



Audit of Certain Tax Division Contracts Awarded for Expert Witness Services



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EXECUTIVE SUMMARY

Audit of Certain Tax Division Contracts Awarded for Expert Witness Services

Objectives

The OIG examined the Department of Justice (DOJ) Tax Division's contracting for expert witness services. The objectives of this audit were to: (1) determine whether the Tax Division adhered to federal regulations during the contract award and administration processes, (2) assess the adequacy of the Tax Division's contract oversight, and (3) determine if contractors properly invoiced DOJ and complied with the contracts' terms and conditions.

Results in Brief

Our review of three expert witness contracts, totaling \$3.7 million, did not identify any performance-related non-compliance with the contracts' terms and conditions, and the Tax Division indicated it received the contracted services. Nonetheless, we identified numerous areas of non-compliance with the Federal Acquisition Regulation (FAR) and internal guidance. For example, while trial attorneys were expected to handle significant contracting activities, they were not formally designated these responsibilities, were not trained as required by the FAR, and did not display the requisite knowledge of FAR requirements to undertake certain contract procurement and oversight tasks. This non-compliance increases the risk that the government's financial interests may not be appropriately safeguarded during the procurement of expert witness services. We also identified concerns that the controls over the appropriation used to fund these services were weak or ineffective, potentially increasing the risk that this source of funding could be misused.

Recommendations

Our report contains 15 recommendations to assist the Tax Division in improving its award, administration, and oversight of expert witness services contracts. We requested a response to our draft report from the Tax Division, which can be found in Appendix 3. The Tax Division concurred with all 15 recommendations.

Audit Results

The Tax Division uses expert witnesses to assist in executing its mission of enforcing the nation's tax laws through criminal and civil litigation. These contracts are funded through the DOJ's Fees and Expenses of Witnesses (FEW) Appropriation, which is managed by DOJ's Justice Management Division (JMD). To address the audit's objectives, we reviewed three expert witness services contracts totaling \$3.7 million. Each of these three contracts exceeded the Tax Division contracting officer's warrant level. Therefore, a contracting officer from JMD's Procurement Services Staff (PSS) signed the contracts.

Contracting Officer Responsibilities

According to Tax Division guidance and practice, trial attorneys initiate the process to contract for expert witness services by identifying an expert and developing a statement of work, a justification for other than full and open competition, and a price reasonableness determination of the expert witness's services. In addition, Tax Division guidance states that the trial attorney is responsible for monitoring the expert witness services contract—ensuring the contract period of performance does not expire and the contracted dollar amount is not exceeded. As part of the oversight efforts, the trial attorneys are also expected to review the contractor invoices, confirm that the services reflected on the invoices were provided and acceptable, and approve the invoices for payment. JMD-issued guidance related to DOJ's expert witness contracting efforts includes similar guidance and expectations.

While the trial attorneys are integrally involved in the contracting process for expert witnesses, Tax Division guidance clearly states that the contracting officer is responsible for ensuring compliance with all requirements of federal contracting law, including federal statutes and regulations, as well as internal policies and

procedures. Additionally, the FAR states that contracting officers are responsible for ensuring all necessary actions for effective contracting are completed and comply with the terms and conditions of the contract. The FAR allows for other personnel to execute certain contracting activities, but contracting officers must designate and authorize a contracting officer's representative (COR) in writing.

We determined that the Tax Division contracting officer and JMD PSS contracting officer generally did not participate in critical contracting duties, such as acquisition planning, market research, and price reasonableness analysis. Neither of the contracting officers formally designated the trial attorneys as CORs by issuing a contracting officer designation letter so that the trial attorneys could officially conduct contract oversight duties, including invoice review and approval. Further, neither contracting officer ensured that all contracting responsibilities were executed in accordance with the FAR, and no official was responsible for ensuring the trial attorneys received training commensurate with their expected contract oversight duties. As a result, we identified several areas where the Tax Division's expert witness services contracts we audited did not comply with the FAR or internal guidance, as well as questioned costs, as listed in the following table.

Areas of Non-compliance with the FAR and Internal Guidance for the Expert Witness Services Contracts Audited
Non-documented acquisition plans
Inadequate and non-documented market research
Inadequate price reasonableness determinations
Exclusion of mandatory whistleblower protections
Payment of unsupported & unallowable expenditures
Non-documented contract oversight
Absence of past performance evaluations
Failure to compete a subcontractor award

Failure to comply with the FAR increases the risk that the government is not receiving expert witness services at fair and reasonable prices or in accordance with the terms and conditions of the contracts. Moreover, we believe that the Tax Division created an environment that

increased the risk of failing to safeguard the financial interests of the United States during the procurement of these expert witness services. We identified \$24,296 in unsupported and unallowable expenses resulting from contractors billing for costs: (1) without sufficient support, (2) in excess of contracted rates, (3) associated with a position not authorized in the contract, or (4) not in accordance with the Federal Travel Regulation and DOJ travel policy.

Use of FEW Appropriation

The FEW Appropriation provides dedicated funding for expenses related to the provision of testimony in federal court. Previous OIG audit reports identified the potential for FEW Appropriation funds to be misused, and JMD has issued guidance to assist DOJ components in the administration of expert witness funding. According to JMD guidance, the FEW Appropriation can be used to procure expert witness services but use of this funding is specifically prohibited for litigative consulting.

Between fiscal years 2015 and 2020, the Tax Division received approximately \$35 million of FEW Appropriation funding annually and expended, on average, \$13 million per year. Given the magnitude of FEW Appropriation funding available to the Tax Division, we believe that it is important that the Tax Division have adequate controls to ensure proper use of the funding, including a review of the invoices to determine whether the services provided are expert witness services or litigative consulting. However, the trial attorneys, who were unofficially designated responsibility for reviewing the invoices, told us that they had limited knowledge that the contracts were funded by the FEW Appropriation. Additionally, we found that the trial attorneys were not provided with JMD's guidance on what is considered expert witness services (an expert by knowledge, skill, experience, training, or education and may testify) versus litigative consulting (an individual retained to assist in a matter or case and is not expected to testify) and were not given any related training on making such a determination. Moreover, invoices we reviewed often provided only vague descriptions of services rendered and did not reference a contract deliverable. Therefore, we believe there is a potentially increased risk that FEW Appropriations could be misused.

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Introduction

As one of the litigating components of the Department of Justice (Department or DOJ), the Tax Division's mission is to enforce the nation's tax laws fully, fairly, and consistently through both criminal and civil litigation. According to the Tax Division, it strives, through its litigation efforts, to promote voluntary compliance with the tax laws, maintain public confidence in the integrity of the tax system, and promote the sound development of the law. To assist in carrying out its mission, the Tax Division employs more than 350 attorneys while also using the services of expert witnesses. The DOJ Office of the Inspector General (OIG) conducted an audit to examine certain Tax Division contracts awarded for expert witness services.

The Tax Division's Contracting for Expert Witness Services

According to Tax Division documentation, from October 1, 2014, through October 19, 2020 (the time of our request), the Tax Division initiated 409 contract actions for expert witness services totaling approximately \$97 million.¹ To fund these contracts, the Tax Division used the Department's Fees and Expenses of Witnesses (FEW) Appropriation, which is a pool of funds the Department receives to pay for the fees and related expenses incurred by individuals who provide factual or opinion testimony in federal judicial proceedings. Between fiscal years (FY) 2015 and FY 2020, the DOJ received approximately \$1.5 billion in FEW Appropriation funding, which remains available until expended.

The Department's Justice Management Division (JMD) has issued to the Department's litigating components guidance on the use of the FEW Appropriation, including:

- *Guiding Principles for Obtaining Witness Services Under the Fees and Expenses of Witnesses Appropriation*, revised April 2005;
- 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), effective September 28, 2018; and
- Procurement Information Bulletin 2019-03, *Contracting for Expert Witnesses and Litigative Consultants*, effective May 31, 2019.

JMD's 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, 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.

¹ Of the 409 contract actions totaling approximately \$97 million, the Tax Division indicated 219 contract actions totaling \$65 million were associated with open cases and potentially active litigation.

The above-mentioned guidance documents also discuss the acquisition and payment processes for expert witness services. For instance, the guidance states that documentation should be included in the contract file explaining the basis for selecting a particular expert witness and whether other experts were considered. Moreover, according to JMD's guidance, DOJ litigating components should negotiate rates with the expert witness in advance of the contract, and trial attorneys are to review contractor invoices and certify that the services were performed and acceptable.

