Internal Investigations: Special Considerations for Government Contractors

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Introduction: Why Specific Guidance for Government Contractors Is Needed

Government Contracts Raise Unique Regulatory Concerns

A company that contracts with the Government is subject to voluminous and detailed statutory and regulatory requirements that govern the entirety of its business relationship and substantially affect its daily operations. Government contractors that receive federal funds and perform contracts involving programs of national importance or that affect national security need to be aware of the special position of trust that they hold. As a result, they need to be vigilant to detect, investigate, and report (where appropriate) misconduct, false claims, overpayments, violations of federal criminal law involving conflict of interest, bribery, and fraud, or other specified issues as soon as possible. In this context, a Government contractor must be prepared to conduct a thorough and timely investigation.

The statutory and regulatory requirements most relevant to this issue are:

- ***False Claims Act ("FCA")***. The FCA provides for reduced penalties when a contractor cooperates with the Government.[1] Specifically, if the company provides the Government with all of the known information about the violation within 30 days of first obtaining the information and fully cooperates with the Government' s investigation, the Court may award two times the amount of damages sustained (as opposed to the treble damages otherwise imposed by the statute). To qualify for reduced damages, no criminal prosecution, civil action, or administrative action may have commenced when the information is disclosed.
- ***The Mandatory Disclosure Rule***, which requires contractors performing covered contracts to disclose certain misconduct and to have a business ethics awareness and compliance program with an internal control system.[2] Specifically, a contractor must disclose credible evidence of a violation of federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations; violation of the False Claims Act ("FCA"), or significant overpayment(s) on a contract. The disclosure requirement applies to current contracts and contracts that have closed within the three prior years. The

rule also delineates the requisite elements of both a compliance program and an internal control system. A contractor can be suspended or debarred for failing to comply with the Rule.

Additionally, Government contractors have unique concerns regarding compliance and ethical conduct and interest in obtaining future contracts, such as:

- ***Suspension, Debarment, & Administrative Agreements***. As discussed above, under the Mandatory Disclosure Rule, a contractor can be suspended or debarred for failing to disclose misconduct or an overpayment. A contractor may also be subject to disclosure requirements under an administrative agreement.
- ***Past Performance Evaluations & the Federal Awardee Performance and Integrity Information System ("FAPIIS")***. A contractor's performance on a current contract can directly impact the contractor's ability to obtain contracts in the future. Detecting and investigating misconduct can help ensure that a contractor retains a positive past performance rating. The reports on FAPIIS are publicly available.
- ***Audits***. Government contracts are subject to audits, and an auditor who comes across what he or she believes to be fraud must refer the matter for investigation, either in writing (using a DCAA Form 2000, Defense Contract Management Agency Fraud Referral Form, or other written submission) or through the Defense Hotline. The Generally Accepted Government Auditing Standards require auditors to report known or likely fraud, and noncompliance with provisions of laws, regulations, or contracts. Similarly, a Department of Defense ("DoD") Instruction requires prompt referral of all allegations of fraud involving DoD personnel or persons affiliated with DoD and any property or programs under their control or authority.[3] The same DoD Instruction requires the director of the DCAA to establish procedures to ensure the prompt referral of irregularity or fraud arising from audit activities to the appropriate Defense Criminal Investigative Organization. The Government encourages auditors and their supervisors to make a referral even if they do not have all of the information.

The 2013 National Defense Authorization Act § 832 ("NDAA") requires the Defense Contract Audit Agency ("DCAA") to issue guidance with respect to its requests for internal audit reports from contractors. In April 2013, DCAA issued guidance with respect to how it would apply its broadened authority.[4] The guidance stated that "DCAA can use internal audit reports for evaluating

and testing the efficacy of contractor internal controls ***and*** the reliability of associated contractor business systems," and it would request internal audit reports only when DCAA can demonstrate how the report may support a risk assessment or audit procedures in a current and ongoing audit. Further, DCAA would treat internal audit reports as proprietary data, not include internal audit reports as part of an auditor's working papers, and document how the internal audit reports affected the audit plan.

