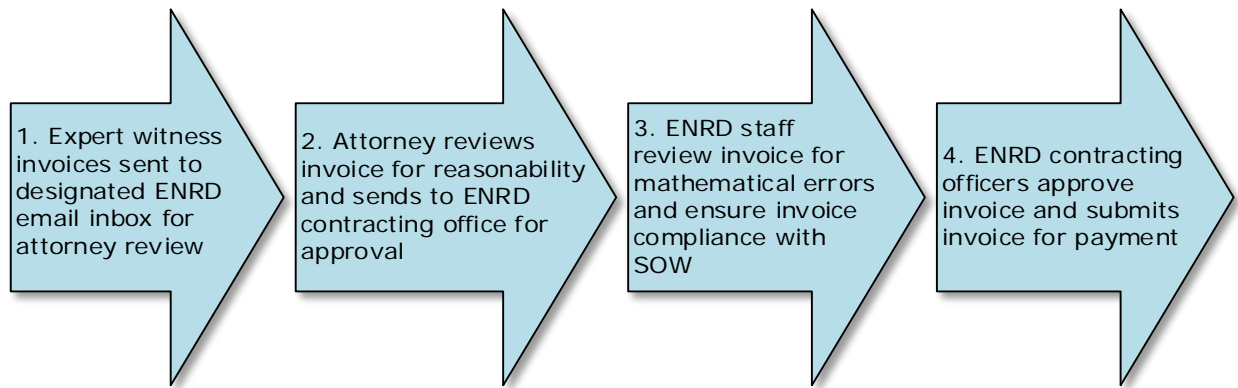
⁴ DOJ Procurement Guidance Document 16-05: *Implementation of Requirement of Notification to Contractors of Employee Whistleblower Rights*

research techniques used in the acquisition of expert witness contracts; (d) maintain evidence that price or cost to the government as well as non-cost factors were evaluated for each expert witness contract; (e) properly justify the use of other than full and open competition for expert witness contract acquisitions; and (f) provide evidence that all contracts exceeding \$250,000 have been modified to include the whistleblower provision required in FAR Subpart 52.203-17 and that contractors have informed its workers of their whistleblower rights.

Billings and Payments

We determined that ENRD did not complete a sufficient review and approval of expert witness contract invoices. As with acquisition planning, we found that a significant portion of invoice review and approval was conducted by ENRD litigation staff. However, ENRD contracting officers are still required to approve each invoice. We outline ENRD's billings and payments process in Figure 3 below.

Figure 3
Billings and Payments Process



Source: ENRD Contracting Officials and Litigating Staff

For the 8 expert witness contracts in our sample, we reviewed 22 contractor invoices, totaling \$3,957,863, or approximately 11 percent of the total amount expended as of July 1, 2020. A breakdown of our invoice review by contractor is outlined in Table 5 below.

Table 5
Sampled Invoices

OIG Sampled Contractors	Amount Expended as of July 1, 2020	Amount Sampled	Percentage Sampled	Number of Expenditures Sampled
Contractor A	\$25,609,462	\$1,946,585	8%	3
Contractor B	\$5,163,353	\$335,325	7%	6
Contractor C	\$6,319,179	\$1,397,271	22%	2
Contractor D	\$50,320	\$12,297	25%	2
Contractor E	\$266,529	\$50,966	19%	2
Contractor F	\$224,964	\$78,420	35%	3
Contractor G	\$124,850	\$124,850	100%	2
Contractor H	\$27,918	\$12,150	44%	2
Total:	\$37,786,575	\$3,957,863	11%	22

Source: ENRD Accounting System

Invoice Support and Reasonability

The federal contract cost principles outlined in FAR Subpart 31.205 states that professional services are acquired to obtain information, advice, opinions, alternatives, conclusions, recommendations, training, or direct assistance, such as studies, analyses, evaluations, liaison with government officials, or other forms of representation. Evidence necessary to determine that work performed is proper and does not violate law or regulation shall include details of actual services performed. Invoices or billings from consultants should include sufficient detail as to the time expended and nature of the actual services provided.

The services provided by the expert witness contractors under our review classify as professional services. For instance, the majority of the deliverables reviewed during our analysis involve providing analyses, evaluations, opinions, and advice to the litigating staff at ENRD. These activities closely align with the FAR's definition of professional services. Overall, we believe that the invoices provided to ENRD for payment should contain details as to the time expended and nature of actual services provided.

We determined that 15 out of the 22 invoices in our sample (68 percent), totaling approximately \$3.7 million, did not contain sufficient evidence or support as to the time expended and nature of services performed. We outline these expenses in Table 6 below.

Table 6
Contractor Expenses with Inadequate Support

OIG Sampled Contractors	Amount Sampled	Inadequate Support			Reason
		Number of Invoices	Dollar Value	Percent of Sample	
Contractor A	\$1,946,585	3	\$1,910,200	98%	Dates worked not listed on invoice.
Contractor B	\$335,325	3	\$244,705	73%	Dates worked not listed on invoice.
Contractor C	\$1,397,271	2	\$1,397,271	100%	Dates worked & activities completed by employee not listed on invoice.
Contractor D	\$12,297	2	\$11,853	96%	Dates worked not listed on invoice.
Contractor E	\$50,966	2	\$50,966	100%	Dates worked & activities completed by employee not listed on invoice.
Contractor F	\$78,420	3	\$71,194	91%	Dates worked not listed on invoice.
Total:	3,820,863	15	\$3,686,188		

Source: ENRD Expert Witness Contractors

Unauthorized Invoices and Contractor Payments

As previously explained, ENRD contracting officers did not issue delegation letters to staff outlining their contracting responsibilities. As a result, contracting officers are the only officials with the authority to approve invoices. Contracting officers use an official stamp to approve each invoice, which includes their initials and the date of approval. We identified 5 out of 22 invoices (23 percent) that were not properly approved by a contracting officer, totaling approximately \$1.2 million. We outline these expenses in Table 7 below.

Table 7
Unauthorized Expenditures

OIG Sampled Contractors	Amount Sampled	Unauthorized Invoices		
		Number of Invoices	Dollar Value	Percent of Sample
Contractor B	\$335,325	3	\$38,090	11%
Contractor C	\$1,397,271	1	\$1,048,535	75%
Contractor F	\$78,420	1	\$75,609	96%
Total:	\$1,811,016	5	\$1,162,234	

Source: ENRD Expert Witness Contractors

Next, we compared contractor personnel paid on each invoice to the approved SOW to ensure each contractor was paying personnel that had been approved by ENRD. We identified eight contractor personnel on six invoices that were paid for expert witness services, totaling approximately \$67,425 that were not authorized by a contracting officer in the approved SOW. We outline these expenses in Table 8 below.

Table 8
Unauthorized Contract Personnel

OIG Sampled Contractors	Amount Sampled	Unauthorized Contract Personnel			
		Number of Personnel	Number of Invoices	Dollar Value	Percent of Sample
Contractor B	\$335,325	6	3	\$22,624	7%
Contractor C	\$1,397,271	1	2	\$42,731	3%
Contractor F	\$78,420	1	1	\$2,070	3%
Total:	\$1,811,016	8	6	\$67,425	

Source: ENRD Expert Witness Contractors

Overall, because ENRD did not authorize the use of these personnel, we believe that there is an increased risk that ENRD overpaid for expert witness services. As a result, we question the \$67,425 identified in Table 8 as unallowable personnel costs.

Further, to support the authorization of contract employees, ENRD explained that it used contract letter modifications for one of the contractors under our review. These modifications include written correspondence from the contractor that informs ENRD that the contractor is going to update pay rates or add personnel to the project. The ENRD contracting officer then approves the modification for use during the review and verification of invoices. In addition to the unauthorized personnel identified in Table 8, we identified seven personnel under Contractor A that were not authorized in the approved SOW, but were retroactively approved through a contract letter modification. However, the modification was not approved by a contracting officer until nearly 2 months after the period of performance listed on that invoice. In our judgment, retroactively approving personnel to work under a contract increases the risk that the contractor inappropriately incurs personnel costs that may be unallowable, and we believe that ENRD's internal controls related to this issue could be strengthened.

As previously mentioned, we reviewed contractor personnel pay rates on each sampled invoice and compared these rates to the approved SOW or contract letter modification to ensure each contractor was paying rates that had been approved by an ENRD contracting officer. We identified 22 personnel on 4 different invoices that were paid using rates for services that were greater than the rates authorized by the contracting officer in the approved SOW or contracting letter modification. Overall, we question the \$4,390 in unallowable costs associated with the 22 contractor personnel that were overpaid, as shown in Table 9.

Table 9
Overpaid Contractor Personnel

OIG Sampled Contractors	Number of Overpaid Personnel	Amount of Overpayment
Contractor A Invoice #1	1	\$1,325
Contractor A Invoice #2	1	\$86
Contractor B Invoice #1	11	\$1,271
Contractor B Invoice #2	9	\$1,709
Total:	22	\$4,390

Source: ENRD Expert Witness Contractor Invoices and SOWs

Similarly, we found that one contractor under our review paid three subcontractors at rates that were not specified in the SOW. FAR Subpart 16.601 states that T&M contracts shall specify separate hourly rates for each labor category to be performed by each subcontractor. ENRD also stated that subcontractor agreements must include the estimated hours needed for each employee. For Contractor B, we found that the SOW and the subcontractor agreements did not specify separate hourly pay rates or estimates of hours needed. Instead, the SOW identified a lump sum amount that would be paid to the subcontractors over the life of the contract. We identified \$1.66 million in payments made to the subcontractors where the rates used were not approved in the SOW. However, the accounting records did not specify what portion of subcontractor payments consist of labor, materials, or travel costs. Therefore, we cannot specifically identify the amount of labor costs ENRD paid to subcontractors without approved pay rates.

