

USPTO Could Improve Oversight Practices to Close Out Contract Files by Complying with Acquisition Regulations and Policies

FINAL REPORT NO. OIG-19-018-A

JULY 10, 2019



U.S. Department of Commerce
Office of Inspector General
Office of Audit and Evaluation



July 10, 2019

MEMORANDUM FOR: Andrei Iancu
Under Secretary of Commerce for Intellectual Property
and Director of the U.S. Patent and Trademark Office

Scott Palmer
Director
Office of Procurement
U.S. Patent and Trademark Office

A handwritten signature in cursive script that reads "Carol N. Rice".

FROM: Carol Rice
Assistant Inspector General for Audit and Evaluation

SUBJECT: *USPTO Could Improve Oversight Practices to Close Out Contract Files
by Complying with Acquisition Regulations and Policies*
Final Report No. OIG-19-018-A

Attached is our final audit report on our audit to assess the procedures for closing out completed contracts at the U.S. Patent and Trademark Office (USPTO). Our audit objective was to determine whether USPTO contracting personnel administered contract closeout procedures in accordance with federal and Departmental policy and regulations.

We reviewed a judgmental sample of 36 task/delivery orders associated with 8 contracts that had a total expended value of approximately \$615 million. OIG found that

- contracting officers did not close out contracts timely;
- contracting officials did not complete some key closeout steps;
- contracting officer representatives were not adequately trained, certified, and appointed; and
- order files were missing or lacked key documentation.

On May 24, 2019, OIG received USPTO's response to the draft report. USPTO agreed with our five findings, noting that it has either already implemented, or is in the process of implementing, corrective action to address OIG's recommendations.

Pursuant to Department Administrative Order 213-5, please submit to us an action plan that addresses the recommendations in this report within 60 calendar days. This final report will be posted on OIG's website pursuant to sections 4 and 8M of the Inspector General Act of 1978, as amended (5 U.S.C. App., §§ 4 & 8M). We appreciate the cooperation and courtesies extended by your staff during our audit. If you have any questions or concerns about this report, please contact me at (202) 482-6020 or Susan Aggen, Audit Director, at (404) 730-2063.

Attachment

cc: Anthony Scardino, Chief Financial Officer, USPTO
Sarah Harris, General Counsel, USPTO
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Report in Brief

July 10, 2019

Background

In November 29, 1999, the President signed into law the Patent and Trademark Office Efficiency Act, granting the U.S. Patent and Trademark Office (USPTO) authority to make purchases and enter into contracts with certain exemptions from the Federal Property and Administrative Services Act of 1949 and Competition in Contracting Act of 1984. As a result, USPTO is not subject to the Federal Acquisition Regulation (FAR) in its entirety. Although the Patent and Trademark Office Efficiency Act gives USPTO flexibility within the acquisition process, the agency is still required to maintain and retain government contract and order files and comply with closeout requirements outlined by the FAR and *Commerce Acquisition Manual (CAM)*. Contract closeout is a key step in ensuring that the Department has received the appropriate goods and services at the agreed-upon price. Physical completion of the contract initiates the contract closeout process. Contract closeout is important because it enables the federal government to protect its interest against litigation and releases excess funds tied to the contract by deobligation.

Why We Did This Review

Our audit objective was to determine whether USPTO contracting personnel administered contract closeout procedures in accordance with federal and Departmental policy and regulations.

UNITED STATES PATENT AND TRADEMARK OFFICE

USPTO Could Improve Oversight Practices to Close Out Contract Files by Complying with Acquisition Regulations and Policies

OIG-19-018-A

WHAT WE FOUND

We reviewed a judgmental sample of 36 task/delivery orders associated with 8 contracts that had a total expended value of approximately \$615 million. In conjunction with USPTO policies, we used guidance from the FAR and CAM as a benchmark for identifying practices most beneficial to ensuring effective closeout of the sampled orders. We determined that contracting officials did not properly administer closeout procedures for the 33 of the 36 task/delivery orders. Specifically, we found that:

1. contracting officers did not close out orders timely;
2. contracting officials did not complete some key closeout steps;
3. contracting officer representatives were not adequately trained, certified and appointed; and
4. order files were missing or lacked key documentation.

Our review found deficiencies because contracting personnel did not comply with at least one or more of the closeout actions required by the FAR, CAM, and USPTO's policy memorandums. In addition, USPTO stated that it had a contractor perform closeout activities until April 2017, and that the contractor did not adequately comply with policy and regulations regarding required closeout timeliness.

Moreover, USPTO stated that a lack of acquisition management focus in overall closeout oversight efforts caused these deficiencies. USPTO's compliance with closeout requirements is critical to substantiate that goods and services were provided as intended, validate final costs and payments, and free excess funds for possible use elsewhere.

WHAT WE RECOMMEND

We recommend that USPTO's Director of the Office of Procurement do the following:

1. Improve controls and oversight processes to ensure compliance with federal and Departmental closeout requirements.
2. Ensure that contracting officers appoint, in writing, properly trained and certified CORs and remove those who fail to meet those requirements.
3. Ensure that all CORs meet their continuous learning requirements and be certified at the appropriate level.
4. Ensure that documents required to be in contract files to constitute a complete history of the transaction are contained in the contract file as identified in FAR Subpart 4.8.
5. Improve controls to ensure contract files are properly safeguarded and maintained as required by the FAR.

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Cover: Herbert C. Hoover Building main entrance at 14th Street Northwest in Washington, DC. Completed in 1932, the building is named after the former Secretary of Commerce and 31st President of the United States.

Introduction

During fiscal year (FY) 2016 and the first three quarters of FY 2017, the U.S. Patent and Trademark Office (USPTO) closed out 119 contracts and orders, mostly related to information technology and patent processing support services, worth approximately \$723 million.