- ***Implicated Statutes –The Anti-Kickback Act, Procurement Integrity Act, & Annual Changes in Procurement Law***. The Anti-Kickback Act requires contractors to "have in place and follow reasonable procedures designed to prevent and detect violations" of the Act and cooperate fully in investigating a potential violation.[5] Similarly, the Sarbanes-Oxley Act requires publicly traded companies to have an internal control structure.[6] The Procurement Integrity Act ("PIA") prohibits a contractor from knowingly obtaining contractor proposal information or source selection information before award,[7] and a contractor facing a PIA violation would be well-advised to conduct an internal investigation. Additionally, procurement law is constantly changing, and new obligations and reporting requirements are imposed on a regular basis.
- ***Agency Disclosure Programs***. Various agencies, including the DoD, the General Services Administration, National Aeronautics and Space Administration ("NASA"), Department of Transportation, Department of Commerce, and the Department of Labor, have disclosure programs that encourage contractors to report fraud, an overpayment, or other forms of misconduct.

Taken together, these laws, regulations, and other procurement-related considerations create an environment where a company must be prepared to detect, investigate, and report potential misconduct, false claims, overpayments, violations of federal criminal law involving conflict of interest, bribery, and fraud, or other specified issues. Having a robust internal compliance program and mechanisms to conduct internal investigations allows a contractor to manage these concerns.

Benefits of Conducting Internal Investigations for Government Contractors

Conducting an internal investigation provides numerous benefits to government contractors. Internal investigations provide company executives and management with

critical information early on, which facilitates informed decision-making. For example, an internal investigation helps inform decisions to disclose under the Mandatory Disclosure Rule. A timely internal investigation gives the company a degree of control in what can be a difficult situation and may help to present a positive picture of an ethical company to the Government. A sound internal investigation may persuade the Government to refrain from undertaking or to postpone a Government investigation, and it may help a contractor to avoid suspension or debarment. Finally, internal investigations are necessary to adhere to a compliance program.

Bad Practices

In addition to having a compliance program, it is essential to be aware of and to eliminate problematic practices. DoD has identified the following items as indicators for general fraud:[8]

- Management override of key controls
- Inadequate or weak internal controls
- No written policies and procedures
- Overly complex organizational structure
- Key employee never taking leave or vacation
- Computer-generated dates for modifications to electronic files that do not fit the appropriate time line for when they were created
- Missing signatures of approval or discrepancies in signature/handwriting
- Computer report totals that are not supported by source documentation
- Lengthy unexplained delays in producing requested documentation
- High turnover rate, reassignment, firing of key personnel
- Missing electronic or hard copy documents that materialize later in the review
- Lost or destroyed electronic or hard copy records.
- Photocopied documents instead of originals. Copies are poor quality or illegible
- “Unofficial” electronic files or records instead of “archived” or “official” files or records
- Revisions to electronic or hard copy documents with no explanation or support
- Use of means of alteration to data files

Additionally, DoD has published a list of management fraud indicators:[9]

- Failure to display and communicate an appropriate attitude regarding the importance of internal control, including a lack of internal control policies and procedures; ethics program; codes of conduct; self-governance activities; and oversight of significant controls
- Displaying through words or actions that senior management is subject to less stringent rules, regulations, or internal controls than other employees
- Significant portion of compensation being incentive-driven based on accomplishment of aggressive target goals linked to budgetary or program accomplishments or stock prices
- High turnover of senior executives or managers
- Hostile relationship between management and internal and/or external auditors. This would include domineering behavior towards the auditor, failure to provide information, and limiting auditors' access to employees of the organization
- Failure to establish procedures to ensure compliance with laws and regulations and prevention of illegal acts
- Indications that key personnel are not competent in the performance of their assigned responsibilities
- Adverse publicity concerning an organization's activities or those of senior executives
- Lack of, or failure to adhere to, policies and procedures requiring thorough background checks before hiring key management, accounting, or operating personnel
- Inadequate resources to assist personnel in performing their duties, including personal computers, access to information, and temporary personnel
- Failure to effectively follow-up on recommendations resulting from external reviews or questions about financial results
- Nondisclosure to the appropriate Government officials of known noncompliance with laws, regulations, or significant contract or grant provisions
- Directing subordinates to perform tasks that override management or internal controls
- Undue interest or micromanagement of issues or projects that most knowledgeable individuals would identify with a substantially lower level manager
- A manager that claims disinterest or having no knowledge about a sensitive or high profile issue in which you would expect management involvement
- Constant over usage or inappropriate use of cautionary markings on management or organizational documents such as "Attorney Client Privilege/Attorney Work Product," "For Official Use Only," or other markings indicating an item is business sensitive or has a higher security classification than is appropriate.