Compliance with the Prompt Payment Act

FAR Subpart 32.9 states that agencies must establish policies and procedures to ensure compliance with the Prompt Payment Act, which identifies the due date for making an invoice payment as the later of the following: (1) the 30th day after the designated billing office receives a proper invoice from the contractor; or (2) the 30th day after the government acceptance of the services performed.

We reviewed the 22 invoices in our sample to determine if ENRD paid each contractor in compliance with the criteria outlined above, and found that 10 out of the 22 invoices in our sample, or 45 percent, were not paid in compliance with the Prompt Payment Act. As a result, we used the interest rates provided by the Department of the Treasury to calculate the appropriate amount of interest owed to the contractors under our review. We outline these expenses in Table 10 below.

Table 10
Prompt Payment Violations

OIG Sampled Contractors	Amount Invoiced	Prompt Payment Violations		
		Number of Days Late	OIG Calculated Interest	Interest Paid by ENRD
Contractor A Invoice #1	\$1,269,265	27	\$1,785	\$0
Contractor A Invoice #2	\$507,702	10	\$264	\$0
Contractor B Invoice #1	\$28,966	4	\$8	\$0
Contractor B Invoice #2	\$113,235	4	\$30	\$0
Contractor C Invoice #1	\$348,736	3	\$76	\$0
Contractor D Invoice #1	\$10,132	19	\$13	\$5
Contractor E Invoice #1	\$42,674	21	\$65	\$0
Contractor E Invoice #2	\$8,292	12	\$7	\$0
Contractor H Invoice #1	\$4,725	60	\$15	\$12
Contractor H Invoice #2	\$7,425	58	\$31	\$0
Total:	\$2,341,152		\$2,295	\$17

Source: ENRD Expert Witness Contractors, Department of the Treasury

Because ENRD paid a cumulative total of \$17 of interest to the contractors in our sample, we determined that there is a remaining \$2,278 in interest that should have been paid to the contractors under our review. Additionally, because nearly half of the invoices in our sample were not paid in compliance with the Prompt Payment Act, we determined that paying expert witness contractor invoices in a timely manner is a systemic problem at ENRD.

Other Invoicing Requirements

FAR Subpart 32.905 states that payment for contract expenses will be based on receipt of a proper invoice and satisfactory contractor performance. Additionally, all invoices must be supported by a proper receiving document or documentation authorizing payment. We outline the FAR elements of a proper invoice and a proper authorizing document in Appendix 3.

We reviewed each invoice and authorizing document in our sample and determined that none of the 22 invoices we reviewed contained all the elements outlined in Appendix 3. For example, majority of the invoices did not contain the contract number, or a description and quantity of time spent on the services performed. Additionally, we found that majority of the authorizing documents we reviewed were not provided by contracting staff to the billing office by the 5th day after acceptance of the services, as required in Appendix 3. This further indicates that invoice processing at ENRD is not being completed in a timely manner.

Overall, we determined that ENRD was not compliant with the FAR in numerous areas of our audit related to billings and payments. Ultimately, these inadequacies increase the risk of misuse of contract funds. As a result, we recommend that ENRD implement policies and procedures to ensure that billings and payments for expert witness contracts are compliant with the FAR, including ensuring that: (a) invoices submitted by expert witness contractors contain sufficient detail as to the time expended and the nature of the actual services

provided; (b) expert witness contractors and subcontractors only bill for personnel and pay rates that have been approved by ENRD prior to the contract employee performing services; (c) all invoices contain approval by a qualified ENRD contracting official; (d) invoices and authorizing documentation contain the elements required by the FAR and are paid in accordance with the SOW for expert witness contractors; and (e) invoices submitted by expert witness contractors are paid and authorized in accordance with the Prompt Payment Act.

We also recommend that ENRD remedy \$71,815 in unallowable personnel costs resulting from \$67,425 in unauthorized contract personnel costs, and \$4,390 related to the payment of contractor pay rates that were not authorized in the approved SOW.

Contract Oversight, Monitoring, and Administration

We determined that ENRD contracting officials did not complete adequate oversight and monitoring of the contractors we reviewed. We found that contractor oversight was primarily conducted by ENRD litigation staff. We also identified areas of non-compliance related to contract administration, including required documentation that was not included in each contract file, and subcontracts that did not contain the adequate terms and conditions required in ENRD's internal policies.

Contractor Oversight and Monitoring

FAR Subpart 16.601 states that government surveillance of contractor performance is required to give reasonable assurance that efficient and effective cost controls are being used. FAR Subpart 46.401 states that quality assurance surveillance plans should be prepared in conjunction with the SOW. The plan should specify all work requiring surveillance and the method of surveillance.

ENRD contracting officials stated that ENRD does not use quality assurance surveillance plans, and provided no evidence related to contract monitoring. We found that ENRD attorneys visited two contractors under our review, however, these visits were related to on-going case work. No activities related to the oversight and monitoring of contractor work were conducted by ENRD contracting officials. While we acknowledge the importance of attorney involvement in contractor oversight, the FAR states that it is the responsibility of a contracting officer to conduct proper oversight and monitoring activities, unless formally delegated using a delegation letter.

Contractor Performance Evaluations

FAR Subpart 42.15 states that past performance evaluations for contractors should be completed at least annually. Past performance information shall be entered into the Contractor Performance Assessment Reporting System (CPARS), the government-wide evaluation reporting tool for all past performance reports on contracts. However, the Expert Witness Instruction issued by JMD states that CPARS reports or evaluations are not required for expert witness contractors. We asked JMD why guidance was issued that contradicts the criteria identified in FAR

Subpart 42.15. JMD stated that it intended to obtain a FAR deviation that would exempt expert witness contracts from FAR Subpart 42.15, however, this deviation was never requested or approved, and JMD did not identify a specific date by which this would be completed. As a result, we determined that past performance information should be entered into CPARS for expert witness contractors, and that JMD's Expert Witness Instruction is not compliant with the FAR. We recommend that JMD ensure that the Expert Witness Instruction is compliant with FAR Subpart 42.15 related to contractor performance evaluations.

Contract Administration

ENRD includes in each contract the Standard Expert Witness Contract Terms and Conditions that outline specific requirements for each contractor. The terms and conditions state that a resume should be made a part of the contract file, and states that all individuals working under the contract, before commencing work, must sign a confidentiality agreement. Additionally, the Expert Witness Instruction states that all expert witness contractors should use approved rates when traveling under the contract. As a result, ENRD contracting officers complete a travel authorization letter when an expert witness contractor travels under the contract. This letter states that the contractor is authorized for government rates.

We reviewed the eight contract files within our contract sample to determine if a resume, travel authorization, and confidentiality agreement were included in each file for a sample of 35 contractor personnel. As shown in Table 11, we found that ENRD did not document these requirements for all contractor personnel sampled.

Table 11
Missing Resumes, Travel Authorizations,
and Confidentiality Agreements⁵

OIG Sampled Contractors ⁶	Number of Personnel Sampled	Missing Resumes	Missing Travel Authorizations	Noncompliant CA Agreements
Contractor A	8	0	2	2
Contractor B	8	0	0	2
Contractor C	5	2	0	0
Contractor D	3	2	0	0
Contractor E	3	0	1	2
Contractor F	6	1	1	2
Contractor G	1	0	0	0
Contractor H	1	0	0	0
Total:	35	5	4	8

Source: ENRD Contract Files

⁵ We only took exception with missing resumes that were not maintained for key contractor personnel. Additionally, we did not take exception with missing travel authorizations that were not maintained for personnel that did not travel under the contract. Lastly, six of the eight missing confidentiality agreements were not signed before the employee started working on the contract. The remaining two were not completed at any time.

⁶ Contractor C stated that they did not receive the Standard Expert Witness Contractor Terms and Conditions. Therefore, we did not take issue if Contractor C did not know of certain requirements.

Without maintaining these documents, ENRD may not have available all the appropriate documentation to demonstrate that key personnel, who are generally the expert witnesses, have the appropriate experience and knowledge to testify in court. ENRD also risks the proper safeguarding of confidential information, and risks that travel conducted by contractors may exceed appropriate amounts.

Next, FAR 16.601 states that prior to an increase in the ceiling price of a time and materials contract, the contracting officer shall conduct an analysis of pricing and other relevant factors to determine if the action is in the best interest of the government. The contracting officer should document the decision in the contract file. We found that ENRD increased the original amount of the award for six contracts under our review. However, ENRD did not complete an analysis of pricing and other relevant factors to determine if these increases were in the best interest of the government. While ENRD issued contract modifications increasing the funding under these contracts, the modification did not include an explanation as to why the increase was needed, including if the litigation under the contract was longer than expected, or if additional personnel costs were required to complete the contract deliverables.

Subcontractor Agreements

ENRD's Standard Expert Witness Contractor Terms and Conditions state that subcontractors must be identified in each expert witness contractor's SOW. The expert's contract with the subcontractor must incorporate applicable language from the prime contract with the expert witness, including language pertaining to credential checks, conflicts of interest, and confidentiality agreements.