In addition to the above-mentioned JMD guidance, the Tax Division has its own set of instructions to guide its personnel through the expert witness contract process (Tax Division Guidance).² Tax Division trial attorneys initiate the contracting process for expert witnesses when they determine the services of an expert witness are needed and, in turn, identify a specific expert witness to use. According to the Tax Division Guidance, the trial attorneys are required to submit to the Tax Division contracting officer several documents to substantiate the request to contract for expert witness services, including a(n):

- Form OBD-47 (*Request, Authorization, and Contract for Services of Expert Witness, Litigative Consultant, or [Alternate Dispute Resolution] ADR Neutral*) that identifies the expert witness, the court case, the requirement, and the negotiated contractor rates.³
- Statement of Work that defines the expert witness's responsibilities.
- Explanation and Justification for Retaining Expert Witness that explains the government's need for the expert witness.
- Justification for other than Full and Open Competition for Expert Witness that justifies the restriction of competition to a single source and establishes the price reasonableness of the expert witness's services.
- Confidentiality and Security Certification that explains the expert witness's obligations to, among other items, safeguard and not improperly disclose certain information and to comply with DOJ computer data security requirements.

The Tax Division Guidance states that the contracting officer is responsible for ensuring compliance with all requirements of federal contracting law. This guidance also requires that the contracting officer review the request package to ensure all required documentation has been completed and that there are sufficient funds remaining in the Tax Division's allotment for expert witnesses. The Tax Division contracting officer has a warrant level of \$250,000. As a result, if the expert witness services contract amount is \$250,000 or less, the Tax Division contracting officer has the authority to approve and sign the contract. In instances where the contract amount exceeds \$250,000, a contracting officer on JMD's Procurement Services Staff

² *Tax Division Guidance on Expert Witness Contracts*, revised June 2011.

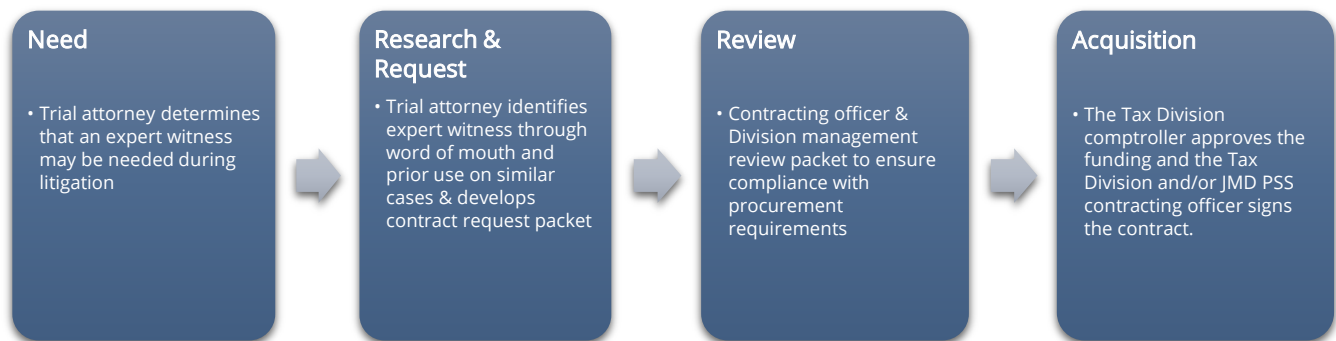
³ This information is contained in Part I of the form and is completed by the trial attorney and the chief of the trial section in which the case originated. Form OBD-47 includes other sections that are subsequently completed by other personnel. For example, Part II contains the funding approval, which is completed by the Tax Division Comptroller or Deputy Comptroller.

(PSS) is required to review and approve the contract. JMD PSS delegates procurement authority to individuals within the Department's Offices, Boards and Divisions (OBDs), provides acquisition support to the OBDs, and establishes Department policy on and oversees the use of the FEW Appropriation.

After the contract is awarded, the trial attorneys are expected to monitor the contract and the expert witness's services. According to the Tax Division Guidance, the trial attorney is responsible for monitoring the performance period to ensure it does not expire, as well as the dollars expended to ensure the award amount is not exceeded. In addition, Tax Division and JMD guidance state the trial attorneys are responsible for reviewing and approving each invoice. Figure 1 depicts the Tax Division's process for awarding expert witness services contracts.

Figure 1

Tax Division Expert Witness Contract Acquisition Process



Source: OIG representation of information provided by the Tax Division

OIG Audit Approach

From the list of expert witness contracts provided by the Tax Division, we judgmentally selected a sample of three labor hours contracts to audit, totaling \$3.7 million, as shown in Table 1.⁴ Because each of these three contracts exceeded \$250,000, a JMD PSS contracting officer signed the contracts.

⁴ The three contracts we selected to audit involved cases that were closed because the Tax Division expressed concern that auditing contracts for ongoing cases could impact the U.S. government's litigation efforts. Given the nature of our audit, we were able to accomplish our objectives by focusing on contracts associated with closed cases.

Table 1

Tax Division Expert Witness Contracts Audited

Contract	Contract Type	Award Date	Period of Performance	Total Awarded	Total Expended ^a
Contract A	Labor Hours	09/25/2015	04/16/2015 - 12/31/2020	\$2,679,051	\$2,613,227
Contract B	Labor Hours	08/15/2017	07/25/2017 - 09/30/2018	584,800	539,518
Contract C	Labor Hours	08/30/2017	07/28/2017 - 12/31/2018	442,460	432,546
Total				\$3,706,311	\$3,585,291

^a The Tax Division provided information from the Financial Management Information System and Unified Financial Management System that we used for the amount expended per contract.

Source: Tax Division contract files and financial information

Our audit objectives were to: (1) determine whether the Tax Division adhered to federal regulations during the contract award and administration processes, (2) assess the adequacy of the Tax Division's contract oversight, and (3) determine if the contractors properly invoiced the government and complied with the contracts' terms and conditions.

To accomplish our objectives, we reviewed the Tax Division's June 2011 guidance for expert witness contracts; Department-level guidance related to contracting for expert witness services, including JMD's Expert Witness Instruction and Procurement Information Bulletin 2019-13; and the FAR. We also reviewed the three expert witness services contract files, as well as the deliverables and invoices from each contract. In addition, we interviewed:

- key Tax Division personnel involved in the contracts, including the contacting officer, trial attorneys, and the Comptroller;
- other DOJ personnel, including the JMD PSS Director; and
- contractors who assisted in providing the expert witness services.

Audit Results

Our audit did not identify any performance-related non-compliance with the contracts' terms and conditions, and the Tax Division trial attorneys told us they were satisfied with the work that the expert witnesses provided. Nonetheless, we identified numerous instances where the Tax Division was non-compliant with the FAR during the contract award, administration, and oversight processes, including acquisition planning, market research, invoice review, and contract modification. Specifically, the Tax Division trial attorneys were expected to handle significant contracting activities, yet the trial attorneys were not formally designated these responsibilities, did not receive training as required by the FAR, and did not display the requisite knowledge of FAR requirements related to contract administration and oversight. These systemic deficiencies in how the Tax Division conducts its contracting for expert witness services creates an environment that increases the risk of failing to safeguard the government's financial interests during the procurement of expert witness services. In the three contracts that we reviewed as part of this audit, we identified \$24,296 in unsupported and unallowable expenses resulting from contractors billing for costs: (1) without sufficient support, (2) in excess of contracted rates, (3) associated with a position not authorized in the contract, or (4) not in accordance with the Federal Travel Regulation.

We also identified concerns related to the controls over the use of the FEW Appropriation. Specifically, although the trial attorneys performed significant contracting activities on FEW-funded expert witness contracts, the Tax Division did not ensure the trial attorneys had the relevant guidance or training on the appropriate uses of the FEW Appropriation. In particular, the trial attorneys were responsible for reviewing and approving the invoices, which we believe should include analysis of whether the invoice descriptions include enough detail to determine whether the provided services fall within the appropriate uses of the FEW Appropriation. Without the proper guidance or training, there is an increased risk that the invoices included services not covered by the FEW Appropriation yet were paid for with FEW Appropriation funds.

Contracting Officer Responsibilities

Within the Tax Division, the trial attorneys play a significant role in the contract award, administration, and oversight processes. As previously discussed, the trial attorneys initiate the process by identifying the need for services and requesting the use of a specific expert witness. According to the Tax Division contracting officer, as part of this process the trial attorneys are expected to conduct acquisition planning and market research. Similarly, the Tax Division contracting officer told us that the trial attorneys are responsible for contractor oversight, including the review and approval of expert witness invoices. These statements are corroborated by current JMD and Tax Division guidance that authorize litigation staff (e.g., trial attorneys) to conduct certain contracting activities, including the selection of the expert and the review of invoices to determine whether the work performed was acceptable. For example, the Tax Division Guidance states that the trial attorney is responsible for monitoring the expert witness services contract's performance period and the dollars expended. Similarly, JMD guidance states that the trial attorney is responsible for reviewing each invoice.

