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# Analysis & Perspective

## Fraud

### Criminal Investigations

## Practical Tips for Government Contractors on What to Expect And How to Respond to Federal Criminal Investigations

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**C**riminal investigations of government contractors have become more common, especially in the procurement streamlining areas such as Federal Supply Schedule contracts, task and delivery order contracts, and simplified acquisitions. Most procurement-related investigations are conducted by agents from the 61 inspector general ("IG") organizations in the federal government, sometimes in cooperation with the Federal Bureau of Investigation.

The Department of Justice categorizes every person involved in an investigation as a "target," a "subject," or a "witness." A target is a person (including a company) who the government believes has committed a crime and is likely to be indicted. A subject is a person who may have committed a crime but has not yet reached target status. A witness is someone who has information concerning the commission of a crime. These distinctions are obviously important in and of themselves, but a government contractor also should be mindful that the status of any person *can change at any time*.

### Compliance Programs

At the outset, it must be stressed that a corporate compliance program should be in place *before* a government contractor learns of an investigation. The compliance program should include the diligent establishment of effective procedures to both prevent and detect potential violations of law along the lines of Chapter 8 of the U.S. Sentencing Guidelines and DFARS 203.7001. The program should include an ombudsman or compliance officer, an ethics code, and effective employee training. The training should include clear instructions to employees that if they are questioned by federal agents they may decline to answer, but if they elect to answer, they must be truthful.

But even the best corporate compliance program is not fool-proof. Thus, it is important to know what to ex-

pect and how to respond when a federal investigator comes knocking at a contractor's door. Cooperation by companies in investigations can range from full production of anything required by subpoenas to voluntarily contacting government authorities to report potential wrongdoing. All the IGs operate "hotlines" which can be used to report potential crimes, and the Defense Department, Veterans Affairs Department and Department of Health and Human Services have voluntary disclosure programs to which companies can report fraud.

### Typical Investigative Areas In Government Contracts

There are certain problem areas in government contracting that frequently form the basis of criminal investigations. These include:

- Falsified time cards (overcharging, charging to the wrong contract/task or improper time transfers);
- False certification of the accuracy, currency and completeness of cost or pricing data submitted pursuant to the Truth in Negotiations Act (10 U.S.C. § 2306a; 41 U.S.C. § 254b; FAR 15.406-2);
- False certification in representations and certifications of an offer (FAR 53.301-33 § K);
- False claims on invoices (billing for the wrong amount or an incorrect quantity);
- False statements in quality control documents (certifying that tests not completed have been performed or that substandard products meet contract specifications); and
- Failing to furnish all required commercial transactions during the formation of a multiple award Federal Supply Schedule contract while certifying that the submissions were accurate, current and complete (FAR 15.406-2).

### Investigative Tools

Federal investigators generally use traditional law enforcement investigative tools when investigating government contractors. These include IG subpoenas for documents, grand jury subpoenas for documents and witnesses, search warrants, and witness interviews. We discuss each of these in turn.

### IG and Grand Jury Subpoenas

Most investigations of government contractors use an IG subpoena, rather than a grand jury subpoena, to obtain documents. This enables the documents to be

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used in administrative suspension or debarment actions even if there is no provable criminal case. See *In re Grand Jury Matter (Catania)*, 682 F.2d 61, 64 (3d Cir. 1982). Federal criminal procedure rules prohibit use of documents and other materials obtained via a grand jury subpoena in a suspension or debarment proceeding. Fed. R. Crim. P. 6(e).

The IGs have very broad subpoena powers. They may require by subpoena any information that is relevant to an inquiry concerning any type of fraud, waste, or abuse. *United States v. Westinghouse Elec. Corp.*, 788 F.2d 164 (3d Cir. 1986). Similarly, grand juries possess broad authority to issue subpoenas to a wide range of persons. *United States v. Mandujano*, 425 U.S. 564 (1976). There is no requirement that an IG or a grand jury have any particular evidence available to it in order to initiate an investigation or issue a subpoena. They "can investigate merely on suspicion that the law is being violated, or even just because [they] want assurance it is not." *United States v. Powell*, 379 U.S. 48, 57 (1964) (quoting *United States v. Morton Salt Co.*, 338 U.S. 632, 642-643 (1950)).

A grand jury subpoena to produce documents or to provide testimony is equivalent to a court order. Grand juries are empanelled for specific terms and typically hear a variety of matters. Grand juries exist under the authority of the district courts, but proceedings before them are conducted by federal prosecutors (normally, Assistant U.S. Attorneys). Counsel for grand jury witnesses are not permitted to be present in the grand jury room while the grand jury is in session. Proceedings before a grand jury are generally secret (Fed. R. Crim. P. 6(e)); however, witnesses are usually permitted to discuss what happened and relate to counsel the questions asked of them.

