



U.S. PATENT AND TRADEMARK OFFICE

Awarding of U.S. Patent and Trademark Office Noncompetitive Contracts Did Not Consistently Follow Guidelines and Best Practices

FINAL REPORT NO. OIG-16-033-A

JUNE 16, 2016

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

FOR PUBLIC RELEASE





June 16, 2016

MEMORANDUM FOR: Russell Slifer
Deputy Under Secretary of Commerce for Intellectual Property
and Deputy Director of the U.S. Patent and Trademark Office

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


FROM: Mark Zabarsky
Assistant Inspector General for Acquisition
and Special Program Audits

SUBJECT: *Awarding of U.S. Patent and Trademark Office Noncompetitive
Contracts Did Not Consistently Follow Guidelines and Best Practices*
Final Report No. OIG-16-033-A

Attached is our final report on USPTO's contracts that were awarded using other than full and open competitive ("noncompetitive") procedures. Our objective was to determine whether these noncompetitive contract awards were properly justified. Overall, we found that contracting and program officials did not consistently follow USPTO policies and best practices for justifying and awarding noncompetitive contracts and task orders. We also found that contract files were not properly maintained.

We determined that USPTO did not have adequate acquisition planning processes in place, both to leverage competition as well as assure that it received fair and reasonable prices. Specifically, we found:

- market research was not sufficient to support sole-source justifications, and that using competitive rather than noncompetitive procedures could have potentially saved approximately \$23.2 million in acquisition costs;
- appropriate signature authorities were not obtained to approve the use of noncompetitive contracts;
- USPTO does not follow federal best practices defining the competition advocate's role in reviewing noncompetitive contract justifications;
- price reasonableness determination documentation was missing or lacked rationale for price reasonableness resulting in \$108 million in determination decisions that could not be verified; and
- the Office of Procurement is not used as a strategic partner with other organizational components.

We have included USPTO's entire formal response to our draft report as appendix D. The final report will be posted on OIG's website pursuant to section 8M of the Inspector General Act of 1978, as amended.

In accordance with Department Administrative Order 213-5, please provide us your action plan within 60 days of this memorandum. The plan should outline the actions you propose to take to address each recommendation.

We appreciate the cooperation and courtesies extended to us by your staff during our audit. Please direct any inquiries regarding this report to me at (202) 482-3884, and refer to the report title in all related correspondence.

Attachment

cc: Michelle Lee, Under Secretary of Commerce for Intellectual Property and Director, USPTO
Welton E. Lloyd Jr., Audit Liaison, USPTO
Robert Fawcett, Back-up Audit Liaison, USPTO



Report in Brief

JUNE 16, 2016

Background

Competition is a cornerstone of the federal acquisition system and a critical tool for achieving the best possible return on investment for taxpayers. Some degree of noncompetitive contracting is unavoidable—such as when only one responsible source can perform the work—and, in some cases, competition is impractical due to the government's previous reliance on specific contractors. However, competitive contracts can help save money, conserve scarce resources, improve contractor performance, curb fraud, and promote accountability. Competition also discourages favoritism by leveling the playing field for contract competitors and curtailing opportunities for fraud and abuse.

In 2003, USPTO published the Patent and Trademark Acquisition Guidelines (PTAG), which allows for flexibility within their acquisition process. For FY 2014 and the first quarter of FY 2015, USPTO awarded 104 noncompetitive contracts (e.g., contracts and task orders) with a total obligated value of approximately \$51.6 million.

Why We Did This Review

Our objective was to determine whether USPTO's noncompetitive contract awards were properly justified.

U.S. PATENT AND TRADEMARK OFFICE

Awarding of U.S. Patent and Trademark Office Noncompetitive Contracts Did Not Consistently Follow Guidelines and Best Practices

OIG-16-033-A

WHAT WE FOUND

We found that contracting and program officials did not consistently follow USPTO policies and best practices for justifying and awarding noncompetitive contracts and task orders. We also found that contract files were not properly maintained. We determined that USPTO did not have adequate acquisition planning processes in place, both to leverage competition as well as assure that it received fair and reasonable prices. Specifically, we found: (a) market research was not sufficient to support sole-source justifications, and that using competitive rather than noncompetitive procedures could have potentially saved approximately \$23.2 million in acquisition costs; (b) appropriate signature authorities were not obtained to approve the use of noncompetitive contracts; (c) USPTO does not follow federal best practices defining the competition advocate's role in reviewing noncompetitive contract justifications; (d) price reasonableness determination documentation was missing or lacked rationale for price reasonableness resulting in \$108 million in determination decisions that could not be verified; (e) and the Office of Procurement is not used as a strategic partner with other organizational components.

WHAT WE RECOMMEND

We recommended that Deputy Under Secretary of Commerce for Intellectual Property and the Deputy Director of USPTO: (1) Require that the competition advocate and program offices are actively involved in highlighting opportunities to increase competition; and (2) Require program offices to coordinate with the Office of Procurement throughout the strategic planning process to develop efficient, effective, and economical acquisition strategies to include opportunities to promote competition.

We also recommended that the Director of Office of Procurement (3) Require contracting officers to maintain supporting documentation in the contract file describing the specific steps taken and the results of the market research conducted; (4) Require contracting officers to examine opportunities to expand the vendor competition base in which vendors are chosen when only one responsible source and no other supplies or services will satisfy agency requirements; (5) Enforce current approval authorities for all contracts as defined in USPTO Policy Memorandum 2014-02 (Revision 3); (6) Include documentation and approval authority requirements in future training sessions for acquisition workforce staff; (7) Establish guidance to require that the competition advocate review and approve noncompetitive contracts over a certain dollar threshold; (8) Establish guidance to reflect best practices for retaining, as part of the contract file, the supporting documentation used to make price reasonableness determinations; and (9) Improve controls to properly maintain and safeguard contract files.

