

# Preparing for a Rise in Government Investigations

By Joanne T. Rupprecht

Few contractors plan for an investigation or audit and even fewer price the cost of that risk in their proposals. Yet every federal government contractor accepts, as a term and condition of its contract, increased scrutiny by the federal government for waste, fraud, and abuse for the services and supplies it provides in exchange for federal funds.

Federal budgets are tight and the government's terminations on the basis of its "convenience" are on the rise. While contractors have a legal obligation to cooperate, the timing and administration of shutting down operations under a contract are never cut and dry. Consequently, these situations can become contentious. It is when a contractor responds to the same and makes it less convenient for the government to terminate its contract that additional problems can arise.

## Well, Get Prepared ...

The government has recently increased the use of one of the most lethal weapons in its arsenal governing contracts and contractor control; its increased invocation of authority to initiate audits and investigations against unsuspecting and often unprepared contractors.

Audits and investigations can be conducted by a variety of agencies, including but not limited to the Defense Contract Audit Agency (DCAA), Defense Contract Management Agency (DCMA), Defense Logistics Agency (DLA), Contract Integrity Center (CIC), Defense Criminal Investigative Service (DCIS), Office of Inspector General (OIG), Department of Justice (DOJ), and the Federal Bureau of Investigations (FBI). These agencies have the authority to intervene on behalf of the government against contractors to ensure that supplies and services are delivered on time at projected cost and that they meet all performance requirements of a contract; one of their primary functions is to investigate *allegations* of fraud and other misconduct. The DOJ alone has realized substantial increases in investigations in the last five years. Likewise, the FBI has also seen a spike in investigations in recent years. Other investigations by various agencies have similarly skyrocketed.

At the same time, the threshold of conduct that may be considered "fraudulent", "criminal" or "intentional" has lowered and contractors must pay attention or risk paying financially. Accompanying the rise in government investigations is the record financial settlements reached as a result. In the current economy, taking into account existing budget deficits, this additional stream of revenue may become more utilized.

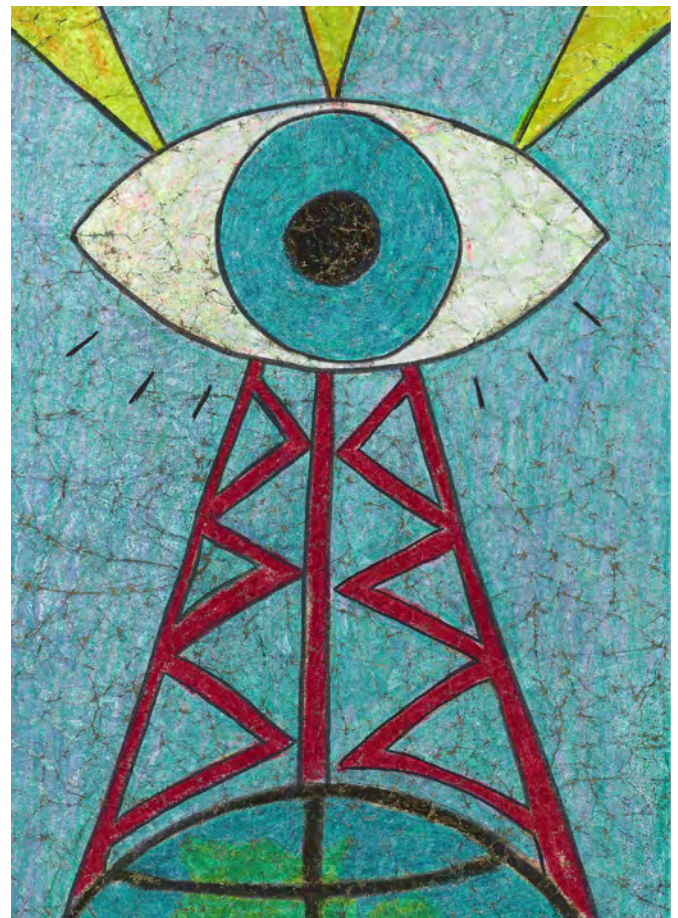
Although federal officials are required to report suspected fraud or irregularities and are *presumed* to act in good faith when administering contracts, it is not beyond the realm of possibility that a CO will unnecessarily and prematurely assign its authority to an investigative or auditing agency in retaliation for on-going disputes or contests to its authority.

While there are legitimate instances where a contractor attempts to defraud the government, recent experience

has shown that COs, empowered to allege fraud and other misconduct, have become increasingly comfortable with initiating these adverse actions defensively and perhaps even in bad faith.

Audits and investigations can simply become the by-product or collateral damage of a contentious relationship between a CO and a contractor. Many times the conflict stems from unreasonable expectations, verbal commitments or informal modifications to a contract. Even if a dispute has arisen as a result of gross mismanagement of the procurement, a CO may avoid accountability by simply alleging suspicions of contractor misconduct. A contractor's non-compliance can occur unintentionally and may be detected during the government's unreasonable scrutiny of its billing, accounting, quality control, manufacturing, purchasing or subcontracting procedures. The determination regarding the adequacy of an offeror's cost accounting system is a matter of an offeror's responsibility and that determination rests within the broad discretion of the contracting officer, who, in making that decision, must necessarily rely on his or her business judgment. *McKissack Delcan JV II*, B-401973.2, B-401973.4, Jan. 13, 2010, 2010 CPD ¶ 28 at 6.