We asked ENRD what specific requirements should be included in each subcontractor agreement. ENRD stated that the agreement must outline the specific tasks that will be performed by the subcontractor, and include the estimated hours needed for each individual multiplied by their hourly rate. The agreement should include the subcontractor's qualifications and any conflicts of interest. Specifically, the subcontractor must disclose any potential or actual conflicts of interest. ENRD also stated that subcontractors must adhere to all the terms and conditions of the contract that they agreed to and signed. The contractor should discuss proposed case work with the attorney.

We found that one out of the eight contracts under our review used subcontractors. Specifically, we identified three subcontract agreements, and identified the following concerns with the agreements:

- All three agreements did not contain the appropriate contract language related to credential checks;
- All three agreements did not contain the appropriate contract language related to conflicts of interest;
- All three agreements were for organizations that were identified in the prime contractor's SOW, but the rates of the individual employees of each subcontractor were not provided or approved by ENRD.

As a result, we determined that these subcontract agreements were not compliant with ENRD's policies and procedures. In our judgment, there is minimal assurance that subcontractors are following the same guidance that prime contractors are required to follow in the Standard Expert Witness Contractor Terms and Conditions.

Overall, we determined that ENRD has not fully complied with the FAR, as well as internal ENRD policies and procedures, in numerous areas of our audit related to contract oversight, monitoring, and administration. As a result, we recommend that ENRD enhance and implement policies and procedures to ensure adequate contract oversight, monitoring, and administration of its expert witness contracts, including ensuring that ENRD contracting officials: (a) develop and implement a quality assurance surveillance plan for its expert witness contracts, as required by the FAR; (b) maintain the proper documentation in each expert witness contract file, including resumes, travel authorizations, and confidentiality agreements that are signed prior to when the contractor begins work under the contract; (c) document an analysis of pricing and support for increases in contract ceilings; and (d) ensure subcontract agreements comply with ENRD's Standard Expert Witness Terms and Conditions, as well as additional guidance identified in the prime expert witness contract.

ENRD Standard Expert Witness Contractor Terms and Conditions

Credentials Check

"The government reserves the right to verify the expert's credentials. If false information has been provided, this contract may be declared null and void."

Conflicts of Interest

"The expert shall inform the government to the best of his or her knowledge and belief, of any organizational or personal conflicts of interests..."

"The expert agrees that, if a conflict of interest is discovered, the expert shall make an immediate and full disclosure in writing to the government, which shall include a description of the action that the expert has taken... to avoid, eliminate, or neutralize the conflict."

Confidentiality Agreements

"All individuals working under this contract, before commencing work, must be identified to the government and must sign a confidentiality agreement satisfactory to the government."

Contractor Performance

We reviewed a total of 34 contract deliverables, as outlined in Table 12. This includes tasks such as expert witness reports, the compilation of data and analyses, and participation in litigation. Overall, we found that the expert witness contractors under our review generally completed the contract deliverables that we sampled. However, we identified concerns related to the preservation of working materials by ENRD expert witness contractors and litigating staff. Additionally, we found that certain contractors deviated from the approved SOW without contracting officer approval and without a formal contract modification.

Table 12
Contractor Deliverables

OIG Sampled Contractors	Number of Deliverables Reviewed
Contractor A	4
Contractor B	4
Contractor C	4
Contractor D	2
Contractor E	6
Contractor F	4
Contractor G	5
Contractor H	5
Total:	34

Contractor Bibliographies

ENRD's Standard Expert Witness Contractor Terms and Conditions states that expert witness contractors must agree to create and maintain a written and running bibliography of all information sources that the expert or the people working on the expert's behalf have consulted. While some of the expert witness contractors under our review maintained working materials using techniques such as file databases and research logs, we found that six out of the eight contractors did not maintain an adequate bibliography or list of sources used during the work completed under each contract. We believe that not maintaining a list of sources limits the amount of verifiable information available in ENRD litigation and during contractor oversight and monitoring. As a result, we recommend that ENRD enhance its policies and procedures to ensure that all expert witness contractors maintain a written and running bibliography of all information sources used during the life of the contract to ensure the proper preservation of working materials.

Contractor Compliance with SOW

FAR Subpart 43.102 states that only contracting officers can execute contract modifications on behalf of the government. Other government personnel shall not direct or encourage the contractor to perform work that should be the subject of a contract modification. Further, FAR Subpart 43.301 states that a modification of a contract shall be used for any amendment to a solicitation; administrative changes; supplemental agreements; or addition of funds to a contract.

We found that two out of the eight contractors under our review conducted work on tribal trust claims that were not specifically included in the approved SOW. Each SOW lists the number of tribes in litigation with the United States government and includes an estimated budget based on the tribes identified in the SOW. While one SOW we reviewed does not place a limit on the number of tribal cases that the contractor may work on, we believe that the ENRD contracting staff should approve the tribal case work completed by contractor in order to regulate costs under the

contract and ensure that the contractor does not incur more expenses than the contract allows. During our testing of contractor deliverables, we found that the two contractors worked on a combined total of five tribal trust litigation cases that were not specifically approved in the SOW. Similarly, we found that one contractor conducted research under the contract that was not included as one of the deliverables approved in the SOW. Further, as outlined under the *Billings and Payments* section above, we identified eight contractor personnel that were not authorized in the approved SOW, but were paid under the contracts we reviewed. Similarly, we identified 22 contractor personnel that were paid at a higher rate than what was authorized in the approved SOW.

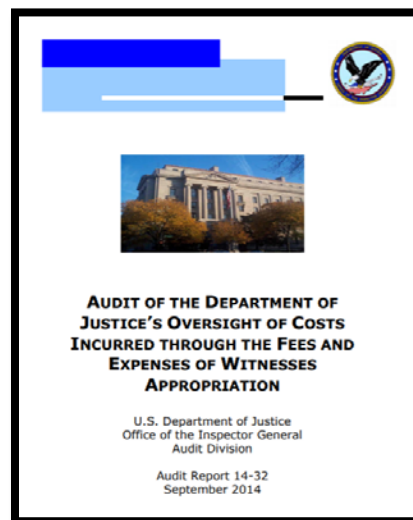
Overall, because these actions can increase the scope and funding needed under a contract, we believe that the ENRD contracting office should have issued a contract modification that approved any actions increasing work performed. Additionally, these examples demonstrate that the current contracting process does not provide reasonable assurance that effective cost controls are being used during contractor performance. As a result, we recommend that ENRD implement policies and procedures to ensure that any contract changes identified under FAR Subpart 43.301 are authorized using a formal contract modification that is approved by a qualified ENRD contracting official.

Use of FEW Appropriation

JMD's Expert Witness Instruction specifically states that expert witness contracts funded through the FEW Appropriation can only be used for the preparation of testimony in federal judicial proceedings. Further, litigative consulting costs are specifically prohibited under this guidance. While we did not directly test specific expenditures related to the allowability of costs under each contract as it relates to the preparation of testimony, we identified concerns where the controls over the use of FEW Appropriation were weak or ineffective, potentially increasing the risk that FEW Appropriations could be misused.

Prior OIG Audit

As previously mentioned, the OIG conducted an audit in 2014 with the objective of reviewing the DOJ's management and use of the FEW Appropriation for expert witnesses. The OIG identified instances where the FEW Appropriation was used inconsistently with JMD guidance, and determined that this guidance should be strengthened to ensure that the allowable uses of the FEW Appropriation are clear and that all DOJ attorneys and their staff understand the necessary elements of an expert witness contract to be paid with the FEW Appropriation. As a result, in 2018 JMD revised its guidance to address the OIG's recommendations.



In general, we found that JMD’s Expert Witness Instruction improved the specificity of the guidance to better outline JMD’s requirements related to the FEW Appropriation. As a result, we assessed ENRD’s ability to effectively implement the changes to JMD’s expert witness guidance.⁷ While we do not express an opinion on the allowability of ENRD’s expert witness contracts relating to compliance with the Expert Witness Instruction, we identified concerns related to ENRD’s internal controls around the FEW Appropriation.

Internal Control Weaknesses

We reviewed each SOW for the eight expert witness contracts under our review to determine if the deliverables agreed upon by the contractor were reflective of the requirements identified in the Expert Witness Instruction. Our assessment also included interviews with ENRD contracting officials and ENRD litigation staff. We also conducted a survey of each of the eight contractors in our sample to determine how ENRD implemented the changes identified in the 2018 revision of the Expert Witness Instruction. We identified various areas of risk related to ENRD’s use of the FEW Appropriation, which are outlined in Table 13 below.

Table 13
FEW Appropriation Risk Areas

1. Handwritten Changes on Contractor SOWs
Some of the contracts we reviewed included handwritten changes by ENRD to the deliverables within the SOW to be more reflective of an expert witness contract versus a litigative consultant, whose services are prohibited by the Expert Witness Instruction.
2. Prohibited Litigative Consultant
During our survey of the eight contractors we reviewed, one contractor identified themselves as a litigative consultant, which is prohibited by the Expert Witness Instruction.
3. No Training, Certifications, or Dissemination of Information
ENRD conducted no trainings or certifications on the 2018 Expert Witness Instruction to ensure that contracting officials, litigation staff, and the expert witness contractors were familiar with JMD’s guidance. While ENRD explained that all of its expert witness contracts are intended to assist litigation staff in the preparation for testimony, we found that ENRD has not disseminated guidance that defines preparation for testimony or provided appropriate training on this distinction. Therefore, we believe that ENRD has not appropriately identified the requirements or expectations of a contractor who is assisting in the preparation for testimony.
4. Ambiguous Contract Deliverables
Some contract deliverables were written ambiguously and indicate that a portion of the work to be completed closely relates to litigative consulting. For example, one contractor completed research and assisted the attorney in duties not directly linked to the preparation for testimony.