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*COVER: Detail of fisheries pediment,
U.S. Department of Commerce headquarters,
by sculptor James Earle Fraser, 1934*

Introduction

Competition is a cornerstone of the federal acquisition system and a critical tool for achieving the best possible return on investment for taxpayers. Some degree of noncompetitive contracting is unavoidable—such as when only one responsible source can perform the work—and, in some cases, competition is impractical due to the government’s previous reliance on specific contractors. However, competitive contracts can help save money, conserve scarce resources, improve contractor performance, curb fraud, and promote accountability. Competition also discourages favoritism by leveling the playing field for contract competitors and curtailing opportunities for fraud and abuse.

On November 29, 1999, the President signed into law the Patent and Trademark Office Efficiency Act (effective March 29, 2000), 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 the 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 Negotiation). Although the Patent and Trademark Office Efficiency Act gives USPTO flexibility within the acquisition process, the agency is still subject to several laws such as the Office of Federal Procurement Policy (OFPP) Act, Small Business Act, Service Contract Act, and Procurement Integrity Act. In 2003, USPTO published the *Patent and Trademark Acquisition Guidelines (PTAG)*, which allows for flexibility within their acquisition process.¹ For fiscal year (FY) 2014 and the first quarter of FY 2015, USPTO awarded 104 noncompetitive contracts (e.g., contracts and task orders) with a total obligated value of approximately \$51.6 million.²

A Presidential Memorandum on government contracting directed the Office of Management and Budget (OMB) and all federal agencies to reduce the use of noncompetitive contracts.³ Sole-source procurements are those that the government purchasing authority has decided can only be performed by one company. However, these types of contracts are considered high-risk and can result in wasted financial resources, poor contractor results, and inadequate accountability. An OMB Memorandum on government contracting directed agencies to reduce the use of high-risk contracts, which included sole-source contracts.⁴

¹ USPTO issued an updated version of the *PTAG* on October 3, 2013.

² *Noncompetitive* contracts and task orders are those awarded using other than full and open competition. Noncompetitive contracts enable agencies to address requirements that can only be satisfied by one source or that arise during emergencies when time allows for only limited consideration of offers. A *task order* is for services placed against an established contract or with government sources. Data on number and value of USPTO noncompetitive contracts and task orders obtained from the Federal Procurement Data System-Next Generation (FPDS-NG).

³ The memorandum, entitled “Government Contracting,” was issued March 4, 2009.

⁴ OMB memorandum M-09-25, entitled “Improving Government Acquisition,” was issued July 29, 2009.

Objective, Findings, and Recommendations

Our objective was to determine whether USPTO's noncompetitive contract awards were properly justified. Overall, we found that contracting and program officials did not consistently follow USPTO policies and best practices for justifying and awarding noncompetitive contracts and task orders. We also found that contract files were not properly maintained. In conjunction with OMB and USPTO policies, we used guidance from the FAR and the *Commerce Acquisition Manual (CAM)* as a benchmark for identifying practices that we considered most beneficial to enhance awarding of sole-source contracts. Appendix A further details the objective, scope, and methodology of our audit. Appendix B summarizes the findings.

We determined that USPTO did not have adequate acquisition planning processes in place, both to leverage competition as well as assure that it received fair and reasonable prices. Specifically, we found:

- market research was not sufficient to support sole-source justifications, and that using competitive rather than noncompetitive procedures could have potentially saved approximately \$23.2 million in acquisition costs;
- appropriate signature authorities were not obtained to approve the use of noncompetitive contracts;
- USPTO does not follow federal best practices defining the competition advocate's role in reviewing noncompetitive contract justifications;
- price reasonableness determination documentation was missing or lacked rationale for price reasonableness resulting in \$108 million in determination decisions that could not be verified; and
- the Office of Procurement is not used as a strategic partner with other organizational components.

We also identified that contract files are not properly maintained.

USPTO utilizes contracts to fulfill its primary goal of fostering innovation, competitiveness, and economic growth, both domestically and abroad. Therefore, sound procurement practices and an effective acquisition structure must be in place to ensure that federal funds are appropriately spent and USPTO maintains integrity in its day-to-day procurement operations—while leveraging its acquisition function to help further its mission.

USPTO has taken some actions to improve the efficiency and effectiveness of its procurement system. For example, the Office of Procurement is planning to implement the USPTO Source Selection Guide in FY 2017. This guide will provide policies, procedures, templates, and common definitions for competitions conducted at USPTO. Additionally, the Office of Procurement is in the process of establishing the *Patent and Trademark Acquisition Manual*. The *Manual* is structured to align with specific FAR parts and provide detailed acquisition guidance needed to implement the FAR, CAM, and PTAG. The Office of Procurement plans to issue chapter 6 (Other Than Full and Open Competition) by mid-year FY 2017. USPTO does not have a scheduled issuance date for chapter 15 (Contracting by Negotiation). USPTO program

officials and contracting officers have further opportunity to enhance its acquisition function by assessing and improving existing noncompetitive policies, processes, and strategic partnerships.

I. USPTO Did Not Carry Out Some Key Acquisition Planning Procedures

We found that contracting and program officials did not consistently follow USPTO's policies and best practices for planning, justifying, and approving the award of noncompetitive contracts. First, USPTO did not conduct or adequately document market research to support sole-source justifications. Second, USPTO did not obtain appropriate signature authorities for the approval of noncompetitive contract awards. Third, USPTO did not define the competition advocate's role in reviewing noncompetitive contracts. Fourth, USPTO could not demonstrate that price reasonableness was supported in price determination documentation. Finally, the Office of Procurement was not always used as a strategic partner in implementing USPTO mission objectives.

