

# USPTO Must Improve Acquisition Planning to Ensure Efficient and Competitive Procurements

FINAL REPORT NO. OIG-24-008-A

December 21, 2023



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



December 21, 2023

**MEMORANDUM FOR:** Kathi Vidal  
Under Secretary of Commerce for Intellectual Property and  
Director of the United States Patent and Trademark Office

**FROM:** Frederick J. Meny, Jr.  
Assistant Inspector General for Audit and Evaluation

**SUBJECT:** *USPTO Must Improve Acquisition Planning to Ensure Efficient and  
Competitive Procurements*  
Final Report

Attached for your review is our final report on the audit of the United States Patent and Trademark Office's (USPTO's) acquisition planning process. Our objective was to determine whether USPTO's processes and activities for acquisition planning are effective and consistent with established practices, procedures, and regulations.

Overall, we found that USPTO's processes and activities for acquisition planning were ineffective and not consistent with established regulations, policies, and procedures. Specifically, we found the following:

- I. USPTO's policies and procedures did not provide sufficient guidance on the use of its *Patent and Trademark Office Acquisition Guidelines* acquisition procedures.
- II. USPTO did not retain key documents, and documents developed during acquisition planning were insufficient and not supported.
- III. USPTO did not adhere to federal regulations relating to the Small Business Administration's (SBA's) Business Development program (the 8(a) Program).

On November 6, 2023, we received USPTO's formal response to our draft report. USPTO concurred with all of our recommendations. However, we are concerned that USPTO's responses to recommendations 2, 3, 4, and 5 will not ensure that the issues related to these recommendations will be resolved. USPTO also included technical comments, which we considered but we did not revise the report. We look forward to USPTO's action plan that will provide details on its corrective actions. USPTO's complete response to our draft report is in appendix E.

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. The final report will be posted on the Office of Inspector General's website pursuant to the Inspector General Act of 1978, as amended (5 U.S.C. §§ 404 & 420).

We appreciate the cooperation and courtesies extended to us by your staff during this audit. If you have any questions or concerns about this report, please contact me at (202) 793-2938 or Amni Samson, Director for Audit and Evaluation, at (202) 793-3324.

Attachment

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# Report in Brief

December 21, 2023

## Background

In its fiscal year 2021–2023 acquisition forecast, the United States Patent and Trademark Office (USPTO) projects spending more than \$1.86 billion for contracted supplies and services. USPTO relies on contractors to perform services required for or in support of patent and trademark examination and other tasks. As such, careful consideration of appropriate acquisition strategies is critical to ensure USPTO's overall investment is spent wisely.

In 1999, the Patent and Trademark Office Efficiency Act gave USPTO its own procurement authority to promote innovation and efficiency. The Act provided USPTO procurement flexibility while ensuring objectivity to bolster or promote competition. It also granted USPTO certain exemptions from laws governing acquisition planning, including the Competition in Contracting Act of 1984 and certain parts of the Federal Acquisition Regulation.

As a result of these exemptions, USPTO developed the *Patent and Trademark Office Acquisition Guidelines* (PTAG), the *PTAG Desktop Guide*, and the *Patent and Trademark Office Acquisition Manual* (PTAM) to provide USPTO-specific guidance. Although USPTO has been working to update its policies and procedures, we have repeatedly found the need for improvements in strengthening USPTO's acquisition management efforts.

## Why We Did This Audit

Our objective was to determine whether USPTO's processes and activities for acquisition planning are effective and consistent with established practices, procedures, and regulations.

## UNITED STATES PATENT AND TRADEMARK OFFICE

### USPTO Must Improve Acquisition Planning to Ensure Efficient and Competitive Procurements

OIG-24-008-A

#### WHAT WE FOUND

Overall, we found that USPTO's processes and activities for acquisition planning were ineffective and not consistent with established regulations, policies, and procedures. Specifically, we found the following:

- I. USPTO's policies and procedures did not provide sufficient guidance on the use of its PTAG acquisition procedures.
- II. USPTO did not retain key documents, and documents developed during acquisition planning were insufficient and not supported.
- III. USPTO did not adhere to federal regulations relating to the Small Business Administration's (SBA's) Business Development program (the 8(a) Program).

#### WHAT WE RECOMMEND

We recommend that the Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office direct the Director of the Office of the Procurement to:

1. Create a comprehensive framework for acquisition planning by updating the PTAG, *PTAG Desktop Guide*, PTAM, and other supplemental documents to clearly define the proper use of its PTAG acquisition procedures.
2. Create and publish, with support from USPTO executives, a comprehensive and clear acquisition planning process including formalizing and updating acquisition planning policies and procedures.
3. Develop policies and procedures to ensure (1) appropriate acquisition planning documents, such as the market research, acquisition planning, and sole-source or other justifications, are retained in the contract file and (2) current reviews and approvals for acquisition planning are properly documented and enforced.
4. Provide and require initial and ongoing training for business unit staff and other personnel on agency-specific acquisition planning processes, requirements, and roles and responsibilities.
5. Develop policies and procedures to provide oversight of 8(a) Program acquisitions to ensure those acquisitions comply with federal regulations to mitigate the risk of questioned costs, identified at about \$38 million in obligated amounts.

# Contents

**Introduction..... 1**

**Objective, Findings, and Recommendations ..... 3**

    I. USPTO’s Policies and Procedures Did Not Provide Sufficient Guidance on the Use of Its PTAG Acquisition Procedures.....4

        A. USPTO used its PTAG acquisition procedures to bypass competition when competition would have been reasonable.....4

        B. USPTO did not adequately define how and when PTAG acquisition procedures should be used .....5

        Recommendation .....7

    II. USPTO Did Not Retain Key Documents, and Documents Developed During Acquisition Planning Were Insufficient and Not Supported .....7

        Recommendations .....9

    III. USPTO Did Not Adhere to Federal Regulations Relating to the Small Business Administration’s 8(a) Program.....9

        Recommendation ..... 10

**Summary of Agency Response and OIG Comments ..... 11**

**Appendix A: Objective, Scope, and Methodology ..... 14**

**Appendix B: Detailed Acquisition Requirements ..... 16**

**Appendix C: Review of Key Acquisition Planning Documents..... 18**

**Appendix D: Potential Monetary Benefits ..... 19**

**Appendix E: Agency Response ..... 20**

*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

Acquisition planning is an essential first step in securing a federal contract for supplies and services. Planning is critical to successful acquisitions to deliver the right solutions at the best value, on time, and within budget. Planning involves all personnel responsible for an acquisition and must be coordinated and integrated through a comprehensive plan for fulfilling agency need. Effective planning also encourages open competition.

In its fiscal year 2021–2023 acquisition forecast, the United States Patent and Trademark Office (USPTO) projects spending more than \$1.86 billion for contracted supplies and services. USPTO relies on contractors to perform services required for or in support of patent and trademark examination and other tasks. As such, careful consideration of appropriate acquisition strategies is critical to ensure USPTO’s overall investment is spent wisely.

In 1999, the Patent and Trademark Office Efficiency Act gave USPTO its own procurement authority to promote innovation and efficiency.<sup>1</sup> The Act provided USPTO procurement flexibility while ensuring objectivity and to bolster or promote competition. It also granted USPTO certain exemptions from laws governing acquisition planning, including the Competition in Contracting Act of 1984 and certain parts of the Federal Acquisition Regulation (FAR), including Part 6, which covers competition requirements. As a result of these exemptions, USPTO developed:

- the *Patent and Trademark Office Acquisition Guidelines* (PTAG),<sup>2</sup> for how it will conduct its acquisitions using its granted acquisition authority under the Patent and Trademark Office of Efficiency Act (referred to in this report as “PTAG acquisition procedures”);
- the *PTAG Desktop Guide*,<sup>3</sup> to provide further guidance on the intent and purpose of the PTAG; and
- the *Patent and Trademark Office Acquisition Manual* (PTAM), to provide USPTO-specific guidance or unique requirements necessary to implement the FAR, the Commerce Acquisition Regulation, the Commerce Acquisition Manual, and provisions of the PTAG.

USPTO began developing the PTAM in 2014 and was to have 53 parts mirroring the FAR; however, only 4 parts have been published.