Source: OIG Analysis of ENRD Expert Witness Contracts

⁷ On May 31, 2019, the JMD Procurement Services Staff issued Procurement Information Bulletin 2019-03, *Contracting for Expert Witnesses and Litigative Consultants*. The bulletin provides further guidance about the distinction between expert witness and litigative consulting services. However, this bulletin is not vetted DOJ policy, and was only provided to each OBD’s Chief Procurement Officer. We were not provided evidence that this information was appropriately disseminated to DOJ litigation staff. According to ENRD litigation staff, no training related to the use of the FEW Appropriation was provided.

Based on these concerns, we determined that ENRD could improve its controls over the use of the FEW Appropriation. As a result, we recommend that ENRD enhance its internal controls to mitigate the risk that the FEW Appropriation could be misused. These controls should be reflective of the requirements outlined in JMD's 2018 Expert Witness Instruction, and any additional guidance that has been issued by JMD. Finally, ENRD should ensure that any policies and procedures created to address this recommendation are appropriately disseminated to ENRD contracting and litigation staff, and that appropriate training on the subject is provided to ENRD staff.

CONCLUSION AND RECOMMENDATIONS

Our review of ENRD's procurement and administration of expert witness contracts identified significant concerns related to the delegation of contracting duties to ENRD attorneys and litigation staff. As a result, we found numerous areas of non-compliance with the FAR and internal ENRD guidance. Overall, in accordance with the FAR, we determined that if contracting duties are not retained by the contracting officer, ENRD should issue contracting officer delegation letters to those delegated contracting duties. Additionally, ENRD should provide training commensurate of the duties outlined in the delegation letter.

We determined that ENRD did not complete significant acquisition planning requirements, including the proper use of a written acquisition plan, or a determination on the appropriate contracting vehicle for expert witness contracts. Further, we found that ENRD did not complete adequate market research and did not appropriately track historical expert witness contractor rates and performance. We also found that ENRD did not adequately evaluate the reasonableness of contractor rates, or adequately document justifications for other than full and open competition, as required by the FAR. Finally, we found that ENRD did not include required whistleblower criteria in each of the expert witness contracts we reviewed.

With regard to billings and payments, we identified: 15 invoices totaling \$3.7 million that did not contain adequate supporting information; 5 invoices totaling \$1.2 million that were not properly approved; \$71,815 in unallowable payments made to unauthorized contractor personnel or that were paid at rates higher than what was approved in the SOW; 10 invoices where ENRD paid the contractor in violation of the Prompt Payment Act, resulting in \$2,295 in interest owed; and 22 invoices that did not contain the proper invoice elements, as required by the FAR.

Next, we determined that ENRD contracting officials did not complete adequate oversight and monitoring of the expert witness contractors we reviewed. We found that ENRD did not maintain resumes, confidentiality agreements, and travel authorizations for every contractor employee under our review, and found that the subcontractor agreements we reviewed did not contain the necessary contract information, as required by ENRD.

Finally, we found that while the contractors under our review generally completed each contract deliverable, six expert witness contractors did not maintain a bibliography of sources used during the project, as required by ENRD, and did not adhere to the approved SOW in every activity completed. We also identified concerns with ENRD's internal controls related to the FEW Appropriation, and identified risk areas throughout our audit where these controls could be strengthened.

We recommend that ENRD:

1. Implement policies and procedures to ensure that contracting duties are:
(1) retained by ENRD contracting officers; or (2) appropriately delegated to other qualified ENRD officials that have received a written delegation letter and training commensurate of the duties being delegated.
2. Implement policies and procedures to ensure that the acquisition and procurement of expert witness contracts is compliant with the FAR, including ensuring that ENRD contracting officials:
 - (a) create and implement a written acquisition plan for expert witness contractors;
 - (b) maintain a determination and findings for time and materials contracts;
 - (c) conduct and document market research techniques used in the acquisition of expert witness contracts;
 - (d) maintain evidence that price or cost to the government as well as non-cost factors were evaluated for each expert witness contract;
 - (e) properly justify the use of other than full and open competition for expert witness contract acquisitions; and
 - (f) provide evidence that all contracts exceeding \$250,000 have been modified to include the whistleblower provision required in FAR Subpart 52.203-17 and that contractors have informed its workers of their whistleblower rights.
3. Implement policies and procedures to ensure that billings and payments for expert witness contracts are compliant with the FAR, including ensuring that:
 - (a) invoices submitted by expert witness contractors contain sufficient detail as to the time expended and the nature of the actual services provided;
 - (b) expert witness contractors and subcontractors only bill for personnel and pay rates that have been approved by ENRD prior to the contract employee performing services;
 - (c) all invoices contain approval by a qualified ENRD contracting official;
 - (d) invoices and authorizing documentation contain the elements required by the FAR and are paid in accordance with the SOW for expert witness contractors; and
 - (e) invoices submitted by expert witness contractors are paid and authorized in accordance with the Prompt Payment Act.

4. Remedy \$71,815 in unallowable personnel costs resulting from:
 - (a) \$67,425 in unauthorized contract personnel costs; and
 - (b) \$4,390 related to the payment of contractor pay rates that were not authorized in the approved SOW.
5. Implement policies and procedures to ensure adequate contract oversight, monitoring, and administration of its expert witness contracts, including ensuring that ENRD contracting officials:
 - (a) develop and implement a quality assurance surveillance plan for its expert witness contracts, as required by the FAR;
 - (b) maintain the proper documentation in each expert witness contract file, including resumes, travel authorizations, and confidentiality agreements that are signed prior to when the contractor begins work under the contract;
 - (c) document an analysis of pricing and support for increases in contract ceilings; and
 - (d) ensure subcontract agreements comply with ENRD's Standard Expert Witness Terms and Conditions, as well as additional guidance identified in the prime expert witness contract.
6. Enhance its policies and procedures to ensure that all expert witness contractors maintain a written and running bibliography of all information sources used during the life of the contract to ensure the proper preservation of working materials.
7. Implement policies and procedures to ensure that any contract changes identified under FAR Subpart 43.301 are authorized using a formal contract modification that is approved by a qualified ENRD contracting official.
8. Enhance its internal controls to mitigate the risk that the FEW Appropriation could be misused. These controls should be reflective of the requirements outlined in JMD's 2018 Expert Witness Instruction and any additional guidance that has been issued by JMD. Finally, ENRD should ensure that any policies and procedures created to address this recommendation are appropriately disseminated to ENRD contracting and litigation staff, and that appropriate training on the subject is provided to ENRD staff.

We recommend that JMD:

9. Ensure that the Expert Witness Instruction is compliant with FAR Subpart 42.15 related to contractor performance evaluations.

OBJECTIVES, SCOPE, AND METHODOLOGY

Objectives

The objectives of this audit were to assess: (1) ENRD’s acquisition planning and procurement policies and procedures related to expert witness contracts; and (2) ENRD and contractor compliance with contract terms and conditions. We reviewed ENRD and contractor compliance with the FAR, as well as ENRD and JMD policies and procedures related to expert witness contracting. Specifically, we conducted our review in the areas of acquisition and procurement; contract management, oversight, and monitoring; billings and payments; and contractor performance.

Scope and Methodology

This was an audit of ENRD’s procurement and administration of expert witness contracts. In making our assessment, we judgmentally selected a sample of eight time and materials expert witness contracts to review, totaling approximately \$52 million, which are outlined in Table 14 below.

Table 14
Sampled ENRD Expert Witness Contracts

OIG Sampled Contractor	Total Award	Amount Expended as of July 1, 2020	Contract Start	Contract End
Contractor A	\$27,335,997	\$25,609,462	10/12/2011	2/22/2024
Contractor B	\$9,572,940	\$5,163,353	9/11/2014	6/30/2022
Contractor C	\$8,024,365	\$6,319,179	1/22/2018	6/30/2023
Contractor D	\$6,568,300	\$50,320	9/25/2015	6/30/2020
Contractor E	\$505,378	\$266,529	3/31/2017	6/30/2022
Contractor F	\$226,212	\$224,964	4/5/2011	4/30/2020
Contractor G	\$150,000	\$124,850	9/16/2016	6/30/2021
Contractor H	\$100,000	\$27,918	6/3/2016	6/30/2021
Total:	\$52,483,192	\$37,786,575		

Source: ENRD

We conducted site work at ENRD’s contracting office to interview contracting officials and executive staff, as well as to review the contract files for the expert witness contracts under our review. We also held an in-person interview with an ENRD attorney in ENRD’s Denver, Colorado field office. Additionally, we held interviews with five other attorneys over-the-phone related to the eight contracts under our review. Finally, we conducted a survey with the eight expert witness contractors to obtain more information about the work completed under each contract. Additional information on our methodology is outlined in Table 15 below.