Conducting an Internal Investigation

Issues & Events Giving Rise to an Internal Investigation

The following events and issues may lead a company to conduct an internal investigation:

- An internal report of misconduct through the company's hotline or other internal reporting mechanism.
- Whistleblower
- A Subpoena, Civil Investigative Demand, or Search Warrant
- Customer or Vendor Complaint
- The Business Systems Rule, which applies to contracts subject to the Cost Accounting Standards. It requires contractors to implement enhanced compliance programs, and an assertion of noncompliance may result in an internal investigation.
- Congressional Report or Inquiry
- Media Inquiry
- Industry Trend

Shaping an Investigation: Considerations Based in Relevant Statutes & Regulations

Statutes and regulations influence the process that a company should use and the timing of an internal investigation. As discussed above, the Mandatory Disclosure Rule requires a contractor with a covered contract (contract value exceeds $5 million and the performance period is 120 days or more) to "***timely disclose*** to the Government . . . ***credible evidence*** of a violation of federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations" or a violation of the FCA.[10] Thus, if a contract is subject to the Mandatory Disclosure Rule, the timing of the disclosure must be timely, the contractor must disclose credible evidence, and the investigation should be aimed at achieving these ends. Additionally, as discussed above, Section 832 of the 2013 NDAA broadened DCAA's statutory authority to request, access, and use contractor internal audit reports. Internal audits are frequently part of a privileged internal investigation, and a contractor may have justifications to withhold a privileged audit report.

Internal or External Counsel?

The company should decide at the outset of the investigation whether to use in-house or external counsel. The decision largely depends on the gravity and nature of the matter – more serious allegations generally require external counsel. Outside counsel offer expertise and experience in conducting an internal investigation and also bring independence. Using outside counsel may help maintain privilege with respect to the investigation because outside counsel are associated with providing legal advice, and in-house counsel are often involved in providing non-privileged business advice. Additionally, the Government may give more weight to an investigation conducted by outside counsel because it perceives that outside counsel have more independence and thus using outside counsel may suggest that the company is taking the matter seriously.

Best Practices throughout an Investigation

Launching the Investigation

Attorneys should lead the investigation and begin by defining the scope of the investigation. The client should prepare a memo requesting an investigation and make clear that the purpose of the investigation is to obtain legal advice. Emphasizing that the purpose of the investigation is to obtain legal advice will help retain privilege later on. The memo should also reflect whether there is an existing threat of litigation. The company and investigation team should maintain confidentially of the investigation to the fullest extent possible.

The investigation should begin with the end goals in mind. As part of this effort, counsel should prepare an investigation plan. The plan should recite the alleged misconduct, identify the subjects on which information is sought, identify people who are likely to have knowledge of the allegations, and define places where relevant information may be kept. At the beginning, the investigation should focus on the people and sources that are most likely to have relevant evidence and information. The investigation should be adjusted as evidence is obtained and analyzed.

Document Preservation & Collection

Document preservation and collection is a critical aspect of any internal investigation. The company should issue a document retention notice and cease any routine document destruction immediately. It is essential to identify where documents are kept, the formats in which the documents are created and maintained, and key custodians. The investigative team should develop a plan for securing, maintaining, searching, collecting, reviewing, and analyzing the documents and electronic evidence. Internal or external personnel with expertise in the company's systems should be involved. The company and investigatory team will need to decide whether to use internal or external resources to collect, process, cull, and review documents. This decision will be driven by the nature of the allegation giving rise to the investigation, costs, the abilities of internal resources, and the level of disruption that would occur.

The collection must be done in a manner that preserves the chain of custody and metadata. The more serious the allegations, the more comprehensive the forensic review of email, hard drives, servers, backup tapes, etc. needs to be. Additionally, this collection and review will be more time-sensitive when the Government has already launched an investigation. The personnel who identify and collect documents should prepare a report for counsel that identifies the methods used and the areas searched. The report should be marked as attorney work product. If any electronic evidence or documents are lost, the investigative team must memorialize all efforts taken to prevent the loss and all steps taken to retrieve the lost information.