In November 29, 1999, the President signed into law the Patent and Trademark Office Efficiency Act (effective March 29, 2000), granting USPTO authority to make purchases and enter into contracts with certain exemptions from the Federal Property and Administrative Services Act of 1949 and Competition in Contracting Act of 1984. As a result, USPTO is not subject to the Federal Acquisition Regulation (FAR) in its entirety, particularly parts 6 (Competition Requirements) and 15 (Contracting by Negotiations). Although the Patent and Trademark Office Efficiency Act gives USPTO flexibility within the acquisition process, the agency is still required to maintain and retain government contract and order files and comply with closeout requirements outlined by the FAR and *Commerce Acquisition Manual (CAM)*. Additionally, USPTO is required to adhere to the Office of Federal Procurement Policy (OFPP) and CAM's warrant and certification programs for contracting personnel.

The FAR 4.804-5, "Procedures for closing out contract files," establishes the requirements and procedures for administrative contract closeout. Contract closeout, which is the final phase in a contract's life cycle, is a key step in ensuring that the Department has received the appropriate goods and services at the agreed-upon price. Physical completion of the contract initiates the contract closeout process. Contract closeout is important because it enables the federal government to protect its interest against litigation and releases excess funds tied to the contract by deobligation.

FAR 4.804-4 states a contract with deliverables is considered physically complete when the government has issued a complete contract termination notice to the contractor or when the following three actions have occurred:

- The contractor has completed the required deliveries, and the government has inspected and accepted the goods and materials.
- The contractor has completed all services, and the government has accepted those services; or
- All option provisions have expired.

For rental, use, and storage agreements, the FAR 4.804-4 also states a contract is considered physically complete when the government has given the contractor a notice of complete contract termination, or the contract has expired.

According to FAR 4.804-5, once the contract is physically complete, the contracting officer is required to conduct an initial funds status review and determine whether the contract has excess funds that should be deobligated. The contracting officer then initiates administrative action in accordance with federal and Departmental contract closeout guidance.

Once the contracting officer confirms that the applicable administrative actions have been completed, a completion statement is prepared and the contract is designated as closed. FAR 4.804-1 and the CAM contain timelines for closing out different types of contracts and orders. Those timelines, in relevant part, range from 6 months for fixed-price contracts/orders to 20 months for labor-hour and time-and-materials contracts/orders. FAR 4.804-1 and CAM 1304.804 also discuss contract and order closeout timeframes using simplified acquisition procedures and settlement of indirect cost rates. However, our sample selection did not include these types of contracts and orders.

FAR 4.801 and the CAM¹ state that documentation in the contract/order files shall be sufficient to constitute a complete history of the transaction for the purposes of providing a complete background as a basis for informed decisions at each step in the acquisition process, supporting all actions taken, providing information for reviews, investigations, and furnishing essential facts in the event of litigation or congressional inquiries. Federal regulation² and Departmental³ policy also states, in relevant part, that all firm fixed price, labor-hour, and time-and-materials contracts/orders should be closed within required timeframes, based off contract type, after the contracting officer receives evidence of physical completion. FAR 4.803 lists examples of records normally contained in the contract file, which include, but are not limited to, contract completion documents.

The CAM states that Contracting Officer Representatives (COR) are responsible for supporting contract closeout activities and providing contracting officers with documentation of contractor performance and funding information.⁴ Additionally, the CAM provides the framework and procedures for implementing the Federal Acquisition Certification for Contracting Officer Representatives, which requires a minimum of 40 hours of continuous training every 2 years for certification, along with delegated contract management responsibilities from the contracting officer via appointment letter for every contract action.

¹ CAM 1304.804, October 2013, §2.1.

² FAR 4.804-1 and 4.804-4.

³ CAM 1304.804, October 2013, §1.5.

⁴ CAM 1304.804, October 2013, §1.6.5.

Objective, Findings, and Recommendations

Our audit objective was to determine whether USPTO contracting personnel administered contract closeout procedures in accordance with federal and Departmental policy⁵ and regulations.

To accomplish our audit objective, we reviewed a judgmental sample of 36⁶ task/delivery orders⁷ associated with 8 contracts that had a total expended value of approximately \$615 million. In conjunction with USPTO policies, we used guidance from the FAR⁸ and CAM⁹ as a benchmark for identifying practices most beneficial to ensuring effective closeout of the sampled orders. See appendix A for further details about the objective, scope, and methodology of this audit. Appendix B summarizes the findings.

We determined that contracting officials did not properly administer closeout procedures for the 33 of the 36 task/delivery orders. Specifically, contracting officers did not close out task/delivery orders timely and order files lacked evidence that key closeout steps were completed. Furthermore, contracting officials did not ensure that CORs had met their continuous learning requirements to maintain their certifications—or properly appoint CORs prior to their providing technical oversight for orders. In addition, order files were not always properly maintained.

Our review found deficiencies because contracting personnel did not comply with at least one or more of the closeout actions required by the FAR, CAM, and USPTO's policy memorandums. In addition, USPTO stated that it had a contractor perform closeout activities until April 2017, and that the contractor did not adequately comply with policy and regulations regarding required closeout timeliness. Moreover, USPTO stated that a lack of acquisition management focus in overall closeout oversight efforts caused these deficiencies. USPTO's compliance with closeout requirements is critical to substantiate that goods and services were provided as intended, validate final costs and payments, and free excess funds for possible use elsewhere.

⁵ CAM 1304.804, Contract Closeout, dated October 2013. This chapter was in effect throughout our audit scope. A revised version of Chapter 1304.804 was issued on 30 June 2017, which included (1) changes to appendix titles (2) additional emphasis on timely contract closeout (3) changed dollar threshold from \$500,000 to \$750,000 for final audits (4) added criteria for unilateral contract closeouts (5) revised contract file retention requirements and (6) defined "de-obligation."

⁶ Our sample selection consisted of 43 contracts (e.g., contracts and task/delivery orders) with an approximate value of \$653 million. USPTO could not provide either the contract file or adequate documentation for 7 out of the 43 sampled contracts/orders. As a result, we reviewed order files for 36 task/delivery orders.

