

Government Contractor Enforcement & White Collar Series

# What to Do When the Government Comes Knocking

November 14, 2023

# AGENDA

- 1** Overview
- 2** Effective Preparation for an Investigation
- 3** Ways an Investigation Emerges
  - Audits
  - Informal outreach
  - Subpoenas & Civil Investigative Demands
  - Unannounced Visits / “Knock-and-Talks”
  - Search Warrants
- 4** Key Takeaways and Conclusion

# PRESENTERS



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# General Goals and Objectives



**Understand** how the government approaches investigations and what government agents and attorneys think about when evaluating a company's responses.

**Learn** the government's primary investigative tools and how they could arise.

**Identify** how you should respond to these government inquiries.

# OVERVIEW


*Why are we talking about this?*

# Why Are We Talking About Government Investigations?

Any company—particularly those that regularly interact and contract with the U.S. government—can find themselves dealing with an investigation.

*Common examples include:*

- Third party witness subpoena
- Issue with a subcontractor / prime contractor
- “Rogue” employee
- Questions regarding adequacy of policies and procedures (often judged with the powerful benefit of hindsight)
- Other creative theories by the government or “relators.”



Purpose of this session is to educate about governmental investigation processes and best practices to consider, should you become involved.

# WHY SHOULD CONTRACTORS CARE?

- “Good contractors” are not immune from FCA investigations or liability
- Investigations are expensive even if the contractor prevails

Best line of defense is a good offense:

- Know your contract requirements
- Proactive compliance measures, especially when government contracts are involved
- Government contracts training

# “Knowingly” under the FCA

- Specific intent to defraud not required
- Actual knowledge
- Deliberate ignorance
- Reckless disregard
  - Does the contractor have policies to comply with “material” contract requirements?
  - Do the policies actually work?
  - Trend of materiality language in regulations



# Subcontractors

- Privity not required for FCA liability
- Prime can be responsible for subcontractor conduct in some cases
- Subcontractor can be responsible for causing prime to submit a “false claim”
- Prime can be responsible for subcontractor’s “false claims”
- Conspiracy

# Whistleblowers

- A “relator” can file an FCA case on behalf of the government
- Receive a portion of recovery from the case

## Who can be a relator?

- Anyone with “inside information” about the alleged wrongdoing
- “Rogue” employees or those just seeking help
- Suppliers
- Competitors

**Remember:** “Professional” relators

# THE GOVERNMENT'S PERSPECTIVE

The government will  
decide early on the  
“good”/“bad” issue

Is this a mistake  
made by a “good”  
company /  
employee?

Or is it common  
wrongdoing  
committed by a  
“bad” company /  
employee?

**Your Goal:** Help the  
government answer this  
question in words and in  
deeds

# THE GOVERNMENT'S PERSPECTIVE

## **“Good” companies / employees:**

- Take government inquiries seriously
- Respond promptly
- Tell the truth
- Prepare and accurately report the facts

## **“Bad” companies / employees:**

- Ignore or fail to prioritize government requests
- Do not inspire confidence that what they say is either true or accurate

# THE GOVERNMENT'S PERSPECTIVE

## Best Practices

### Deal respectfully with the government

- Minimizes issues that can be become costly.
- Can streamline and often shorten the investigation.
- If the Company is a “target”, may preserve Company’s ability to cooperate and minimize its exposure.

### This is NOT civil litigation with a private party

- Instinctively opposing government requests is a mistake.
- Responding to written requests with written and extensive objections is rarely appropriate.
- Inviting conflict is rarely wise.

# STEPS TO TAKE NOW

**1**

Establish a company policy for handling investigative inquiries

- Ensure employees are aware of the policy
- Hold trainings for employees (1x / year)
- Ensure employees know they are not required to speak to investigators

**2**

Appoint a Designated Person ("DP")

- Provide work phone and email to employees
- Assign as the person to handle and be contacted for any formal or informal demand or request from any government official

## Benefits:

- Ensures DP immediately receives all inquiries
- Avoids missed deadlines
- Gives opportunity to object / strategize
- Avoids inadvertent misstatements
- Protects relevant privileges
- Promotes effective cooperation

# Ways an Investigation Emerges

# Ways Government Investigations Begin

- ▷ Whistleblower-initiated  
(e.g., qui tam lawsuit)
- ▷ Government initiated
  - Audits
  - Information received from other agencies
  - Surveillance tools
  - Policy priorities
- ▷ Other reporting or complaints received



# How The Existence of a Government Investigation May Emerge

## Government Investigative Tools



**Government audits**



**Informal Inquiries**



**Subpoenas and Civil Investigative Demands**



**Unannounced Visits or "Knock and Talks"**



**Search Warrants**

# OIG and Other Audits

# Government Audits

## Routine Audits

- Contract Pricing Audits
- Incurred Cost Audits
- Agency Office of Inspector General

## Non-Routine Audits

- Contracting officer referrals
- Disclosures
- Whistleblowers

## Styles of Audit Requests

- Audit request letters
- Subpoenas

# Responding to Government Audits

## Engage Counsel to Protect the Attorney-Client Privilege

- Contractors often do not know the source of the audit
- Counsel can provide legal advice on audit strategy to protect the company and internal documents

## Engage with Auditors to Understand Scope and Purpose

- Ambiguous or broad language in requests
- Extend deadline or waterfall production if needed
- Is the company a target or third party with relevant information?

