

# Procuring Expertise in a Pinch: How to Retain Expert Witnesses for Courts-Martial Quickly and Legally

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## I. Introduction

You are days or weeks before trial and find out that you are on the hook to retain an expert witness. There are a wide variety of circumstances that could have led to this urgent scenario: perhaps it is the result of a successful defense motion to compel, a last-minute change in plans for the prosecution, or maybe the request was simply put off for too long (or even forgotten). Now it is crunch time to get an expert witness or consultant in a hurry.

What happens next? Can the office just charge it to the Governmentwide Purchase Card (GPC) or issue Invitational Travel Authorizations (ITAs)? Or, is the staff judge advocate (SJA) office required to go through the contracting office? If so, what documentation does the contracting office require; specifically, do they require quotes from three different experts?

After the court-martial is over, why am I being asked to fill out this “Ratification of Unauthorized Commitment” packet?<sup>1</sup> The convening authority authorized the expert, so why do we have to request ratification of something that is already authorized? And why does any of this matter?

It matters because judge advocates, legal administrators, and paralegals will likely experience this scenario at least once in their careers. Yet, we all find ourselves asking the same basic question each time it comes up. “What are the rules for this again?”

The good news is that both the Defense Finance and Accounting Service Regulation 37-1 (DFAS-IN Reg. 37-1)<sup>2</sup> and the Federal Acquisition Regulation (FAR)<sup>3</sup> streamline the process for fulfilling an expert witness or consultant requirement relatively quickly. However, considering not everyone enjoys perusing the thirty-two chapters and twenty-four appendices of DFAS-IN Reg. 37-1, or the more than 1,800 pages of the FAR to brush up on what is pertinent, this

brief article is intended to serve as a quick reference guide for anyone in need of an expert witness or consultant, but short on time. Governmentwide Purchase Cards purchases,<sup>4</sup> contracts, and under some circumstances ITAs, can all be used to legally procure expert witnesses and consultants for courts-martial. Circumstances and local policies are most often determinative of which option is best for any particular office.

## II. Determining the Method of Acquisition: “Can we Just Charge it?”

Although it is not widely done, there is authority to charge procurement of an expert witness to the GPC. There are two major steps to this method: (1) it requires the expert witness to have a method of processing a credit card payment,<sup>5</sup> and (2) the *total* cost of the expert witness must not exceed the micro-purchase threshold for services, which is currently \$2,500.<sup>6</sup>

If the total lump-sum cost to the government is at or below \$2,500, and the expert witness has a method of receiving payment by credit card, the purchase can be charged to the GPC. However, because the purchase will not be made by a contracting officer, it is good practice for the GPC holder to be aware of any terms included on an invoice or quote from the expert witness. When reviewing these quotes, judge advocates should particularly be on the lookout for terms that bind the government to unreasonable open-ended obligations. Some common, seemingly innocuous terms in many commercial quotes and contracts can violate federal law and even result in a violation of the Anti-Deficiency Act.<sup>7</sup>

Beware of attempts to fit expert costs under the \$2,500 micro-purchase threshold by separating the expert’s consulting fee from travel expenses. Separating the costs in order to avoid the micro-purchase threshold constitutes

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<sup>1</sup> Federal Acquisition Regulation (FAR), 48 C.F.R. § 1.602-3 (2016).

<sup>2</sup> See DEF. FIN. & ACCT. SERV.—INDIANAPOLIS, REG. 37-1, FINANCE AND ACCOUNTING ch. 10 (Jan. 1, 2000) [hereinafter DFAS-IN REG. 37-1].

<sup>3</sup> See FAR § 6 (2016).

<sup>4</sup> See FAR 2.101 (2016); Service Contract Labor Standards, 41 U.S.C. ch. 67 (2016). Acquisition of services are subject to a lower \$2,500 threshold rather than the \$3,500 micro-purchase threshold for goods because of the extensive limitations and requirements imposed on acquisitions over \$2,500 by the Service Contract Labor Standards and the McNamara-O’Hara Service Contract Act of 1965. See 41 U.S.C. §§ 351–358; 41 U.S.C. ch. 67.

<sup>5</sup> Convenience checks are possible, but beware of processing time.

<sup>6</sup> See *supra* note 4.