While USPTO has been working to update its policies and procedures, we have repeatedly found the need for improvements in strengthening USPTO’s acquisition management efforts. Specifically, in 2016, we reported that USPTO’s inadequate acquisition planning processes led to

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<sup>1</sup> See Pub. L. No. 106-113, 113 Stat. 1501, 1501A-572; see also 35 U.S.C § 2(b)(4) (listing statutory provisions that USPTO is exempt from following for acquisitions).

<sup>2</sup> U.S. Department of Commerce (DOC), USPTO, adopted March 10, 2003, Revised October 3, 2013. *Patent and Trademark Office Acquisition Guidelines*. Alexandria, Virginia: USPTO.

<sup>3</sup> DOC, USPTO. April 2022. *PTAG Desktop Guide*. Alexandria, Virginia: USPTO.

spending more than \$23 million that could have been saved.<sup>4</sup> In 2020, we found that USPTO did not timely plan and compete a software development contract, incurring almost \$47 million in avoidable costs.<sup>5</sup> In 2022, we reported that poor planning resulted in delays in recompeting a patent data capture contract and identified more than \$22 million in questioned costs.<sup>6</sup> Recurring themes we observed were lapses in acquisition planning, a lack of coordination between USPTO's Office of Procurement and its business units, and noncompliance with policies and best practices. This led to delays in contract awards and poor management of vendor performance, resulting in over \$90 million in questioned costs.

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<sup>4</sup> DOC, Office of Inspector General (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.

<sup>5</sup> DOC OIG, November 19, 2020. *USPTO Should Improve Acquisition Planning and Vendor Performance Management to Prevent Schedule Delay and Unnecessary Costs Related to the SDI-NG Contract*, OIG-21-010-A. Washington, DC: DOC OIG.

<sup>6</sup> DOC OIG, August 16, 2022. *USPTO Should Strengthen Its Planning and Oversight of Patent Data Capture Contracts to Manage Risks and Prevent Unnecessary Costs*, OIG-22-028-A. Washington, DC: DOC OIG.

## Objective, Findings, and Recommendations

Our audit objective was to determine whether USPTO's processes and activities for acquisition planning are effective and consistent with established practices, procedures, and regulations. To address this objective, we used the FAR and USPTO policies and procedures to review a judgmental sample of 20 acquisition files. We selected files, dated from January 2018, through December 2022, that were either FAR compliant sole-source contracts valued over \$10 million, or contracts awarded using USPTO's PTAG acquisition procedures. Appendix A provides a more detailed description of our scope and methodology.

Overall, we found that USPTO's processes and activities for acquisition planning were ineffective and not consistent with established regulations, policies, and procedures. Specifically, we found the following:

- I. USPTO's policies and procedures did not provide sufficient guidance on the use of its PTAG acquisition procedures.
- II. USPTO did not retain key documents, and documents developed during acquisition planning were insufficient and not supported.
- III. USPTO did not adhere to federal regulations relating to the Small Business Administration's (SBA's) Business Development program (the 8(a) Program).<sup>7</sup>

Although USPTO received its acquisition authority more than 20 years ago, we found that USPTO has not yet fully defined the scope of its procurement authority or how to use it. USPTO was granted acquisition exemptions by the Patent and Trademark Office Efficiency Act, allowing USPTO to streamline its acquisition processes and to promote innovative acquisition strategies.

Well-developed policies and procedures on the proper use of its PTAG acquisition procedures are necessary to reduce the risk of procuring unnecessary services and not obtaining the best value. Further, it is important that USPTO has a comprehensive acquisition planning process, develops policies and procedures to ensure documents are being retained and reviews and approvals are occurring, and provides initial and ongoing training to ensure USPTO staff has the knowledge necessary to make informed decisions and to facilitate future acquisitions. It is also crucial for USPTO to develop policies and procedures for oversight of 8(a) Program acquisitions to ensure adherence to federal regulations. USPTO's failure to adhere to federal regulations resulted in over \$38 million in questioned costs. Without strengthening USPTO's policies and procedures, it will continue to be exposed to inefficiencies in its acquisition process and unnecessarily limit competition.

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<sup>7</sup> The 8(a) Program assists businesses owned and controlled by disadvantaged individuals and native organizations to efficiently compete for and receive federal contracting opportunities. See SBA, 8(a) Business Development program. Available online at [www.sba.gov/federal-contracting/contracting-assistance-programs/8a-business-development-program](http://www.sba.gov/federal-contracting/contracting-assistance-programs/8a-business-development-program) (accessed June 1, 2023).

## I. USPTO's Policies and Procedures Did Not Provide Sufficient Guidance on the Use of Its PTAG Acquisition Procedures

USPTO's acquisition authority allows the agency to create its own acquisition processes. The PTAG outlines alternative competition or other noncompetitive procedures USPTO may use to award acquisitions. It also provides internal operating procedures for how USPTO will conduct acquisitions as a result of its statutory exemptions.

We reviewed USPTO's use of the PTAG alternative competition and noncompetitive processes and found that USPTO did not adequately explain its use of these processes. Instead, USPTO used it to circumvent competitive acquisitions when full and open competition<sup>8</sup> would have been reasonable. Specifically, USPTO used its PTAG acquisition procedures (1) to compensate for delays during acquisition planning and (2) when a likely vendor was identified ahead of acquisition planning.

### A. USPTO used its PTAG acquisition procedures to bypass competition when competition would have been reasonable

The PTAG provides for the use of an alternative competition process in which USPTO's Office of Procurement may reduce the number of competitors for an acquisition.<sup>9</sup> The process begins with the contracting officer (CO) posting a request for information or "sources sought" notice<sup>10</sup> on the System for Award Management (SAM.gov).<sup>11</sup> Potential contractors respond to the postings, and USPTO uses those responses to determine which contractors will most likely successfully meet its needs. The CO then solicits only those contractors to compete.

We found that USPTO used its PTAG acquisition procedures to bypass competition<sup>12</sup> and correct poor planning. For example, we reviewed the acquisition plan for an administrative services contract valued at an estimated \$43 million. This acquisition was in the planning phase since 2019—for more than 3 years—and needed to be awarded to continue these necessary services. In October 2022, the CO elected to use USPTO's PTAG alternative competition process, restricted to 8(a) businesses, to expedite the long-delayed acquisition. However, market research conducted during 2019 and 2020 indicated that open competition among qualified 8(a) Program participants, following FAR procedures, was reasonable.

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<sup>8</sup> As defined in the FAR, full and open competition means that all responsible sources are permitted to compete. FAR Part 2 Subpart 2.1. USPTO policy is to follow FAR competition regulations "when it is reasonable to do so." PTAG Section 5.0.

<sup>9</sup> PTAG Subpart 6.1.1.

<sup>10</sup> A sources sought notice is a synopsis posted by a government agency that states they are seeking possible sources for a project. See [https://csrc.nist.gov/glossary/term/sources\\_sought\\_notice](https://csrc.nist.gov/glossary/term/sources_sought_notice) (accessed on June 28, 2023).

<sup>11</sup> SAM.gov is an official website of the U.S. government, which enables users to register to do business with the Government, search for contract opportunities, and access publicly available award data. See <https://sam.gov/content/about/this-site> (accessed on June 8, 2023).

<sup>12</sup> See footnote 8.

Our review of USPTO's policies and procedures showed that USPTO did not adequately define when the PTAG alternative competition process is permitted. The *PTAG Desktop Guide* permits the use of PTAG's alternative competition for "expediency," but it has no instructions for determining what constitutes that circumstance and refers to the PTAM. However, the PTAM also does not define "expediency." We found that the PTAG alternative competition process was used reactively to mitigate deficiencies in the acquisition planning process, increasing the risk of not obtaining the best value or services, and potentially excluding more capable vendors.

*B. USPTO did not adequately define how and when PTAG acquisition procedures should be used*

PTAG Part 5, "Competition," states, "USPTO is not required to meet the test of 'full and open competition' as defined in FAR Part 6." Rather,

the CO may use agency-specific acquisition procedures described [in PTAG] **when the particular circumstances warrant it and it is in the best interest of the agency.** The USPTO will endeavor to conduct its procurements on a competitive basis in accordance with the FAR **when reasonable to do so.**<sup>13</sup> (emphasis added)

The remainder of Part 5 provides only that (1) COs must document their decisions on the use of competition in the contract file and (2) COs must satisfy FAR notification requirements for publicizing contract actions.<sup>14</sup>

The CO may choose to use either PTAG procedures or FAR-compliant competition procedures. If PTAG procedures are used, USPTO needs "to only meet the criteria of reasonableness."<sup>15</sup> Further, the *PTAG Desktop Guide* notes, in part, that "[r]easonableness takes into account multiple gray areas. **Specific criteria for what constitutes 'reasonableness' will be provided in the PTAM.**"<sup>16</sup> (emphasis added)

We selected a judgmental sample of 20 USPTO acquisition files. From our sample, we found two acquisition planning files in which USPTO used its PTAG acquisition procedures to make awards to specific contractors.