# Responding to Government Audits

## Identify Risk Areas:

What is the primary purpose of the audit?

- Financial
- Compliance

Does the company have exposure?

- Conduct internal or consultant-supported analysis while producing documents to the government.
- Government auditors often construe requirements narrowly when other interpretations may be more reasonable.



### **Beware extrapolation!**

Government auditors frequently extrapolate findings – ensure that extrapolation is appropriate given the sample size

# Informal Inquiries

# Informal Inquiries

Phone calls, visits, or letter requests where cooperation is voluntary

- ▷ Requests from agents or prosecutors may appear as:
  - Letter
  - Phone call
  - In person visit
  
- ▷ Well-thought out response is just as important as responding to a formal inquiry
  
- ▷ Exercise caution – agents may “play dumb” to seek additional information

# Informal Inquiries

You have received a phone call from a government agent or official,

## HOW DO YOU RESPOND?

Ask for and record the agent's name, agency, and contact information

Record the details of the requested information

Immediately contact company counsel

**REMEMBER:** You are not required to answer any questions



# Civil Investigative Demands and Subpoenas

# Formal, Compulsory Inquiries

## Subpoenas or Civil Investigatory Demands

### Subpoenas

- Administrative: Issued by Government agency (FBI, OIG)
- Investigative: Issued by Grand Jury through the US Attorney
- Trial: Issued by prosecutor, plaintiff, or a defendant




Request documents, testimony, or both

### Civil Investigative Demands

- Requests documents
- Issued prior to civil or criminal proceedings
- Sometimes used interchangeably with administrative subpoenas; not subject to court approval
- Common in FCA matters

You have received a written inquiry,  
either formal or informal,  
**HOW DO YOU RESPOND?**

*If the subpoena is directed at you or the Company:*

-  Accept the subpoena, do not avoid service.
-  Immediately scan and forward to Company counsel.
-  Do not take any action to respond to the request. Do not look for, delete, or identify documents.

*If the subpoena is not directed at you or the Company:*



**You do not need to accept the subpoena**

# RESPONDING TO GOVERNMENT INQUIRIES

## Set the Tone

- Never ignore or sit on a government request
- Identifying and retaining counsel quickly will help counsel respond promptly
- Prompt response builds trust

## Identify a strategy for response:

- First chance to send “good company” message
- Consider cooperation

# RESPONDING TO GOVERNMENT INQUIRIES

## Counsel can obtain additional information, including:

- Is the Company or its employees “targets” or “subjects” of the investigation?
- What does the government actually want?
- Why did the investigation begin?
- What is the focus of the investigation?
- Can the deadline to comply be extended?
- How can the scope be limited?

Calls between government and counsel can help build rapport and trust

# RESPONDING TO GOVERNMENT INQUIRIES

Example: Government believes Company's submission of invoices to the government for payment is unlawful

## 1 Preserve Documents:

- Implement hold notice.
- Are historic invoices deleted?
- Any email or communication deletion protocols?

## 2 Gather Documents:

- Who has been involved in the invoice preparation? Submission?
- May be able to self-collect invoices and contracts.
- May need IT assistance for email search, identification of documents on hard drives.

## 3 Identify if Issue is Ongoing:

- Are invoices still being submitted?
- Are there concerns about certain employees?
- Consider implementing secondary review measures.

# RESPONDING TO GOVERNMENT INQUIRIES

## MAINTAINING PRIVILEGE

### Attorney-client privilege makes confidential:

- A communication;
- Made between privileged persons;
- In confidence;
- For the purpose of seeking, obtaining or providing legal assistance.

# RESPONDING TO GOVERNMENT INQUIRIES

## MAINTAINING PRIVILEGE



**Communication  
must remain  
confidential to  
maintain  
privilege**

- Remind employees who know about the government requests not to discuss the matter;
- Label all correspondence “**Attorney Client Privilege;**”
- Copy Legal on all emails regarding the response to the request;
- Include Legal in all conversations regarding the response and underlying facts.



# Unannounced Visits and Surprise Interviews

# Unannounced Interviews



**Agents will often be low-key and ask for a brief, immediate “conversation” or “discussion.”**

**Element of surprise – these meetings are often:**

- At a person’s home
- Early in the morning or at dinner time

## **Agents’ Goals:**

- Gather facts for their ongoing investigation
- Catch the person off guard
- Start the interviewee talking and answering questions without preparation or time to gather thoughts
- Use natural conversation to get the interviewee to agree with the agents’ theories

# Unannounced Interviews: Risks

*Often very difficult to suppress damaging statements made by a corporate employee / executive during such an interview*



Whenever someone speaks to a government agent, they must tell the truth.

- Lying to a federal agent during an interview is a federal crime.
- Whether a statement is a “lie” is often a matter of dispute; particularly when discussing a detailed or dated matter.
- The government can bring a false statement charge even if it does not pursue the underlying issue prompting the interview.