A. Market Research Was Not Sufficient to Support Sole-Source Justifications

Although competition is the preferred method of acquisition, in certain circumstances FAR subpart 6.3 permits for other than full and open competition. Such circumstances include

- when the supplies or services required by the agency are available from only one responsible source;
- a statute expressly authorizes or requires that the acquisition be made through another agency or from a specified source; and/or
- when the need exists to acquire the services of an expert.

The FAR, CAM, and *PTAG Desktop Guidebook* generally require that contracting officers who approve the acquisition of goods or services through other than full or open competition provide written justification.⁵ Under the FAR and CAM, these justifications generally should contain sufficient facts and rationale to justify the use of the specific exception to full and open competition that is being applied to the procurement.⁶

Additionally, the FAR, CAM, and *PTAG* generally require contracting officers to conduct market research early in the acquisition process regardless of the status of competition.⁷ Market research ensures that the government is procuring goods and services at reasonable costs and promotes maximum competition by collecting and analyzing information to determine potential vendors capable of meeting agency needs and acquiring pricing information.

⁵ FAR § 6.303-1(a)(1); CAM 1306.70 § 2.3; and *PTAG Desktop Guidebook*, PTAG part 5. The FAR is codified in title 48 of the Code of Federal Regulations.

⁶ FAR § 6.303-2; CAM 1306.70 § 2.3;

⁷ FAR part 10; CAM 1307.1 § 1.6; CAM 1316.1 § 3.4(b); and *PTAG* subpart 4.1, dated October 3, 2013.

FAR subsection 6.303-2(b)(8) states that justifications for other than full or open competition must describe the market research conducted and the results or the reason market research was not conducted. The FAR states that agencies should document the results of market research in a manner appropriate to the size and complexity of the acquisition.⁸ Similarly, the Government Accountability Office (GAO) reported in October 2014 that documenting market research is an important step to help others understand how the acquisition team collected and analyzed market information.⁹ PTAG also states that contracting officials should work closely with program officials to conduct market research and requires that they document the results of the research in the contract file.¹⁰ Furthermore, the *PTAG Desktop Guidebook* states that completing comprehensive market research is an absolute necessity when citing only one responsible source and no other supplies or services will satisfy agency requirements.¹¹ The *Guidebook* also states that the results of the market research should be captured in the contract file in such a way that the acquisition team's decision is clearly supportable.¹²

Contracting and program office officials did not adequately justify the sole-source authorities cited in 24 of the 34 (71 percent) contracts reviewed. This occurred because these officials did not adequately document market research for identifying other potential qualified vendors. Specifically:

- For 20 contracts (with a total value of more than \$107.9 million), market research was summarized or mentioned in the files. However, contracting and program officials could not provide documentation to support the summaries or activities conducted. Examples include:
 - A contract valued at \$139,520 for expert witness services cited that market research was conducted. The contract file contained a summary stating that information was reviewed for five candidates and four were interviewed. Although market research was mentioned in the file, there was no supporting narrative to substantiate these claims. Also, discussions with an attorney from USPTO's Solicitor's Office confirmed that the four candidates interviewed were all from the same contractor. Furthermore, this vendor was awarded all three expert witness services contracts included in our sample. The lack of sufficient market research combined with awarding multiple contracts to the same contractor for expert witness services contracts could limit the opportunities or pool of potential vendors for such services. Therefore, USPTO may not be receiving best value for its expert witness services contracts.

⁸ FAR § 10.002(e).

⁹ U.S. Government Accountability Office, October 9, 2014. *Market Research: Better Documentation Needed to Inform Future Procurements at Selected Agencies*, GAO-15-8. Washington, DC: GAO.

¹⁰ PTAG subpart 4.1, dated October 3, 2013.

¹¹ PTAG *Desktop Guidebook*, PTAG parts 5–6.

¹² PTAG *Desktop Guidebook*, PTAG part 6.

- On a contract valued at about \$69.3 million for a subscription to access scientific technical network databases, the contracting officer’s justification cited only one responsible source will satisfy the agencies requirement. The summary in the contract file showed that USPTO’s Electronic Information Centers personnel performed market research to determine whether three sources other than the current contractor could meet the requirements. USPTO concluded that the overall breadth and depth of the content and search flexibility of the aforementioned search tools does not approach the levels currently available through the current contractor. However, neither contracting nor program office officials could provide supporting evidence to substantiate the narrative contained in the contract file.
- For four contracts, documentation supporting the market research cited in the summaries was inadequate. For example, on a contract valued at \$7.8 million for subscription services which provide online access to a collection of scientific journals, the justification cited only one responsible source will satisfy the agency’s requirement. However, the documentation in the file supporting the market research and justification was based primarily on a self-certification by the contractor that it was the only company who could provide its product. Contracting officials accepted the contractor’s self-certification without any further verification of other potential sources.

Insufficient market research could result in contracting officials not making an informed decision—such as the proposed contractor was the only available or capable source—which could lead to questionable or inappropriate sole-source awards. Given the recurring nature of some of USPTO’s requirements covered in the contracts we reviewed, and the staff turnover we observed, not clearly documenting such fundamental information hinders the use of market research to inform future acquisitions.