Conducting Interviews

Interviews are a crucial part of an internal investigation because they are the key to determining what occurred. Interviews should be conducted in person whenever possible. As discussed in greater detail below, the interview must begin with an *Upjohn* warning. Experienced interviewers who are able to establish rapport, gain all relevant information, and follow up immediately with the provided information should conduct the interviews. To maximize the potential of an accurate record, two people should conduct each interview, with one person designated as the main interviewer and the other person as the

note taker. The note taker must take detailed notes, which will be converted to a memorandum as soon as possible after the interview (three days or fewer is advised). If a witness is already represented by personal counsel, the interview must be coordinated with that counsel. The following practices are recommended for an effective interview:

- To the extent possible, relevant documents identified during the document review and preservation stage should be reviewed before interviewing a witness. This will aid the interviewers in formulating questions and identifying relevant facts.
- Have a goal in mind for each interview (information gathering, locking a witness into a position, confronting witness with adverse information) and tailor questions toward that goal.
- Prepare an outline of questions, including questions about document practices.
- Sequence witnesses is a manner that make sense given the information already known, so that early witnesses are likely to provide information that can be used in later interviews.
- Be aware of the interviewee's body language.
- Ensure that potential misunderstandings or uncertainties are clarified immediately.
- Do not take notes in the form of a verbatim transcript and state within the notes that the notes are not a transcript.
- Do not record, videotape, or transcribe an interview.
- Conduct multiple interviews of key personnel if necessary.

As discussed in the section on Making a Disclosure, maintaining privilege is a critical concern. Failing to follow best practices when interviewing employees could result in a lack of privilege over the entire investigation. The findings from an interview are most likely to be considered privileged if these best practices are followed:

- Counsel conducts the interviews, and interviews are conducted in a confidential manner, isolated from third parties.
- The interview begins with an *Upjohn* warning. Specifically, interviewees are told that the attorney-client privilege over communications between

company counsel and its employees belongs solely to, and is controlled by, the company. And, the company may choose to waive this privilege and disclose what the employee says to in-house counsel, a Government agency. or another third party.

- The interviewee is told that the investigation is being conducted to provide legal advice to the company.
- The interviewee is told that their cooperation is required.
- The interviewee is told that the conduct and results of the investigation are to be kept confidential except as necessary to provide legal advice to the company. Accordingly, the employee must keep the interview confidential.
- Document that the interviewee was given the *Upjohn* warning in the interview notes. Mark the notes and memorandum as attorney work product and privileged.

Additional Considerations in a Unionized Workplace

There are additional considerations that must be kept in mind if there are unionized employees within the company. Specifically, an employee in a unionized workplace is entitled to have a union representative present during an interview if the interview may lead to disciplinary action. The union's bargaining agreement may also provide an employee with a right to representation, in addition to other enumerated rights.

The existence of a union may effect the company's ability to maintain confidentiality over an investigation. A unionized employer is required to furnish the union, upon request, with information relevant and necessary to the union's role as the employees' bargaining representative. Because an internal investigation may result in the discipline of a represented employee, the union's role as the employee's representative is implicated. As such, the company may be required to disclose information obtained from the investigation, including witness statements.

Additionally, Section 7 of the National Labor Relations Act provides union and non-union employees the right to engage in protected concerted activity, including discussing or improving the terms and conditions of their employment.[11] The National Labor Relations

Board held that prohibiting employees from discussing an ongoing internal investigation violated Section 7.[12]

Interviewing a Whistleblower – Additional Considerations

Statutory & Regulatory Concerns

Additional concerns apply when a whistleblower is being interviewed. Namely, whistleblowers are protected by several statutes.

- The FCA provides an employee, contractor, or agent with a cause of action if he/she “is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done by the employee, contractor, agent or associated others in furtherance of an action” under the FCA.[13]
- Federal law protects an employee of a contractor or subcontract from reprisal for disclosing information that the employee believes is evidence of gross mismanagement, an abuse of authority, or a violation of a law, rule, or regulation related to a DoD or NASA contract or grant.[14]
- Section 827 of the 2013 NDAA amended the whistleblower protections applicable to employees of DoD contractors outside of the intelligence community by extending whistleblower protections to employees of DoD subcontractors, expanding the entities to which a disclosure can be made, and providing for attorneys’ fees and costs when the Government files an action to enforce whistleblower protections.
- Section 828 of the 2013 NDAA instituted a pilot whistleblower protection program for employees of contractors performing contracts, subcontracts, and grants with non-DoD executive agencies.
- The Sarbanes-Oxley Act protects employees of publicly traded companies from retaliation in fraud cases.[15] Recently, the Supreme Court held that this protection applies to employees of privately held contractors who provide services to publicly traded companies.[16]