Although Tax Division trial attorneys are integrally involved in the contracting process for expert witnesses, FAR Subpart 1.602-2 makes clear that contracting officers are responsible for ensuring all necessary actions for effective contracting (e.g., acquisition planning, market research, invoice review) are completed, as well as ensuring compliance with the terms and conditions of the contract. The FAR allows for other personnel to execute certain contracting activities. To do so, contracting officers are required to designate and

authorize in writing the appointment of a contracting officer's representative (COR); otherwise, the contracting officers retain and execute their contracting duties.

We determined that the Tax Division contracting officer and JMD PSS contracting officer did not officially delegate critical contracting duties to the trial attorneys.⁵ Neither the Tax Division contracting officer nor the JMD PSS contracting officer formally designated the trial attorneys as CORs by issuing a contracting officer designation letter. Moreover, the Tax Division contracting officer and JMD PSS contracting officer did not ensure all contracting responsibilities were executed in accordance with the FAR, and no official was responsible for ensuring that the trial attorneys received training commensurate with the duties being designated. As a result, we identified several areas where the Tax Division's expert witness services contracts we reviewed did not comply with the FAR. For example, the contract files for the three contracts we audited did not contain written acquisition plans, documented market research, or price reasonableness determinations. Additionally, the contracts did not include the required whistleblower protection clause, quality assurance surveillance plans and contractor past performance evaluations were not completed, and a subcontractor award was not competed. Further, the Tax Division paid invoices that included unsupported and unallowable costs. These instances of FAR non-compliance are discussed in subsequent sections of this report.

The Tax Division contracting officer acknowledged the trial attorneys handle a wide range of contracting functions on expert witness contracts but stated that designating the trial attorneys as CORs was not feasible because the trial attorneys did not have the time necessary to complete the required COR training. The JMD PSS contracting officer provided a similar perspective—stating that the trial attorneys are too busy, and it would be cumbersome to train them as CORs. While we acknowledge the operational priorities of trial attorneys, the Tax Division has a responsibility to comply with the FAR. This is made clear in the Expert Witness Instruction, which states that “[a]ll uses of the FEW Appropriation that result in a contract action are governed by the FAR.”

Failure to comply with the FAR increases the risk that the government is not receiving expert witness services at a fair and reasonable price or in accordance with the terms and conditions of the contracts. Given the significant contracting responsibilities the Tax Division expects its trial attorneys to perform, we believe it is important that trial attorneys be given formal direction and training to help ensure compliance with the FAR and that the financial interests of the federal government are properly safeguarded. Neither current JMD policy nor the Tax Division Guidance fully address the FAR requirement for the contracting officer to designate litigation staff as a COR and properly delegate these responsibilities to the litigation staff. Therefore, we recommend that the Tax Division, in coordination with JMD, implement policies and procedures to ensure that contracting duties are: (1) retained by Tax Division contracting officers; or (2) appropriately designated to other qualified Tax Division personnel who have received a written designation letter and training commensurate with the duties being designated. In addition, we believe that the Tax Division should take corrective action within the specific areas of FAR non-compliance we identified, as detailed in the following sections.

⁵ As previously mentioned, the three expert witness services contracts we audited exceeded the Tax Division contracting officer's warrant level. Therefore, a JMD PSS contracting officer signed the contracts.

We also believe that a review of the Tax Division Guidance is warranted as part of the Tax Division's corrective action efforts related to FAR non-compliance. Although this document is intended to guide trial attorneys through the expert witness contracting process, including their responsibilities for managing the contract and approving invoices, a senior Tax Division official told us that the guidance is outdated. Moreover, trial attorneys involved on the contracts we audited stated that they were aware of the Tax Division Guidance but did not rely on it during their respective expert witness contracts. Therefore, we recommend that the Tax Division determine whether the Tax Division Guidance is needed, and if it is, update the guidance and ensure trial attorneys have and use the updated guidance as intended.

Acquisition Planning

According to FAR Subpart 6.302-3, acquiring the services of an expert for any current or anticipated litigation is exempt from the full and open competition requirement. However, FAR Subpart 7.102 states that when competition is not required, agencies shall still perform acquisition planning and conduct market research. The FAR also states that acquisition planning should ensure that the government meets its needs in the most effective, economical, and timely manner, and 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. The Tax Division and JMD PSS contracting officers stated that the trial attorneys conducted acquisition planning for the three contracts we audited. However, none of the three contract files we reviewed contained a written acquisition plan, and all three trial attorneys told us that they did not prepare written acquisition plans for their respective contract. Therefore, we recommend that the Tax Division ensure it develops written acquisition plans, in accordance with FAR requirements, for its expert witness services contracts.

Market Research

FAR Subpart 10.001 states that agencies shall conduct market research before soliciting offers for acquisitions with an estimated value greater than the simplified acquisition threshold (\$250,000), which involves documenting information specific to the service being acquired and should include requirements of laws or regulations unique to the service being acquired. As with acquisition planning, the Tax Division and JMD PSS contracting officers stated that the trial attorneys conducted the market research, yet none of the three contract files we reviewed included evidence of market research. For the contracts we audited, the trial attorneys described the limited amount of market research that was conducted, which simply involved discussing with other Tax Division trial attorneys their experiences with previous expert witnesses. However, the trial attorneys stated that none of this research was documented. As a result, we recommend that the Tax Division ensure expert witness services contracts are supported with adequate and documented market research in accordance with FAR requirements.

Price Reasonableness

FAR Subpart 15.402 states that contracting officers are responsible for evaluating the reasonableness of offered prices and shall obtain pricing data to establish reasonableness. We determined that the Tax Division contracting officer did not fully assess the price reasonableness for any of the three contracts we audited. The contract files for two of the contracts we audited (Contract A and Contract C) included statements from the trial attorneys that the rate of the respective expert witness was reasonable. However, in these two instances, the file contained no other documentation of the price reasonableness determination nor any evidence that the contracting officer was involved.

For the third contract we audited (Contract B), the contract file included both a price reasonableness statement signed by both the trial attorney and the contracting officer, as well as a separate price reasonableness document. However, this documentation did not fully justify the rates on the awarded contract. The awarded contract had four different labor category rates associated with specific positions—with the lowest rate being \$350 per hour for research analysts and the highest rate being \$850 per hour for the expert witness. The price reasonableness document listed three other Tax Division contracts for expert witness services that were awarded in 2016 and 2017 that the Tax Division contracting officer deemed comparable to the expert witness services needed. The hourly labor rates documented in the price reasonableness determination for these other three contracts included the following ranges: (1) \$180 to \$560 per hour, (2) \$250 to \$850 per hour, and (3) \$500 to \$750 per hour. Although the hourly labor rates in the contract we audited (\$350 to \$850 per hour) fell within the hourly labor rate ranges in the price reasonableness document, the price reasonableness analysis did not include the associated labor categories in the past contracts that would be used to compare with similar labor categories on the awarded contracts' price proposals. Therefore, we believe the price reasonableness determination document was not adequate to fully justify the rates on the awarded contract.

Additionally, FAR Subpart 15.403-4 requires the contracting officer to obtain certified cost or pricing data prior to awarding a contract for prime contracts awarded prior to July 1, 2018, that were greater than \$750,000.⁶ The contracting officer should have obtained certified cost or pricing data for Contract A as it exceeded the \$750,000 threshold, but none was located in the contract file. The other two contracts (Contract B and Contract C) had an initial contract award of less than \$750,000; therefore, certified cost or pricing data was not required. We recommend that the Tax Division ensures that its contracting officers conduct adequate price reasonableness determinations and obtain certified cost or pricing data, where necessary, to ensure the Tax Division is in compliance with the FAR and is receiving a fair and reasonable price for expert witness services.

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. 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. Additionally, the DOJ issued guidance in 2016 that requires DOJ contracting officers to: (1) provide contractors with a "Whistleblower Information for DOJ Contractors, Subcontractors, and Grantees" document; (2) direct contractors and subcontractors to distribute this document to their employees; and (3) direct the contractor to provide an affirmative response notifying the DOJ of the successful distribution of this document to its employees, which should be added to the contract file.⁷ The 2016 guidance attached this requirement to both new contracts and those already in effect at that time. We found that none of the contracts we

⁶ According to the FAR, the term "prime contract" means a contract or contractual action entered into by the federal government to obtain supplies, materials, equipment, or services of any kind. The threshold for this requirement increased to \$2 million for contracts awarded on or after July 1, 2018.