⁷ A *task order* is "an order for services placed against an established contract or with Government sources." FAR 2.101. A *delivery order* is "an order for supplies placed against an established contract or with Government sources." *Id.*

⁸ With the exception of grants and cooperative agreements, FAR 2.101 defines "contracts" as all types of commitments that obligate the Government to an expenditure of appropriated funds, which include, but not limited to, task and delivery orders.

⁹ In accordance with the FAR, the CAM 1304.804, dated October 2013, states that closeout shall be accomplished for physically completed contracts and orders.

I. Contracting Officers Did Not Close Out Orders Timely

The FAR and CAM provide timelines for closing out different types of contracts and orders, ranging from 6 to 20 months, in relevant part,¹⁰ after evidence of physical completion. Table I shows the required closeout timeframes by contract type.

Table I. Closeout Timeframes by Contract Type

| Closeout Timeframes | |
|---------------------|----------------|
| Contract Type | Time Standards |
| Firm-Fixed Price | 6 months |
| Time-and-Material | 20 months |
| Labor Hour | 20 months |

Source: FAR 4.804-1(a)(2) and (4) and CAM 1304.804

Of the 36 completed task/delivery orders that we reviewed, 25 were not closed within the timelines prescribed by the FAR and CAM. Closeout timeframes ranged from 25 months to 118 months. (Table 2 summarizes the number of task/delivery orders closed outside the FAR timelines.) Closing an order years after the order is completed can be more time-consuming because key documentation and contracting personnel with first-hand knowledge of the order may no longer be available. Closing orders within expected timeframes can help limit the government's exposure to certain financial risks by identifying and recovering improper payments. Timely closeout also allows agencies to deobligate and make available funds from completed orders for possible use elsewhere.

Table 2. Summary of Order Closeout Timeframes

| Contract Type | FAR Timeline Guidance (Months) | Number of Orders Closed Within Guidance Timeframes | Number of Orders Closed Outside Guidance Timeframes |
|-------------------------|--------------------------------|--|---|
| Fixed Price | 6 | 5 | 10 |
| Labor Hour | 20 | 4 | 14 |
| Time-and-Material | 20 | 2 | 1 |
| Of the 36 Total Orders: | | 11 | 25 |

Source: OIG analysis of a sample of 36 closed task/delivery orders

¹⁰ FAR 4.804-1 and CAM 1304.804, October 2013, also discuss time standards for simplified acquisition and contracts requiring settlement of indirect cost rates. Our sample selection of closed contracts did not include these types of contracts.

II. Contracting Officials Did Not Complete Some Key Closeout Steps

The FAR and CAM require agencies to complete a number of contract/order closeout steps. The FAR also requires that agencies document the results of these steps in the contract file to support final contract actions and payments. However, USPTO's closed order files did not always include evidence that contracting officials completed some key closeout steps that the FAR, CAM, and USPTO guidance requires. These steps involve (a) verifying physical contract/order completion, (b) obtaining a signed contractor closing statement, (c) executing a contracting officer completion statement, and (d) conducting an initial funds review.

A. Contracting officials did not appropriately document physical completion of orders

The FAR¹¹ requires the contracting office to begin contract closeout as soon as the contracting officer receives evidence that the contract has been physically completed. A contract, in relevant part, is considered physically completed when (1) the contractor has completed the required deliveries and the government has inspected and accepted the supplies and (2) the contractor has performed all services and the government has accepted these services.¹² The CAM¹³ further requires contracting officers to receive evidence of physical completion for all types of contracts/orders.

The CAM¹⁴ states that CORs are responsible for verifying final inspection and acceptance of all work required under the contract prior to the contracting officer closing out the contract/order. According to USPTO policy, USPTO appoints task order managers (TOMs)¹⁵ to assist the contracting officer in several administrative functions to include, but not limited to, performing final inspection and acceptance of all work required.¹⁶ Both the COR and TOM are required to maintain records of deliverable and/or service inspections. These policies also require the COR to ensure that the contractor, as required by the contract, submits all required items, documentation, data, and reports.

We found that (1) CORs did not consistently document final inspection and acceptance of contracted services—or verify overall physical completion, and (2) contracting officers did not always verify the final inspection and acceptance of contracted services prior to closeout in accordance with federal¹⁷ and Departmental¹⁸ guidelines. Of the 36 task/delivery orders reviewed, 10 did not have any documentation supporting COR

¹¹ FAR 4.804-5 (a).

¹² FAR 4.804-4 (a)(1)(i) and (ii).

¹³ CAM 1304.804, October 2013, §4.1, §5.1, and §5.2.

¹⁴ CAM 1301.804, October 2013, §4.2(a), §5.3(a) and CAM 1301.670, January 2012, "Appendix H—Sample Nomination, Delegation and Appointment Memorandums" p. H-5.

¹⁵ USPTO Procurement Memorandum 2014-04, September 11, 2014 and 13 January 2017, "Contracting Officer Representatives, Task Order Manager, and Point of Contact Roles and Responsibilities, states the TOM is appointed by the CO and is responsible for supporting the contract COR by overseeing tasks and making recommendations on the acceptability of products, services or deliverables.

¹⁶ Form USPTO-OP-006, version 3, August 2015 and version 4, January 2017, paragraph 3(c)(14).

¹⁷ FAR 4.802, FAR 4.803(a)(37) and (b)(20), and FAR 4.804-4 (a)(1)(i) and (ii).

¹⁸ CAM 1304.804, October 2013, §4.2(a) and §5.3(a).

verification and acceptance of contracted services.¹⁹ Additionally, there was no evidence received by the contracting officer that physical completion had occurred for the 10 task/delivery orders. For example, the COR did not provide any documentation verifying final inspection and acceptance of contracted services for patent data capture and patent printing services, worth approximately \$78.6 million. When contracting officers are not notified that contractual goods or services are delivered and accepted, USPTO may miss opportunities to deobligate excess funds and use them on other programs.

According to USPTO Instructions Memorandum,²⁰ due diligence by the COR is signified when invoices are approved for payment. USPTO's current process allows payment of an invoice in Momentum without requiring a specific form or certification statement from the COR to document, in writing, that they received, inspected, and/or accepted deliverables. Although it is important to process and pay contractor invoices, the transactional process for approving invoices within the Momentum system is not a substitution for performing and documenting COR inspection and acceptance of contracted deliverables.