Best Practices in Interviewing a Whistleblower

Because whistleblowers are protected from retaliation, there are additional considerations that should be taken. The following best practices should be observed:

- Have at least two interviewers present.
- Inform the whistleblower that he/she does not have a right to have an attorney participate in its internal investigation.
- Remind him/her that he/she agreed to cooperate with the company's investigation process as a condition of his/her employment. Furthermore, remind the whistleblower that his or her continuing cooperation is necessary to reach a conclusion of the investigation.
- Assure the whistleblower that the company cares about his/her specific complaint and relies on its employees to raise concerns with management.
- Explain the process, including advising the whistleblower that you will limit disclosure of information to people who have a legitimate reason to know.
- Explain that the interview will be kept confidential and that its focus is to gather facts and information to address and correct the reported issue.
- Tape record or take copious notes. Tape recording poses a risk because the recording may be discoverable, but a recording may be useful if a whistleblower subsequently challenges how the interview or investigation was conducted. Notably, this guidance differs from the recommendations provided for interviewing non-whistleblowers. Whistleblowers are unique in that they present the risk of retaliation claims or allegations that the company did not take the report seriously or conduct a proper investigation. Recording and documenting the whistleblower interview helps to mitigate against this risk.
- Make and record a non-retaliation pledge. Assure the whistleblower that if the company learns that another employee has retaliated against him/her, the company will promptly take action against that employee.
- Conduct an interview, not an inquisition.

When the interview is over and the investigation continues, keep the whistleblower informed of the status of the investigation. When the investigation is completed, inform the whistleblower of the outcome (without disclosing privileged information). At the same time, proactively prevent retaliation by keeping the whistleblower's identity confidential and avoiding obvious retaliatory conduct, such as discharging, demoting, suspending, threatening, or discriminating against the employee in any way. The company should also be careful to avoid less obvious retaliatory actions, such as denying a leave request,

scheduling the employee for fewer hours, excluding the employee from certain meetings or projects, or applying a higher level of scrutiny to the employee or his/her work. Engaging in retaliatory conduct or permitting other employees to retaliate against the whistleblower may result in liability and increased attention from the Government.

Concluding the Investigation

The investigation should be completed as quickly as possible, and the investigation should conclude with a report from counsel to the company. The report should include the following elements/sections: summary of allegation, scope of the investigation, investigation process, chronology of events, identification of applicable laws and regulations, legal analysis, conclusion, and recommendation. Exhibits, such as key documents, can be included with the report as needed. The report should be labeled as privileged work product, and the distribution of the reported should be limited.

The report can be provided to the company in an oral or written format. An oral report reduces the risk of disclosure, but it makes it more difficult to memorialize and demonstrate how the company responded to the allegations. A written report may help persuade Government officials that the company acted reasonably and responsibly. As such, when investigating serious allegations, the report should almost always be in writing. Alternatively, the report can be divided into two components, with counsel's recommendations provided in a separate report, either written or oral. Then, if the investigative report is provided to the Government, the company can withhold the recommendation section as privileged.

In addition to documenting the findings of the investigation, the company should also document any corrective actions taken after the investigation.

Making a Disclosure

How & What to Disclose

At the end of an investigation, the company must determine what to disclose to the Government and how to disclose the identified information. To a large extent, the timing

and scope of the disclosure are driven by the Mandatory Disclosure Rule. For contracts not subject to the Mandatory Disclosure Rule, the decision to disclose may be impacted by an agency disclosure program, which are becoming increasingly common (agency disclosure programs are discussed in greater detail below). Regardless of whether a disclosure is mandated by the Mandatory Disclosure Rule, a disclosure to the Government should be coordinated among all of the affected agencies. Specially, the contractor should make a simultaneous disclosure to the contracting officers and inspectors general of the affected agencies.