- In one file, a media company approached USPTO with a proposal to create a special segment for a television show, at a cost of \$54,700. We found that the acquisition file did not adequately demonstrate or explain that USPTO had a need for the service prior to being solicited. The CO used USPTO's PTAG acquisition procedures to avoid FAR competition requirements and awarded the contract to the media company. The file did not contain an adequate analysis justifying why other vendors could not perform similar work.

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<sup>13</sup> PTAG Section 5.0.

<sup>14</sup> PTAG Section 5.1.

<sup>15</sup> *PTAG Desktop Guide*, 5.

<sup>16</sup> *PTAG Desktop Guide*, 8.

- In another file, the Office of Procurement used USPTO's PTAG acquisition procedures to award a contract in the amount of \$90,554 to an executive search firm. A USPTO business unit needed those services and indicated that it had already chosen the firm. The sole-source justification in the acquisition planning file stated, in part, "The head of the agency selected which firm to use in advance." USPTO's justification to support a noncompetitive acquisition to the pre-selected contractor was insufficient because the contractor was not included in USPTO's market research.

In the first example, USPTO avoided competition without adequate explanation, and in the other, avoided competition by selecting a firm in advance. Although these two acquisitions represent low-dollar amounts, the risks posed by these deficiencies are considerable, given the hundreds of millions of dollars spent annually by USPTO on its acquisitions.

The intent of the PTAG and *PTAG Desktop Guide* is to provide guidance on the use of USPTO's acquisition authority. However, the PTAG and the *PTAG Desktop Guide* do not (1) define the circumstances when the CO should use agency-specific noncompetitive acquisition procedures and (2) do not provide a test or specific direction for determining the "reasonableness" of FAR-based competition planning. Effectively, the guidance is so general as to enable avoidance of competition in practically any situation.

The PTAG and *PTAG Desktop Guide* note that the PTAM would provide specific guidance on what constitutes "reasonableness" for using full and open competition. However, the PTAM does not have such guidance and has not been completed. USPTO intended for the PTAM to have 53 parts, corresponding to each part of the FAR. To date, USPTO has issued only four parts of the PTAM: Parts 1, 8, 52, and 53. Moreover, none of those parts clarify what circumstances warrant the use of the PTAG and "when it is in the best interest of the agency" to do so.

The *PTAG Desktop Guide* confirms that USPTO will continue to compete its requirements because competition is a good business practice. However, the level of commitment to competition indicated in the PTAG and *PTAG Desktop Guide* was not always present in USPTO practice. As illustrated above, we found that USPTO used its PTAG acquisition procedures to bypass open competition requirements when the use of competition would have been reasonable. Consequently, USPTO may be paying for unneeded services and may not be obtaining the best value for its acquisitions when awards are made to already determined vendors.

## Recommendation

We recommend that the Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office direct the Director of the Office of the Procurement to:

- I. Create a comprehensive framework for acquisition planning by updating the PTAG, *PTAG Desktop Guide*, PTAM, and other supplemental documents to clearly define the proper use of its PTAG acquisition procedures.

## II. USPTO Did Not Retain Key Documents, and Documents Developed During Acquisition Planning Were Insufficient and Not Supported

During the acquisition planning phase, several documents must be developed and retained in the acquisition file. These documents include a requirements document (for example, a statement of work or performance work statement), a market research memorandum, a sole-source or other limited competition document, an acquisition plan, and an Independent Government Cost Estimate (IGCE). We evaluated the documents submitted by USPTO and determined whether they were supported and complied with federal regulations and USPTO policies and procedures. See appendix B for detailed information on the regulations, policies, and procedures.

Of the 20 acquisition files that we reviewed within our sample, we found that each file contained at least one insufficient document. Detailed information on the sufficiency of each required document is shown in appendix C. We also found that acquisition planning documents were not consistently retained in the acquisition file. For example, 15 of 20 (75 percent) acquisition files were missing one or more documents, with 12 files missing two or more documents.

The following are examples of deficiencies found during our review.

- A statement of work did not clearly state the time of delivery for server equipment, installation services, and offsite technical assistance for a 5-year contract. The delivery of goods and services must be clearly defined and understood to ensure that delivery and performance schedules are realistic and meet acquisition requirements.
- A market research document was incomplete and did not include the outcome of the team's work. A complete market research document is critical to the success of an acquisition because it documents determinations such as the sufficiency of the market to fulfill the acquisition need, set-aside potential, acquisition strategy, and reasonableness of competition.
- A sole-source justification for a contract with an anticipated \$22 million ceiling did not undergo official review, although USPTO policy requires it. The review and approval of sole-source justifications is an important control to ensure the appropriate use of noncompetitive contracts.

- Fifteen IGCEs lacked pertinent information such as labor categories and cost, number of employees required by category, and quantification of labor categories. As we reported in *USPTO Needs to Improve Its Cost Estimating, Scheduling, and Agile Practices to Timely Retire Patent Legacy Systems*,<sup>17</sup> generating a reliable cost estimate is a critical program management function. An inaccurate IGCE could result in insufficient funding for the program, negotiation difficulties and delays with the vendor, and other internal administrative problems.
- USPTO awarded three labor-hour contracts without justification and the required review and approval. We previously reported on the risks associated with time-and-materials and labor-hour contracts in our report *The U.S. Patent and Trademark Office's Awarding and Administering of Time-and-Materials and Labor-Hour Contracts Needs Improvement*.<sup>18</sup> Time-and-materials and labor-hour contracts should be used only in limited circumstances to reduce the risk of cost overruns.

We reviewed applicable USPTO policies and procedures on acquisition planning and found that they lack cohesiveness and clarity regarding the acquisition planning process. In the absence of definitive policy, business unit officials must rely upon their understanding of acquisition policies and the CO's and the contract specialist's (CS's) interpretation to develop acquisition packages. As a result, business unit officials may receive different answers to questions, based on who is assigned to their acquisition. One business unit official indicated that each CO or CS has different acquisition requirements, potentially impacting the length of time an acquisition package is approved. In one instance, a business unit learned of additional requirements or needed revisions only upon the appointment of the CO and CS.

Although USPTO updated policies and procedures related to acquisition planning, critical updates were not retained in subsequent revisions. Specifically, in response to our 2016 report, *Awarding of U.S. Patent and Trademark Office Noncompetitive Contracts Did Not Consistently Follow Guidelines and Best Practices*,<sup>19</sup> USPTO implemented processes and procedures related to acquisition planning to include guidelines on market research, justifications for limiting competition, and management review and approval. USPTO has since removed some of these processes and procedures. For example, in revision 2 of Procurement Memorandum (PM) 2016-03, *USPTO Market Research*, effective January 2020, USPTO removed specific procedures and as a result, market research roles and responsibilities for the business unit and Office of Procurement were no longer clearly defined as to who is responsible for conducting and finalizing the market research memorandum. In another revision, revision 1 of PM 2017-02, *Contract File Content Checklists*, effective in May 2018, USPTO removed the requirement for the contract file content

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<sup>17</sup> DOC OIG, July 20, 2022. *USPTO Needs to Improve Its Cost Estimating, Scheduling, and Agile Practices to Timely Retire Patent Legacy Systems*, OIG-22-026-A. Washington, DC: DOC OIG.

<sup>18</sup> DOC OIG, December 3, 2014. *The U.S. Patent and Trademark Office's Awarding and Administering of Time-and-Materials Labor-Hour Contracts Needs Improvement*, OIG-15-012-A. Washington, DC: DOC OIG.

<sup>19</sup> DOC OIG, June 16, 2016, *Awarding of U.S. Patent and Trademark Office Noncompetitive Contracts Did Not Consistently Follow Guidelines and Best Practices*.

checklist. By removing the checklist requirement, USPTO reduced the likelihood that documentation for each stage of the acquisition would be retained.<sup>20</sup>

An additional factor contributing to poor acquisition planning is a lack of an agency-specific formal training program. Training provides employees with a better understanding of their responsibilities as well as the knowledge and skills to do their job effectively. We found that the training on acquisition planning topics was given on an ad hoc basis; for example, in response to policy updates. According to an Office of Procurement official, educating business units on adhering to acquisition requirements is left to the CO.