The purpose of contractor deliverable verification and acceptance is to ensure that contractor-provided products and services meet specified requirements and otherwise satisfy the terms of the contract. The lack of supporting documentation increases the likelihood of undetected contract fraud, waste, and abuse. CORs are required to review contractor invoices thoroughly to determine completeness, accuracy, and reasonableness of billed costs, including verification of indirect cost. CORs are also required to maintain appropriate documentation and perform inspections and acceptance to demonstrate their thorough review of contractor invoices, as recommended by the CAM²¹ and required by Director's Notice 2016-02. Without documentation, USPTO's contracting officers do not have assurance that CORs have thoroughly reviewed billed costs and accepted them as allowable and reasonable. Consequently, USPTO cannot ensure it had received the deliverable for which it paid the invoiced amount. Contracting officers rely upon initial assessments of invoices and recommendations by the CORs for paying them. Complete recordkeeping of invoices with supporting documentation is important to track contract expenses in accordance with FAR requirements.

¹⁹ We found similar results in the U.S. Department of Commerce Office of Inspector General, December 3, 2014, report, titled *USPTO Awarding and Administering of Time and Materials and Labor Hour Contracts Needs Improvement* (OIG-15-012-A). In this report, we reported that USPTO CORs did not consistently and adequately document acceptance of deliverables. We also recommended that CORs document the acceptance of all deliverables in accordance with contract requirements and USPTO policy. In response to our report, the Director of Procurement issued Director's Notice 2016-02 in August 2016, requiring CORs to document, in writing, acceptance of all deliverables related to Time and Material and Labor-Hour contracts.

²⁰ Form USPTO-OP-006 paragraph 3(c)(9), important note 2, version 3, August 2015, and version 4, January 2017.

²¹ CAM 1301.670, January 2012, "Appendix H—Sample Nomination, Delegation and Appointment Memorandums" pp. H-4 and H-5.

B. Order files lacked contractors' closing statements

The FAR²² requires that a contractor's closing statement be completed as part of the closeout process. This statement, signed by the contractor, includes a limited release of claims against the government from liabilities or claims arising from the contract or order. However, we found that contract files for 29 of the 36 task/delivery orders reviewed did not include the contractors closing statement. For two of these contracts, USPTO spent approximately \$49 million and \$53 million for publication and printing services, respectively. In neither instance could the COR provide any documentation verifying overall contract completion prior to closeout. Without contractors' closing statements in the contract files, USPTO is not fully protected from potential future claims and legal issues.

C. Order files lacked contracting officer completion statements to verify that all closeout steps were completed

The FAR requires a contracting officer to complete and sign a completion statement to verify that required closeout steps have been completed.²³ Additionally, the CAM²⁴ states that each contract/order file shall include documentation addressing each of the applicable requirements within the contract closeout process. According to the FAR, a contracting officer cannot close a contract file until all required steps are completed. We found that order files for 3 of the 36 task/delivery orders did not have overall completion statements verifying all required contract administration actions have been fulfilled. Without this statement, there is an increased risk that orders will not be properly closed out, especially for the order files missing other required documents to indicate that steps were completed.

D. Initial funds reviews to timely identify excess funds were not conducted prior to order closeout

The FAR²⁵ requires that the contracting office conduct a funds review upon initiating the contract closeout process to determine whether excess funds are available for deobligation. The CAM²⁶ also requires excess funds be deobligated through modifications of the contract, task or delivery order. Once identified, the government must deobligate excess funds as part of the closeout process. Of the 36 task/delivery orders, 18 had no evidence in the order files that an initial funds review had been conducted. For example:

- USPTO spent approximately \$339,000 on an order that provided for automation support services. The COR did not perform an initial funds review and requested \$24,873 in excess funds be deobligated more than 2 years after physical completion of the order was determined.

²² FAR 4.804-5(a)(13).

²³ FAR 4.804-5(b).

²⁴ CAM 1304.804, October 2013, § 2.1.

²⁵ FAR 4.804-5(a).

²⁶ CAM 1304.804, October 2013, § 4.2(e) and § 5.3(f).

- USPTO spent approximately \$557,000 on a task order for information technology support services. Because the COR did not perform an initial funds review at the outset of the closeout process, excess funds in the amount of \$212,130 were not deobligated until 3 years after the last invoice was paid.

Contracting officials did not consider conducting an initial funds review a priority because Departmental²⁷ and USPTO policies²⁸ only requires them to review open obligations on a semiannual basis for general deobligation purposes. While the semiannual review is a valuable control, it does not serve the same purpose as an initial funds review, which could lead to delays in deobligating excess funds that could have been used elsewhere.

III. CORs Were Not Adequately Trained, Certified, and Appointed

CORs play a critical role in ensuring that contractors meet the commitment of their contracts and orders. The FAR²⁹ and the CAM³⁰ require that the COR be certified, trained, and appointed in writing throughout the entire acquisition process in order to perform assigned responsibilities and to act on behalf of the contracting officer. In addition, the Office of Federal Procurement Policy (OFPP)³¹ requires CORs to be appropriately trained and certified under the government-wide certification program.

To maintain certification as a COR, contracting professionals are required to earn 40 continuous learning points of skills currency every 2 years, beginning with the date of their certification. We found that 31 of 36 CORs had documentation supporting their continuous learning certification requirements. However, contracting officials could not provide evidence of continuous learning for the remaining 5 CORs. For example, the COR assigned to a task order for patent printing services was not certified to perform COR duties on behalf of the contracting officer and government. USPTO contracting officials could not provide the continuous learning certification for the COR. Although COR certification is not a closeout requirement, contracting officers rely heavily on CORs to provide contract management oversight, technical direction, to include supporting the contracting officer with closeout activities.³² Without meeting continuous learning requirements, there is no assurance that CORs maintain their professional proficiency and remain qualified to perform their duties.