The Mandatory Disclosure Rule

As discussed above, the Mandatory Disclosure Rule requires a contractor with a covered contract (a contract with a value exceeding $5 million and a performance period of 120 days or more) to "***timely disclose*** to the Government . . . ***credible evidence*** of a violation of federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations" or a violation of the FCA.[17]

With respect to timing, what constitutes a "timely disclosure" is not defined in the Rule. However, it is important to consider that a delay in disclosing can undermine the credibility of the company and the investigation. Similarly, the rule does not define "credible evidence." Practitioners have suggested that the "credible evidence" standard is slightly below the better known preponderance of the evidence standard. As such, disclosure is required when the contractor has reliable – but not conclusive – evidence that a violation has occurred. Together, the timely disclosure and credible evidence aspects of the rule suggest that a contractor has time to investigate a matter and determine the veracity and magnitude of the allegations before it is required to make a disclosure.

The Mandatory Disclosure Rule also speaks to the scope of information that must be disclosed. Under the required contract clause, the contractor agrees to fully cooperate with the Government in terms of audits, investigations, and corrective actions.[18] Full cooperation is defined as "disclosure to the Government of the information sufficient for law enforcement to identify the nature and extent of the offense and the individuals

responsible for the conduct. It includes providing timely and complete response to the Government auditors' and investigators' request for documents and access to employees with information."[19] Importantly, the Rule expressly states that a contractor is not required to forego privilege in its efforts to cooperate.[20]

Agency Disclosure Programs

Numerous agencies have adopted disclosure programs, most with forms to submit reports of misconduct on their websites. The form on the DoD Office of Inspector General's webpage requests the following information: (i) name and contact information for employee submitting information; (ii) contractor information; (iii) the affected contract(s), contracting officer(s), and agency(ies); (iv) whether an overpayment occurred; (v) what steps have been taken to prevent a reoccurrence; (vi) whether an internal investigation has been conducted; (vii) the scope of the investigation; and (viii) whether the company is willing to provide the DoD with a copy of the report.[21] Similarly, NASA's disclosure form seeks contact information of the reporting individual, the individual's relationship to the company, the contract number and contracting officer for the affected contract, the dollar amount of the loss, the date the loss occurred, whether there has been a violation of the FCA or a federal criminal law, and "a complete description of the facts and circumstances surrounding the reported incident, including names of individuals involved, dates, locations, how the matter was discovered, potential witnesses and their involvement, estimated monetary loss to the United States, and any corrective action taken by the company." [22] The General Services Administration's disclosure form is almost identical.[23]

The United States Agency for International Development, Department of Commerce, National Archives, Department of Transportation, Department of Justice, Department of Labor, and Department of Interior all have similar disclosure forms. Regardless of whether a submitter uses an agency form, the agencies generally seek the following information:

- Affected contract(s),
- Amount of loss,

- A complete description of facts and circumstances surrounding the reported activities,
- Evidence forming the basis of the report,
- Names of the individuals involved and potential witnesses,
- Date(s) the allegations occurred,
- Location(s) where the reported conduct took place,
- How the matter was discovered, and
- Any corrective action taken by the company.

Notably, the agencies do not expect the reporting individual to provide a legal characterization of the facts and evidence. Rather, the disclosure programs are aimed at obtaining the facts behind any suspected misconduct.

Avoiding a Privilege Waiver

Avoiding a privilege waiver throughout an internal investigation is of upmost importance. Ultimately, whether a particular investigation is privileged will depend on the law in the relevant jurisdiction. Federal common law governs attorney-client privilege in federal claims brought in federal court; state law applies when state claims are brought in state and federal courts. The attorney-client privilege arguably applies to an internal investigation when the investigation is conducted at the direction of company management to secure legal advice from counsel and the communications are kept confidential.

Recent decisions from federal courts on the issue of privilege in internal investigations highlight the need to discuss this topic in greater detail, with special attention to considerations unique to Government contractors acting in a highly-regulated environment.

Overview of Recent Developments / Decisions

United States ex rel. Barko v. Halliburton Co.

Earlier this year, in *United States ex rel. Barko v. Halliburton Co.*, the District Court for the District of Columbia ordered the defendants in an FCA action to produce documents related

to an internal investigation.[24] Kellogg Brown & Root Inc. ("KBR") had conducted a Code of Business Conduct ("COBC") investigation into the proprietary of awards to a subcontractor. A COBC investigation usually occurred when KBR received a report of a potential COBC violation from an employee through the law department, an email submission, or a call to a hotline. The Director of the COBC then decides whether to conduct an investigation. If an investigation is carried out, COBC investigators interview employees, review documents, and prepare a COBC report, which is sent to the law department. KBR argued that the COBC documents at issue were protected by attorney-client privilege.

