THE GOVERNMENT CONTRACTOR®

WEST®

Information and Analysis on Legal Aspects of Procurement

Vol. 55, No. 4 **January 30, 2013**

Focus

¶ 29

FEATURE COMMENT: What To Expect When An IG Investigates You—Answers To Frequently Asked Questions

Federal inspectors general are increasingly focusing their investigative sights on private-sector companies and, in particular, Government contractors, subcontractors and grantees. Many companies are unfamiliar with exactly what IGs are, what IGs can do to them and how best to defend themselves. By the time an IG has a company in its crosshairs, it can well be too late for corporate executives and their general counsel to educate themselves. This FEATURE COMMENT is intended to answer these and related basic questions as briefly, but comprehensively, as possible.

What are IGs and What Do They Do?—Created by the Inspector General Act of 1978, 5 USCA Appendix, as amended by the IG Reform Act of 2008, P.L. 110-409, an Office of Inspector General is a unique, extraordinarily powerful institution whose mission is to prevent, or at least to minimize, fraud, waste, abuse and mismanagement in the Federal Government. An IG carries out this mission by auditing and inspecting the programs and operations of Government agencies, and investigating the activities of an agency's employees, contractors and grantees with respect to those programs and operations.

At smaller agencies, for example, the Smithsonian or Amtrak, the IG is appointed by the agency head and can be fired by the agency head, at will. Accordingly, the IG works at the direction and under the control of the agency head.

At cabinet-level agencies, by way of contrast, the IG is nominated by the president and confirmed by the Senate. The IG Act specifies that the president must choose a nominee "without regard to political affiliation and solely on the basis of integrity and demonstrated ability in accounting, auditing, financial analysis, law, management analysis, public administration, or investigations." 5 USCA App. § 3(a).

The "without regard to political affiliation" clause, in conjunction with the enumeration of relevant disciplines, has been taken to mean that, although a president may appoint someone who shares his party affiliation and ideological persuasion (and, indeed, they do), the primary criteria should be the nominee's character and substantive qualifications. And, once confirmed, the IG's political leanings should have no influence whatsoever in the determination of what matters to look into, and what to conclude and report once the fact-finding phase of a given inquiry is complete. In practice, this means that cabinet-level IGs who take their statutory responsibilities seriously will, in due course, issue an audit or inspection report, or conduct an investigation that could cause political embarrassment, or worse, legal trouble, for the administration that appointed them, or for a subsequent administration whose politics they share. And this leads to the next point.

Presidents can remove IGs, but doing so is the exception rather than the rule. To discourage presidents from removing IGs for political reasons or willy-nilly, the IG Act requires presidents to explain their reasons for removal, in writing, to Congress. Many IGs stay in office long past the term of the president who appointed them.

To further empower IGs to be independent and expansive in the exercise of their ample powers, the statute provides that an OIG is to be treated as its own separate agency within a given agency. Accordingly, IGs have the power to hire and fire their own staff. IGs have their own legal counsel.

To help them carry out their statutory responsibility to keep Congress (which, in practice, means the authorizing and appropriations committees in both houses with jurisdiction over the agency) as well as the agency head apprised of their activities,

IGs have their own offices of congressional liaison. And to help them keep taxpayers informed of their activities, and to help them pressure the agency or Congress to take action on their recommendations, IGs have their own press liaisons.

To empower IGs still more, the IG Act gives them considerable influence in determining their own budgets. IGs submit their budget requests to the administration through agency heads. The administration then submits to Congress its requested budget for an IG, as well as the IG's own budget request, so that Congress can see the difference between the two, if any. And if an IG believes that any difference between the two is so great that it would "substantially inhibit the Inspector General from performing the duties of the office" (5 USCA App. § 6(f)(3)(E)), the administration must submit the IG's comments to that effect to Congress for its consideration in determining whether an increase is warranted over the administration's objections.