⁷ The OIG recently highlighted systemic non-compliance with laws, regulations, and established internal policies designed to ensure notice to contract workers about their whistleblower rights and protections in the DOJ OIG, [Management Advisory: Notification of Concerns Regarding the Department of Justice's Compliance with Laws, Regulations, and Policies Regarding Whistleblower Rights and Protections for Contract Workers Supporting Department of Justice Programs](https://oig.justice.gov/reports/management-advisory-notification-concerns-regarding-department-justices-compliance-laws) Audit Report 21-038 (February 2021), <https://oig.justice.gov/reports/management-advisory-notification-concerns-regarding-department-justices-compliance-laws>.

reviewed included the whistleblower clause even though each of the contracts exceeded \$250,000. Because the contracts did not include the proper notice on whistleblower protections, the contractor workers may not have been aware of the rights and protections available to them if they became whistleblowers. As a result, we recommend that the Tax Division incorporate the mandatory whistleblower protections in all ongoing expert witness contracts greater than \$250,000 as prescribed in FAR Subpart 3.908-9 and ensure the necessary whistleblower protections are incorporated on future contracts.

Invoices

According to the Tax Division Guidance, the Tax Division's Office of Management Administration (OMA) reviews contractor invoices for accuracy. Specifically, this guidance states that OMA ensures that invoices are dated and contain, among other items, the date or time period that indicates when the expert witness services were provided, as well as a description and price for the services rendered. Further, this review is to ensure compliance with the Federal Travel Regulation and that the billed rates match those in the contract. Following OMA's review, the invoices are sent to the relevant trial attorney to confirm the services reflected on the invoices were provided and acceptable and then approve the invoices for payment. As previously mentioned, the trial attorneys were not formally designated as CORs with responsibility for invoice review; as a result, in accordance with the FAR, the Tax Division contracting officer retained responsibility for the approval of invoices.

We reviewed all invoices submitted for two of the expert witness contracts we audited (Contract B and Contract C). For the other contract we audited (Contract A), we reviewed a judgmental sample of invoices—testing 30 of the 57 invoices submitted totaling \$1,049,712, or 40 percent, of the \$2,613,227 expended on the contract. For the invoices we reviewed, we noted that the relevant trial attorney approved each invoice for payment. According to FAR Subpart 32.205-33, evidence necessary to determine that work performed is proper and does not violate law or regulation shall include invoices or billings submitted by consultants, including sufficient detail as to the time expended and nature of the actual services provided. In general, we determined that the invoices contained vague descriptions of the work performed. Therefore, we were unable to tie the actual work performed as noted on the invoices to the agreed upon deliverables in the statements of work. For example, on one invoice, an expert witness described 10 hours of work as “review materials, think about the issues, talk with staff, and prepare for call.” While we are not questioning any amounts associated with the vague invoice descriptions, we believe it is important for the invoices to contain sufficient details to tie the services to the contract deliverables. Therefore, we recommend that the Tax Division require future invoices for contracted expert witness services to contain adequate descriptions that clearly tie to contract deliverables.

We also identified \$24,296 in questioned costs—\$9,350 in unsupported costs; \$13,016 in unallowable labor costs; and \$1,930 in unallowable travel costs, as reflected in Table 2.

Table 2

Summary of Questioned Costs Associated with the OIG's Analysis of
Tax Division Invoices for the Three Expert Witness Services Contracts Audited
June 2017 – August 2020

Contract	Total Invoice Amount	Unsupported Costs	Unallowable Labor Costs	Unallowable Travel Costs
Contract A	\$1,049,712	\$ 0	\$ 0	\$ 852
Contract B	539,405	9,350	5,863	552
Contract C ^a	432,652	0	7,153	526
Total	\$2,021,769	\$9,350	\$13,016	\$1,930

^a The amount paid on Contract C was lower than the total amount invoiced by \$106.

Source: OIG analysis of invoices provided by the Tax Division

For Contract B, the invoices submitted to the Tax Division included a cover page that summarized the total hours worked by each individual during a specific time period and then additional pages that detailed the hours worked on specific dates along with a description of the tasks performed. However, one of the submitted invoices did not include the detailed support and description behind the total hours worked by the expert witness, which amounted to \$9,138. Additionally, for one support staff member, the detailed support indicated fewer hours worked than charged resulting in \$212 that should not have been billed. Therefore, we question the \$9,350 as unsupported costs.

The \$13,016 in unallowable labor costs encompasses 19 instances from 2 separate contracts where either the hourly labor rate billed to the Tax Division was higher than the agreed upon contracted rate or the labor category was not listed in the contract. Specifically:

- On Contract B, the contractor invoiced a senior associate at an hourly labor rate of \$475 throughout the contract period of performance when the agreed upon hourly rate for a senior associate per the contract was \$450. According to the invoices, this senior associate charged 234.5 hours, which, with overbilling by \$25 per hour, totaled \$5,863 in unallowable costs.
- On Contract C, the contractor invoiced a senior associate at \$80 more than the approved rate for a total of 63.5 hours. Therefore, we computed the total amount of unallowable costs to be \$5,080. Additionally, the invoices for this contract included charges for a labor category (corporate) that was not listed in the price proposal and, therefore, not approved in the contract. The amounts billed for this unapproved labor category totaled \$2,073.

According to the Tax Division Guidance, expert witnesses are subject to the Federal Travel Regulation and are to be reimbursed only in accordance with those regulations. This guidance also clearly states that OMA is to ensure each invoice is in compliance with the Federal Travel Regulation. We identified \$1,930 in

travel-related costs on approved invoices that were not allowable under the Federal Travel Regulation and DOJ travel policy, as detailed below.

- On Contract A, the contractor charged \$852 more than the allowable lodging and per diem rates while the expert witness was on official travel.
- On Contract B, the contractor charged \$521 more than the allowable lodging and per diem rates and \$31 for an airline seat upgrade while the expert witness team was on contract-related travel. According to DOJ travel policy, upgraded seating with additional cost to the Department must be authorized in advance and cannot be for the convenience of the traveler. Additionally, justification for upgraded seating must be included with the travel authorization, neither of which were in the contract file.
- On Contract C, the contractor charged the government \$429 for meals and an overnight hotel stay for the expert witness even though the contractor's office was 20 miles from the expert witness's residence. According to DOJ travel policy, the reimbursement of lodging and per diem when traveling within an employee's local commuting area (50-mile radius) is generally prohibited with limited exceptions.⁸ This policy also notes that local travel requiring an overnight stay is rarely necessary, the mere convenience of the employee is not a sufficient justification, and authorization for such local travel must occur prior to the overnight stay. Although the contractor included a justification with the associated invoice, we believe it did not meet the exceptions noted in the DOJ travel policy, and the justification was provided after the overnight stay occurred.
- On Contract C, the contractor also charged the government \$97 for meals on days where the expert witness traveled to the contractor's office to work more closely with contractor staff. Once again, the distance between the expert witness's residence and the contractor's office was 20 miles. According to the Federal Travel Regulation, employees are eligible for per diem when they are on official travel away from their official duty station (i.e., greater than 50 miles) and are in travel status for more than 12 hours. Further, DOJ travel policy states that per diem at a traveler's permanent duty station or residence should never be authorized, and that reimbursement for local travel within 1 calendar day is to be limited to out-of-pocket transportation costs. We do not believe the expert witness met these travel requirements and, therefore, question the \$97 as unallowable.

The questioned costs we identified indicate weaknesses in the Tax Division's process for reviewing and approving invoices on expert witness services contracts. Although the Tax Division Guidance states that the invoice review should ensure compliance with the Federal Travel Regulation and that the billed rates match those in the contract, invoices were approved that did not comply with Federal Travel Regulation and charged hourly labor rates that exceeded the contracted rates. Therefore, we recommend that the

⁸ According to DOJ Policy Statement 1400.04, Section 301-40.040, local travel requiring an overnight stay outside of a 20-mile radius of a traveler's permanent duty station and residence may only be authorized if all of the following conditions are met: (1) the local travel assignment must require the employee to attend late night or early morning session(s) that are beyond the normal work schedule; (2) the scheduling of such late night or early morning sessions must be beyond the DOJ Component's control and must be on an official agenda or otherwise documented, with assigned speaker(s) and/or facilitator(s); and (3) significant safety issues are raised by the combination of the number of hours required for driving between the employee's residence and the alternate work location.