Table 15
OIG Audit Approach

Subject Area	Methodology
Acquisition & Procurement	Interviewed ENRD contracting officers and executive staff; reviewed internal expert witness contractor data; reviewed internal policy related to acquisition; reviewed contractor pay rate justifications, when available; and reviewed contractor Statements of Work (SOW).
Contract Management, Oversight, & Monitoring	Reviewed contract file documentation and ENRD contract file checklists; reviewed quality assurance procedures; and conducted surveys of each contractor on nature and content of contract.
Billings & Payments	Reviewed ENRD adherence to SOW regarding pay rates; reviewed authorization of payments; reviewed ENRD compliance with Prompt Payment Act; and traced contractor invoices to source documentation.
Contractor Performance	Reviewed contract deliverables as stated in the SOW; and interviewed ENRD attorneys on contractor progress for each contract.

Source: OIG, ENRD, Expert Witness Contractors

Statement on Compliance with Generally Accepted Government Auditing Standards

We conducted this performance audit in accordance with generally accepted government auditing standards (GAGAS). Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

Internal Controls

In this audit, we performed testing of internal controls significant within the context of our audit objectives. We did not evaluate the internal controls of ENRD to provide assurance on its internal control structure as a whole. ENRD’s management is responsible for the establishment and maintenance of internal controls in accordance with OMB Circular A-123 and the FAR. Because we do not express an opinion on the ENRD’s internal control structure as a whole, we offer this statement solely for the information and use of ENRD and JMD.⁸

In planning and performing our audit, we identified the following internal control components and underlying internal control principles as significant to the audit objective(s):

⁸ This restriction is not intended to limit the distribution of this report, which is a matter of public record.

Internal Control Components & Principles Significant to the Audit Objectives	
Control Environment Principles	
	Management should establish an organizational structure, assign responsibility, and delegate authority to achieve the entity's objectives.
Control Activity Principles	
	Management should design control activities to achieve objectives and respond to risks.
	Management should implement control activities through policies.
Information & Communication Principles	
	Management should use quality information to achieve the entity's objectives.

We assessed the design, implementation, and operating effectiveness of these internal controls and identified deficiencies that we believe could affect ENRD's ability to effectively and efficiently operate, to correctly state financial and/or performance information, and to ensure compliance with laws and regulations. The internal control deficiencies we found are discussed in the Audit Results section of this report. However, because our review was limited to aspects of these internal control components and underlying principles, it may not have disclosed all internal control deficiencies that may have existed at the time of this audit.

Compliance with Laws and Regulations

In this audit we tested, as appropriate given our audit objectives and scope, selected transactions, records, procedures, and practices, to obtain reasonable assurance that ENRD's management complied with federal laws and regulations for which noncompliance, in our judgment, could have a material effect on the results of our audit. Our audit included examining, on a test basis, ENRD's compliance with the following laws and regulations that could have a material effect on ENRD's operations:

- FAR Part 6: *Competition Requirements*
- FAR Part 7: *Acquisition Planning*
- FAR Part 10: *Market Research*
- FAR Part 11: *Describing Agency Needs*
- FAR Part 15: *Contracting By Negotiation*
- FAR Part 31: *Contract Cost Principles and Procedures*
- FAR Part 32: *Contract Financing*
- FAR Part 37: *Service Contracting*
- FAR Part 43: *Contract Modifications*
- FAR Subpart 1.602-2: *Responsibilities of a COR*

- FAR Subpart 3.908: *Pilot Program for Enhancement of Contractor Employee Whistleblower Protections*
- FAR Subpart 16.601: *Time-and-Materials Contracts*
- FAR Subpart 42.15: *Contractor Performance Information*
- FAR Subpart 46.4: *Government Contract Quality Assurance*
- Department of Treasury, Bureau of Fiscal Service, Federal Register Volume 76-84: *Prompt Payment Interest Rates (2012-2020)*
- DOJ Procurement Guidance Document 16-05: *Implementation of Requirement of Notification to Contractors of Employee Whistleblower Rights*
- DOJ Instruction 1300.01.02: *Use of the Fees and Expenses of Witnesses Appropriation for Expert Witnesses and Other Services Related to Litigation and Mediation.*

This testing included analyzing contract files and related documentation, interviewing ENRD contracting officials, attorneys and litigation staff, and contractor personnel, and reviewing invoices and supporting documentation. As noted in the Audit Results section of this report, we found that ENRD did not comply with federal regulations related to acquisition and procurement, billings and payments, contractor oversight and monitoring, and contractor performance.

Sample-based Testing

To accomplish our audit objectives, we performed sample-based testing for invoices, ENRD contract files, and contractor deliverables. In this effort, we employed a judgmental sampling design to obtain broad exposure to numerous facets of the areas we reviewed. This non-statistical sample design did not allow projection of the test results to the universe from which the samples were selected.

Computer-Processed Data

During our audit, we obtained information from the DOJ's Unified Financial Management System (UFMS), ENRD's accounting system, and ENRD's internal SAFARI database, which is used to track expert witness contracts. We did not test the reliability of ENRD's accounting system as a whole, therefore any findings identified involving information from those systems were verified with documentation from other sources.

We assessed the reliability of the data received from UFMS and SAFARI through our comparisons of sampled ENRD expert witness contractor records and financial data to ensure it was complete and accurate. We brought any identified discrepancies to the attention of ENRD, and worked with ENRD to correct the discrepancies.

SCHEDULE OF DOLLAR RELATED FINDINGS

<u>Description</u>	<u>Amount</u>	<u>Page</u>
Questioned Costs:		
Unallowable Contractor Personnel	\$67,425	14
Unallowable Contractor Pay Rates	<u>4,390</u>	15
Total Questioned Costs⁹	\$71,815	

⁹ Questioned Costs are expenditures that do not comply with legal, regulatory, or contractual requirements; are not supported by adequate documentation at the time of the audit; or are unnecessary or unreasonable. Questioned costs may be remedied by offset, waiver, recovery of funds, or the provision of supporting documentation.

ADDITIONAL FAR INSTRUCTION

FAR 7.105 outlines the contents of a written acquisition plan. We found ENRD did not complete a majority of the required elements of a written acquisition plan prior to awarding each contract we reviewed, as outlined in FAR Subpart 7.105. We summarize these requirements and if they were completed by ENRD for each contract we reviewed in Table 16.

Table 16
Contents of Written Acquisition Plans

FAR Instruction for Contents of Acquisition Plan
1. Plan milestones at which decisions are made
2. Statement of need, including contractual history
3. Applicable conditions, such as requirements or constraints
4. Cost goals for the acquisition and rationale supporting cost
5. Required capabilities or performance characteristics
6. Basis for performance period requirements
7. Trade-offs among cost, performance, and schedule goals
8. Technical, cost, and schedule risks
9. Source of services that can meet government's need
10. Authority for exemptions related to competition
11. Rationale for contract type selection
12. Source selection procedures for acquisition
13. Acquisition considerations such as option years
14. Budget estimates and funding
15. Service types, such as performance-based acquisitions

Source: FAR Subpart 7.105, ENRD Expert Witness Contracts

Next, FAR Part 6.303-2 states that each justification for sole source contracting shall contain sufficient facts and rationale to justify the use of the specific authority that allows the contracting officer to sole source the contract. We identify the information required in a justification for other than full and open competition (JOFOC) in Table 17. JMD has created a form for expert witness contracts that contain many of the elements outlined in Table 17.

Table 17
Contents of a JOFOC

FAR Instruction for Contents of a JOFOC
1. Identification of the agency and contracting activity, and specific identification of the document as a "justification for other than full and open competition"
2. Nature and/or description of the action being approved
3. A description of the services required to meet the agency's needs, including estimated value
4. An identification of the statutory authority permitting other than full and open competition
5. A demonstration that the proposed contractor's unique qualifications or the nature of the acquisition requires use of the authority cited
6. A description of the efforts made to ensure that offers are solicited from as many potential sources as practicable, and if not, which exception under FAR 5.202 applies
7. A determination that the anticipated cost to the government will be fair and reasonable
8. A description of the market research conducted, and the results or a statement of the reason market research was not conducted
9. Any other facts supporting the use of other than full and open competition
10. A listing of sources, if any, that expressed, in writing, an interest in the acquisition
11. A statement of actions, if any, the agency may take to remove or overcome any barriers to competition before any subsequent acquisition for the services required
12. Contracting officer certification that the justification is accurate and complete to the contracting officer's knowledge and belief

Source: FAR Subpart 6.303-2

Last, FAR Subpart 32.905 states that payment for contract expenses will be based on receipt of a proper invoice and satisfactory contractor performance. Additionally, all invoices must be supported by a proper receiving document or documentation authorizing payment. We outline the FAR elements of a proper invoice and a proper authorizing document in Table 18.