If USPTO continues to engage in poor acquisition planning, it may lead to uninformed decisions that increase the use of high-risk contract vehicles. Furthermore, poor narratives and justifications are a missed opportunity to build a repository of knowledge USPTO could use to (1) inform future acquisitions, (2) facilitate the development of follow-on contracts, and (3) explain why certain contract vehicles were used.

### Recommendations

We recommend that the Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office direct the Director of the Office of Procurement to:

2. Create and publish, with support from USPTO executives, a comprehensive and clear acquisition planning process including formalizing and updating acquisition planning policies and procedures.
3. Develop policies and procedures to ensure (1) appropriate acquisition planning documents, such as the market research, acquisition planning, and sole-source or other justifications, are retained in the contract file and (2) current reviews and approvals for acquisition planning are properly documented and enforced.
4. Provide and require initial and ongoing training for business unit staff and other personnel on agency-specific acquisition planning processes, requirements, and roles and responsibilities.

### III. USPTO Did Not Adhere to Federal Regulations Relating to the Small Business Administration's 8(a) Program

The Small Business Administration helps small firms access federal contracting opportunities. Its 8(a) Program is targeted at firms owned and controlled by socially and economically disadvantaged individuals.<sup>21</sup> A company that qualifies can compete for the program's sole-source and set-aside contracts offered by various federal agencies.

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<sup>20</sup> For new awards initiated in e-acquisitions.

<sup>21</sup> The program also targets small businesses owned by Alaska Native corporations, Community Development Corporations, Indian tribes, and Native Hawaiian organizations.

At the end of a contract awarded through the 8(a) Program, any follow-on requirement must remain in the program unless SBA agrees to release it.<sup>22</sup> An agency must also notify the SBA if a subsequent acquisition is deemed a new requirement and should not be considered a follow-on.<sup>23</sup> Thus, an agency must make a written request to and receive the SBA's approval to take a follow-on contract out of the program.

We found that for one acquisition, USPTO did not comply with these federal regulations. The original contract was a competitive 8(a) Program indefinite delivery vehicle (IDV)<sup>24</sup> for administrative services. It had a period of performance from July 2012 to January 2019, and an obligated amount of \$42.9 million. At the expiration of the initial contract, USPTO awarded a follow-on IDV contract outside of the 8(a) Program. As of May 11, 2023, USPTO had obligated over \$38 million under the follow-on award.

USPTO did not notify the SBA that the follow-on acquisition was going to be removed from the program, and so could not receive the SBA approval required for such removal. It also did not notify SBA that the acquisition was a new requirement, and so should not be considered a follow-on. We asked USPTO for any evidence of communication with the SBA for the follow-on acquisition, but USPTO stated that no such communication was in the file and that the CS and CO no longer work for USPTO. We found no USPTO policies and procedures for oversight of notifications to SBA.

Without communication to and approval from SBA, either to request release from the 8(a) Program or to notify that the follow-on acquisition was a "new requirement," the follow-on award outside the 8(a) Program was contrary to regulation. For that reason, we question the over \$38 million in obligated funds for that follow-on administrative services acquisition.<sup>25</sup> See appendix D for details.

## Recommendation

We recommend that the Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office direct the Director of the Office of the Procurement to:

5. Develop policies and procedures to provide oversight of 8(a) Program acquisitions to ensure those acquisitions comply with federal regulations to mitigate the risk of questioned costs, identified at about \$38 million in obligated amounts.

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<sup>22</sup> 13 C.F.R. 124.504 (d)(1).

<sup>23</sup> 13 C.F.R. 124.504 (c)(1)(ii) states that an agency can request that an acquisition be removed from the 8(a) Program when a requirement is new. New requirements include those situations where no small business could have previously performed the requirement, or there is an expansion or modification of an existing requirement when the magnitude of change is significant to cause a price adjustment of at least 25 percent (adjusted for inflation) or to require significant additional or different types of capabilities or work.

<sup>24</sup> An IDV is a contract awarded to one or more contractors to facilitate the delivery of supply or service orders. IDVs include contracts such as a federal supply schedule, government-wide acquisition contract, blanket purchase agreement, and indefinite-delivery contracts.

<sup>25</sup> As of May 11, 2023.

# Summary of Agency Response and OIG Comments

On November 6, 2023, we received USPTO's formal response to our draft report. USPTO concurred with all of our recommendations. However, we are concerned that USPTO's responses to recommendations 2, 3, 4, and 5 will not ensure that the issues related to these recommendations will be resolved. USPTO also included technical comments, which we considered but we did not revise the report. We look forward to USPTO's action plan that will provide details on its corrective actions. We have included summaries of USPTO responses regarding recommendations 2, 3, 4, and 5 with our discussion below. USPTO's complete response to our draft report is in appendix E.

In response to our draft report, USPTO stated that our audit did not relate to its overall performance in competing contract awards and the sample we reviewed made it difficult to accurately assess USPTO's acquisition planning and processes during that time. As noted in our report, we obtained from USPTO a universe of 427 noncompetitive contracts (FAR sole-source or PTAG acquisition procedure), awarded between 2018 and 2022 totaling \$1.6 billion. We selected a judgmental sample that included the files of 18 acquisitions totaling \$1.1 billion. Seven of those acquisitions each had a value of more than \$10 million, and 11 were PTAG acquisition procedures contracts that did not have a set dollar value. Our sampling plan was not a statistical sample, so our analysis is not intended to project across the entire universe of USPTO acquisitions.

## Regarding Recommendation 2

*Agency response.* USPTO stated that it has a well-documented, clear, and comprehensive acquisition planning process and that the Automated Procurement Plan (APP) initiative has been implemented. USPTO also stated that (1) it has detailed acquisition planning templates and requirements, (2) acquisition plans are mandatory for all new requirements with an estimated value greater than \$10 million and are signed by USPTO executives, including the Chief Information Officer and Senior Bureau Procurement Official, and (3) its Chief Financial Officer will sign acquisition plans with estimated values greater than \$75 million.

*OIG response.* We reviewed the APP contract data. However, we found that certain data was missing and that the data could not be filtered by contract types (for example, PTAG acquisition procedures or FAR authority). Nevertheless, we are encouraged that USPTO is developing methods to improve acquisition planning. Although USPTO has specific requirements for contracts with an estimated value greater than \$10 million, we found that USPTO did not always adhere to the requirements. For example, in our sample, we found a sole-source justification for a contract with an anticipated \$22 million ceiling that did not undergo official review.

### Regarding Recommendation 3

*Agency response.* USPTO stated that the Office of Procurement has policies, procedures, and reviews in place to ensure acquisition staff properly document contract files. For example, signed copies of all required documentation—including market research, acquisition planning, and sole-source or other justifications, as applicable—are included in the file of record. USPTO also stated that contract file checklists must be filled out and included in contract files, as detailed in PTAM 4.803.

*OIG response.* We reviewed applicable policies and procedures that were in effect during our audit scope. During our audit, we found that although USPTO updated its policies and procedures related to acquisition planning, critical updates were not retained in subsequent revisions. These procedures included a requirement for a contract file checklist. USPTO’s technical comments stated that it issued PTAM 4.803, “Contract File Content Checklists,” on July 6, 2023. However, PTAM 4.803 states “*all contract file checklists are mandatory for inclusion in all contract files as of **October 1, 2023***” (emphasis added), which was after the completion of our audit.

### Regarding Recommendation 4

*Agency response.* USPTO stated that the Office of Procurement Director performs oversight and actively leads procurement staff in planning and executing targeted training sessions about specific acquisition functions, including agency-specific acquisition planning processes, requirements, and roles and responsibilities. In FY 2023, USPTO held a multi-day Acquisition Summit that covered “many broad and USPTO-specific procurement-related topics.”