Agents have no obligation to notify the person of their rights or to disclose the nature or status of the investigation or the interviewee.

- The agents simply ask for a voluntary conversation.

# UNANNOUNCED INTERVIEWS

## Basic Rules

- ❑ You are free, but not required to speak with government agents.  
*Declining is not obstruction of justice or lack of cooperation.*
- ❑ Absent a search warrant, you do not need to allow the agents inside or provide them any documents.
- ❑ If the agents know you are represented by counsel, they should not interview you without your lawyer.
- ❑ You have the right to consult with legal counsel before any interview and to have your counsel be present at an interview.
  - Although the agents are not required to advise you of this right, you can communicate these requests to the agents.
- ❑ If you choose to speak, you must be truthful and avoid making any statement that could be interpreted as false.

# UNANNOUNCED INTERVIEWS: BEST PRACTICES

## Decline the interview

*This is not obstruction of justice.*

Key messages:

“I am represented by counsel. Please contact them.”

“I would like to speak with my counsel before proceeding with an interview.”

## Contact company counsel

## Educate employees about how to handle this situation

- “Basic rules”
- Contact company counsel after the interview request is made, regardless of whether you agreed to be interviewed.
- You are not authorized to waive any Company attorney-client privileges or confidentiality.

# UNANNOUNCED INTERVIEWS: BEST PRACTICES

## **If an employee is contacted by a government agent, and has not yet submitted to the interview:**

- Discuss offering legal representation.
- Request that company counsel be present.
- Gather information about the agents' approach and request.

## **If the employee speaks with government agents:**

Have counsel for the company contact the employee to ask for information regarding:

- What the agents said about the investigation.
- Whether the agents identified “targets.”
- The matters addressed and the questions asked.
- The information or documents provided to the agents.

Discuss legal representation in the event of future contact.

# Search Warrants

# Search Warrants

## What is a search warrant:

Formal court document signed by a judge or magistrate that allows government agencies to search private property and records without the consent of the owner or occupier of the property.

## A search warrant must state:

- (1) The areas to be searched
- (2) The items to be seized if found; and
- (3) The justification for the search.

## Government may conduct search warrants if:

- If they believe evidence is at risk
- To avoid assertions of the privilege against self-incrimination by asking for documents by subpoena
- To send a message regarding the seriousness of the case



# Search Warrants

## Execution of search warrants can be intimidating

- Multiple agents will usually appear to execute the search
- They will be prepared for the worst
- They are authorized to use reasonable force to execute the warrant if necessary

Warrants are often served at inconvenient times – for example, in early morning hours.

Proactively train employees about what to do in the event the government arrives to conduct a search

# SEARCH WARRANTS

## What to do if a search warrant is served, crucial first steps:

- 1** Contact DP  
Immediately
- 2** Contact outside counsel  
and have them attend if  
possible
- 3** Comply with limited  
scope of search  
warrants
- 4** Direct official to any  
individual listed in an  
arrest warrant

**COOPERATE and DO NOT  
INTERFERE** with agents who are  
executing a search warrant

# SEARCH WARRANTS

**What to do if a search warrant is served:**

## START OF THE SEARCH:

- Identify lead agent, establish a line of communication and serve as a contact for agents.
- Ask to see credentials, obtain a business card from every agent.
- Request the opportunity to close down business operations.
- Contact legal counsel and ask the lead agent to wait until he/she arrives.  
*Assume the government agents will **not** agree and will proceed with the search, which they are permitted to do.*
- Request copy of the Warrant **and** Affidavit and email both to legal counsel.

# SEARCH WARRANTS

**What to do if a search warrant is served:**

## **AS THE SEARCH CONTINUES:**

- Follow directions from agents, remain with agents if allowed.
- If agents are exceeding scope of search area, politely inform agents of your objection.
- Keep an inventory of all documents or items they take; request a copy of the inventory from the agents.
- Make a record of agents' responses to all requests and other communications.
- Convene all-hands meeting.
  - Avoid rumors and loose talk.
  - Notify other employees of unfolding events.
  - Remind them of right not to speak with the government agents and advise not to do so without counsel.

# SEARCH WARRANTS

**What to do if a search warrant is served:**

*Remember not to:*

- ⊗ Do **NOT** interfere with the search. You can be arrested for interfering with the search!
- ⊗ Do **NOT** alter, hide or destroy documents.
- ⊗ Do **NOT** consent to the search of areas not named in the warrant.
- ⊗ Do **NOT** volunteer substantive information to the agents.
- ⊗ Do **NOT** instruct anyone **not** to speak to the agents (it is their choice).

# Conclusion

# Departing Considerations

## Next program:

*Ethical Interactions  
with Government  
Officials*

December 2023

## Past programs:

Visit K&L Gates HUB

<http://klgates.com/hub>

## Key Points to Consider:

- Any company can encounter a government investigation, whether as a third-party witness, a subject, or a potential target.
- Government investigations are unlike civil litigation or routine interactions with government contracting officials.
- It is important to maintain credibility and deal respectfully with government investigators.
- Seeking advice from experienced counsel familiar with government investigations is critical to successfully navigating these waters.

# Contact



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