<sup>7</sup> Anti-Deficiency Act, 31 U.S.C. § 1341 (2016); See Dep’t of the Army—Escrow Accounts and the Miscellaneous Receipts Statute, B-321387 (Comp. Gen. Mar. 30, 2011). The Government Accountability Office (GAO) determined that open-ended indemnification provisions constitute a per se violation of the anti-deficiency act (ADA) because they expose the government to potentially unlimited liability. These indemnification provisions are common “boilerplate” provisions found in many commercial contracts.

purchase splitting, which is prohibited.<sup>8</sup> Consequently, if the combined amount exceeds \$2,500, the GPC cannot be used and alternative methods must be pursued.

Additionally, the Army's GPC operating procedures specifically prohibit using the GPC to pay travel-related expenses.<sup>9</sup> This prohibition is not triggered, however, if the total cost to the government is billed as a single, all-inclusive expert fee with non-severable and non-itemized travel costs. Even then, total cost in excess of \$2,500 will preclude use of the GPC. Several installations have local policies that may further limit use of the GPC.

### III. Contracting for Expert Witnesses

If your expert witness exceeds the micro-purchase threshold, you should consider procuring your expert through a warranted contracting officer at the servicing contracting office.<sup>10</sup> Because this option will require reliance on an external office and considerably more paperwork and lead time, contracting for expert witnesses requires a bit more planning. Although daunting at first, the contracting process can be easily navigable.

#### A. Working with your Local Contracting Office

From a line-unit perspective, contracting offices are often viewed as an additional, unnecessary step in the process that slows down mission accomplishment—a bureaucracy that seems to always need “one more thing” before they can process the request. Staff judge advocate offices may even have the same perception. But contracting officers are kept independent of the units they service (and their purchase requirements) for an important reason,<sup>11</sup> and can usually move acquisitions quite rapidly once the requesting unit provides all of the necessary details.

A direct consequence of the contracting officer being removed from the unit and the purchase requirement (and thereby keeping them impartial), however, is that he or she cannot adequately advise the unit of what will be needed to complete the procurement, or how long it will take, unless the unit provides a detailed explanation of what it needs procured and why. Procurement of expert witnesses is one example where contracting officers can move quickly and deliberately to complete the acquisition once provided all of the information.

#### B. Life in the Fast Lane: Bypassing Federal Competition Rules

Absent an exception, contracting officers are required to seek competition on procurements that exceed the micro-purchase threshold, pursuant to the Competition in Contracting Act of 1984 (CICA).<sup>12</sup> Acquisitions of expert witnesses or consultants for “litigation or disputes,” however, enjoy a statutory exception to federal competition requirements and can bypass the most time-consuming processes of contracting.<sup>13</sup>

This statutory exception enables a contracting officer to bypass the CICA and issue a sole-source contract award “to acquire the services of an expert or neutral person for any current or anticipated litigation or dispute” without competition.<sup>14</sup> This exception also extends to alternative dispute resolution processes and is not contingent on the expert actually testifying at the trial or hearing.<sup>15</sup> Because competing a requirement is ordinarily the most time-consuming part of any procurement, this exception reduces the time needed to contract for an expert witness to only the time needed to put together the paperwork and get it signed.

Moreover, multiple contractor quotes are not necessary and the requirement need not be urgent to use this exception.<sup>16</sup> The contracting officer is still responsible for posting a Justification & Approval (J&A) document detailing why the requirement is not being competed, in addition to drafting and executing the contract itself though. It is therefore critical when the expert witness is an urgent requirement that the requiring unit submits the necessary documents to the contracting office as quickly and accurately as possible.

#### C. Get Contracting the Documents They Need

Every contracting office has its own local policy addressing what must be included in any purchase request. It is of primary importance to have a copy of the most up-to-date policy to ensure a smooth and quick procurement. The following four items, however, are the bare minimum documents required for any expert witness sole-source contract:

- 1) Curriculum vitae or résumé of the expert.
- 2) Funding document.

<sup>8</sup> FAR 13.003(c)(2) (2016).

<sup>9</sup> See DEP'T OF THE ARMY, GOVERNMENT PURCHASE CARD OPERATING PROCEDURES app. C (May 3, 2013).

<sup>10</sup> FAR 1.602-1.

<sup>11</sup> FAR 1.602-2(b) (2016). “Contracting officers shall . . . [e]nsure that contractors receive impartial, fair, and equitable treatment.” *Id.*

<sup>12</sup> 31 U.S.C. §§ 3551-56 (2016).

<sup>13</sup> 10 U.S.C. § 2304(c)(3)(c) (2016).

<sup>14</sup> FAR 6.302-3(a)(2)(iii) (2016).