*OIG response.* Our report highlights the need for an “agency-specific formal training” program. The training activities outlined in USPTO’s technical response are federally mandated for contracting personnel and do not discuss the use of PTAG and/or other acquisition authorities unique to USPTO. During the audit, we asked USPTO for any training materials as well as evidence of activities specific to acquisition planning. The supporting documents we received indicated that training was conducted on an ad hoc basis, that is, upon release of a new policy. USPTO did not provide information on its “multi-day Acquisition Summit,” and so we cannot confirm the content or nature of that training. The intent of our recommendation is to ensure that employees have a better understanding of their responsibilities as well as the knowledge and skills to do their job effectively, considering USPTO’s unique acquisition authority.

### Regarding Recommendation 5

*Agency response.* USPTO stated that it has policies and procedures in place to ensure its 8(a) Program acquisitions comply with regulations and mitigate the risk of questioned cost. USPTO also stated that the SBA awarded it an overall rating of “Satisfactory” in its 2023 Surveillance Review. Furthermore, in its technical comments, USPTO explained that in September 2018, the Contracting Officer assigned to the referenced procurement passed away unexpectedly, and the relevant files could not be accessed in time to avoid a break in service.

*OIG response.* We determined that the 2023 Surveillance Review was irrelevant to our analysis, as it did not review the contract that was the subject of our third finding. Furthermore, we understand the tragic circumstances with respect to the Contracting Officer. However, a vital support services contract remained in the planning process for more than 3 years after the death of the Contracting Officer. It is imperative that policies and procedures surrounding acquisition planning are in place for both routine and extraordinary circumstances to prevent a disruption in service.

# Appendix A: Objective, Scope, and Methodology

Our audit objective was to determine whether USPTO's processes and activities for acquisition planning are effective and consistent with established practices, procedures, and regulations.

To accomplish our objective, we performed the following actions:

- Reviewed relevant regulations, policies, procedures, and guidance, including:
  - The Federal Acquisition Regulation (effective October 28, 2022);
  - USPTO *Patent and Trademark Office Acquisition Guidelines*, adopted March 10, 2003, Revised October 3, 2013;
  - *PTAG Desktop Guide*, January 2014;
  - *PTAG Desktop Guide*, April 2022;
  - *Documentation Requirements for Limiting Competition*, PM 2016-02, December 2, 2015;
  - *Documentation Requirements for Limiting Competition*, PM 2016-02, November 4, 2019;
  - *USPTO Market Survey and Market Research Memorandums*, PM 2016-03, March 24, 2016;
  - *USPTO Market Research*, PM 2016-03-ACQ, May 19, 2022;
  - *Procurement Review and Approval Requirements and Procedures*, PM 2017-01, April 5, 2017;
  - *Acquisition Planning*, PM 2017-05, June 27, 2018;
  - *Acquisition Planning*, PM 2022-04-ACQ, August 25, 2022, effective October 1, 2022;
  - 13 C.F.R. Part 124, 8(a) *Business Development/Small Disadvantaged Business Status Determinations*;
  - Government Accountability Office (GAO) *Cost Estimating and Assessment Guide: Best Practices for Developing and Managing Capital Program Costs*, March 2, 2009; and
  - GAO *Cost Estimating and Assessment Guide: Best Practices for Developing and Managing Program Costs*, March 12, 2020.
- Interviewed USPTO personnel—specifically, senior-level officials in the Office of Procurement responsible for strategic management, policy development, and quality assurance—to obtain an understanding of USPTO's acquisition planning processes within the Office of Procurement.
- Interviewed USPTO officials from business units to understand the relationship the Office of Procurement has with its customers during the acquisition planning process.
- Reviewed USPTO's general documents, including planning tools maintained by the Office of Procurement, training materials disseminated to business units and other stakeholders, and USPTO internal reports.

- Reviewed and analyzed acquisition documents within our sample (for example, market research memorandums, requirements documents, and IGCEs) to assess compliance with applicable USPTO policies, the FAR, and GAO best practices.
- Obtained from USPTO a universe of 427 noncompetitive contracts (FAR sole-source or PTAG acquisition procedure) awarded between January 1, 2018, and December 19, 2022, totaling \$1.6 billion. From the universe, we selected a judgmental sample of 20 acquisition files. These included:
  - 18 acquisition files that were awarded between January 1, 2018, and December 19, 2022, using FAR sole-source or PTAG acquisition procedures, totaling \$1.1 billion. Of the 18 acquisitions, 7 were FAR sole-source contracts valued at more than \$10 million, and 11 were PTAG acquisition procedures contracts that did not have a set dollar value.
  - 2 acquisition files that are in the planning phase that USPTO identified as potentially using PTAG acquisition procedures.

We gained an understanding of internal controls significant within the context of the audit objective by interviewing USPTO officials and reviewing documentation for evidence of internal controls. Although we could not independently verify the reliability of all the information provided by USPTO, we compared it with other available supporting documents to determine data consistency and reasonableness. From these efforts, we believe the information we obtained is sufficiently reliable for this report. We did not find any instances of USPTO fraud, waste, or abuse.

We conducted our review from August 2022 through June 2023 under the authority of the Inspector General Act of 1978, as amended (5 U.S.C. §§ 401-424), and Department Organization Order 10-13, as amended October 21, 2020. We performed our fieldwork remotely.

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 that provides a reasonable basis for our findings and conclusions based on our audit objective. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objective.

## Appendix B: Detailed Acquisition Requirements

USPTO is subject to several different regulations, policies, and procedures that govern or provide guidance for USPTO's acquisition process.

- FAR—The FAR is a part of the Federal Acquisition System and provides supporting policies and procedures. USPTO is not subject to the FAR in its entirety; however, USPTO provided an analysis stating that if USPTO chooses to use the FAR, it must comply with the FAR throughout the entire acquisition process, including acquisition planning.
- PTAG—The Patent and Trademark Office Efficiency Act granted USPTO its own procurement authority and certain exemptions. USPTO is exempt from certain provisions of the Federal Property and Administrative Services Act and Competition in Contracting Act. USPTO developed the PTAG, which provides internal operating procedures for how USPTO will conduct its acquisitions because of the exemptions it was granted.
- PTAM—This Manual will provide USPTO-specific guidance or unique requirements necessary to implement the FAR, Commerce Acquisition Regulation, Commerce Acquisition Manual, and provisions of the PTAG.
- PMs—These Procurement Memoranda provide requirements and procedures for implementation of acquisition activities.
- *PTAG Desktop Guide*—Provides guidance about the intent, purpose, and application of each portion of the PTAG.

When USPTO chooses to use the FAR for acquisitions, it is subject to the FAR. USPTO's PMs, and completed PTAM sections provide guidance on the acquisition process.

- Requirements (for example, statement of work or performance work statement)  
FAR Part 11 "Describing Agency Needs"—Prescribes policies and procedures for describing agency needs and states the requirements for an acquisition such as performance required and essential physical characteristics.
- Market Research  
FAR Part 10, "Market Research"—Prescribes policies and procedures for conducting market research to arrive at the most suitable approach to acquiring, distributing, and supporting supplies and services.  
PM 2016-03 Revision I, *USPTO Market Survey and Market Research Memorandums*—Explains USPTO's market survey and market research requirements and provides USPTO's policy and guidance for conducting market surveys and market research. Market research is not required for orders made under a single-award IDV.

- Sole-source or Other Justification  
FAR Part 6, “Competition Requirements”—Prescribes policies and procedures to promote full and open competition in the acquisition process. A sole-source or other justification is not required for orders made under a single-award IDV.
- Acquisition Plan and Milestones  
FAR Part 7, “Acquisition Planning” and PM 2017-05, *Acquisition Planning*—Prescribes policies and procedures for developing acquisition plans including milestones. A documented acquisition plan is not required for non-IT goods or services contracts. A documented acquisition plan is required for IT goods or services contracts over \$10 million; however, it does not apply to orders when a plan was completed for the IDV. A documented milestone plan is not required for supply or service contracts under the simplified acquisition threshold.  
PM 2022-04, *Acquisition Planning*—Establishes and implements acquisition planning procedures and requirements including milestones. Acquisition planning is required for all acquisitions; however, a written acquisition plan and milestones are required for contracts over \$10 million.

When USPTO uses its PTAG acquisition procedures, it must follow the PTAG, *PTAG Desktop Guide*, and PMs.

- PTAG Part 4, “Market Research”—Market research is how USPTO will identify and determine the availability of products or services that will satisfy its requirements.
- PTAG Part 2, “Acquisition Planning”—Acquisition planning serves two important purposes: it establishes how an agency will meet programmatic requirements within the agency’s budgetary goals and it serves as a guideline for the acquisition.
- PTAG Part 5, “Competition”—COs must document the contract file to explain their decisions regarding the use of competition and to what extent it will be used.