Table 18
Elements of a Proper Invoice and Authorizing Document

FAR Instruction for Elements of a Proper Invoice
1. Name and address of the contractor
2. Invoice date and invoice number
3. Contract number, order number, or line item number
4. Description, quantity, unit of measure, and unit price
5. Shipping and payment terms
6. Name and address of contractor official to whom payment is to be sent
7. Name and contact information of person to notify in the event of a defective invoice
8. Banking information
FAR Instruction for Elements of a Proper Authorizing Document
1. Contract number or other authorization for services performed
2. Description of services performed
3. Quantities of services performed
4. Dates of services performed
5. Date that the designated official accepted the services
6. Signature and contact information for official responsible for acceptance or approval
7. Provision of the document to the billing office by the 5 th day after acceptance

Source: FAR Subpart 32.905

**ENVIRONMENT AND NATURAL RESOURCES DIVISION
RESPONSE TO THE DRAFT REPORT**



U.S. Department of Justice
Environment and Natural Resources Division

Executive Office
150 M Street, N.E., 2nd Floor
Washington, DC 20530

Telephone (202) 616-3100
Facsimile (202) 616-3531
Andrew.Collier@usdoj.gov

September 11, 2020

Jason R. Malmstrom
Assistant Inspector General for Audit
Office of the Inspector General
150 M Street, N.E., 12th Floor
Washington, D.C. 20530

**Re: Audit of the Environment and Natural Resources Division’s Procurement
and Administration of Expert Witness Contracts**

Dear Mr. Malmstrom:

I am writing to thank you for the professional and careful audit work performed by staff from the Office of the Inspector General’s (OIG’s) Denver Regional Audit Office on the above referenced Audit, and to address the Draft Audit Report’s Recommendations. The acquisition and retention of – as well as the invaluable services performed by – expert witnesses is extraordinarily important to the Environment and Natural Resources Division (ENRD), and to the Department’s other litigating components. Your audit work will help the Department improve the processes and internal controls related to the procurement and administration of expert witness contracts.

The objectives of this audit were to assess: (1) ENRD’s acquisition planning and procurement policies and procedures for expert witness contracts; and (2) ENRD and contractor compliance with contract terms and conditions. To accomplish these objectives, the OIG reviewed eight time and materials expert witness contracts totaling approximately \$52 million in value. We are satisfied that only one-fifth of one percent (\$71,815 of approximately \$38 million, or 0.0019%) of the expenditures sampled require remedial documentation and/or corrective action. And we are pleased that the OIG “generally found that each contractor completed the deliverables under each award.” However, our goal is to run a 100% mistake-free expert contracting operation and achieve complete compliance with governing policies and regulations.

As such, we have noted below our agreement – in part or whole – with the Recommendations described in the draft Audit Report. As previously noted, ENRD follows guidance from the Justice Management Division (JMD) regarding application of the Federal Acquisition

Regulations (FAR) to the unique procurement needs of expert witness contracting for litigation. Where applicable, we have described the corrective actions we plan to take to address the Recommendations.

RECOMMENDATION #1: Implement policies and procedures to ensure that contracting duties are: (1) retained by ENRD contracting officers; or (2) appropriately delegated to other qualified ENRD officials that have received a written delegation letter and training commensurate of the duties being delegated.

RESPONSE: ENRD concurs with part of this Recommendation. Given the nature of expert contracting, which is very dependent on the expertise of litigation staff, considering all litigators as CORs who must have COR certification and training is not feasible or consistent with FAR 1.602. DOJ's own policy governing expert witness contracting acknowledges the important role litigation staff can and should play in the acquisition process.

"When acquiring the services of an expert, the litigating DOJ attorney is authorized to perform the following functions subject to the Contracting Officer's final determination: identifying and vetting a proposed expert; soliciting a proposal from the proposed expert; negotiating terms, conditions, and price with the proposed expert; and determining which proposed expert should be awarded a contract." (*DOJ Instruction 1300.01.02, Section V.A.*)

Litigation staff assist the CO, who is always ultimately responsible for contracting requirements. To accommodate this Recommendation, instead of conducting COR training, ENRD proposes that the Division conduct specific expert contracting training for attorneys and other applicable litigation staff to assure they know their proper role in the expert contracting process.

RECOMMENDATION #2: Implement policies and procedures to ensure that the acquisition and procurement of expert witness contracts is compliant with the FAR, including ensuring that ENRD contracting officials:

- (a) create and implement a written acquisition plan for expert witness contractors;
- (b) maintain a determination and findings for time and materials contracts;
- (c) conduct and document market research techniques used in the acquisition of expert witness contracts;
- (d) maintain evidence that price or cost to the government as well as non-cost factors were evaluated for each expert witness contract;
- (e) properly justify the use of other than full and open competition for expert witness contract acquisitions; and
- (f) provide evidence that all contracts exceeding \$250,000 have been modified to include the whistleblower provision required in FAR Subpart 52.203-17 and that contractors have informed their workers of their whistleblower rights.

RESPONSE: We concur with part of this Recommendation, and propose the following remedial measures.

- (a) JMD plans to develop an expert witness acquisition planning template for DOJ's litigating divisions, which ENRD will begin using when available.
- (b) JMD also plans to develop an expert witness specific determination-and-findings (D&F) template that ENRD will likewise begin using when available.
- (c) ENRD's primary form of market research involves word-of-mouth and consideration of previously-used expert witnesses. The vast majority of expert witness contracts in ENRD involve individuals and companies that have been used previously by the Division. ENRD has had great success retaining high-quality experts at fair rates through word-of-mouth and consideration of previously-used experts. The Division's approach to conducting market research and determining price reasonableness is adequate, considering the nature of the acquisitions and the Division's extensive experience with the expertise it needs to acquire. Moreover, it is consistent with Section V.B.2. of the Department's policy governing expert witnesses (DOJ Instruction 1300.01.02).
- (d) ENRD will include an affirmation in its contract files noting that both cost and non-cost factors were considered when retaining each of its expert witnesses. ENRD plans to utilize an ink stamp or other notation mechanism, which will be affixed to the Form OBD-47 and/or otherwise included in the file, confirming that the CO considered both cost and non-cost factors when awarding the contract.
- (e) JMD plans to supply ENRD and the other litigating divisions with a template to utilize in justifying the use of other than full and open competition (JOFOC) for expert witness contracts. We will work with JMD to implement use of the template.
- (f) ENRD includes a document titled, "Standard Expert Witness Contract Terms and Conditions," with all of its expert witness contracts. We will update this document so as to include the "rights and requirements" whistleblower provision at FAR 52.203-17. We will provide a copy of the updated document to the OIG. Furthermore, the Division will identify all active contracts valued at \$250,000, ensure those contracts have, or are modified to contain, the whistleblower provision, and provide the OIG with evidence of such.

RECOMMENDATION #3: Implement policies and procedures to ensure that billings and payments for expert witness contracts are compliant with the FAR, including ensuring that:

- (a) invoices submitted by expert witness contractors contain sufficient detail as to the time expended and the nature of the actual services provided;
- (b) expert witness contractors and subcontractors only bill for personnel and pay rates that have been approved by ENRD prior to the contract employee performing services;
- (c) all invoices contain approval by a qualified ENRD contracting official;

- (d) invoices and authorizing documentation contain the elements required by the FAR and are paid in accordance with the SOW for expert witness contractors; and
- (e) invoices submitted by expert witness contractors are paid and authorized in accordance with the Prompt Payment Act.

RESPONSE: We concur with this Recommendation. ENRD will edit/update its “Invoice Instructions,” and emphasize the above sub-points (a), (b) and (d) in the revised instructions. We will provide a copy of the updated document to the OIG. Additionally, ENRD will ensure all invoices are annotated to confirm CO approval, and processed in compliance with the Prompt Payment Act. We will validate compliance with these latter requirements – Recommendations 3(c) and 3(e), respectively – through the quality assurance surveillance program described below (in response to Recommendation 5). ENRD will maintain documentation confirming the requirements are being monitored as part of the quality assurance surveillance program.

RECOMMENDATION #4: Remedy \$71,815 in unallowable personnel costs resulting from:

- (a) \$67,425 in unauthorized contract personnel costs; and
- (b) \$4,390 related to the payment of contractor pay rates that were not authorized in the approved SOW.

RESPONSE: We concur with this Recommendation. ENRD will closely evaluate the costs in question and will execute contract modifications to properly authorize any allowable costs incurred due to contractor personnel that were not identified in the SOW or contractor rates that may have changed but were not properly documented or approved in advance.

RECOMMENDATION #5: Implement policies and procedures to ensure adequate contract oversight, monitoring, and administration of its expert witness contracts, including ensuring that ENRD contracting officials:

- (a) develop and implement a quality assurance surveillance plan for its expert witness contracts, as required by the FAR;
- (b) maintain the proper documentation in each expert witness contract file, including resumes, travel authorizations, and confidentiality agreements that are signed prior to when the contractor begins work under the contract;
- (c) document an analysis of pricing and support for increases in contract ceilings; and
- (d) ensure subcontract agreements comply with ENRD’s Standard Expert Witness Terms and Conditions, as well as additional guidance identified in the prime expert witness contract.

RESPONSE: We concur with this Recommendation, and will take the following remedial measures.

- (a) ENRD will include in its “Standard Expert Witness Contract Terms and Conditions” for each contract a reference to FAR 46.401(b), indicating that the Government reserves the right to perform quality assurance. Furthermore, the Division will develop a template for performing quality assurance of expert contracts and annually perform quality assurance inspections on a sample of its active expert contracts. We will maintain records documenting ENRD’s quality assurance surveillance program.
- (b) ENRD will update and expand the scope and use of its “Expert Contract and SOW Checklist,” and ensure it includes validations that contractor resumes, travel authorizations and confidentiality agreements are included in the contract file. The “Checklist” will be an active and living document (not just a document that is processed when the contract is created), and it will remain permanently in the contract file.
- (c) Similar to the OIG’s Recommendation at 2(d) above, and consistent with ENRD’s proposed response to 2(d), we will include an affirmation in our contract files noting that both cost and non-cost factors were considered when approving increases to contract ceilings. Such a notation will appear on contract mods as well as initial contract actions.
- (d) ENRD will edit Section III (“Subcontracting”) of its “Standard Expert Witness Contract Terms and Conditions” to make it clear that subcontract agreements must comply with all the Terms and Conditions outlined in that same document.