Tax Division reiterate to all staff involved in the review and approval of invoices their responsibilities in the invoice review process and ensure this staff has all necessary guidance and policy to fully execute their responsibilities. We also recommend that the Tax Division remedy the \$9,350 in unsupported expert witness costs, the \$13,016 in unallowable labor costs, and the \$1,930 in unallowable travel costs.

Quality Assurance

FAR Subpart 46.401 states that quality assurance surveillance plans (QASP) should be prepared in conjunction with the Statement of Work. The plan should specify all work requiring surveillance and the method of surveillance. During our review of the contract files, we did not find any documented QASPs nor did we find any evidence related to the Tax Division's contract oversight efforts. As with other contracting duties, the Tax Division contracting officer told us that the trial attorneys were responsible for conducting contract oversight, including the review of invoices; the Tax Division contracting officer stated that she did not conduct any oversight.

When we asked about contract oversight efforts, the trial attorneys told us that part of their oversight was the review and approval of invoices. Moreover, one of the trial attorneys stated that he was in constant discussion with the contractor and, therefore, knew what the contractor was doing. Despite the trial attorneys' assertions, the contract files did not provide any evidence of contract oversight or quality assurance documentation. As a result of incomplete records in the contract file regarding oversight efforts, we recommend that the Tax Division ensure QASPs are developed and documented in compliance with the FAR requirements and support the Tax Division's efforts to receive the services in accordance with the contract terms and conditions listed in the statements of work.

Past 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. The Tax Division trial attorneys stated that they do not complete past performance evaluations, which is consistent with JMD's Expert Witness Instruction that states CPARS reports or evaluations are not required for expert witness contractors.

A prior OIG audit report on contracted expert witness services also identified past performance evaluations not being completed as required by the FAR and recommended that JMD ensure that the Expert Witness Instruction be compliant with FAR Subpart 42.15.⁹ In its response to that OIG report, JMD stated that disclosing expert witness information in CPARS may negatively impact the Department's litigation strategies and was, therefore, seeking a deviation from complying with this FAR requirement. As of April 2021, JMD had not yet received approval for this deviation.

We will continue to monitor the status of JMD's exception request through the OIG's follow up on the actions taken as a result of the previous audit report's recommendation. If JMD's deviation request is approved and

⁹ DOJ OIG, [Audit of the Environment and Natural Resource Division's Procurement and Administration of Expert Witness Contracts](https://oig.justice.gov/reports/audit-environment-and-natural-resources-divisions-procurement-and-administration-expert-witness-contracts) Audit Report 20-108 (September 2020), <https://oig.justice.gov/reports/audit-environment-and-natural-resources-divisions-procurement-and-administration-expert-witness-contracts>

completing past performance evaluations are not required for DOJ expert witness contracts, we believe the Tax Division would still benefit from executing informal evaluations for internal use such as information that could be used when researching future expert witness contracts. If JMD's deviation request is not approved, we recommend that the Tax Division establish policy requiring past performance evaluations to be conducted in accordance with FAR Subpart 42.15.

Contract Modification

The Tax Division's Standard Expert Witness Contractor Terms and Conditions for the three contracts we audited included a reference to FAR Subpart 52.244-5, which states that "The Contractor shall select subcontractors (including suppliers) on a competitive basis to the maximum practical extent consistent with the objectives and requirements of the contract." One of the contracts we audited (Contract A) was modified to include an additional \$180,000 for the contractor to hire a vendor to upload and manage a document review service and application, including electronic discovery software. Tax Division officials told us that at the time of this contract, the Tax Division could not provide the expert witness with necessary case-related documentation due to the significant volume of electronic data and limitations in its existing information technology systems. These officials also told us that the Tax Division contracting officer was not involved in the discussions about the need for these additional services or the need for a contract modification.

From our discussion with the trial attorney on the case and review of the Tax Division's contract file, we found no evidence that this subcontract was competed. As a result, the contractor did not comply with the terms and conditions of the contract and the associated FAR requirement. We believe that the Tax Division contracting officer's involvement in the decision-making process could have helped ensure the proper safeguarding of the financial interests of the Tax Division and helped ensure compliance with the FAR and the terms and conditions of the contract. Therefore, we recommend that the Tax Division ensure that appropriate official contracting personnel are involved in future contract modifications to reduce the risk of FAR non-compliance.

FEW Appropriation

As previously mentioned, the Tax Division funded its expert witness services contracts through the FEW Appropriation. Table 3 shows the yearly amount of FEW Appropriation funds received and obligated by the Tax Division for expert witness services during this time.

Table 3

Overview of the Tax Division's Receipt and Obligation of the FEW Appropriation
FY 2015 – FY 2020

Fiscal Year	FEW Appropriation Received	FEW Appropriation Obligated
2015	\$32,885,786	\$11,137,329
2016	\$34,262,988	\$12,526,514
2017	\$33,456,252	\$14,934,115
2018	\$36,605,571	\$7,859,348
2019	\$36,557,804	\$14,492,675
2020	\$35,447,313	\$17,464,906

Source: Tax Division

According to JMD guidance, expert witness contracts funded through the FEW Appropriation can be used for the preparation of testimony and testifying in federal judicial proceedings. The guidance specifically prohibits the DOJ from using the FEW Appropriation for litigative consulting costs. The OIG conducted two prior audits that have identified weaknesses regarding DOJ's management and use of the FEW Appropriation. In 2014, the OIG audited the DOJ's oversight of the FEW Appropriation and concluded that the Department did not always meet the requirements for retaining and paying expert witnesses with FEW funds because, among other things, the available guidance was ambiguous or the underlying contract was vaguely written.¹⁰ As a result of that audit, in 2018 JMD issued the Expert Witness Instruction to help strengthen the procedures and guidelines governing use of the FEW Appropriation for acquiring expert witness services and other litigation-related services. In 2019, JMD issued additional guidance on the requirements that apply to contracting for expert witness services funded by the FEW Appropriation as differentiated from contracting for litigative consultants. The 2019 guidance reiterates that the FEW Appropriation is to be used only when contracting for expert witnesses and provides definitions for expert witnesses and litigative consultants.¹¹ In 2020, the OIG issued another report specific to expert witness services contracts awarded by the Environment and Natural Resources Division (ENRD) that discussed concerns related to ENRD's internal controls around use of FEW Appropriation funds.¹²

As previously discussed, for the three contracts we audited, the trial attorneys were responsible for performing significant contracting activities such as contract oversight, including the review and approval of

¹⁰ DOJ OIG, *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), <https://oig.justice.gov/reports/audit-department-justices-oversight-costs-incurred-through-fees-and-expenses-witnesses>.

¹¹ According to the 2019 guidance, an expert witness is an individual who is an expert by knowledge, skill, experience, training, or education and may testify in the form of an opinion or otherwise. A litigative consultant is an individual with expertise in a matter or case who is not expected to testify.

¹² DOJ OIG, *Audit of ENRD's Expert Witness Contracts*.

invoices. We believe that part of this review should include assessing whether the invoiced amounts are limited to expert witness services and payable with the FEW Appropriation. However, the trial attorneys we interviewed had limited knowledge that the contracts were funded by the FEW Appropriation, and the Tax Division Guidance does not require such an evaluation. Moreover, we found that the Tax Division did not ensure the trial attorneys had the relevant guidance (neither the 2018 Expert Witness Instruction nor the 2019 Procurement Instruction Bulletin) or training about the FEW Appropriation to ensure such funding was being used appropriately.¹³ According to a senior official in the Tax Division, the administrative arm of the Tax Division tries not to overburden the trial attorneys by sending out policy documents that are not applicable to their operational work. We did not look at the individual services provided throughout each contract with a goal of determining whether a given line item/event was expert witness services or litigative consulting. Nonetheless, when asked, two trial attorneys told us that certain services performed on their respective expert witness contract could potentially be considered litigative consulting. Because use of the FEW Appropriation is limited to certain types of costs and those responsible for the review and approval of invoices (i.e., trial attorneys) were not made aware of those limitations and circumstances, we believe there is a greater risk for misuse of the FEW Appropriation.

Moreover, we believe the risk is heightened by the magnitude of FEW Appropriation funding available to the Tax Division (as shown in Table 3) as compared to the Tax Division's general appropriation. The Tax Division receives, on average, approximately \$35 million annually and spends, on average, \$13 million per year from the FEW Appropriation. In contrast, a senior Tax Division official stated that the Tax Division's general appropriation, which is used to pay for litigative consulting, is much less plentiful than the FEW Appropriation funding.

Based upon our concerns noted above, we recommend that the Tax Division establish guidance to enhance its invoice review process to include a determination of whether the services provided are expert witness services or litigative consulting, and disseminate JMD's guidance on the use of the FEW Appropriation to all relevant staff, including its trial attorneys.