GAO issues best practices for developing IGCEs.

GAO *Cost Estimating and Assessment Guide*<sup>26</sup> and *Cost Estimating and Assessment Guide*<sup>27</sup> state that IGCEs should be comprehensive, well-documented, accurate, and credible.

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<sup>26</sup> GAO, March 2, 2009. *GAO Cost Estimating and Assessment Guide: Best Practices for Developing and Managing Capital Program Costs*, GAO-09-3SP. Washington, DC: GAO.

<sup>27</sup> GAO, March 12, 2020. *Cost Estimating and Assessment Guide: Best Practices for Developing and Managing Program Costs*, GAO-20-195G. Washington, DC: GAO.

## Appendix C: Review of Key Acquisition Planning Documents

Table C-1 outlines the sufficiency of the contract documents we reviewed; the majority of documents we reviewed were found to be insufficient. We sampled 20 acquisition files and reviewed key documents developed during acquisition planning. Acquisition documents justify the decisions made during the planning process and ensure that the Government meets its needs in the most effective, economical, and timely manner.

**Table 1. Sufficiency of Key Acquisition Planning Documents**

Document	Requirements	Market Research	Sole-Source or Other Justification	Acquisition Plan	IGCE	Milestones
Insufficient	8	13	8	9	15	12
Sufficient	12	4	9	3	5	2
Not Required	0	3	3	8	0	6
<b>Total</b>	<b>20</b>	<b>20</b>	<b>20</b>	<b>20</b>	<b>20</b>	<b>20</b>

Source: OIG analysis of USPTO documents

## Appendix D: Potential Monetary Benefits

For contracts awarded in the 8(a) Business Development program (8(a) Program), the Code of Federal Regulations requires follow-on contracts to remain in that program. An agency must make a request to the Small Business Administration (SBA) to release it from the 8(a) Program, and the SBA must agree to the release. If an agency determines the follow-on contract is a new requirement, the agency must notify the SBA of the new requirement.

USPTO awarded the previous Administrative Support Services contract as a competed contract in the 8(a) Program. The follow-on contract, however, was issued to the incumbent contractor as an unrestricted, sole-source contract not in the 8(a) Program. USPTO did not request, nor did SBA agree, to release the contract from the 8(a) Program. Neither did USPTO notify SBA that the follow-on was a new requirement. Therefore, USPTO was not in compliance with regulations that govern the 8(a) Program, resulting in \$38,229,511.91 in questioned costs for orders made against the Administrative Support Services IDV contract.

Finding and Recommendation	Questioned Costs
Finding III	\$ 38,229,511.91
<b>Total Potential Monetary Benefits</b>	<b>\$ 38,229,511.91</b>

Source: OIG analysis of funding obligations reporting in USASpending.gov (As of May 11, 2023)

# Appendix E: 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

Date November 6, 2023

MEMORANDUM FOR Frederick J. Meny, Jr.  
Assistant Inspector General for Audit and Evaluation

FROM: Kathi Vidal, Users, Vidal, Katherine (Kathi) Digitally signed by Users, Vidal, Katherine (Kathi) Date: 2023.11.06 15:20:04 -05'00'  
Under Secretary of Commerce for Intellectual Property and  
Director of the United States Patent and Trademark Office

SUBJECT: Response to Draft Report, "USPTO Must Improve Acquisition Planning to Ensure Efficient and Competitive Procurements"

### Executive Summary

The United States Patent and Trademark Office's (USPTO or Agency) is in receipt of the draft report, "USPTO Must Improve Acquisition Planning to Ensure Efficient and Competitive Procurements."

We appreciate the effort you and your staff made in reviewing the USPTO's acquisition planning process. At a high level, the USPTO prides itself on promoting competition in its acquisitions and competed 84% of its obligations in Fiscal Year (FY) 2023. In doing so, the USPTO not only exceeded the Department of Commerce's competition goal of 75%, but also closed the year with a higher competition rate than any other bureau in the Department. This metric reflects the USPTO's commitment to competition that is supported by its procurement policies and processes, a comprehensive training program, and talented staff. The OIG audit team's review does not relate to our overall performance in competing contract awards. The sample of 20 noncompetitive contract files over a five-year period only equates to 1.25% of the USPTO's award portfolio and makes it difficult to accurately assess the agency's acquisition planning processes and the improvements to its policies, procedures, training, and 8(a) program made during that time. That said, the USPTO is a continuous improvement agency, and we take every opportunity to refine and optimize our processes to meet our agency's mission.

### OIG Recommendations

OIG recommendation that the Undersecretary of Commerce and Director of the U.S. Patent and Trademark Office take the following actions:

1. *Direct the Director of the Office of the Procurement to create a comprehensive framework for acquisition planning by updating the PTAG, PTAG Desktop Guide, PTAM, and other supplemental documents to clearly define the proper use of its PTAG authority.*

USPTO Response:

The USPTO concurs with this recommendation. The Policy, Programs, and Compliance Division within the Office of Procurement (OP) regularly re-evaluates the effectiveness and usefulness of its acquisition policies. The USPTO will continue to perform regular reviews of the PTAG and PTAM and make revisions as necessary. The USPTO concurs that the PTAG Desktop Guide should be further revised to add additional guidance for Contracting Officers when determining whether the flexibilities outlined in the PTAG would be beneficial.

2. *Direct the Director of the Office of the Procurement to create and publish, with support from USPTO executives, a comprehensive and clear acquisition planning process including formalizing and updating acquisition planning policies and procedures.*

USPTO Response:

The USPTO concurs with this recommendation, and the Agency already has a well-documented, clear, and comprehensive acquisition planning process. For example, in FY 2022, the OP Director implemented the Automated Procurement Plan (APP) initiative, which is now in full use by the Agency's acquisition stakeholders. The USPTO also has detailed acquisition planning templates and requirements, issued through PTAM part 7 "Acquisition Planning." Acquisition Plans are required for all new requirements with an estimated value greater than \$10 million, and are signed by USPTO executives, including the Chief Information Officer and Senior Bureau Procurement Official. The Chief Financial Officer also signs Acquisition Plans with estimated values greater than \$75 million. As it is our practice, we will continually review our policies and procedures to see where changes are warranted.

3. *Direct the Director of the Office of the Procurement to develop policies and procedures to ensure (1) appropriate acquisition planning documents, such as the market research, acquisition planning, and sole-source or other justifications, are retained in the contract file and (2) current reviews and approvals for acquisition planning are properly documented and enforced.*

USPTO Response:

The USPTO concurs with this recommendation, and the OP already has policies and procedures in place to ensure acquisition staff properly document contract files, including that signed copies of all required documentation, including market research, acquisition planning, and sole-source or other justifications as applicable, are included in the file of record. Current policies are clear and appropriate to ensure requirements are met. Contrary to the OIG Report finding in section II, "USPTO Did Not Retain Key Documents, and Documents Developed During Acquisition Planning Were Insufficient and Not Supported," contract file checklists must be filled out and are mandatory for inclusion in contract files, as detailed in PTAM 4.803. Robust review and approval procedures for acquisition planning are required and enforced for all solicitations and awards. The Policy, Programs, and Compliance Division also performs post-award "spot checks" of recently awarded actions to ensure required documentation is contained in the file. The OP has also designated bi-monthly "clean up" days to allow staff dedicated time to perform file management and upkeep. The OP holds twice-yearly Internal Procurement Management

Reviews to assess contract file compliance. During these reviews, sampled files from across the operational divisions are thoroughly reviewed, and the findings are used to develop and implement recommendations for improvement across the office. Each review has demonstrated improved contract file compliance, with the most recent review concluding with a “Good” rating.

4. *Direct the Director of the Office of the Procurement to provide and require initial and ongoing training for business unit staff and other personnel on agency specific acquisition planning processes, requirements, and roles and responsibilities.*

USPTO Response:

The USPTO concurs with the recommendation to provide and require targeted training on USPTO-specific acquisition requirements. The OP Director performs oversight and actively leads procurement staff to plan and execute targeted training sessions about specific acquisition functions, including but not limited to agency specific acquisition planning processes, requirements, and roles and responsibilities. The OP has delivered numerous training sessions to the USPTO’s acquisition community, including but not limited to: APP development and effective use and specific acquisition policy developments and updates. In FY 2023, the OP planned and delivered a multi-day Acquisition Summit for business unit staff with a robust acquisition curriculum that covered many broad and USPTO-specific procurement-related topics. This special training offering was a complement to the USPTO’s formal acquisition training program.