RECOMMENDATION #6: Enhance its policies and procedures to ensure that all expert witness contractors maintain a written and running bibliography of all information sources used during the life of the contract to ensure the proper preservation of working materials.

RESPONSE: We concur with this Recommendation. As part of our proposed quality assurance surveillance program, we will annually sample expert witness contracts and validate compliance with the requirement that contractors maintain a written and running bibliography of all information sources used during the life of the contract. We will maintain documentation confirming that this requirement is being monitored as part of the quality assurance surveillance program.

RECOMMENDATION #7: Implement policies and procedures to ensure that any contract changes identified under FAR Subpart 43.301 are authorized using a formal contract modification that is approved by a qualified ENRD contracting official.

RESPONSE: We concur with this Recommendation. Only a warranted Contracting Officer may execute a modification to a contract. As ENRD assesses and ensures contractor performance – and the completion of contract deliverables – through its

proposed quality assurance and surveillance program, the Division will also look at changes to the scope of the contract. We will cross-check any changes to the scope of the contract and validate that any changes are accompanied by proper CO-authorized contract modifications. We will maintain documentation confirming that this requirement is being monitored as part of the quality assurance surveillance program.

RECOMMENDATION #8: Enhance its internal controls to mitigate the risk that the FEW Appropriation could be misused. These controls should be reflective of the requirements outlined in the Justice Management Divisions (JMD's) 2018 Expert Witness Instruction and any additional guidance that has been issued by JMD. Finally, ENRD should ensure that any policies and procedures created to address this Recommendation are appropriately disseminated to ENRD contracting and litigation staff, and that appropriate training on the subject is provided to ENRD staff.

RESPONSE: We concur with this Recommendation. This is an area in which ENRD already applies the utmost vigilance. We ensure that all expert witness contracts include references to expert witness reports and/or testimony, and through our proposed quality assurance surveillance program, we will validate that ongoing expert witness contract work continues to support anticipated expert witness reports and/or testimony.

Furthermore, to fully address this Recommendation, and to thoroughly mitigate the risk that the FEW Appropriation could be misused, ENRD will incorporate information and guidance on this topic into the ENRD attorney/litigation staff training referenced in Recommendation 1.

ENRD is committed to maintaining a responsible and compliant program for procuring and administering expert witness contracts. This Audit is helpful in identifying areas where ENRD, the other litigating components, and JMD can focus to explore changes and/or improvements to the processes for acquiring and managing expert witness contracts. Thank you once again for the hard work performed by your Audit team. Should you or your staff require further information, please do not hesitate to contact me.

Sincerely,



Andrew T. Collier
Executive Officer
Environment and Natural Resources Division

JUSTICE MANAGEMENT DIVISION
RESPONSE TO THE DRAFT REPORT



U.S. Department of Justice

Washington, D.C. 20530

MEMORANDUM FOR JASON R. MALMSTROM
ASSISTANT INSPECTOR GENERAL FOR AUDIT

FROM: Lee J. Lofthus
Assistant Attorney General
For Administration

LEON
LOFTHUS

Digitally signed by LEON
LOFTHUS
Date: 2020.09.10
14:07:28 -04'00'

SUBJECT: Justice Management Division Response to Office of the Inspector General Draft
Report: *Audit of the Environment and Natural Resources Division's Procurement
and Administration of Expert Witness Contracts*

This responds to the Office of the Inspector General (OIG) draft report, *Audit of the Environment and Natural Resources Division's Procurement and Administration of Expert Witness Contracts*. We appreciate OIG's review of the expert witness program of the Environment and Natural Resources Division (ENRD). ENRD's program is governed by Justice Management Division (JMD) procurement guidance that applies to Contracting Officers in the Offices, Boards, and Divisions.

The report directs one of its recommendations to JMD:

Recommendation 9: Ensure that the Expert Witness Instruction is compliant with [Federal Acquisition Regulation] FAR Subpart 42.15 related to contractor performance evaluations.

Response: JMD concurs with the recommendation.

FAR Subpart 42.15 requires acquiring agencies to post vendor past performance information on the Contractor Performance Assessment Reporting System (CPARS), administered by the General Services Administration (GSA).

As you are aware, CPARS reporting applies only to acquisitions over the simplified acquisition threshold, which is currently \$250,000. FAR 42.1502(b). When an agency reports past performance is on CPARS, vendors are permitted to see the agency's assessment and to rebut it. Vendors must be registered in GSA's System for Award Management (SAM) in order to do so. There are thousands of expert witness service acquisitions annually in the litigating divisions. Many do not exceed this amount.

The conduct of litigation on behalf of the United States is reserved to the Department, unless otherwise authorized by law. 28 U.S.C. § 516. Expert witness services may be acquired without

Subject: Justice Management Division Response to Office of the Inspector General
Draft Report: *Audit of the Environment and Natural Resources Division's
Procurement and Administration of Expert Witness Contracts*

regard to competitive requirements.¹ As the government's primary litigator, the Department has substantial experience in acquiring and administering expert witness services.

The Department acquires expert witness services to prepare and present opinion testimony at trial. It is Department attorneys who sponsor expert testimony at trial. CPARS reports on expert witnesses would involve disclosure of the sponsoring attorney's impressions about the quality of the expert's preparation and performance. These impressions are subject to the attorney-client privilege of the United States, and also could be considered as attorney work product. As such, this information is not suitable for disclosure on CPARS, which may breach applicable privileges associated with the information. Moreover, disclosure of past performance information could, in some cases, tend to impeach the expert testimony the Department sponsored, or the quality of the expertise the Department relied upon to prepare for litigation. Such disclosures would not be in the government's litigation interest.

Some disciplines are highly specialized, and the pool of available experts in them is small. Occasionally, parties retain expert witnesses for the purpose of conflicting them out of a particular matter, making them unavailable to the government. Disclosure of the identities of the government's expert witnesses in CPARS, especially when there are few experts in a field, would tend to disclose the government's litigation strategies. Such disclosures also would not be in the government's litigation interest.

For these reasons, the Department's longstanding practice is not to require CPARS reporting of expert witness services. The Department codified this practice most recently in DOJ Instruction 1300.01.02, *Use of the Fees and Expenses of Witnesses Appropriation for Expert Witnesses and Other Services Related to Litigation and Mediation*, § IV(F) (2018).

The lack of CPARS reporting does not mean that institutional knowledge about expert witnesses to inform future acquisitions is unavailable. To the contrary, the litigating divisions are familiar with the experts they have hired and encountered in litigation, and share their experiences. In addition, on request, the JMD Library Staff compiles privileged reports on proposed experts. It makes little sense to endanger the government's legal privileges by posting past performance information outside of the agency when such experiential information is available and shared within the agency.

In 2003, the Department obtained a class deviation to exempt its expert witnesses and litigative consultants from mandatory registration under FAR 4.1102 & 4.1102 in the database now called

¹ See Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1992, P.L. 102-140, § 611(a) (28 U.S.C. § 509 note); 41 U.S.C. §§ 3301(a), 3304(a)(3)(C).

Memorandum for the Assistant Inspector General for Audit

Page 3

Subject: Justice Management Division Response to Office of the Inspector General
Draft Report: *Audit of the Environment and Natural Resources Division's
Procurement and Administration of Expert Witness Contracts*

SAM.² A justification for the deviation was that expert witnesses, many of who are sole proprietors and infrequently retained by government, were refusing to register. As JMD observed at the time, this aspect of commercial contracting was not suited to acquiring expert witness and litigative consulting services, causing “large scale, severe difficulties” with litigation.

Since the Department’s expert witnesses and litigative consultants are not required to register in SAM, even if the Department did report in CPARS, those who do not register would be unable to see the reports. For consistency with the existing class deviation regarding SAM registration, JMD will seek a deviation regarding compliance with FAR Subpart 42.15. JMD intends to seek that deviation in Fiscal Year 2021.

If you have any questions, please contact me on (202) 514-3101, or have your staff call Tom Naccarato, Director, JMD Procurement Services Staff, on (202) 307-1921.

² See DOJ Procurement Guidance Document 03-3, *Class Deviation Exempting Expert Witnesses and Litigative Consultants from Central Contractor Registration* (Sept. 24, 2003) (available at: https://dojnet.doj.gov/jmd/cao/pgd/pgd03_03.pdf).

OFFICE OF THE INSPECTOR GENERAL ANALYSIS AND SUMMARY OF ACTIONS NECESSARY TO CLOSE THE REPORT

The Office of the Inspector General (OIG) provided a draft of this audit report to the Environment and Natural Resources Division (ENRD) and the Justice Management Division (JMD) for review and official comment. ENRD's response is incorporated in Appendix 4, and JMD's response is incorporated in Appendix 5 of this final report. In response to our draft report, ENRD concurred with six of our recommendations and concurred in part with two of our recommendations. JMD concurred with its one recommendation. As a result, the status of the audit report is resolved. The following provides the OIG analysis of the response and summary of actions necessary to close the report.