²⁷ *Department of Commerce Policy for Monitoring of Undelivered Obligations* is issued by the Department's Chief Financial Officer to all bureau finance, procurement, and grant officials. The policy was issued for FY 2016 and 2017. Section VII, Review Frequency, establishes semi-annual reviews for non-travel balances.

²⁸ USPTO, Internal Standard Operating Procedures, FY 2016 and 2017 De-obligation Reviews, § A, Summary, Q1 and Q3 paragraphs.

²⁹ FAR 1.602-2 (d).

³⁰ CAM 1301.670, January 2012, § 1.7 and 2.3.

³¹ OFPP memorandum, November 26, 2007. "The Federal Acquisition Certification for Contracting Officer Technical Representatives."

³² CAM 1301.670, January 2012, § 1.7.1.1, and CAM 1304.804, October 2013, § 1.6.5.

Furthermore, OFPP³³ policy requires that contracting officers appoint CORs in writing. In addition, the CAM³⁴ requires an appointment letter for every contract action where the contracting officer delegates contract administration responsibilities to a technical representative such as CORs, assistant and alternate CORs, and other surveillance personnel. In response to a prior OIG audit report,³⁵ the USPTO Office of Procurement issued a policy memorandum 2014-04 requiring a signed appointment letter to be placed in every contract file at contract award.³⁶ However, we still found that contracting officials could not locate COR appointment letters for 32 of the 36 task/delivery orders.

Although COR certification and appointment is not a required closeout item, the FAR, CAM and OFPP require CORs to be trained, to include recertification through continuous training courses, and appointed to perform contract/order actions on behalf of the contracting officer. In recent years, OIG has examined USPTO's management of contracts. A 2014 OIG audit report found that USPTO did not follow federal and Departmental regulations resulting in inadequate contract oversight and lack of key contract documentation.³⁷

IV. Order Files Were Missing or Lacked Key Documentation

The FAR and the CAM require that contracting offices maintain files with a complete and readily accessible history of a contract's transactions³⁸ to support informed decisions at each step in the acquisition process and provide information for reviews and investigations. In addition, the Government Accountability Office's *Standards for Internal Control in the Federal Government* states that agencies should have internal control activities, such as the creation and maintenance of records that provide evidence of execution of approvals and authorizations.

As part of our initial sample, USPTO could not locate seven requested files for contracts and orders (see appendix A). For the seven contracts/orders, USPTO officials stated that archives had lost four; the contract closeout team did not return two to the Office of Procurement;³⁹ and USPTO did not retain the remaining one.

Additionally, we found that order files that were part of our sample lacked documents such as modifications for orders, contractor closing statements, and contracting officer completion statements. Missing contract/order files and documentation are an indication of poor internal

³³ OFPP memorandum, September 6, 2011. "Revisions to the Federal Acquisition Certification for Contracting Officer's Representatives (FAC-COR)."

³⁴ CAM 1301.670, January 2012, § 3.2.

³⁵ DOC OIG, December 3, 2014. *The U.S. Patent and Trademark Office's Awarding and Administering of Time and Materials and Labor-Hour Contracts Needs Improvement*. OIG-15-012-A. Washington, DC: DOC OIG.

³⁶ Procurement Memorandum 2014-04, September 11, 2014. "Contracting Officer Representatives, Task Order Manager, and Point of Contact Roles and Responsibilities."

³⁷ See OIG-15-012-A.

³⁸ FAR 4.801; CAM 1304.804, October 2013, §2.1.

³⁹ USPTO had a contract with i4 Now Solutions to complete USPTO's contract closeout procedures. The contract with i4 Now Solutions ended on April 30, 2017.

control. We also identified this condition in two prior OIG audit reports.⁴⁰ We reported that contract files were not properly maintained. In both reports, USPTO agreed with the recommendations to improve its controls over maintaining and safeguarding contract files.

The need for well-maintained and complete contract and order files is important, not only for day-to-day contract administration but also for when the Department experiences turnover with its contracting staff. Complete contract/order files help ensure proper transfer of responsibilities among staff and continuity of operations.

Recommendations

We recommend that USPTO's Director of the Office of Procurement do the following:

1. Improve controls and oversight processes to ensure compliance with federal and Departmental closeout requirements.
2. Ensure that contracting officers appoint, in writing, properly trained and certified CORs and remove those who fail to meet those requirements.
3. Ensure that all CORs meet their continuous learning requirements and be certified at the appropriate level.
4. Ensure that documents required to be in contract files to constitute a complete history of the transaction are contained in the contract file as identified in FAR Subpart 4.8.
5. Improve controls to ensure contract files are properly safeguarded and maintained as required by the FAR.

⁴⁰ See OIG-15-012-A. DOC OIG, June 16, 2016, *Awarding of U.S. Patent and Trademark Office Noncompetitive Contracts Did Not Consistently Follow Guidelines and Best Practices*. OIG-16-033-A. Washington, DC: DOC OIG.

Summary of Agency Response and OIG Comments

On May 24, 2019, OIG received USPTO's response to the draft report. USPTO agreed with our five findings, noting that it has either already implemented, or is in the process of implementing, corrective action to address OIG's recommendations. USPTO also stated in its response that, in April of 2019, the Director of Procurement issued a new policy that requires electronic files to be the official contract files of record for contracts awarded in FY 2019 and beyond. With the new policy, these electronic files are required to be maintained in accordance with FAR Subpart 4.8. For contracts already awarded, the Director of Procurement requires COR certifications, appointment orders, and contract file documentation to be maintained electronically. Additionally, by the end of Calendar Year 2019, the Director of Procurement will issue a Contract Closeout policy that complies with federal and Departmental closeout requirements. For the complete response, see appendix C for details.