Even in situations where USPTO anticipates a noncompetitive award, market research is a tool that should be used to promote competition to the maximum extent practicable, and agencies generally should identify actions, if any, they may take to remove or overcome barriers to competition for future acquisitions of the supplies or services required. GAO’s *Standards for Internal Control in the Federal Government* state that transactions and other significant events need to be clearly documented and the documentation should be readily available for examination, so as to ensure management directives are carried out.¹³

Accordingly, USPTO may not have received the best possible value on the services acquired for these 24 contracts, which had a total value of \$115.9 million. To estimate a potential savings rate from using competitive rather than noncompetitive procedures, we analyzed government-wide studies identified during the audit. A 2014 study disclosed that using competitive rather than noncompetitive procedures to award contracts may

¹³ GAO, September 2014. *Standards for Internal Control in the Federal Government (Green Book)*, GAO-14-704G. Washington, DC: GAO.

result in an estimated average savings rate of 20 percent.¹⁴ Based on the 24 noncompetitive contracts value of approximately \$115.9 million, we estimate USPTO could have potentially saved 20 percent in acquisition costs or approximately \$23.2 million in questioned costs (see appendix C).

B. *Appropriate Signature Authorities Were Not Obtained to Approve the Use of Noncompetitive Contracts*

Several 2014 USPTO procurement memorandums¹⁵ define the current approval authority for all contracts at various thresholds for the cumulative contract value including options as shown below in table 1.

Table 1. Contract Limits and Required Approval Authority

Contract Amount	Required Approval Authority
Up to the simplified acquisition threshold ^a	Contracting officer
Over the simplified acquisition threshold to \$25 million	Division chief or designee
Over \$25 million	Division Chief and Director of the Office of Procurement

Source: USPTO Procurement Memorandum 2014-02 (revision 2)

^a The simplified acquisition threshold increased from \$100,000 to \$150,000 on October 1, 2010.

We found that 13 of the 34 noncompetitive contracts were not approved at the appropriate levels required by USPTO policy.¹⁶ Of the 13 contracts:

- Five should have been approved by the Director of the Office of Procurement.¹⁷
- Three should have been approved by the division chief.
- Four should have been approved by the competition advocate.¹⁸
- One should have been approved by the contracting officer.

¹⁴ Healy, P.A., et al., September 2014. *The Value of Competitive Contracting*. Monterey, CA: Naval Postgraduate School.

¹⁵ USPTO procurement memorandums 2014-02 (Revision 2), dated June 23, 2014; 2014-02 (Revision 1), dated May 20, 2014; and 2014-02, dated January 15, 2014.

¹⁶ We compared each contract to the approval thresholds established in USPTO policy guidance in effect at that time. The previous version of the PTAG required justifications for noncompetitive contracts of certain dollar thresholds be approved by the Contracting Officer, Director of the Office of Procurement, or the Agency Competition Advocate.

¹⁷ Of the five contracts, three were task orders associated with an indefinite delivery/indefinite quantity contract. Since the sole-source justification is approved at the indefinite delivery/indefinite quantity contract level then the Director of the Office of Procurement's approval authority was required.

¹⁸ Of the four contracts, two were task orders associated with an indefinite delivery/indefinite quantity contract. Since the sole source justification is approved at the indefinite delivery/indefinite quantity contract level then the agency competition advocate's approval authority was required.

To illustrate, one contract awarded in February 2013 had a total value of about \$17.1 million for a database software license agreement. The policy in effect at the time of the contract award required that the competition advocate should have approved the justification. Contracting officials could not determine why they did not obtain the proper approval authority because the contracting officer was no longer with USPTO. The proper review and approval of the justification is an important internal control over the award of contract actions. Consequently, USPTO lacked assurance that the contracts had been properly awarded and that they had received the best value.

C. USPTO Does Not Follow Federal Best Practices Defining the Competition Advocate's Role in Reviewing Noncompetitive Contract Justifications

PTAG provides internal operating procedures for how USPTO will conduct its acquisitions as a result of exemptions and unique procurement flexibilities. The March 2003 version of the PTAG, in part, defined approval authorities at various thresholds for sole-source justifications. For instance, this version of the PTAG required USPTO's competition advocate to approve justifications greater than \$10 million.¹⁹ In October 2013, USPTO revised the PTAG, no longer addressing the approval authority thresholds for sole-source justifications. However, in July 2013, USPTO issued Procurement Memorandum 2013-04, establishing policy for the required level of review for all contractual actions.²⁰ Although USPTO has since updated the approval threshold one time—most recently in May 2014—none of the memorandums address the competition advocate's review and approval of sole-source justifications.

FAR²¹ requires that the competition advocate approve justifications for proposed noncompetitive contracts over \$700,000, but not exceeding \$13.5 million. Competition advocates promote competition by helping contracting officials develop effective ways to obtain best value in contracting and issuing an annual report on noncompetitive purchase activity. The competition advocate's role is to ensure that competition is maximized in the agency by challenging any unnecessary restrictions on competition. Without a control to ensure the advocate reviews noncompetitive contractual actions for opportunities to improve competition, there is increased risk that USPTO will not achieve best value in contracting.

D. Price Reasonableness Determination Documentation Was Missing or Lacked Rationale

FAR and CAM require that contracting officials make price-reasonable determinations in the absence of adequate price competition.²² The purpose of performing cost or price analysis is to develop a negotiation position that permits the contracting officer and the offeror an opportunity to reach agreement on a fair and reasonable price.²³ The FAR

¹⁹ PTAG, dated March 10, 2003.

²⁰ Procurement Memorandum 2014-02 and subsequent revisions supersede Procurement Memorandum 2013-04.

²¹ FAR § 6.304(a)(2).

²² FAR § 15.402(a) and 6.303-2; CAM 1316.1 § 3.4(e) and 1306.70 § 4.2.

²³ FAR § 15.405(a).

also states that a contracting officer's primary concern is the price the government will actually pay.²⁴ CAM requires that contracting officials ensure fair and reasonable pricing by obtaining the information and data needed, consistent with FAR subpart 15.4.²⁵ FAR section 4.803 provides examples of the records normally kept in the contract files. These records include the cost or price analysis.