¹³ The three contracts we audited were awarded prior the issuance of DOJ Instruction 1300.01.02 (effective September 2018) and Procurement Instruction Bulletin 2019-03 (effective May 2019). However, two of the contracts' performance periods were active after issuance of this guidance.

Conclusion and Recommendations

Our review of certain expert witness contracts revealed significant concerns related to the Tax Division's contracting activities and numerous areas of non-compliance with the FAR. Most importantly, the Tax Division relied on its trial attorneys to handle significant contracting activities, yet the trial attorneys were not formally designated as CORs or given the necessary training and guidance to fully execute these responsibilities. According to the FAR, when a COR is not formally designated, the contracting officer retains responsibility for executing the contracting activities. However, we found that neither the Tax Division contracting officer nor the JMD PSS contracting officer were integrally involved, if at all, during many aspects of the award, administration, and oversight of the contracts we audited. As a result, we found that the Tax Division did not conduct adequate acquisition planning and market research, did not adequately evaluate the price reasonableness of contractor rates, and did not include the required whistleblower protection clause in the contracts. Further, based upon our review of invoices, we identified \$24,296 in questioned costs. Besides the questioned costs we identified, we believe the numerous instances of FAR non-compliance and the overreliance on trial attorneys to handle contracting duties without providing a commensurate level of guidance and training increases the risk that the Tax Division is not properly safeguarding the government's financial interests during the procurement of expert witness services.

In addition, we are concerned that the Tax Division's controls over the use of the FEW Appropriation are weak or ineffective, potentially increasing the risk that FEW Appropriations could be misused. For instance, the FEW Appropriation is not to be used for litigative consulting services, and JMD has issued various guidance to assist in ensuring proper use of the FEW Appropriation. However, the Tax Division has not given its trial attorneys any of this guidance despite the significant role the trial attorneys play in several contracting activities, including the review and approval of invoices.

We recommend that the Tax Division:

1. In coordination with JMD, implement policies and procedures to ensure that contracting duties are: (1) retained by Tax Division contracting officers; or (2) appropriately designated to other qualified Tax Division personnel who have received a written designation letter and training commensurate with the duties being designated.
2. Determine whether the Tax Division Guidance is needed, and if it is, update the guidance and ensure trial attorneys have and use the updated guidance as intended.
3. Ensure that it develops written acquisition plans, in accordance with FAR requirements, for its expert witness services contracts.
4. Ensure its expert witness services contracts are supported with adequate and documented market research in accordance with FAR requirements.
5. Ensure that its contracting officers conduct adequate price reasonableness determinations and obtain certified cost or pricing data, where necessary, to ensure the Tax Division is in compliance with the FAR and is receiving a fair and reasonable price for expert witness services.

6. Incorporate the mandatory whistleblower protections in all ongoing expert witness services contracts greater than \$250,000 as prescribed in FAR Subpart 3.908-9 and ensure the necessary whistleblower protections are incorporated on future contracts.
7. Require future invoices for contract expert witness services to contain adequate descriptions that clearly tie to contract deliverables.
8. Reiterate to all staff involved in the review and approval of invoices their responsibilities in the invoice review process and ensure this staff has all necessary guidance and policy to fully execute their responsibilities.
9. Remedy the \$9,350 in unsupported expert witness services costs.
10. Remedy the \$13,016 in unallowable labor costs and \$1,930 in unallowable travel costs.
11. Ensure quality assurance surveillance plans are developed and documented in compliance with FAR requirements and support the Tax Division's efforts to receive the services in accordance with the contract terms and conditions listed in the statement of work.
12. Establish policy requiring past performance evaluations to be conducted in accordance with FAR Subpart 42.15, if JMD's deviation request is not approved.
13. Ensure that appropriate official contracting personnel are involved in future contract modifications to reduce the risk of FAR non-compliance.
14. Establish guidance to enhance its invoice review process to include a determination of whether the services provided are expert witness services or litigative consulting.
15. Disseminate JMD guidance on the use of the FEW Appropriation to all relevant staff, including its trial attorneys.

APPENDIX 1: Objectives, Scope, and Methodology

Objectives

The objectives of our audit were to: (1) determine whether the Tax Division adhered to federal regulations during the contract award and administration processes, (2) assess the adequacy of the Tax Division's contract oversight, and (3) determine if the contractors properly invoiced the government and complied with the contracts' terms and conditions.

Scope and Methodology

This was an audit of the Tax Division's procurement and administration of certain expert witness contracts. In making our assessment, we judgmentally selected a sample of three labor hour expert witness services contracts to review, totaling approximately \$3.7 million. To accomplish the audit objectives, we reviewed various federal regulations and policies, including the FAR, as well as JMD and Tax Division guidance for expert witness services contracts. Further, we reviewed the contract files for each of the three expert witness services contracts we audited, as well as invoices associated with the three contracts. We also interviewed approximately 12 Tax Division and JMD employees, including the Tax Division Comptroller, Tax Division and JMD PSS contracting officers, and trial attorneys who were tasked with various contract administration and oversight functions, including the review of invoices. Additionally, we interviewed five expert witness contractors involved in the performance of the contracts reviewed.

Statement on Compliance with Generally Accepted Accounting Principles

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 the Tax Division to provide assurance on its internal control structure as a whole. Tax Division'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 Tax Division's internal control structure as a whole, we offer this statement solely for the information and use of the Tax Division and JMD.¹⁴

We reviewed the effectiveness of the Tax Division's internal controls related to the award of expert witness service contracts. Specifically, we reviewed the designated responsibilities of Tax Division contracting and litigative personnel to determine if those responsibilities were adequate and appropriate to award,

¹⁴ This restriction is not intended to limit the distribution of this report, which is a matter of public record.

administer, and oversee the contract; prevent payment of unsupported and unallowable invoices; and prevent the misuse of the FEW appropriation.

The internal control deficiencies we found are discussed in the Audit Results section of this report. However, because our review was limited, 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 the Tax Division'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, the Tax Division's compliance with the following laws and regulations that could have a material effect on the Tax Division'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 16: *Types of Contracts*
- FAR Subpart 1.602-2: *Responsibilities of a COR*

This testing included analyzing contract files and related documentation, interviewing Tax Division officials, (including the contracting officer, trial attorneys, and contractor personnel) and reviewing invoices and available supporting documentation. As noted in the Audit Results section of this report, we found that the Tax Division 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 the invoice review of one the contracts we audited. 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 sample was selected.

Computer-Processed Data

During our audit, we obtained information from the DOJ's Unified Financial Management System, and the Tax Division's accounting system. We did not test the reliability of Tax Division's accounting system as a whole; therefore, any findings identified involving information from those systems were verified with documentation from other sources.

APPENDIX 2: Schedule of Dollar-Related Findings

Description	Contract			Amount	Page
Questioned Costs: ¹⁵					
Unallowable Labor Costs	\$ 0	\$ 5,863	\$7,153	\$13,016	9
Unallowable Travel Costs	<u>852</u>	<u>552</u>	<u>526</u>	<u>1 930</u>	9
Unallowable Costs	\$852	\$ 6,415	\$7,679	\$14,946	
Unsupported Contractor Invoice	<u>\$ 0</u>	<u>\$ 9 350</u>	<u>\$ 0</u>	<u>\$9 350</u>	9
Unsupported Costs	0	9,350	0	9,350	
TOTAL DOLLAR-RELATED FINDINGS	<u>\$852</u>	<u>\$15,765</u>	<u>\$7,679</u>	<u>\$24,296</u>	

¹⁵ **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, the provision of supporting documentation, or contract ratification, where appropriate.

APPENDIX 3: Tax Division Response to the Draft Audit Report



U.S. Department of Justice

Tax Division
Washington, D.C. 20530

September 10, 2021

Carol S. Taraszka
Regional Audit Manager
Chicago Regional Audit Office
Office of the Inspector General
U.S. Department of Justice
500 W. Madison Street, Suite 1121
Chicago, Illinois 60661

**Re: Audit of Certain Tax Division Contracts
Awarded for Expert Witness Services**

Dear Ms. Taraszka:

The Tax Division appreciates the work performed by staff from the Office of the Inspector General's Audit Office on the Audit of Certain Tax Division Contracts Awarded for Expert Witness Services, as well as the opportunity to address the draft Audit Report's Recommendations. Obtaining the services of highly qualified witnesses to provide their opinions on the myriad issues in the Division's complex litigation is crucial to the Division's mission. To be effective, contracts for expert witnesses should meet the litigators' specific needs in the case for which services are required. As such, some procedural requirements set forth in the Federal Acquisition Regulation are burdensome and without value for expert witness procurements. Your report will serve as the basis for the Tax Division to improve our processes and internal controls related to procuring and administering contracts for expert services.