5. *Direct the Director of the Office of the Procurement to develop policies and procedures to provide oversight of 8(a) Program acquisitions to ensure those acquisitions comply with federal regulations to mitigate the risk of questioned costs, identified at about \$38 million in obligated amounts.*

USPTO Response:

The USPTO concurs with the need to have policies and procedures in place to ensure its 8(a) program acquisitions comply with regulations and mitigate the risk of questioned costs. The USPTO already has such policies and procedures in place. The OIG’s finding and associated recommendation was based on one non-compliant file in a judgmental sample of 20, which we have already established is too small a sample to provide meaningful information to help the USPTO improve the acquisition planning processes. By contrast, in a 2023 Surveillance Review of the USPTO, the Small Business Administration (SBA) reviewed a judgmental sample of contracts awarded from FY 2018 to April 2023 and awarded the USPTO an overall rating of “Satisfactory,” signifying the USPTO’s achievements in supporting small business goals, including the 8(a) program. The SBA made no negative findings relating to the USPTO’s adherence to the 8(a) program requirements, and no corrective actions were required. More information on the USPTO’s small business achievements is provided in the technical comments section.

**Conclusion**

In closing, we express appreciation to the Assistant Inspector General for Audit and Evaluation for providing us with this report. The USPTO takes these findings seriously and intends to continue providing outstanding acquisition support to the agency and supporting acquisition community through thoughtful policy development, training, implementation, and contract management oversight.

If additional information is needed, please contact Kristin Fuller, Director, Office of Procurement, USPTO at 571-272-7878 or [Kristin.Fuller@uspto.gov](mailto:Kristin.Fuller@uspto.gov).

**USPTO Technical Comments to OIG Draft Report:  
“USPTO Must Improve Acquisition Planning to Ensure Efficient and Competitive  
Procurements”**

**Page 1, Paragraph 3, bulleted list:**

The OIG does not include additional policy adhered to by the USPTO, published in the form of procurement memoranda (PMs) and Director’s Notices (DNs). These policy documents have the same force and effect as the PTAM.

**Page 1, Paragraph 4, “USPTO began developing the PTAM in 2014 and was to have 53 parts mirroring the FAR; however, only 4 parts have been published.”; Page 6, Paragraph 4, Sentences 3-4, “USPTO intended for the PTAM to have 53 parts, corresponding to each part of the FAR. To date, USPTO has issued only four parts of the PTAM: Parts 1, 8, 52, and 53.”**

This is an inaccurate statement. PTAM 1.101 states: “The PTAM will only cover areas where there is a need to provide supplementary or clarifying guidance beyond what is stated in the FAR, CAR, or CAM. Where the USPTO does not require supplementary guidance, those sections will be omitted from the PTAM.” This statement is also found in PM 2015-02 “Establishment of the Patent and Trademark Office Acquisition Manual (PTAM).” While the USPTO concedes that the PTAG Desktop Guide indicates that the PTAM will contain 53 parts, the PTAG Desktop Guide is internal guidance for Contracting Officers to support their use the PTAG flexibilities. It is superseded by the Agency policy referenced here.

In addition, as of the date of receipt of this draft report, the PTAM contains 11 parts: 1, 4.2, 4.802, 4.803, 5.1, 7, 8, 10, 15.6, 52, and 53.

**Page 4, Paragraph 3, “The PTAG provides for the use of an alternative competition process in which USPTO’s Office of Procurement may reduce the number of competitors for an acquisition. The process begins with the contracting officer (CO) posting a request for information or “sources sought” notice on the System for Award Management (SAM.gov). Potential contractors respond to the postings, and USPTO uses those responses to determine which contractors will most likely successfully meet its needs. The CO then solicits only those contractors to compete.”**

The OIG report implies that concerning the PTAG 6.1.1 Alternative Competition Method, both the competitive and the noncompetitive procedures are synonymous with “sole source.” This may be true with the noncompetitive procedures; however, the alternative competition method does include competitive procedures. Using the PTAG 6.1.1 competitive procedures, the USPTO elects to “down select” potential vendors at the market research phase, rather than later at the solicitation phase. This process would still be considered competitive because vendors who believe they can perform the work are free to submit capability statements to the Request for Information/Sources Sought or in response to other market research mechanism, in accordance with FAR part 10.

**Page 4, Paragraph 4, “We found that USPTO used its PTAG acquisition procedures to bypass competition and correct poor planning. For example, we reviewed the acquisition plan for an administrative services contract valued at an estimated \$43 million. This acquisition was in the planning phase since 2019—for more than 3 years—and needed to be awarded to continue these necessary services. In October 2022, the CO elected to use USPTO’s PTAG alternative competition process, restricted to 8(a) businesses, to expedite**

**USPTO Technical Comments to OIG Draft Report:  
“USPTO Must Improve Acquisition Planning to Ensure Efficient and Competitive  
Procurements”**

the long-delayed acquisition. However, market research conducted during 2019 and 2020 indicated that open competition among qualified 8(a) Program participants, following FAR procedures, was reasonable.”

The example given of the USPTO conducting a procurement that was “restricted to 8(a) businesses” fails to consider that this was an open competition among qualified 8(a) program participants. It did not “restrict” 8(a) participants from submitting capability statements. The procedures streamline the competition process, rather than circumvent it.

Page 5, Paragraph 1, Sentence 1, “Our review of USPTO’s policies and procedures showed that USPTO did not adequately define when the PTAG alternative competition process is permitted.”

We believe the OIG did not understand the specific procurement authority Congress provided in the Patent and Trademark Office Efficiency Act (PTOEA). The PTOEA exempts the USPTO from many of the procurement regulations when the USPTO elects to act under this authority. The OIG’s statement assumes that using FAR competition procedures is preferable to using the PTAG alternative competition process; however, this assumption is clearly contrary to the authority granted by Congress. Despite requests for further elaboration, the OIG has yet to provide evidence as to how it came to this conclusion. Notably, Congress granted the USPTO the flexibilities detailed in the PTAG through its passage of the PTOEA and did not impose any limitations on the USPTO’s use of this authority. The flexibilities have allowed the USPTO to operate with efficiency, conserving both Government and contractor resources. For example, the PTAG 6.1.1 flexibilities allow the Contracting Officer the ability to streamline the procurement in the best interest of the Government while saving businesses the time and financial resources required when creating proposals in response to solicitations for which they are unlikely to be competitive. The USPTO has successfully used its flexibilities while maintaining its high competition rate and support of small businesses, as demonstrated elsewhere in this response, and the flexibilities have withstood the scrutiny of GAO and COFC protests. The choice of acquisition strategy is up to the business judgment of the Contracting Officer, as stated in PTAG 6 (“[t]he CO has the discretion to determine whether to use any procedures as appropriate for the particular procurement”). The PTAG Desktop Guide further states:

For a noncompetitive procurement, the CO must document that they have a *reasonable expectation that no other company can perform the work*. This *reasonable expectation that no other company can perform the work* is a direct result of market research. While it is a lower standard of proof than FAR Part 6, it does not relinquish the acquisition team from having to justify that the selected vendor is the only responsible source. The result of the market research should be captured in the Market Research Memorandum or AFD, as applicable and in accordance with Policy in such a way that the acquisition team’s decision is clearly supportable. Requisite sole source or brand name justification must be completed in accordance with the applicable PM guidance.

As the audience of this desktop guide is OP employees, the reader would be aware that the PM referenced above is PM 2016-02-ACQ “Documentation Requirements for Limiting Competition,” which requires the CO to justify noncompetitive procurements. The justification is

**USPTO Technical Comments to OIG Draft Report:  
“USPTO Must Improve Acquisition Planning to Ensure Efficient and Competitive  
Procurements”**

vetted and approved by OP leadership, sometimes including the Competition Advocate, Head of Contracting Activity, and legal counsel.

**Page 6, Paragraph 2, Sentence 2, “Although these two acquisitions represent low-dollar amounts, the risks posed by these deficiencies are considerable, given the hundreds of millions of dollars spent annually by the USPTO on its acquisitions.”**

The USPTO awarded 1,600 contracts valued at \$21 billion over the five-year period in the audit. It is a disservice to the reader of this report to extrapolate findings regarding two procurements, respectively valued at only \$54,700 and \$90,554, across all procurements, regardless of dollar value.