The court rejected the privilege claim, finding that the investigation was carried out pursuant to regulatory law and corporate policy – not for the purpose of obtaining legal advice. The court specifically pointed to DoD regulations that require a contractor to have internal control systems to investigate and disclose misconduct and reasoned that "KBR's COBC policies merely implement these regulatory requirements."[25] The court further noted that the interviewed employees were never told that the purpose of the investigation was to assist the company in obtaining legal advice, the confidentiality agreement that employees signed did not state that the investigation's purpose was to obtain legal advice, and the interviewer was not an attorney. The Court also distinguished the facts at hand from *Upjohn*, where attorneys from the legal department consulted with outside counsel about whether and how to conduct an internal investigation.[26] The *Barko* Court rejected the privilege claim because the investigation would have been conducted regardless of whether legal advice was sought. An appeal of the order is pending.

United States v. ISS Marine Services, Inc.

The court reached a similar decision in *United States v. ISS Marine Services, Inc.* in late 2012.[27] In *ISS Marine*, the Government brought a petition to enforce compliance with an administrative subpoena issued by the DoD Inspector General. The subpoena sought an internal audit report, and ISS Marine argued that the report was protected by the attorney-client privilege and the work-product doctrine. ISS Marine conducted an internal audit after employees raised concerns about potentially fraudulent conduct. ISS Marine consulted outside counsel but did not retain the firm to carry out the investigation. Instead,

ISS Marine's internal auditor undertook the investigation, and outside counsel advised the company of its legal obligations.

The court held that the audit report was not protected by attorney-client privilege because neither the investigation nor the report was made for the purpose of obtaining legal advice. The court noted that the company "eschewed the involvement of outside counsel," the interviewed employees did not know their responses would be conveyed to counsel, and there was no evidence that outside counsel provided the company with legal advice after receiving the report.[28]

The court also rejected ISS Marine's argument for protection under the work-product doctrine. The court determined that there was no evidence that the company had contemplated a whistleblower lawsuit – meaning the audit was not done in anticipation of a specific claim. Further, the fact that counsel was not involved suggested that litigation was not a concern. Rather, the company had a clear business motivation to conduct the investigation. Specifically, the court noted that ISS Marine was contractually obligated to return any overpayments.[29] The court ordered ISS Marine to produce the audit report.

Practical Guidance

The following are best practices to maintaining privilege.

- Assign an attorney to be in charge of every aspect of the investigation.
- Attorneys must conduct the interviews.
- Document that the investigation is being carried out to obtain legal advice and cite any anticipated threats of litigation.
- Give every individual who is interviewed an *Upjohn* warning and inform them that the investigation is being conducted to provide the company with legal advice.
- Mark documents as privileged and confidential.
- Limit disclosure and circulation of information within the company. When information is circulated, request that it be returned.
- Limit the involvement of personnel outside the legal department and management.

- Maintain confidentiality over the investigation.

Making a disclosure increases the risk of a privilege waiver because a disclosure will almost certainly be deemed to waive protection that might otherwise have attached to the information that was disclosed. As such, when making a disclosure, disclose only facts and make the disclosure as narrow as possible.[*] A contractor should try to obtain a confidentiality agreement with the Government because information may be protected if the contractor has an enforceable agreement. The Government's willingness to enter a confidentiality agreement will depend on the nature of the allegations, the agency involved, the company's prior relationship with the Government, and other such considerations.

Other Considerations

Protective Measures

A company can take additional measures to protect itself once the investigation is complete. First, the company or its counsel can prepare a preliminary report – an unpolished recitation of the facts and the recommended corrective action. The preliminary report and any other investigative reports should have a disclaimer stating that the report is not an admission. All reports should also have a disclaimer to protect the report from disclosure under a Freedom of Information Act request.