Noncompliance with a subpoena is punishable by civil and/or criminal contempt. See, e.g., *Doe v. United States*, 487 U.S. 201 (1988). Although IG subpoenas may be used only for documents (not to compel testimony), it is worth noting that they are enforceable in the federal district courts.

Subpoenas require careful and comprehensive searches for all requested records, and the complete production by the date specified, or a later date if agreed to by the issuer of the subpoena. An inadequate search for responsive documents or a withholding of troublesome or embarrassing records may well result in contempt proceedings or obstruction of justice investigations—both of which are likely to be easier to prosecute than the original offense being investigated. Furthermore, obstruction of justice is likely to result in increased criminal penalties. See, e.g., *United States v. Upton*, 91 F. 3d 677 (5<sup>th</sup> Cir. 1996); U.S.S.G. § 3C1.1 ("Obstructing or Impeding the Administration of Justice").

In general, companies should wait until they have been subpoenaed before producing materials sought by investigators. Government contractors' records may contain their subcontractors' proprietary information, which should not be released without a proper subpoena. Companies should be cognizant of the fact that it is unlawful to disclose certain financial records under the Right to Financial Privacy Act, 12 U.S.C. § 3401 et seq. A government contractor must comply with lawful demands, but it is important that the company separate responsive and nonresponsive records, retain privileged documents, and ensure that the conduct of its

business can continue while it complies with the subpoena.

### Search Warrants

Search warrants are used in criminal investigations where use of the less intrusive subpoena likely would result in the destruction, alteration, or concealment of the materials (documents) sought. 28 C.F.R. § 59.4(c). The most widely publicized use of search warrants in the government contracts context was in the DOD/FBI "Ill Wind" procurement fraud investigation during the 1980s. Ill Wind involved the investigation of company consultants who improperly obtained other companies' bidding and government evaluation documents.

Search warrants are issued on the basis of an affidavit that is submitted as an application for the warrant, as prescribed in Fed. R. Crim. P. 41. Search warrants need not be served on the targets of the warrant and may be sealed, at least temporarily, by court order to preserve the integrity of an ongoing investigation.

When search warrants are executed at a government contractor facility, the serving agents essentially take control of the premises to preserve evidence and to avoid risk to themselves. (The agents typically carry weapons.) On many occasions, particularly when the company being searched is a target of the investigation, investigators will seek to conduct on-the-spot interviews of company employees. This is a hectic time, and employees are often under intense pressure. Counsel can often assist the company when a warrant is being executed by ensuring that there is orderly interaction between investigators and employees.

### Interviews

Whether conducted during execution of a search warrant or at some other time, interviews by government agents are *voluntary*. The normal *Miranda* warnings concerning the interviewee's rights to remain silent and to have an attorney present at the interview are not administered at the outset because an interview concerning a government contract is not normally custodial. See *Miranda v. Arizona*, 384 U.S. 436, 479 (1966), and its progeny. The interviewee has a right to decline to answer any or all questions. However, there are several factors a government contractor should consider in connection with a voluntary interview.

A company may not forbid and should not discourage its employees from granting interviews—this could result in an allegation of obstruction of justice. A company should advise a prospective interviewee who is merely a witness that the decision is entirely up to the witness and there is no obligation to comply, but as may be appropriate, the company shares the public interest in the government's obtaining relevant and accurate information.

A government contractor may properly request that its counsel be present for any employee interviews concerning the company's business. The company must clearly advise those present at the interview, including the employee, that counsel represents the company, *not* the employee. Any employee may, of course, elect to retain his or her own counsel for any interview.

When any person is interviewed, it is absolutely critical that he or she be truthful in answering all inquiries. It is a separate crime to make a false statement in an interview with a federal agent acting in the course of his or her duties. 18 U.S.C. § 1001; See *Brogan v. United*

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*States*, 522 U.S. 398 (1998). It is a good practice for a government contractor to encourage an interviewee to qualify any statement about which he or she is uncertain, or about which the employee does not have first-hand knowledge. Employees should be encouraged to answer questions with facts they know, and to decline to speculate or engage in gossip.

Lastly, employees should be instructed that company documents belong to the company, and that company approval is required before turning over any documents requested by agents during interviews.

Whether materials are produced voluntarily or in response to a subpoena or search warrant, a careful government contractor will keep a record of what was requested or demanded, what was provided, and the basis for the investigative authority. In all but the most exigent circumstances, a company should seek to furnish duplicates of the pertinent materials, and to main-

tain custody of the originals for the purpose of ongoing business. However, if production of originals is compelled, then copies should be maintained for both business and record purposes.

### **Conclusion**

All government contractors should have in place a well-planned, well-executed compliance program. In the event of a federal criminal investigation, a company must comply fully with all lawful subpoenas and search warrants. This includes ensuring full production of all requested documents, and that employees understand their responsibilities and rights when interviewed by federal investigative agents. Understanding the investigative process should assist government contractors in meeting their obligations as responsible corporate citizens.