I understand that the objectives of the OIG's audit of certain Tax Division contracts awarded for expert witness services were to: (1) determine whether the Tax Division adhered to federal regulations during the contract award and administration processes, (2) assess the adequacy of the Tax Division's contract oversight, and (3) determine if the contractors properly invoiced the government and complied with the terms and conditions of the contract award.

Below we note our agreement, in whole or in part, or disagreement with the draft Audit Report's Recommendations. The Tax Division follows the Justice Management Division's guidance regarding application of the Federal Acquisition Regulations to the unique procurement needs of expert witness contracting for litigation. See DOJ Policy Statement 1300.01, *Administration of the Fees and Expenses of Witnesses (FEW) Appropriation (2018)*. Where applicable, we have described the corrective actions we plan to take to address the Recommendations.

1. In coordination with JMD, implement policies and procedures to ensure that contracting duties are: (1) retained by Tax Division contracting officers; or (2) appropriately designated to other qualified Tax Division personnel who have received a written designation letter and training commensurate with the duties being designated.

RESPONSE: Concur.

The Tax Division will coordinate with JMD's Procurement Services Staff (PSS) on appropriate policies and procedures for expert procurements.

Tax Division attorneys will work with the Contracting Officer who is ultimately responsible for contracting requirements. We note that it would be impractical and inefficient to train all Tax Division litigators as Contracting Officer's Representatives, with the attendant need for COR certification and annual training. However, we recognize an opportunity to provide additional targeted training for attorneys on the expert witness procurement process. The Tax Division will work with PSS to prepare and conduct specific expert contracting training for attorneys and other applicable litigation staff to ensure they know their proper role in the expert contracting process. Additionally, the Tax Division will implement any JMD issued procedures for delegating to its personnel certain contract administration functions as practicable.

2. Determine whether the Tax Division Guidance is needed, and if it is, update the guidance and ensure trial attorneys have and use the updated guidance as intended.

RESPONSE: Concur.

The Tax Division will update and distribute to all trial attorneys Tax Division Guidance on Expert Witness Contracts in compliance with *DOJ Policy Statement 1300.01, Administration of the Fees and Expenses of Witnesses (FEW) Appropriation* and *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 (2018)* and the TAX Expert Witness Instructions.

3. **Ensure that it develops written acquisition plans, in accordance with FAR requirements, for its expert witness services contracts.**

RESPONSE: Concur.

PSS is aware of this issue on recent audits and is working toward a solution. Current plans are to develop an expert witness acquisition planning template for DOJ's litigating divisions. Tax Division intends to work with PSS and begin using the selected solution when available.

4. **Ensure its expert witness services contracts are supported with adequate and documented market research in accordance with FAR requirements.**

RESPONSE: Concur.

The Tax Division has consistently performed market research through consideration of expert witnesses used in earlier cases; contacting internal and external resources familiar with an expert's work and, using the Library Staff who provides expert witness research services when requested. A vast majority of the Tax Division's expert witness contracts involve individuals and companies that have been used previously by the Division. As such, the Tax Division is successful in retaining high quality experts through these processes. The Tax Division concurs to ensure that such adequate market research is documented in accordance with FAR requirements.

5. **Ensure that its contracting officers conduct adequate price reasonableness determinations and obtain certified cost or pricing data, where necessary, to ensure the Tax Division is in compliance with the FAR and is receiving a fair and reasonable price for expert witness services.**

RESPONSE: Concur.

The Tax Division will review its price analysis documentation process to ensure it supports an adequate analysis of its expert services proposed prices to determine that the price is fair and reasonable.

6. **Incorporate the mandatory whistleblower protections in all ongoing expert witness services contracts greater than \$250,000 as prescribed in FAR Subpart 3.908-9 and ensure the necessary whistleblower protections are incorporated on future contracts.**

RESPONSE: Concur.

The Tax Division will follow guidance as issued by the Department for inclusion of the Whistleblower clause.

7. Require future invoices for contract expert witness services to contain adequate descriptions that clearly tie to contract deliverables.

RESPONSE: Concur.

We concur that future invoices should provide adequate descriptions of the services provided and will review/update our guidance surrounding expert witness invoice approval.

8. Reiterate to all staff involved in the review and approval of invoices their responsibilities in the invoice review process and ensure this staff has all necessary guidance and policy to fully execute their responsibilities.

RESPONSE: Concur.

The Tax Division will continue to utilize its multi-tier invoice review process as described in the Report at page 9. To implement this Recommendation, as described in our response to Recommendation #2, the Tax Division will update and distribute Tax Division Guidance on Expert Witness Contracts in compliance with *DOJ Policy Statement 1300.01, Administration of the Fees and Expenses of Witnesses (FEW) Appropriation* and *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*.

9. Remedy the \$9,350 in unsupported expert witness services costs.

RESPONSE: Concur.

The Tax Division will review the questioned costs and remedy the situation based on its determination.

10. Remedy the \$13,016 in unallowable labor costs and \$1,930 in unallowable travel costs.

RESPONSE: Concur.

The Tax Division will review the costs in question and take the steps necessary to remediate the situation based on its determination.

11. Ensure quality assurance surveillance plans are developed and documented in compliance with FAR requirements and support the Tax Division's efforts to receive the services in accordance with the contract terms and conditions listed in the statement of work.

RESPONSE: Concur.

The Tax Division will develop quality assurance procedures in accordance with the FAR and any JMD issued guidance on the subject.

12. Establish policy requiring past performance evaluations to be conducted for internal use and, if necessary, in accordance with FAR Subpart 42.15, if JMD's deviation request is not approved.

RESPONSE: Concur.

The Tax Division will wait to hear from JMD on the outcome of the FAR deviation request before determining how to address this recommendation.

13. Ensure that appropriate official contracting personnel are involved in future contract modifications to reduce the risk of FAR non-compliance.

RESPONSE: Concur.

We recognize an opportunity to provide additional targeted training for attorneys on the expert witness procurement and contract administration processes. The Tax Division will work with PSS to prepare and conduct specific expert contracting training for attorneys and other applicable litigation staff to ensure they know their proper role in the expert contracting process.

14. Establish guidance to enhance its invoice review process to include a determination of whether the services provided are expert witness services or litigative consulting.

RESPONSE: Concur.

The Tax Division does not issue contracts that include both Expert Witness and Litigative Consultants services. We will nevertheless review our training for the attorneys to understand the differences of those types of contracts.

15. Disseminate JMD guidance on the use of the FEW Appropriation to all relevant staff, including its trial attorneys.

RESPONSE: Concur.

The Tax Division will disseminate and include *DOJ Policy Statement 1300.01, Administration of the Fees and Expenses of Witnesses (FEW) Appropriation* and *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* and an updated Expert Witness Instructions to its new attorney training curriculum.

The Tax Division is committed to acquiring, administering, and overseeing our expert witness contracts in a manner that complies with applicable regulations. Your audit and report will help us focus on implementing changes, along with JMD and the other DOJ components, that will improve our program. Again, thank you for your audit team's hard and careful work. If you need any further information, please contact me.

Sincerely yours,



Digitally signed by
DAVID HUBBERT
Date: 2021.09.10
15:23:56 -04'00'

DAVID A. HUBBERT
Acting Assistant Attorney General

APPENDIX 4: 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 report to the Tax Division. The Tax Division's response is incorporated in Appendix 3 of this final report. In response to our audit report, the Tax Division concurred with our recommendations and discussed the actions it will implement in response to our findings. 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 the Tax Division:

- 1. In coordination with the Justice Management Division (JMD), implement policies and procedures to ensure that contracting duties are: (1) retained by Tax Division contracting officers; or (2) appropriately designated to other qualified Tax Division personnel who have received a written designation letter and training commensurate with the duties being designated.**

Resolved. The Tax Division concurred with our recommendation. In its response, the Tax Division stated that it would be impractical and inefficient to train its entire litigation staff as Contracting Officer's Representatives (COR). The Tax Division further stated, though, that it recognized an opportunity to provide its litigation staff additional targeted training on the expert witness procurement process. The Tax Division stated that it will work with JMD's Procurement Services Staff (PSS) to prepare and deliver this training. In addition, the Tax Division said that it will implement, as practicable, any JMD-issued procedures for delegating certain contract administration functions to its staff.