We found that price reasonableness was not adequately determined in 23 of the 34 contracts reviewed. More specifically, we found that USPTO personnel did not retain essential documentation as part of the contract file to support the price reasonableness determinations. Examples include the following:

- On a contract for online subscription services—valued at about \$7.8 million—the contract file contained unsupported statements claiming that contracting personnel had evaluated price reasonableness and determined prices were fair and reasonable because the contractor's proposed prices were 10 percent less than the list price charged to other customers. However, the contracting officer accepted prices listed on briefing charts prepared by the contractor without any analysis or verification.
- On a contract for subject matter engineering expertise, valued at about \$1.1 million, the contracting officer documented the contract file stating that the “proposed prices were 10 percent less than similar items on General Services Administration (GSA) schedules,” but support for these claims—such as screen shots of the GSA schedules—was not included. Contracting officers should have documented the comparable prices established within the GSA schedules. The contract did not include price lists, nor were prices considered in awarding the contracts to the contractor.

As a result, USPTO was unable to demonstrate that prices paid were reasonable and potentially paid more than it should have for services. In total, we were unable to verify USPTO's price reasonableness determination decisions involving approximately \$108.4 million in contract prices.

Furthermore, PTAG does not specifically address determining price reasonableness for noncompetitive contracts. This allows personnel to apply price determination requirements inconsistently.

E. Office of Procurement Is Not Used as a Strategic Partner With Other Organizational Components

OMB directs agencies to take appropriate steps to ensure contracting and program officials work together and apply their respective skill sets to understanding the market for the types of products and services they need—including industry structure, potential cost drivers, and its competitive state.

²⁴ FAR § 15.405(b).

²⁵ CAM 1316.1 § 3.4(e).

PTAG states that acquisition planning is the joint responsibility of the entire acquisition team, which includes the contracting officer and the technical and program representatives.²⁶ Best practices have procurement departments aligned to play a strategic role in procurement processes. At USPTO, the Office of Procurement plays a critical role in executing the award of multimillion dollar contracts to assist USPTO in accomplishing its mission.

For example, USPTO relies on the Office of Procurement to award contracts, such as information technology, software maintenance and licenses, technical subscriptions, and expert witness services. However, USPTO's program offices do not consistently use the Office of Procurement as a strategic partner—that is, they do not use their expertise during the acquisition process for help in planning acquisitions to achieve common goals, such as identifying potential qualified vendors, which ultimately can lead to not receiving mission critical goods and services at the best value. Rather, the Office of Procurement is viewed more as an administrative support function, and USPTO's program offices generally direct and dictate acquisitions. Furthermore, in response to our draft report, USPTO officials stated program offices would assist the Office of Procurement in obtaining best value by ensuring that procurement requests were delivered earlier to permit the contracting staff to increase competition, negotiate with vendors, and properly document files. USPTO could gain a more coordinated and strategically oriented approach to procurement and make strategic decisions that achieve acquisition outcomes more effectively and efficiently by involving the Office of Procurement earlier in the procurement process.

II. Contract Files Are Not Properly Maintained

Contracting officers did not follow government-established best practices for maintaining comprehensive contract files. We found all 34 contract files lacked key documentation such as acquisition plans, market research, and price determination documents. FAR²⁷ requires that documentation in contract files be sufficient to constitute a complete history of the contract transactions to support informed decisions at each step in the acquisition process and provide information for reviews and investigations. In addition, GAO'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.²⁸ The need for well-maintained and complete contract 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 files help ensure proper transfer of responsibilities among staff and continuity of operations.

Additionally, USPTO was unable to locate the contract file for one contract identified in our sample. FAR²⁹ requires the head of each office performing contracting, contract

²⁶ PTAG subpart 2.0, dated October 3, 2013.

²⁷ FAR § 4.801(b).

²⁸ Ibid.

²⁹ FAR § 4.801(a).

administration, or paying functions to establish files containing the records of all contract actions. The contract had a total negotiated price of \$198,000, which included two option periods. Ultimately, USPTO had to recreate contract documentation—such as the contract award, modifications, acquisition file document, and contractor project estimate—from its electronic files. Missing documentation and files are indications of questionable contract management and oversight practices.

Recommendations

We recommend that Deputy Under Secretary of Commerce for Intellectual Property and the Deputy Director of the United States Patent and Trademark Office

1. Require that the competition advocate and program offices are actively involved in highlighting opportunities to increase competition.
2. Require program offices to coordinate with the Office of Procurement throughout the strategic planning process to develop efficient, effective, and economical acquisition strategies to include opportunities to promote competition.

We recommend that the Director of Office of Procurement

3. Require contracting officers to maintain supporting documentation in the contract file describing the specific steps taken and the results of the market research conducted.
4. Require contracting officers to examine opportunities to expand the vendor competition base in which vendors are chosen when only one responsible source and no other supplies or services will satisfy agency requirements.
5. Enforce current approval authorities for all contracts as defined in USPTO Policy Memorandum 2014-02 (Revision 3).
6. Include documentation and approval authority requirements in future training sessions for acquisition workforce staff.
7. Establish guidance to require that the competition advocate review and approve noncompetitive contracts over a certain dollar threshold.
8. Establish guidance to reflect best practices for retaining, as part of the contract file, the supporting documentation used to make price reasonableness determinations.
9. Improve controls to properly maintain and safeguard contract files.

Summary of Agency Response and OIG Comments

OIG received USPTO's comments on the draft report, consisting of its response and a separate document containing technical comments—the first of which we include as appendix D of this final report. Based on USPTO's review of the draft and subsequent discussions, we have made some suggested changes in the report. USPTO concurred with the recommendations in the report.