<sup>15</sup> 10 U.S.C. § 2304(c)(3)(c) & FAR 6.302-3(b)(3).

<sup>16</sup> *Id.*

- 3) Draft justification & approval document.<sup>17</sup>
- 4) Court-Martial Convening Authority Expert Approval

A complete and accurate J&A document is the key to both a successful acquisition and a good relationship with the local contracting office. The contracting office will usually prefer to provide a specific template J&A that it wants the unit to use. It is good practice to make contact with the contracting office to get a copy of this template before the need to procure an expert even arises. This ensures the legal office already has the form (and format) on file when it is needed, and the contracting office is not caught off guard when they receive a short-suspense requirements for an expert.

However, unlike most sole-source J&As, procurement of an expert witness need not detail why competition is unavailable or that the requirement is too urgent to survey competition. Instead, the J&A must note the authority for the action pursuant to FAR 6.302-3(a)(2)(iii) and state that the expert witness is required for a court-martial. Providing the expert's credentials on the J&A is also helpful for preserving the file in the event the procurement is later challenged.

For recurring requirements, such as forensic toxicologists or psychologists, the contracting office is also able to enter into one or many blanket purchase agreements, or BPAs.<sup>18</sup> These BPAs, once emplaced, can last several years before needing to be renewed and enable the unit to procure experts as a routine, repetitive task.

#### IV. Invitational Travel Authorizations

Invitational Travel Authorizations (ITAs) can be a quick, convenient method of using unit operations & maintenance funds to cover the travel costs of non-employee experts and consultants to courts-martial. An ITA is typically used to pay the authorized travel costs of unpaid civilian witnesses to a court-martial. This generally suggests that if your agency is

employing an expert that requires compensation, then an ITA is not a viable option due to the non-travel related expenses incurred.

Despite this apparent limitation, Chapter 10 of DFAS-IN Reg 37-1 appears to suggest that an ITA *can* be used as a method of payment for expert compensation with travel.<sup>19</sup> However, it is critical to note that this expansive interpretation of the DFAS regulation does not appear to be rooted in any express legal authority. In fact, the regulation itself goes on to suggest that additional "authorization and prescribed procedures" (an obligating document) must be obtained in order to pay for any expert compensation with an ITA.<sup>20</sup>

Additionally, the Joint Travel Regulations (JTRs) largely contradict the expansive interpretation of the DFAS regulation and are more firmly grounded in statutory authority. The JTRs broadly state that ITAs are applicable to persons not employed by the government and those "intermittently employed by the government as a consultant or expert and paid on a daily when actually employed basis under 5 U.S.C. § 5703."<sup>21</sup> The JTRs, echoing 5 U.S.C. § 5703, explicitly limit the use of an ITA to travel expenses and provides statutory authority that stops far short of permitting the payment of expert compensation using ITAs.<sup>22</sup>

#### V. An Authorized Expense is Different than the Authority to Obligate Funds

Although court-martial convening authorities are the approval authorities for expert requests, convening authorities wield an authority different than that of contracting officers. A convening authority's approval of an expert witness, for example, authorizes an expenditure. It gives the unit authority to spend official funds to procure an expert witness. It does not actually procure the witness; that is left to the GPC holder or contracting officer.

Traditionally, once a requirement exceeds the micro-purchase threshold, the government can become obligated,

<sup>17</sup> See FAR 6.302-3(c); 6.303-1(a), requiring the contracting officer to justify the use of the sole-source action in writing.

<sup>18</sup> See generally FAR 13.303 (2016).

<sup>19</sup> DFAS-IN REG. 37-1, *supra* note 2, ch. 10, para. 100405.F (1)

When the employment of an expert witness is necessary during a trial by a military court, the trial counsel requests the convening authority to authorize an expert before such employment (Rule 703(d), Manual For Courts Martial, 1984). The Invitational Travel Order (ITO) should state the compensation recommended by the prosecution and defense. In addition, travel allowances authorized in paragraph 100405.E may be authorized for travel to and from the place of trial. The terms of the ITO should be specific if the compensation includes travel allowances to and from place of trial or specify the travel allowance authorized in addition to the compensation. Without the authorization and the prescribed procedures, only the ordinary witness fees and travel allowances may be paid for the employment of the witness.

*Id.*

<sup>20</sup> *Id.* Despite this expansive DFAS interpretation, few finance offices are willing to pay expert compensation with an ITA, and instead choose to pay the compensation portion of the expense as a "miscellaneous payment" on a separate Standard Form (SF) 3881. Unless signed by a contracting officer, paying expert compensation with an SF does not alleviate the need for an underlying obligating document.