Appendix A: Objective, Scope, and Methodology

The objective of the audit was to determine whether USPTO contracting personnel administered contract closeout procedures in accordance with federal and Departmental policy and regulations. To accomplish the objective, we:

- **Evaluated USPTO practices against relevant policies, regulations, and guidance, including the FAR, CAM⁴¹, and USPTO policies and procedures.**
- **Identified the total number of contracts closed during FY 2016 through third quarter of FY 2017 using the Federal Procurement Data System–Next Generation (FPDS-NG).** Our universe represented a total of 119 closed contracts and orders, 38 fixed-price, 13 time-and-materials, and 68 labor-hour, valued at \$723 million. We judgmentally selected 43 of the 119 contracts/orders with a total value of approximately \$653 million. Out of the 43, we reviewed 36 orders, valued more than \$615 million, because USPTO was not able to provide either the contract/order file or adequate documentation for the remaining 7.
- **Tested the reliability of FPDS-NG data by comparing information from the contract file with FPDS-NG data.**⁴² Although an independent review of the Department’s FPDS-NG data quality was found to be insufficient, we tested and found USPTO’s data quality to be 96 percent accurate.⁴³
- **Reviewed selected order file documents, such as contract/order award documents⁴⁴ and support documentation, invoices, excess funds deobligations, emails, FPDS-NG data, appointment letters, and certifications.** Additionally, we reviewed the order files for evidence of (a) final inspection and (b) acceptance of contracted deliverables at closeout. We reviewed financial reports generated from Momentum, USPTO’s accounting system. We then compared order files’ support documentation to the FAR, CAM, and USPTO policies and procedures. We analyzed the results of our order files review and summarized the results of our findings. (For further details, see findings I through IV.)

⁴¹ Our review of the CAM included Chapter 1304.804, Contract Closeout, dated October 2013. This chapter was in effect throughout our audit scope. A revised version of Chapter 1304.804 was issued on 30 June 2017, which included (1) changes to appendix titles (2) additional emphasis on timely contract closeout (3) changed dollar threshold from \$500,000 to \$750,000 for final audits (4) added criteria for unilateral contract closeouts (5) revised contract file retention requirements and (6) defined “de-obligation”. We compared both the 2013 version to the 2017 policy and found the criteria referenced throughout this report was still in effect.

⁴² We compared 11 FPDS-NG data fields for each order file. The 11 data fields reviewed were: (1) type of contract, (2) date signed, (3) effective date, (4) completion date, (5) action obligation (current), (6) base and exercised options value (current), (7) total contract value (current), (8) action obligation (total), (9) base and exercised options value (total), (10) total contract value (total), and (11) reason for modification.

⁴³ Our data reliability testing found 358 out of 374 reviewed FPDS-NG data fields to be accurate.

⁴⁴ We reviewed the base contract for each of the 36 closed orders to determine the stated terms related to closeout procedures.

To gain an understanding of relevant controls, we interviewed management and staff from the USPTO Office of Procurement and Office of Finance regarding policies, procedures, and internal control to effectively and efficiently closeout order files, track and deobligate excess funds, and ensure contracting personnel were properly appointed and trained. While we identified and reported on internal control deficiencies, no incidents of fraud, illegal acts, or abuse were detected within this audit. We identified weaknesses in controls related to the process and procedures used to retain and maintain order files. To assess the reliability of FPDS-NG and Momentum data, we interviewed agency officials knowledgeable about the data and reviewed relevant documentation. We determined that the data were sufficiently reliable for the purposes of this report.

We conducted an entrance conference on October 31, 2017, with representatives from USPTO's Office of Procurement, Office of Finance, and Office of General Counsel. We discussed the audit objective, audit approach, tentative audit schedule, our protocols, and audit expectations. Our field work occurred from October 2017 through April 2018 under the Inspector General Act of 1978, as amended (5 U.S.C. App.), and Department Organization Order 10-13, dated April 26, 2013. We performed our work at the headquarters office of USPTO in Alexandria, Virginia.

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

Appendix B: Summary of Findings by Order

| Closeout Timeframes | | | | | | | | | | | |
|---------------------|------------------|---------------|-----------------------|---|---|--|-------------------------------------|----------------------------------|------------------------------|--------------------------------|------------------------------|
| Sample No. | Order No. | Contract Type | Total Amount Expended | Missing Final Inspection and Acceptance | Missing Contract Officer Completion Statement | Missing Contractor Closing (Release) Statement | Time Standards for Closeout Not Met | Evidence of Delayed Funds Review | Missing COR Training Records | Missing COR Appointment Letter | Missing Awards Documentation |
| 1 | DOC46PAPT1500368 | Fixed Price | \$78,642,505.41 | X | | X | | | | X | |
| 2 | DOC46PAPT0803020 | Fixed Price | \$74,111,551.38 | X | | X | | | X | X | X |
| 3 | DOC46PAPT0703001 | Fixed Price | \$52,847,702.77 | X | X | X | X | X | | X | X |
| 4 | DOC46PAPT1500365 | Fixed Price | \$51,888,308.40 | X | | X | | | | X | |
| 5 | DOC46PAPT1100310 | Fixed Price | \$50,926,248.84 | X | | | | | | X | |
| 6 | DOC46PAPT0503005 | Fixed Price | \$48,653,158.00 | | | X | X | X | X | X | |
| 7 | DOC46PAPT0603002 | Fixed Price | \$48,627,999.00 | X | X | X | X | X | | X | X |
| 8 | DOC46PAPT0503003 | Fixed Price | \$32,349,999.35 | | | X | X | X | | X | |
| 9 | DOC46PAPT1500364 | Fixed Price | \$25,946,075.55 | X | | X | | | | X | |
| 10 | DOC56PAPT0905036 | Fixed Price | \$11,223,701.00 | | | X | X | | X | X | |
| 11 | DOC56PAPT1100335 | Fixed Price | \$6,708,700.00 | | | X | X | | | X | |
| 12 | DOC56PAPT1000004 | Fixed Price | \$6,679,187.00 | | | X | X | | X | X | |
| 13 | DOC56PAPT0605064 | Fixed Price | \$33,807,226.19 | | | X | X | X | | | |
| 14 | DOC56PAPT1300548 | Labor Hour | \$20,894,710.93 | X | | X | | | | | |
| 15 | DOC56PAPT0705083 | Fixed Price | \$17,389,922.00 | | | X | X | X | | | |
| 16 | DOC56PAPT0805087 | Fixed Price | \$10,584,766.00 | | | X | X | | | | X |
| 17 | DOC56PAPT1200323 | Labor Hour | \$4,509,367.46 | | | X | X | X | | X | X |
| 18 | DOC56PAPT1100389 | Labor Hour | \$735,519.61 | | | X | X | X | | X | |
| 19 | DOC56PAPT1100348 | Labor Hour | \$643,324.60 | | | X | X | X | | X | |
| 20 | DOC56PAPT1300485 | Labor Hour | \$557,610.60 | | | X | X | X | | X | |