Parallel Investigations

The contractor and investigation team must be aware and mindful of any parallel investigations. When there is a parallel investigation, it is recommended that the company

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[*] Although there are clear benefits to conducting an internal investigation, government contractors should be aware of a recent district court decision, *United States ex rel. Saunders v. Unisys Corp*., No. 1:12-cv-00379 (GBL/TCB), 2014 WL 1165869 (E.D. Va. Mar. 21, 2014), in which the court held that a contactor's disclosure to the Government was insufficient to invoke the public disclosure bar. In *Saunders*, a *qui tam* plaintiff brought an FCA action alleging fraudulent overbilling. The defendant moved to dismiss, arguing that the company's disclosure of "unethical" billing practices to the DoD Office of Inspector General constituted a public disclosure under the FCA. *Id.* at *4. The court denied the motion, finding that the company's reports were not made public within the meaning of the FCA because (1) the reports were not made to the general public or placed in the public domain and (2) the reports did not reveal allegations or transactions of fraud. *Id.* at *5-6. Rather, the company revealed unacceptable and unethical practices.

stay one step ahead of the Government. This allows the company to be aware of the information the Government is receiving and the potential consequences of the information. This information helps the company develop a strategy for dealing with the Government. As part of this effort, the company should determine its level of cooperation early on, including whether employees will be made available and whether and to what extent documents will be produced. Staying attuned to the Government investigation is an important aspect in carrying out an effective internal investigation.

The Importance of Accuracy

It is of critical importance that any disclosures or other statements made to the Government be completely accurate. Submitting inaccurate information can expose the company to liability under the FCA and other fraud statutes. Similarly, disclosing false or incomplete information can result in suspension or debarment. If, after disclosing information to the Government, the company determines that the information disclosed was inaccurate or incomplete, the company should correct the mistake as soon as possible. Specifically, the company should inform the Government what information was inaccurate or incomplete, state when and how the company learned of the discrepancy, and provide accurate and complete information.

Conclusion

Internal investigations have become part of the landscape for government contractors. Thus, it is important to recognize the need for and become comfortable with the rules and procedures for effective use of the internal investigation as a means to protect the company's interests.

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[1] 31 U.S.C. § 3729(a)(2) (2012).
[2] Contractor Business Ethics Compliance Program and Disclosure Requirements, 73 Fed. Reg. 67,064 (Nov. 12, 2008) (codified at 48 C.F.R. pts. 2, 3, 9, 42 and 52). A "covered contract" is a contract valued at more than $5 million or greater than 120 days in duration.
[3] Department of Defense, DoD Instruction 5505.2: Criminal Investigations of Fraud Offenses (Aug. 29, 2013).

[4] Defense Contract Audit Agency, Updated Audit Guidance on Access to Contractor Internal Audit Reports (April 23, 2013).
[5] 41 U.S.C. § 8703(a) (2012).
[6] *See* 15 U.S.C. § 7262 (2012).
[7] 41 U.S.C. § 2102(b) (2012).
[8] *Auditor Fraud Resources*, United States Department of Defense Office of Inspector General, http://www.dodig.mil/Resources/Fraud/introduction.html.
[9] *Id.*
[10] FAR § 3.1003(b) (2014) (emphasis added).
[11] 29 U.S.C. § 157 (2012).
[12] *Banner Health System d/b/a Banner Estrella Medical Center*, 358 N.L.R.B. No. 93 (July 30, 2012).
[13] 31 U.S.C. § 3730(h)(1) (2012).
[14] 10 U.S.C. § 2409(a) (2012).
[15] 18 U.S.C. § 1514A (2012).
[16] *Lawson v. FMR LLC*, 133 S. Ct. 2387 (2014).
[17] FAR § 3.1003(b) (2014) (emphasis added).
[18] FAR § 52.203-13(c)(2)(ii)(G) (2014).
[19] FAR § 52.203-13(a) (2014).
[20] FAR § 52.203-13(a) (2014).
[21] *Contractor Disclosure Form*, United States Department of Defense Office of Inspector General, http://www.dodig.mil/Programs/CD/pdfs/DoDContractorDisclosureForm.pdf.
[22] *Mandatory FAR Contractor Disclosure*, NASA Office of Inspector General, http://oig.nasa.gov/audits/mandatory.html.
[23] *FAR Contractor Reporting*, Office of Inspector General, http://www.gsaig.gov/index.cfm/gsa-oig-contractor-reporting/gsa-oig-contractor-reporting-form/.
[24] *United States ex rel. Barko v. Halliburton Co.*, Case No. 1:05-CV-1276, 2014 WL 1016784 (D.D.C. Mar. 6, 2014).
[25] *Id.* at *3.
[26] *Id.*
[27] 905 F. Supp. 2d 121 (D.D.C. 2012).
[28] *Id*. at 130.
[29] *Id.* at 132.