Unfortunately, once an investigation or audit has been



initiated, disagreements often arise between the investigative or auditing agency and the contractor over the findings. These findings, whether substantiated or groundless, are often difficult and expensive to resolve. Further, once a contractor comes under the scrutiny of one agency, it can expect that information to be shared with other agencies and the burden placed upon it can intensify exponentially. Investigations and audits used in retaliation for contractor disputes or contests of a CO's authority can cause substantial damage to a contractor and its operations.

Once an investigation or audit is initiated, in addition to continuing to perform its contract or risk being terminated for default, a contractor may be required to respond to findings of deficiencies; produce records in response to subpoenas; monitor proceedings against it; negotiate pleas, settlements, and agreements; fend off threats of suspension, debarment, and exclusion from federal programs; and address employee and investor concerns. This process can also damage its relationships with creditors.

Due process is a constitutional right of every citizen of the United States, including contractors. Unfortunately, contractors can have these rights severely compromised on mere speculation, while the consequences of adverse findings can be far-reaching and may include nonpayment, restitution, suspension, debarment, prosecution and/or jail time.

#### So What Can a Contractor Do to Protect Itself?

1. Proactively put into place a compliance program including adequate policies and internal controls;
2. Perform self-assessments and validations of the compliance program;
3. Conduct internal training for employees responsible for contract administration on compliance with the application rules and regulations governing federal government contracts;
4. Identify and retain a competent attorney upon notice of the potential of an investigation or audit so that some protection is available of findings through the attorney-client confidentiality privilege;
5. Promptly conduct and document the results of an internal investigation into the issues of concern identified by the government;
6. Immediately correct any vulnerabilities or deficiencies identified;
7. Cure any breaches of contract and prepare to show "present responsibility;"
8. In the event a false claim has been submitted, consider its disclosure to the government before an investigation is initiated (this won't prevent damages but may reduce them);
9. Be aware of the increased likelihood of adverse government action including termination for default and/or debarment in today's procurement environment;
10. Document all interactions and communications associated with the investigation or audit;
11. Show good faith in implementing federal and state recommendations and document legal compliance;
12. Never do anything to impede or obstruct a government investigation, such as deleting, concealing, or altering relevant documents. Again, such actions could expose the company to separate criminal liability. See 18 U.S.C.

- § 1505;
13. During any investigation, answer questions as completely as possible, but limit the disclosure of any additional information;
14. Information offered in defense of allegations may trigger additional investigations by other agencies;
15. Be truthful and accurate in any statements to the government. Failure to do so could expose the company and its employees to separate criminal liability. See 18 U.S.C. § 1001;
16. Submit a request under the Freedom of Information Act (FOIA) for all documentation related to the investigation or audit;
17. Familiarize those in positions of responsibility with the requirements of the GAGAS, the FAR, the DFARS, and other applicable laws and regulations that address the responsibilities and duties of investigators and auditors;
18. Realize that even if the government has the authority to invoke its "discretion" during an investigation or audit, its exercise of judgment must be professionally reasonable;
19. If a contractor feels it has been legally wronged, pay attention to the time limitations for bringing a claim under the CDA and/or the FTCA; and
20. Seek competent legal advice from an attorney who specializes in federal government contracts who is knowledgeable on the remedies available to contractors.

Due to a contractor's burden in proving bad faith government misconduct, overcoming the presumption of good faith government conduct, challenging the government's discretionary authority and incurring legal fees and costs, contractors often opt to not pursue remedies or protect their legal rights to the fullest extent, regardless of the merits.

It appears to be the government's position that regardless of why a contractor is subjected to the scrutiny of an investigative agency, the same remains the unfortunate cost of doing business. Nonetheless, just as the government is not "immune" from liability for its breach of agreements, likewise, investigative or auditing agencies can be held liable for their conduct when negligent or below the professional standard of care, i.e., not in compliance with the GAGAS, the FAR, the DFARS, and other applicable law (including the law of negligence in state jurisdictions) under the principles contained in the CDA and/or the FTCA.

Recent experience has underscored the need for transparency and open government apparent so that contract officers can be held accountable when their actions result in the abuse of taxpayer dollars and the betrayal of the public's trust, including that of a contractor. In today's federal procurement environment, contractors should be aware not only of the possibility of unreasonable scrutiny, but of how they can empower themselves to avoid the same and in the event that is not possible, what rights they have in defending themselves and their livelihoods. **TFL**

---

*Joanne T. Rupperecht is a practicing attorney with Watson & Associates LLC in Denver, Colo., where she represents clients worldwide on administrative, business, contract, government, and regulatory and compliance law matters. She can be reached at rupperechtlaw@aol.com.*