| Sample No. | Order No. | Contract Type | Total Amount Expended | Missing Final Inspection and Acceptance | Missing Contract Officer Completion Statement | Missing Contractor Closing (Release) Statement | Time Standards for Closeout Not Met | Evidence of Delayed Funds Review | Missing COR Training Records | Missing COR Appointment Letter | Missing Awards Documentation |
|------------|------------------|-------------------|-----------------------|---|---|--|-------------------------------------|----------------------------------|------------------------------|--------------------------------|------------------------------|
| 21 | DOC56PAPT1100381 | Labor Hour | \$441,407.97 | | | X | X | | | X | |
| 22 | DOC45PAPT1500431 | Labor Hour | \$406,802.31 | X | X | X | | | | X | |
| 23 | DOC56PAPT1400436 | Labor Hour | \$378,194.88 | | | | | | | X | |
| 24 | DOC56PAPT1100357 | Labor Hour | \$354,759.90 | | | X | X | X | | X | |
| 25 | DOC56PAPT1300436 | Labor Hour | \$338,958.35 | | | | X | X | | X | |
| 26 | DOC56PAPT1100387 | Labor Hour | \$312,165.66 | | | X | X | X | | X | |
| 27 | DOC56PAPT0905080 | Labor Hour | \$310,969.20 | | | X | X | X | X | X | |
| 28 | DOC56PAPT1200434 | Labor Hour | \$297,286.80 | | | X | X | | | X | |
| 29 | DOC56PAPT1100388 | Labor Hour | \$246,729.96 | | | X | X | | | X | |
| 30 | DOC44PAPT1406057 | Labor Hour | \$175,802.00 | X | | | | | | X | |
| 31 | DOC56PAPT1100352 | Labor Hour | \$163,089.63 | | | X | X | X | | X | |
| 32 | DOC56PAPT1200429 | Labor Hour | \$161,178.55 | | | X | X | X | | X | |
| 33 | DOC56PAPT1100333 | Time and Material | \$17,824,964.43 | | | | | | | X | X |
| 34 | DOC56PAPT1000016 | Time and Material | \$12,126,775.18 | | | | X | X | | X | X |
| 35 | DOC56PAPT1200328 | Time and Material | \$3,417,699.01 | | | | | | | X | X |
| 36 | DOC56PAPT1100367 | Labor Hour | \$670,938.84 | | | X | X | X | | X | |
| Totals | | | \$615,355,306.76 | 10 | 3 | 29 | 25 | 18 | 5 | 32 | 8 |

Appendix C: Agency Response



UNITED STATES PATENT AND TRADEMARK OFFICE

UNDER SECRETARY OF COMMERCE FOR INTELLECTUAL PROPERTY AND
DIRECTOR OF THE UNITED STATES PATENT AND TRADEMARK OFFICE

MAY 23 2019

MEMORANDUM FOR: Carol Rice
Assistant Inspector General for Audit and Evaluation

FROM: Andrei Iancu 
Under Secretary of Commerce for Intellectual Property
and Director of the U.S. Patent and Trademark Office

SUBJECT: Response to Draft Report: *USPTO Could Improve Oversight Practices to Close Out Contract Files by Complying with Acquisition Regulations and Policies* (April 2019)

Executive Summary

We appreciate the effort you and your staff made in reviewing the Contract Close Out process at the United States Patent and Trademark Office (USPTO). The USPTO agrees with your audit findings and recommendations and has instituted a plan of action that is designed to make us compliant with Acquisition Regulations and Policies.

The USPTO has proactively taken measures to address the concerns outlined in the audit. Those measures were implemented after the majority of the files covered by this audit were awarded and prior to the release of this report.

As the report notes, the Contract Close Out process involves the collaboration between the Office of Procurement (OP), the Contracting Officer Representative (COR), and other functional areas. Recognizing the need for collaboration, the USPTO has implemented policies, procedures, and automated systems that are all designed to improve oversight, accountability, and timeliness.

Our response to each recommendation is discussed in detail below.

Response to Recommendations

IG Recommendation that the Director of the Office of Procurement (1): Improve controls and oversight processes to ensure compliance with federal and Departmental Close Out requirements.

USPTO Response:

The USPTO concurs with this recommendation. The Director of Procurement will issue a Contract Close Out policy that complies with federal and Departmental Close Out requirements

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by the end of Calendar Year 2019. The procedures will be implemented by a workflow in the USPTO's eAcquisitions system to allow for improved internal controls.

Additionally, once the Contract Close Out policy is completed, on at least a quarterly basis, eAcquisitions will generate a report to notify staff when to initiate the Close Out process in order to promote the timeliness and oversight of the USPTO's Close Out function.

IG Recommendation that the Director of the Office of Procurement (2): *Ensure that contracting officers appoint, in writing, properly trained and certified CORs and remove those who fail to meet those requirements.*

USPTO Response:

The USPTO concurs with this recommendation. With the exception of four of the 36 files, which were awarded in FY 2015, all of the awards reviewed by the Office of the Inspector General were awarded prior to the issuance of Procurement Memorandum (PM) 2014-04, "USPTO Contract Officer Representative (COR), Task Order Manager (TOM), and Point of Contact (POC) Roles and Responsibilities," in September 2014.

To address the missing documentation in the four files, the USPTO has made COR appointment and termination paperwork required in all eAcquisitions electronic files.