<sup>21</sup> See DEP'T OF DEF., THE JOINT TRAVEL REGULATIONS, app. E, pt. 1 (Oct. 1, 2014) (Invitation to Travel) [hereinafter JTR].

<sup>22</sup> 5 U.S.C. § 5703 (2016).

An employee serving intermittently in the Government service as an expert or consultant and paid on a daily when-actually-employed basis, or serving without pay or at \$1 a year, may be allowed travel or transportation expenses, under this subchapter, while away from his home or regular place of business and at the place of employment or service.

*Id.*

and official funds committed, only upon the execution of a contract by a warranted contracting officer.<sup>23</sup> This distinction is most important in the period of time between the approval of an expert witness or consultant by the convening authority and the actual finalization of a contract. If units are instead relying on 5 U.S.C. § 5703 and issuing ITAs for travel expenses, and processing compensation as a miscellaneous payment, an underlying obligating document is still necessary.

During this time between authorization by the convening authority and obligation by a contracting officer or GPC holder, both trial and defense counsel are often eager to begin working with their approved expert and may want to make up for lost time by putting the expert to work as soon as the convening authority signs the approval. The danger in doing so is that trial and defense counsel do not have the authority to obligate the government. Compelling performance of services before a contract is finalized, even inadvertently, may result in an unauthorized commitment (UAC).<sup>24</sup>

The ratification process to “fix” a UAC varies depending on the amount of funds needed to cure the improper obligation. But what is important to note about all UACs, regardless of amount, is that the private vendor may treat the agreement as a personal debt of the individual that compelled the performance of services unless and until the debt is endorsed by the individual’s chain of command and ratified by a contracting officer.

Unauthorized Commitments, if approved and ratified, take considerable time to prepare and staff.<sup>25</sup> This may result in expert invoices languishing for months, which raises risks of civil litigation. Trial and defense counsel both would be wise to avoid this scenario by ensuring a contract is signed before compelling any services from expert witnesses and consultants.

## VI. Conclusion

Things are often hectic in the days (and weeks) leading up to trial. Navigating federal procurement rules to retain an expert witness on short notice need not be a time-consuming problem. Despite this, the ability to bypass competition requirements or issue ITAs for travel does not mean that expert witness requirements should be viewed as something that can be routinely delayed and dropped on contracting or the resource manager (RM) the week before trial. While acknowledging that the unpredictable nature of courts-martial often does not lend itself to long lead times, engaging the contracting office or RM early is a reliable recipe for success.

Likewise, engaging an expert for consultations or encouraging him or her to begin travel without a contract or

ITAs in place risks committing a UAC that could have been easily prevented. Unauthorized commitments are best prevented by engaging the RM as early and often as possible to ensure they will be able to issue ITAs for travel expenses, or the servicing contracting office to ensure that it has everything needed to finalize a contract.

Resource managers and contracting offices both operate with a queue of pending purchase requests at any given moment. Submitting an urgent requirement that must be worked immediately essentially “cuts in line” to the front of the queue, delaying all of the earlier submitted requests. Resource managers and contracting offices understand that emergencies happen. Keeping urgent requirements the exception, rather than the rule, will make for a less stressful trial preparation and a better working relationship with the servicing RM and contracting office.

Procuring expert witnesses and consultants is done differently in many legal offices around the DoD. While this would ordinarily be an indicator of a lack of guidance, the reverse is true here; what makes procurement of experts so unique is that there are *multiple* legal authorities that address the matter and all prescribe slightly different guidance on what is the proper method. In other words, it is not a lack of guidance that confuses the issue of expert compensation, but the abundance of guidance. According to 5 U.S.C. § 5703, non-government expert witnesses and consultants are to be classified as *quasi-employees* and not contractors, therefore eligible for ITAs. However, 10 U.S.C. §2304(c)(3)(c) provides statutory authority to procure expert witnesses and consultants through a *contract*, thereby treating experts as contractors. Neither is “wrong,” and a method that works for one legal office may vary depending on the circumstances and local policies in effect.

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<sup>23</sup> FAR 1.602-1 (2016).

<sup>24</sup> FAR 1.602-3(a) (2016).

<sup>25</sup> This assertion is based on the author’s recent professional experiences as the Deputy Command Judge Advocate of the 413th Contracting Support Brigade, U.S. Army Expeditionary Contracting Command, from 12 January 2013 to 14 July 2014.