Appendix A: Objective, Scope, and Methodology

The objective of our audit was to determine whether USPTO's noncompetitive contract awards were properly justified and approved. To accomplish our objective, we did the following:

- *Evaluated USPTO practices against relevant policies and guidance, including OMB and OFPP memoranda, the FAR, CAM, and USPTO policies and procedures.* We used guidance from the FAR and CAM as a benchmark for identifying practices that we considered most beneficial to ensure effective justification and approval of noncompetitive contracts.
- *Identified the total number of contracts and net obligations reported as noncompetitive contracts for FY 2014 and the first-quarter of FY 2015 using the Federal Procurement Data System–Next Generation (FPDS–NG).* Net obligations for noncompetitive contracts were \$51.6 million, encompassing 104 contracts.
- *Judgmentally selected a sample of 35 contracts—9 task orders and 26 stand-alone contracts from a total population of 104 noncompetitive contracts.* Of the 35, we reviewed 34 contracts with total negotiated contract value of approximately \$151 million. We could not review one stand-alone contract because USPTO could not locate and provide the contract file.
- *Tested the reliability of FPDS-NG data by comparing information from the contract file with information gained in interviewing contracting officials.* Although prior GAO and OIG reports noted problems with data quality in FPDS-NG, we found the data sufficient for generalizing issues found in the contracts we reviewed.
- *Reviewed acquisition documentation.* This included contract award documents; acquisition file documents and acquisition plans; market research; sole-source justifications; price determination documents; and training, certification, and appointment requirements for contracting personnel.

Further, we obtained an understanding of the internal control used to award noncompetitive contracts by interviewing the acquisition personnel at the USPTO. While we identified and reported on internal control deficiencies, no incidents of fraud, illegal acts, violations, or abuse were detected within our audit. We identified weaknesses in the controls related to the processes and procedures used to award noncompetitive contracts. We relied on computer-processed data from the FPDS-NG to perform this audit. We conducted the audit fieldwork between April and September 2015. We did our fieldwork at USPTO headquarters in Alexandria, Virginia.

We conducted this performance audit in accordance with generally accepted government auditing standards. 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. We performed our work under the authority of the Inspector General Act of 1978, as amended, and Department Organizational Order 10-13, dated April 26, 2013.

Appendix B: Summary of Findings by Contract

Contract No.	Contract Type	Specific Product or Service	Total Negotiated Contract Amount	Market Research Not Sufficient	Appropriate Signatures Not Obtained	Price Reasonableness Determination Documentation Missing or Lacked Rationale	
1	56PAPT13 00473	Firm Fixed Price	Washington Metropolitan Area Transit Authority Smart Benefit Program	\$3,423,814	x	x	x
2	40PAPT13 02183	Firm Fixed Price	Software Maintenance Renewal	\$74,141	x	x	x
3	50PAPT13 00003	Firm Fixed Price	Derwent World Patent Index database Software License Agreement (commercial item)	\$17,132,029	x	x	x
4	56PAPT14 00403	Labor Hour	Expert Analysis in Real User Application Monitoring Project	\$4,914,869		x	
5	50PAPT14 00004	Firm Fixed Price	Data Synchronizer Services	\$4,560,000			
6	50PAPT15 00002	Labor Hour	User-centered design, interface, and experience support services	\$6,699,985	x		
7	50PAPT10 00007	Firm Fixed Price	ScienceDirect Online Subscription Services	\$7,753,066	x	x	x
8	50PAPT14 00002	Firm Fixed Price	Westlaw Online Subscription Services	\$3,792,964			
9	56PAPT14 00416	Labor Hour	Support Services for LiveLink Discovery and Distributed Products	\$624,000	x		x
10	40PAPT15 05005	Firm Fixed Price	Annual Software Maintenance Support (commercial item)	\$2,685,036	x	x	x
11	56PAPT14 00464	Labor Hour	Expert Analysis in Real User Application Monitoring Project	\$194,460		x	
12	50PAPT15 00001	Labor Hour	Lead IT Architect Consulting Services	\$182,025	x	x	x
13	40PAPT14 02085	Fixed price Redetermination	Site Survey of the Installation of the BridgeWave Transceiver	\$149,138	x		x
14	43PAPT13 02098	Labor Hour	Expert Witness Services (commercial item)	\$139,520	x		x
15	40PAPT12 02042	Firm Fixed Price	Non Patent Literature Searches	\$240,000	x		x
16	43PAPT13 02099	Labor Hour	Expert Witness Services (commercial item)	\$131,550	x		x
17	40PAPT14 02098	Firm Fixed Price	Prime Optical Character Recognition Annual Software Maintenance	\$99,822			x

Contract No.	Contract Type	Specific Product or Service	Total Negotiated Contract Amount	Market Research Not Sufficient	Appropriate Signatures Not Obtained	Price Reasonableness Determination Documentation Missing or Lacked Rationale
18	56PAPT14 00348	Firm Fixed Price	Transit Vouchers (commercial item)	\$37,500		
19	40PAPT14 02011	Labor Hour	Expert Witness Services (commercial item)	\$96,000	x	x
20	56PAPT15 00340	Firm Fixed Price	Transit Vouchers (commercial item)	\$76,000		
21	56PAPT14 00509	Labor Hour	Expert Analysis in Real User Application Monitoring Project	\$55,035		x
22	43PAPT12 02259	Firm Fixed Price	Knowledge Refinery Platform Software, maintenance, and support	\$445,000	x	x
23	41PAPT14 02276	Firm Fixed Price	Compustat Database Subscription	\$98,000	x	x
24	40PAPT14 02061	Firm Fixed Price	CitraTest Software Licenses and Maintenance Renewal	\$46,263	x	x
25	41PAPT14 02277	Firm Fixed Price	Data License for Internet Based Data and Research Service	\$89,000	x	x
26	56PAPT12 00324	Firm Fixed Price	Transit Vouchers (commercial item)	\$107,000		
27	40PAPT14 02056	Firm Fixed Price	Annual software renewal and maintenance.	\$37,714	x	x
28	50PAPT11 00002	Firm Fixed Price	Subscription to Access Chemical Abstracts Databases	\$69,324,000	x	x
29	50PAPT11 00030	Firm Fixed Price	Lease/rental of other warehouse buildings	\$21,484,990		x
30	44PAPT12 09015	Firm Fixed Price	Software Licenses and Maintenance for the Unisys ClearPath Pluss Libra Model 750 Server	\$3,059,415	x	x
31	50PAPT14 00008	Firm Fixed Price	Perpetual License for the Genetic Sequence Database	\$948,403	x	x
32	56PAPT13 00362	Labor Hour	Subject Matter Expert Engineering Support (Proprietary)	\$1,121,745	x	x
33	50PAPT11 00041	Time-and - Materials	Leased Space for Remote Production Operation and Disaster Recovery Data Center	\$900,000	x	
34	50PAPT14 00006	Labor Hour	Lead IT Architect Consulting Services	\$500,000	x	x
			TOTALS	\$151,222,484	24	13
						23