This recommendation can be closed when we receive evidence that the Tax Division, in coordination with JMD, has implemented policies and procedures to ensure that contracting duties are retained by Tax Division contracting officers or appropriately designated to other qualified Tax Division personnel who have received written notification and training commensurate with the duties being assigned. Such evidence would include documentation of any targeted training for litigation staff on the expert witness procurement process, once the training is developed and delivered.

- 2. Determine whether the Tax Division Guidance is needed, and if it is, update the guidance and ensure trial attorneys have and use the updated guidance as intended.**

Resolved. The Tax Division concurred with our recommendation. In its response, the Tax Division stated that it will update and distribute to all trial attorneys the Tax Division Guidance on Expert Witness Contracts.

This recommendation can be closed when we receive evidence that the Tax Division updated its guidance related to expert witness services contracts and has ensured its trial attorneys have and use the guidance as intended.

3. **Ensure that it develops written acquisition plans, in accordance with Federal Acquisition Regulation (FAR) requirements, for its expert witness services contracts.**

Resolved. The Tax Division concurred with our recommendation. In its response, the Tax Division stated that JMD PSS is aware of this issue on recent audits and has current plans to develop an expert witness acquisition planning template for the Department's litigating divisions. The Tax Division stated it intends to work with JMD PSS and will use the selected solution when available.

This recommendation can be closed when we receive evidence that the Tax Division has addressed our recommendation to ensure that it develops written acquisition plans, in accordance with FAR requirements, for its expert witness services contracts.

4. **Ensure its expert witness services contracts are supported with adequate and documented market research in accordance with FAR requirements.**

Resolved. The Tax Division concurred with our recommendation. In its response, the Tax Division stated that it has consistently performed market research when contracting for expert witness services. Nonetheless, the Tax Division stated that it concurs with ensuring this market research is documented in accordance with FAR requirements.

This recommendation can be closed when we receive evidence that the Tax Division has taken adequate steps to ensure its expert witness services contracts are supported with adequate and documented market research in accordance with FAR requirements.

5. **Ensure that its contracting officers conduct adequate price reasonableness determinations and obtain certified cost or pricing data, where necessary, to ensure the Tax Division is in compliance with the FAR and is receiving a fair and reasonable price for expert witness services.**

Resolved. The Tax Division concurred with our recommendation. In its response, the Tax Division stated that it will review its price analysis documentation process to ensure adequate analysis is conducted of proposed prices to determine whether the prices are fair and reasonable.

This recommendation can be closed when we receive evidence that the Tax Division has taken adequate steps to ensure its contracting officers conduct adequate price reasonableness determinations and obtain certified cost or price data, where necessary, to ensure the Tax Division is in compliance with the FAR and is receiving a fair and reasonable price for its expert witness services.

6. **Incorporate the mandatory whistleblower protections in all ongoing expert witness services contracts greater than \$250,000 as prescribed in FAR Subpart 3.908-9 and ensure the necessary whistleblower protections are incorporated on future contracts.**

Resolved. The Tax Division concurred with our recommendation. In its response, the Tax Division stated that it will follow Department guidance for inclusion of the whistleblower clause.

This recommendation can be closed when we receive evidence that the Tax Division has incorporated the mandatory whistleblower protections in all ongoing expert witness services contracts greater than \$250,000 as prescribed in FAR Subpart 3.908-9 and ensured the necessary whistleblower protections are incorporated on future contracts.

- 7. Require future invoices for contract expert witness services to contain adequate descriptions that clearly tie to contract deliverables.**

Resolved. The Tax Division concurred with our recommendation. In its response, the Tax Division stated that future invoices should provide adequate descriptions of the services provided and will review and update guidance related to the approval of expert witness services invoices.

This recommendation can be closed when we receive evidence that the Tax Division has taken appropriate action to require future invoices for expert witness services contracts to contain adequate descriptions that clearly tie to contract deliverables. Such evidence would include any updated guidance related to invoice approvals and evidence that this guidance was disseminated to those responsible for reviewing invoices.

- 8. Reiterate to all staff involved in the review and approval of invoices their responsibilities in the invoice review process and ensure this staff has all necessary guidance and policy to fully execute their responsibilities.**

Resolved. The Tax Division concurred with our recommendation. In its response, the Tax Division stated that it will continue to use its multi-tier invoice review process as described in our report. The Tax Division further stated that to address this recommendation, it will update and distribute Tax Division Guidance on Expert Witness Contracts, as described in its response to Recommendation Number 2.

This recommendation can be closed when we receive evidence that the Tax Division reiterated to all staff involved in the review and approval of invoices their responsibilities in the invoice review process and ensured that this staff has all necessary guidance and policy to fully execute their responsibilities. This includes evidence that the Tax Division Guidance on Expert Witness Contracts has been updated and distributed to appropriate staff.

- 9. Remedy the \$9,350 in unsupported expert witness services costs.**

Resolved. The Tax Division concurred with our recommendation. In its response, the Tax Division stated that it will review the questioned costs and remedy the situation based upon that review.

This recommendation can be closed when we receive evidence that the Tax Division has remedied the \$9,350 in unsupported expert witness services costs.

10. Remedy the \$13,016 in unallowable labor costs and \$1,930 in unallowable travel costs.

Resolved. The Tax Division concurred with our recommendation. In its response, the Tax Division stated that it will review the questioned costs and take necessary steps to remedy the situation.

This recommendation can be closed when we receive evidence that the Tax Division has remedied the \$13,016 in unallowable labor costs and \$1,390 in unallowable travel costs.

11. Ensure quality assurance surveillance plans are developed and documented in compliance with FAR requirements and support the Tax Division's efforts to receive the services in accordance with the contract terms and conditions listed in the statement of work.

Resolved. The Tax Division concurred with our recommendation. In its response, the Tax Division stated that it will develop quality assurance procedures in accordance with the FAR and any JMD-issued guidance on the subject.

This recommendation can be closed when we receive evidence that the Tax Division has taken adequate steps to ensure quality assurance surveillance plans are developed and documented in compliance with FAR requirements and support the Tax Division's efforts to receive the services in accordance with the contract terms and conditions listed in the statement of work. This evidence includes the referenced quality assurance procedures, once developed.

12. Establish policy requiring past performance evaluations to be conducted in accordance with FAR Subpart 42.15, if JMD's deviation request is not approved.

Resolved. The Tax Division concurred with our recommendation and noted that it will wait to hear from JMD on the outcome of the FAR deviation request before determining how to address the recommendation.

This recommendation can be closed when we receive evidence that the Tax Division has addressed our recommendation to establish policy requiring past performance evaluations to be conducted in accordance with FAR Subpart 42.15, if JMD's deviation request is not approved.

13. Ensure that appropriate official contracting personnel are involved in future contract modifications to reduce the risk of FAR non-compliance.

Resolved. The Tax Division concurred with our recommendation. In its response, the Tax Division stated that it recognized an opportunity to provide its litigation staff additional targeted training on the procurement and administration of expert witness services contracts. The Tax Division stated that it will work with JMD PSS to prepare and deliver such training.

This recommendation can be closed when we receive evidence that the Tax Division has ensured that appropriate contracting personnel are involved in future contract modifications to reduce the risk of FAR non-compliance. As part of this evidence, please provide the targeted training—once

developed and delivered—on procurement and administration of expert witness services contracts for litigation staff.

14. Establish guidance to enhance its invoice review process to include a determination of whether the services provided are expert witness services or litigative consulting.

Resolved. The Tax Division concurred with our recommendation. In its response, the Tax Division stated that it does not issue contracts that include both expert witness and litigative consulting services. The Tax Division stated, however, that it will review the training provided to its attorneys regarding the differences between those types of contracts.

This recommendation can be closed when we receive evidence that the Tax Division has established guidance to enhance its invoice review process to include a determination of whether the services provided are expert witness services or litigative consulting.

15. Disseminate JMD guidance on the use of the Fees and Expenses for Witnesses (FEW) Appropriation to all relevant staff, including its trial attorneys.

Resolved. The Tax Division concurred with our recommendation. In its response, the Tax Division stated that it will disseminate DOJ Policy Statement 1300.01, *Administration of the Fees and Expenses of Witnesses (FEW) Appropriation* and DOJ Instruction 1300.01.02, *Use of the Fees and Expenses of Witnesses and Other Services Related to Litigation and Mediation*, and updated Expert Witness Instructions. The Tax Division also stated that these documents will be included in its new attorney training curriculum.

This recommendation can be closed when we receive evidence that the Tax Division disseminated JMD guidance on the use of the FEW Appropriation to all relevant staff, including its trial attorneys. This evidence includes the new attorney training curriculum that incorporates this guidance.