Recommendations for ENRD:

- 1. Implement policies and procedures to ensure that contracting duties are: (1) retained by ENRD contracting officers; or (2) appropriately delegated to other qualified ENRD officials that have received a written delegation letter and training commensurate of the duties being delegated.**

Resolved. ENRD concurred in part with this recommendation. ENRD stated that it believes that the DOJ's own policy authorizes litigation staff to conduct certain acquisition activities. ENRD also stated that it felt that providing contracting officer representative (COR) training to litigation staff was not feasible. However, to accommodate this recommendation, ENRD proposed specific expert contracting training for attorneys and other applicable litigation staff to assure they know their proper role in the expert contracting process.

While we acknowledge that JMD's Expert Witness Instruction authorizes litigation staff to conduct some contracting activities, we determined that this authorization is not compliant with the FAR. If ENRD contracting officers delegate duties to litigation staff, those staff need to have a formal delegation letter outlining the duties they are responsible for, and must receive adequate training commensurate of those duties. This requirement is consistent with FAR Subpart 1.602-2, as outlined in our report.

Therefore, this recommendation can be closed when we receive evidence that ENRD has implemented policies and procedures to ensure that contracting duties are: (1) retained by ENRD contracting officers; or (2) appropriately delegated to other qualified ENRD officials that have received a written delegation letter and training commensurate of the duties being delegated.

2. **Implement policies and procedures to ensure that the acquisition and procurement of expert witness contracts is compliant with the FAR, including ensuring that ENRD contracting officials:**
- (a) create and implement a written acquisition plan for expert witness contractors;**
 - (b) maintain a determination and findings for time and materials contracts;**
 - (c) conduct and document market research techniques used in the acquisition of expert witness contracts;**
 - (d) maintain evidence that price or cost to the government as well as non-cost factors were evaluated for each expert witness contract;**
 - (e) properly justify the use of other than full and open competition for expert witness contract acquisitions; and**
 - (f) provide evidence that all contracts exceeding \$250,000 have been modified to include the whistleblower provision required in FAR Subpart 52.203-17 and that contractors have informed its workers of their whistleblower rights.**

Resolved. ENRD concurred in part with this recommendation. ENRD stated that it will work with JMD to implement acquisition planning templates to address the requirements identified under each subpart of this recommendation. ENRD stated that it believes its market research has been successful in acquiring high quality experts at a fair and reasonable price. However, ENRD stated that it will include affirmation in contract files noting that both cost and non-cost factors were considered when retaining its expert witnesses. Finally, ENRD stated that it will update its Standard Expert Witness Contract Terms and Conditions to include whistleblower provisions required by FAR Subpart 52.203-17.

While we acknowledge that ENRD litigation staff conducted some market research, determination of price reasonableness and the evaluation of past contractor performance should be documented in the contract file and be the primary responsibility of a contracting officer, unless appropriately delegated to other employees that have received adequate training on contracting duties. This requirement is consistent with FAR Subpart 15.4, as outlined in our report.

This recommendation can be closed when we receive evidence that ENRD has implemented policies and procedures to ensure that the acquisition and procurement of expert witness contracts is compliant with the FAR.

3. **Implement policies and procedures to ensure that billings and payments for expert witness contracts are compliant with the FAR, including ensuring that:**
- (a) **invoices submitted by expert witness contractors contain sufficient detail as to the time expended and the nature of the actual services provided;**
 - (b) **expert witness contractors and subcontractors only bill for personnel and pay rates that have been approved by ENRD prior to the contract employee performing services;**
 - (c) **all invoices contain approval by a qualified ENRD contracting official;**
 - (d) **invoices and authorizing documentation contain the elements required by the FAR and are paid in accordance with the SOW for expert witness contractors; and**
 - (e) **invoices submitted by expert witness contractors are paid and authorized in accordance with the Prompt Payment Act.**

Resolved. ENRD concurred with this recommendation. ENRD stated that it will update its invoice instructions to emphasize the requirements identified under each subpart of this recommendation. ENRD stated that it will ensure all invoices are annotated to confirm CO approval, and processed in compliance with the Prompt Payment Act. ENRD stated that it will validate compliance via a quality assurance surveillance program, as discussed under Recommendation 5. ENRD stated that it will maintain documentation confirming the requirements are being monitored as part of the quality assurance surveillance program.

This recommendation can be closed when we receive evidence that ENRD has implemented policies and procedures to ensure that billings and payments for expert witness contracts are compliant with the FAR.

4. **Remedy \$71,815 in unallowable personnel costs resulting from:**
- (a) **\$67,425 in unauthorized contract personnel costs; and**
 - (b) **\$4,390 related to the payment of contractor pay rates that were not authorized in the approved SOW.**

Resolved. ENRD concurred with this recommendation. ENRD stated that it will closely evaluate costs in question and will execute contract modifications to properly authorize allowable costs incurred due to contractor personnel that were not identified in the SOW or contractor rates that may have changed but were not properly documented or approved in advance.

This recommendation can be closed when we receive evidence that ENRD has remedied \$71,815 in unallowable personnel costs.

5. **Implement policies and procedures to ensure adequate contract oversight, monitoring, and administration of its expert witness contracts, including ensuring that ENRD contracting officials:**
- (a) **develop and implement a quality assurance surveillance plan for its expert witness contracts, as required by the FAR;**
 - (b) **maintain the proper documentation in each expert witness contract file, including resumes, travel authorizations, and confidentiality agreements that are signed prior to when the contractor begins work under the contract;**
 - (c) **document an analysis of pricing and support for increases in contract ceilings; and**
 - (d) **ensure subcontract agreements comply with ENRD's Standard Expert Witness Terms and Conditions, as well as additional guidance identified in the prime expert witness contract.**

Resolved. ENRD concurred with this recommendation. ENRD stated that it will develop a template for performing quality assurance of expert contracts and annual perform quality assurance inspections on a sample of its active expert contracts. ENRD stated that it will ensure contractor resumes, travel authorizations, and confidentiality agreements are included in each contract file. ENRD stated that it will include affirmation in each contract file noting both cost and non-cost factors were considered when approving increases to contract ceilings. Finally, ENRD will revise its Standard Expert Witness Contract Terms and Conditions to make clear that subcontract agreements must comply with all the Terms and Conditions outlined in that same document.

This recommendation can be closed when we receive evidence that ENRD has implemented policies and procedures to ensure adequate contract oversight, monitoring, and administration of its expert witness contracts.

6. **Enhance its policies and procedures to ensure that all expert witness contractors maintain a written and running bibliography of all information sources used during the life of the contract to ensure the proper preservation of working materials.**

Resolved. ENRD concurred with this recommendation. ENRD concurred with this recommendation. ENRD stated that it will annually sample expert witness contracts and validate compliance with all the requirements that contractors maintain a written and running bibliography of all information sources used during the life of the contract.

This recommendation can be closed when we receive evidence that ENRD has enhanced its policies and procedures to ensure that all expert witness contractors maintain a written and running bibliography of all information sources used during the life of the contract to ensure the proper preservation of working materials.

- 7. Implement policies and procedures to ensure that any contract changes identified under FAR Subpart 43.301 are authorized using a formal contract modification that is approved by a qualified ENRD contracting official.**

Resolved. ENRD concurred with this recommendation. ENRD stated that as it assesses and ensures contractor performance through its proposed quality assurance and surveillance program, it will also look at changes to the scope of the contract and it will ensure proper CO authorized modifications.

This recommendation can be closed when we receive evidence that ENRD has implemented policies and procedures to ensure that any contract changes identified under FAR Subpart 43.301 are authorized using formal a formal contract modification that is approved by a qualified ENRD contracting official.

- 8. Enhance its internal controls to mitigate the risk that the FEW Appropriation could be misused. These controls should be reflective of the requirements outlined in JMD's 2018 Expert Witness Instruction and any additional guidance that has been issued by JMD. Finally, ENRD should ensure that any policies and procedures created to address this recommendation are appropriately disseminated to ENRD contracting and litigation staff, and that appropriate training on the subject is provided to ENRD staff.**

Resolved. ENRD concurred with this recommendation. ENRD stated that through its proposed quality assurance surveillance program, it will validate that ongoing expert witness contract work continues to support anticipated expert witness reports and/or testimony. ENRD stated that it will incorporate information and guidance on this topic into the ENRD attorney and litigation staff training referenced under Recommendation 1.

This recommendation can be closed when we receive evidence that ENRD has enhanced its internal controls to mitigate the risk that the FEW Appropriation could be misused. These controls should be reflective of the requirements outlined in JMD's 2018 Expert Witness Instruction and any additional guidance that has been issued by JMD. Finally, ENRD should ensure that any policies and procedures created to address this recommendation are appropriately disseminated to ENRD contracting and litigation staff, and that appropriate training on the subject is provided to ENRD staff.

Recommendation to JMD:

- 9. Ensure that the Expert Witness Instruction is compliant with FAR Subpart 42.15 related to contractor performance evaluations.**

Resolved. JMD concurred with this recommendation. In its response, JMD stated that because disclosing expert witness information in CPARS may negatively affect the Department's litigation strategies, it is the Department's

longstanding practice not to require CPARS reporting for expert witness practices. As a result, JMD stated that it would seek a deviation regarding compliance with FAR Subpart 42.15 in FY 2021.

This recommendation can be closed when we receive evidence that JMD has ensured that its Expert Witness Instruction is compliant with FAR Subpart 42.15 related to contractor performance evaluations.