Source: OIG review of contract files

Appendix C: Potential Monetary Benefits

	Questioned Costs	Unsupported Costs	Funds Put to Better Use
Finding I.A	\$23,179,969		

Appendix D: Agency Response

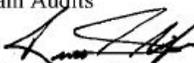


UNITED STATES PATENT AND TRADEMARK OFFICE

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

MAY 23 2016

MEMORANDUM FOR: Mark Zabarsky
Assistant Inspector General for Acquisition and
Special Program Audits

FROM: Russell Slifer 
Deputy Under Secretary of Commerce for Intellectual Property
and Deputy Director of the U.S. Patent and Trademark Office

SUBJECT: Response to Draft Report: *Awarding of U.S. Patent and Trademark
Office Noncompetitive Contracts Did Not Consistently Follow
Guidelines and Best Practices* (April 2016)

Executive Summary

We appreciate the effort you and your staff made in reviewing United States Patent and Trademark Office's (USPTO) process for awarding noncompetitive contracts. We have carefully considered the nine recommendations made in the subject draft report, which were based on the 34 sample files from fiscal year 2013, fiscal year 2014, and early fiscal year 2015.

The USPTO has made significant progress in the award of our noncompetitive contracts in the past year and has likewise improved its file documentation of such contracts. Moreover, in the past year, the Director of Procurement has issued policy and guidance designed to: enhance performance of market surveys and market research in an effort to maximize competition and properly support sole source justifications; ensure that all USPTO procurements are reviewed and approved at appropriate levels; ensure that all justifications for limiting competition are approved at appropriate levels; and require contracting officers to properly document and explain price reasonableness determinations. Finally, the Office of Procurement continues to work with its USPTO customers and stakeholders to develop stronger strategic partnerships, improve organizational understanding of procurement roles and responsibilities, and refine its procurement process to ensure adequate time and planning are provided to produce contracts that provide the goods and services required to foster innovation, competitiveness and economic growth for American companies, innovators and entrepreneurs.

Our response to each recommendation is discussed in detail below.

Response to Recommendations

P.O. Box 1450, Alexandria, Virginia 22313-1450 - www.USPTO.gov

(1) IG Recommendation that the Deputy Director of the USPTO (1): Require that the competition advocate and program offices are actively involved in highlighting opportunities to increase competition.

USPTO Response:

The USPTO concurs with this recommendation. In March 2016, the Director of Procurement issued Procurement Memorandum 2016-03 (Rev. 1) to provide clear guidance to program offices and contracting staff on how to properly conduct and document market surveys and market research. Training was then provided to program managers, Contracting Officer's Representative (CORs), and contracting staff. With regard to the competition advocate's role in the review and approval of sole-source or limited competition justifications, the Director of Procurement issued Procurement Memorandum 2016-02, in December 2015, clarifying when the competition advocate's signature is required. The USPTO will continue to highlight the need and benefits of increased competition to customers and the need for appropriate planning to conduct such competitions.

(2) IG Recommendation that the Deputy Director of the USPTO (2): Require program offices to coordinate with the Office of Procurement throughout the strategic planning process to develop efficient, effective, and economical acquisition strategies to include opportunities to promote competition.

USPTO Response:

The USPTO concurs with this recommendation. The Office of Procurement is currently engaged with program offices in an effort to improve USPTO's acquisition planning, and to ensure that contracting staff have adequate time to conduct procurements. The Office of Procurement is developing an Advance Acquisition Planning/Forecasting process with USPTO business units that will provide data on anticipated acquisitions to facilitate workload planning and provide industry with enhanced notice of upcoming acquisitions to increase the likelihood of competition. Moreover, the Director of Procurement is finalizing standardized Procurement Administrative Lead Times (PALT), based on USPTO procurement processes and federal industry benchmarks, to provide customers with a more realistic preview of how long it takes to process certain procurements, and to provide USPTO contracting professionals with more adequate time to properly process and document procurements. Proper PALT will produce better competition, better pricing, and provide contracting staff with the time needed to properly document contract files.

IG Recommendation that the Director of Office of Procurement (3): Require contracting officers to maintain supporting documentation in the contract file describing the specific steps taken and the results of the research conducted.