PM 2014-04 promulgated Form # USPTO-OP-006, "COR/TOM Instructions Memorandum," which outlines the COR and TOM's roles and responsibilities. Specifically, Form # USPTO-OP-006 and Director's Notice 2016-02, "Contract Administration for Labor Hour and Time-and-Materials Contracts," issued in August 2016, provide clear guidance on the proper steps for reviewing, approving, and processing invoices and for providing final acceptance of deliverables.

PM 2014-04 also promulgated the following forms to document the nomination, appointment, and termination of CORs and TOMs:

- Form # USPTO-OP-004, "USPTO COR/TOM Nomination Memorandum (>\$10M)";
- Form # USPTO-OP-005, "Delegation/Appointment Letter for COR/TOM"; and
- Form # USPTO-OP-008, "Termination of COR or TOM Appointment Letter."

In accordance with the guidelines outlined in PM 2014-04, Contracting Officers (COs) are only able to appoint a COR who is certified at the appropriate level.

The COR certification levels are managed by the Federal Acquisition Certification for COR (FAC-COR) Program Manager (PM) using Momentum's COR Certification Table. When a COR's certification expires or becomes inactive (typically when they leave the agency), the FAC-COR PM updates the COR Certification Table to show that COR as "Inactive." Once a COR's status is changed to "Inactive," a CO is no longer able to appoint that COR on a new award in Momentum. For existing awards where the now "Inactive" COR was designated, the FAC-COR PM will send out a notification alerting the impacted COs that they need to select an eligible COR and assign them for the appropriate contract actions.

IG Recommendation that the Director of the Office of Procurement (3): *Ensure that all CORs meet their continuous learning requirements and be certified at the appropriate level.*

USPTO Response:

The USPTO concurs with this recommendation and has addressed this finding through the implementation of the Federal Acquisition Institute Training Application System (FAITAS) on January 1, 2015.

FAITAS maintains an electronic file for each COR that automatically tracks continuous learning progress and certification status. FAITAS notifies CORs and their supervisors at regular intervals (180, 90, 60, 30, and 15 days prior to expiration). Furthermore, the USPTO FAC-COR PM, an OP employee, personally contacts CORs and their supervisors 30 days prior to expiration as a reminder to renew their certification.

To further ensure that COs only delegate CORs that have the appropriate certification level, the USPTO tracks FAITAS certification data in the COR Certification Table in Momentum. The CO must select a COR that has the appropriate level of certification from the table when making an award.

The USPTO was unable to provide five COR Training Certificates during the audit. These CORs were initially certified prior to the implementation of FAITAS. The five CORs did not maintain their certifications and, therefore, were never listed as active CORs in FAITAS. The paper certifications were lost, and the USPTO was unable to provide the requested documentation. Maintaining COR files in FAITAS will preclude similar findings in the future.

IG Recommendation that the Director of the Office of Procurement (4): *Ensure that documents required to be in contract files to constitute a complete history of the transaction are contained in the contract file as identified in FAR Subpart 4.8.*

USPTO Response:

The USPTO concurs with this recommendation and has addressed it by implementing policy and an electronic system of record (eAcquisitions) to ensure all required documents are in place.

In October 2016, the Director of Procurement issued PM 2017-02, "Contract File Checklists," to establish the standard, essential contract file documentation requirements as prescribed by FAR Subpart 4.8 and agency-specific requirements. Invoice and payment files are maintained by the Office of Finance in Momentum and complement OP contract files to comport with FAR Subpart 4.8.

In April 2019, the Director of Procurement issued PM 2018-01 (Rev 3), "eAcquisitions Procurement Policy," which requires that all awards initiated and awarded in eAcquisitions be compliant with the file documentation requirements of PM 2017-02. A file is not considered complete until all of the required documentation is in the system.

Beginning in FY 2019, all new awards must be initiated and awarded in eAcquisitions. PM 2017-02 and PM 2018-01 recognize the eAcquisitions electronic contract file as the official file of record. Accordingly, all awards made in FY 2019 and beyond will be compliant with the requirements of FAR Subpart 4.8.

IG Recommendation that the Director of the Office of Procurement (5): *Improve controls to ensure contract files are properly safeguarded and maintained as required by the FAR.*

USPTO Response:

The USPTO concurs with this recommendation and has taken steps to safeguard its hard copy files, create an electronic system of record, and improve oversight of personnel who have access to both hard copy and electronic files.

PM 2017-02 and PM 2018-01 recognize the eAcquisitions electronic contract file as the official file of record. Access to eAcquisitions is strictly role based and carefully monitored to ensure that contract files are properly safeguarded and maintained. The designation of the electronic file as the official file of record removes the USPTO's reliance on hard copy files and the need to ultimately send those files to the archives.

For hard copy files for contracts that were awarded prior to the implementation of eAcquisitions, OP created a detailed file management process to properly maintain and safeguard its contract files. This process includes consolidating OP's three separate file rooms into one single file room outfitted with a cypher lock and producing and maintaining a file inventory. In November 2016, the Director of Procurement issued PM 2017-03, "Contract File Management," which provides detailed guidance for all aspects of how OP creates and maintains its hard copy files.

Finally, the Director of Procurement has indicated that any contract support elicited for contract closeout will be performed on site at USPTO facilities. The USPTO will not permit third parties to take temporary possession of files, reducing the chance that the files cannot be produced for review.

Conclusion

In closing, we thank the Assistant Inspector General for Audit and Evaluation for providing us with this report. The USPTO and OP have made significant improvements to the requirements for documenting and performing contract Close Out practices in the past year. Many of the policies, procedures, and templates that have been developed and implemented in that time post-date the vast majority of the files reviewed during the audit. The USPTO is confident in our ability to meet the concurred recommendations in a timely manner.

United States Patent and Trademark Office
Technical Comments for Draft Report:
USPTO Could Improve Oversight Practices to Close Out Contract Files by Complying with
Acquisition Regulations and Policies (April 2019)

Technical Comments:

The USPTO did not identify anything in the report that was inconsistent with our records.