**Page 8, Paragraph 2, Sentence 1: “USPTO awarded three labor-hour contracts without justification and the required review and approval.”**

PTAG 7, Contract Types, states, “[T]he USPTO may use any contract type provided for in the FAR without regard to any limitations specified therein.” The USPTO is not required to obtain justifications and approvals required by the FAR for use of a labor-hour contract type.

**Page 8, Paragraph 3, Sentence 2: “In the absence of definitive policy, business unit officials must rely upon their understanding of acquisition policies and the CO’s and the contract specialist’s (CS’s) interpretation to develop acquisition packages.”**

PM 2020-05 “Acquisition Package Requirements” details specific requirements for acquisition packages. This policy issued Form USPTO-OP-085 “Acquisition Package Checklist,” a robust checklist intended to assist the business unit in developing acquisition packages. The checklist includes applicability for each document and linked policy and guidance references for more information. The policy also includes instructions for the Contracting Officer and Contract Specialist for their review of the acquisition package and determination of acceptability. Further instruction for business unit officials is contained in PTAM 7 “Acquisition Planning,” PTAM 10 “Market Research,” and PM 2020-03 “Preparing a Requirements Document.”

**Page 8, Paragraph 4, Sentence 3: “For example, in revision 2 of Procurement Memorandum (PM) 2016-03, USPTO Market Research, effective January 2020, USPTO removed specific procedures and as a result, market research roles and responsibilities for the business unit and Office of Procurement were no longer clearly defined as to who is responsible for conducting and finalizing the market research memorandum.”**

Revision 2 of PM 2016-03 does not remove specific market research procedures but updated them to conform with federal best practices. Rather than assigning market research responsibility to either the business unit or the OP, the revision stated that market research is a collaborative analysis between the business unit and the OP. This change is in accordance with FAR part 10, Market Research. As well, despite having received each revision since its original issuance in response to document requests, the OIG neglects to note that Form USPTO-OP-025 Market Research Memorandum has been further revised since revision 3 of PM 2016-03. USPTO-OP-025 very clearly delineates that Part A is to be completed by the business unit, and Part B is to be completed by the Office of Procurement. The USPTO’s current market research policy is dictated by PTAM 10 “Market Research.”

**USPTO Technical Comments to OIG Draft Report:  
“USPTO Must Improve Acquisition Planning to Ensure Efficient and Competitive  
Procurements”**

**Page 8, Paragraph 4, Sentence 4:** “In another revision, revision 1 of PM 2017-02, Contract File Content Checklists, effective in May 2018, USPTO removed the requirement for the contract file content checklist.”

PTAM 4.803 “Contract File Content Checklists” superseded PM 2017-02 upon issuance on July 6, 2023. All contract file checklists are mandatory for inclusion in all contract files as of October 1, 2023.

**Page 9, Paragraph 1, Sentence 1:** “An additional factor contributing to poor acquisition planning is a lack of an agency specific formal training program.”

The OP has a robust acquisition training program led by the Bureau Career Manager (BCM). The BCM manages the formal training program in accordance with the annual acquisition community-wide Human Capital Plan. The FAC-C, FAC-COR, and FAC-C-DS certification programs are managed by the BCM within the OP. Each certification program has required training dictated by the Federal Acquisition Institute (FAI) and continuous learning recertification requirements. All of the OP federal staff complete Individual Development Plans (IDPs) with their supervisors to assess individual training needs. Progress against the IDPs is accounted for in employee performance plans. The OP also hosts internally led training on Agency-specific policies, numerous examples of which were submitted to the OIG in response to document requests. Trainings are also hosted based on customer need, an example of which was the Acquisition Summit, held in June 2023. The OP staff led customer training on requested topics to include “Overview of USPTO Acquisition Policies,” “Role of the COR and setting COR file expectations,” and “Understanding PTAG.” The OP also manages an external training contract to provide training to its customers. A training calendar is managed on the OP’s website and allows customers to register for trainings free of cost to the business unit. The OP collaborates with the DOC and other agencies to provide training as well, such as the SBA and GSA. The OP’s policy team hosts a monthly “Policy Office Hours” to respond to questions and review recent policy revisions. During the current FAC-C recertification period, beginning in May 2022 and ending May 2024, the USPTO acquisition community has to date amassed 31,760 continuous learning points. While the OIG may recommend the USPTO focus increased training resources on acquisition planning, the statement that the USPTO “lacks a formal training program” is inaccurate.

**Page 10, Paragraphs 2-3.**

While correct, these statements lack appropriate context. As shared with the OIG in response to document requests, in September 2018 the Contracting Officer assigned to the referenced procurement passed away unexpectedly, and the relevant files could not be accessed in time to avoid a break in service. A bridge contract was awarded in a short period of time to allow the newly assigned Contracting Officer an opportunity to conduct proper acquisition planning. The USPTO acknowledges that no record exists of the SBA notification. This section of the report also fails to acknowledge that the contract awarded following the bridge contract action was in the 8(a) program and adheres to the SBA regulations.

This section of the report gives an inaccurate account for the USPTO’s overall adherence to SBA regulations and best practices. In its report following its Surveillance Review in April 2023,

**USPTO Technical Comments to OIG Draft Report:  
“USPTO Must Improve Acquisition Planning to Ensure Efficient and Competitive  
Procurements”**

which reviewed a judgmental sample of contracts over a time period very similar to this audit, the SBA noted the following:

*The [Surveillance Review Team Lead] selected three contracts identified as awards under the 8(a) Business Development Program, all of which were sole source (SS). The contracts were reviewed to ensure that the required clauses were incorporated; the offer and acceptance letters were in the file; SBA received a copy of the award document; SBA received any contract termination notices; the Limitations on Subcontracting (LOS) or nonmanufacturer rule requirements were satisfied; and the appropriate North American Industry Classification System (NAICS) codes were assigned. The [Procurement Center] ensures appropriate SB clauses are included through division level reviews with the COs as well as Contract Review Board and legal counsel review of solicitation and contracts.*

*There were no findings.*

**Page 11, Appendix, General:**

The USPTO submitted information on the USPTO’s Automated Procurement Plan (APP) in response to document requests, which we believe should be factored into the OIG’s report. The APP collects procurement related information for every planned procurement in one database to allow early acquisition planning. All acquisition packages must have an associated Procurement Plan ID# in order to be accepted by the OP. The APP has allowed the USPTO to engage in acquisition planning early and effectively.

**Page 13, Paragraph 2, Sentence 1, “USPTO is not subject to the FAR in its entirety; however, USPTO provided an analysis stating that if USPTO chooses to use the FAR, it must comply with the FAR throughout the entire acquisition process, including acquisition planning.”**

The USPTO is subject to the FAR, although exceptions apply. Even when PTAG flexibilities are included in the acquisition strategy, those portions of the FAR not exempted by the PTOEA remain applicable to the procurement.

**Page 14, Paragraphs 2-3, “FAR Part 7.... Over \$10 million.”**

This statement implies that PM 2017-05 and PM 2022-04 exist simultaneously. It neglects to clarify that PM 2022-04 superseded PM 2017-05 in order to provide more robust acquisition planning requirements.

**Page 11-14, Appendices A and B, General:**

It appears that in its assessment, the OIG has not accounted for revision histories of the regulation, policies, procedures, and guidance it used in its assessment. Specifically:

- The Federal Acquisition Regulation was last revised September 2023;
- PM 2016-02-ACQ “Documentation Requirements for Limiting Competition” was last revised August 16, 2022;
- PM 2016-03 “USPTO Market Research” was superseded by PTAM 10, issued July 1,

**USPTO Technical Comments to OIG Draft Report:  
“USPTO Must Improve Acquisition Planning to Ensure Efficient and Competitive  
Procurements”**

2023;

- PM 2017-01 “Procurement Review and Approval Requirements and Procedures” was revised multiple times since the April 2017 version the OIG relied upon for its draft report, most recently September 26, 2023; and
- PM 2017-05 “Acquisition Planning” was superseded by PM 2022-04-ACQ “Acquisition Planning,” which was superseded by PTAM 7 “Acquisition Planning” on March 30, 2023.

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