USPTO Response:

The USPTO concurs with this recommendation and presumes it applies to market research. In March 2016, the Director of Procurement issued Procurement Memorandum 2016-03 (Rev. 1) entitled USPTO Market Survey and Market Research Requirements. The policy provides clearer guidance to program office and contracting staffs on how to conduct market surveys and market research and promulgates templates to standardize the way in which USPTO contract files capture market research efforts. The Director of Procurement also issued Procurement Memorandum 2016-01 (Rev. 1), in March 2016, requiring the USPTO Market Survey Memorandum to be included in all applicable procurement request packages delivered to the Office of Procurement for processing. It is the USPTO's firm belief that these enhanced

documentation requirements will help preclude instances cited in the report that led the OIG to assert that the USPTO may not have received best value on 24 sole source contracts for which the market research was deemed inadequate. The USPTO believes that adequate market research was conducted in those instances, but not adequately documented in the file. Accordingly, as discussed in our technical comments to the OIG's draft report, we believe the notional \$23.2 million in acquisition savings is mischaracterized, presuming a 20 percent savings for procurements that could have been competitive. USPTO believes it would be more accurate to characterize this amount as potential savings that may have been realized competition, as this is consistent with the cited report that gives the 20 percent figure and because this amount is not equivalent to unsupported or inappropriate costs. The USPTO believes the issue with these procurements was inadequate market research to support other than full and open competition, not that they should have been competitive. Nevertheless, the USPTO concurs with the recommendation for maintaining better market research documentation in the contract file.

IG Recommendation that the Director of Office of Procurement (4): *Require contracting officers to examine opportunities to expand the vendor competition base in which vendors are chosen when only one responsible source and no other supplies or services will satisfy agency requirements.*

USPTO Response:

The USPTO concurs with this recommendation. The aforementioned policy requiring enhanced market survey, market research, and documentation is designed to provide contracting officers with a fuller picture of USPTO's efforts to identify capable sources. The Director of Procurement will advise contracting officers of their responsibilities to closely scrutinize proposed justifications for procuring goods and services without competition. Further, the Office of Procurement will continue to encourage program offices to include options on initial competitions, to help prevent the practice of awarding follow-up task orders on a sole source basis. This will help drive down the number and value of noncompetitive transactions and make initial contract awards more attractive to industry with a likely increase in competition.

IG Recommendation that the Director of Office of Procurement (5): *Enforce current approval authorities for all contracts as defined in USPTO Policy Memorandum 2014-02 (Revision 3).*

USPTO Response:

The USPTO concurs with this recommendation. In April 2016, the Director of Procurement issued Director's Notice 2016-01 (Rev. 1) providing guidance on appropriate review and approval levels for USPTO procurements. This guidance clarifies roles, responsibilities, and approval authorities for contracts defined in 2014-02 (Rev. 3). In 2017, the Office of Procurement will commence periodic Procurement Management Reviews of procurement files to help ensure compliance with the required review levels.

IG Recommendation that the Director of Office of Procurement (6): *Include documentation and approval authority requirements in future training sessions for acquisition workforce staff.*

USPTO Response:

The USPTO concurs with this recommendation. In June 2015, the Director of Procurement issued Procurement Memorandum 2015-02 establishing the Patent and Trademark Office Acquisition Manual (PTAM), including PTAM Chapters 1, 8, and 53. Training for PTAM Chapter 8 included documentation requirements, templates, and content requirements for

Limited Sources Justifications issued under GSA schedules. This training was provided to procurement staff in June 2015.

In December 2015, the Director of Procurement issued Procurement Memorandum 2016-02 establishing documentation requirements and approval levels for various means of limited or no competition. Training included documentation requirements, templates, and content requirements for Justifications for Exception to Fair Opportunity and Sole Source Justifications. This training was provided to procurement staff and Contracting Officer's Representatives in December 2015.

IG Recommendation that the Director of Office of Procurement (7): Establish guidance to require that the competition advocate review and approve noncompetitive contracts over a certain dollar threshold.

USPTO Response:

The USPTO concurs with this recommendation.

Previously mentioned Procurement Memoranda 2015-02 and 2016-02 promulgated requirements for competition advocate review and approval of noncompetitive contracts at certain dollar thresholds.

IG Recommendation that the Director of Office of Procurement (8): Establish guidance to reflect best practices for retaining, as part of the contract file, the supporting documentation used to make price reasonableness determinations.

USPTO Response:

The USPTO concurs with this recommendation. The existing Acquisition File Documentation Form is intended to capture price reasonableness determinations made by USPTO contracting officers. Some files reviewed during the OIG's audit lacked supporting documentation that should have been retained to support the contracting officer's determination. The Office of Procurement will deliver training to staff to review price analysis, determining fair and reasonableness, and maintaining adequate supporting documentation in the contract file as required by the Federal Acquisition Regulation and the Commerce Acquisition Manual.

IG Recommendation that the Director of Office of Procurement (9): Improve controls to properly maintain and safeguard contract files.

USPTO Response:

The USPTO concurs with this recommendation. In 2015, the Office of Procurement began its improvement efforts in this area by consolidating contract files from three unlocked rooms into a single room (7B25) with a cypher lock. Quarterly, the Office of Procurement conducts an analysis between the Master Contract List, generated from awards made in the Momentum Acquisitions module, and the File Room inventory to determine if any files are missing or new award files have not been logged into the File Room. Discrepancies are identified and the responsible Division Chief and Contracting Officer in the Office of Procurement are notified and requested to return the file. The Office of Procurement is currently designing a "check in" and "check out" feature on its internal SharePoint page to facilitate file monitoring and tracking. Finally, in May 2016, the Director of Procurement will issue a Procurement Memorandum that will promulgate a contract file checklist to standardize and improve documentation retained in contract files.

Conclusion

In closing, we thank the Principal Assistant Inspector General for Audit and Evaluation for providing us with this report. The USPTO and the Office of Procurement have made significant improvements to the requirements for documenting and performing sole source procurements 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 abilities to meet the recommendations we've concurred with in a timely manner, and we look forward to working with your office in the future in our efforts to improve the process by which we award and administer noncompetitive contracts.