An IG has broad power to make examinations "relating to the administration of the programs and operations of the applicable establishment as are, in the judgment of the Inspector General, necessary or desirable." 5 USCA App. § 6(a)(2). The IG Act gives an IG "access to all records, reports, audits, reviews, documents, papers, recommendations, or other material available to the applicable establishment which relate to programs and operations with respect to which that Inspector General has responsibilities." 5 USCA App. § 6(a)(1).

An IG has the power to subpoena the "production of all information, documents, reports, answers, records, accounts, papers, and other data in any medium (including electronically stored information, as well as any tangible thing) and documentary evidence necessary in the performance of the functions" of the office. 5 USCA App. § 6(a)(4). And the IG must have "direct and prompt" access to the agency head when necessary for any purpose pertaining to the performance of functions and responsibilities under the IG Act. 5 USCA App. § 6(a)(6).

One key limitation, at least on paper, to the broad sweep of an IG's powers is the ability of certain agency heads, namely, those of Defense (5 USCA App. § 8(b)(2)), Homeland Security (5 USCA App. § 8I(a)(2)), Justice (5 USCA App. § 8E(a)(2)) and the Treasury (5 USCA App. § 8D(a)(2)), to prohibit an IG from initiating, carrying out or completing any audit or investigation, or from issuing any subpoena, after the IG has decided to initiate, carry out or complete such audit or investigation, or to issue such subpoena, if the agency head determines that such prohibition is "necessary to preserve the national security interests of the United States" or "to prevent significant impairment to the national interests of the United States." I say "at least on paper" because this power (like presidents' power to remove IGs) is rarely exercised by agency heads. No doubt the power is rarely exercised because IGs must apprise Congress of an agency head's exercise of this power, and then the agency head must justify the decision, in writing, to Congress. These requirements discourage agency heads from using the "national security/national interests" exception for political or otherwise illegitimate purposes.

Although audits, inspections and investigations are often colloquially lumped together under the umbrella heading of "investigations," investigations are, in fact, materially different from audits or inspections.

Audits and inspections are alike in kind, but they tend to differ in scope and timing. Both essentially are examinations of a given Government program or operation. Audits tend to be thought of as focused solely on whether Government money is being spent and accounted for properly. Certainly there are such financial audits, but there are also "program" audits that go beyond purely "green eyeshade," dollars-and-cents matters, to instead examine the overall effectiveness of a Government program or operation. A classic example of a financial audit is one focused on whether a given agency's employees are using Government-issued credit cards for personal reasons. A classic example of a program audit is one assessing the effectiveness of the U.S.-led effort to train the Afghan army and police force as the U.S. military involvement in that country winds down.

Whether they focus on finances or programs, audits are in-depth examinations of a given topic. They often take several months to complete, and they may last a year or more. This is because auditors are held to the Government Accountability Office's rigorous auditing standards, the so-called "yellow book," *www.gao.gov/yellowbook*, that basically require that every "i" be dotted and every "t" crossed. Every fact must be checked and rechecked, and every assertion must be validated, much like a law review article or a doctoral dissertation.

Once an audit team has a draft of its final report, the draft is shared with relevant agency officials for their review and comments in an iterative process. If inaccuracies or gaps are found, the audit team will correct or address them in the final report. If, as is often

the case, there is simply a difference of opinion between the agency and the IG about a given matter, the IG's view, given that office's independence, will prevail.

However, the agency's comments to the contrary, and any other comments officials may wish to make, will be incorporated in their entirety in an appendix to the report for Congress, the press and the public to see. Typically, if deficiencies (or simply opportunities for improvement) are found, the report will contain recommendations to agency management, and the agency's comments will include whether management agrees with the recommendations and intends to implement them. (When audits focus on classified matters, either no public report is issued or, more often, an IG issues only a condensed version that usually conveys little more than the general subject matter of the report, whether any recommendations were made, and whether agency management agrees with the recommendations and intends to implement them.)

Typically, an IG will ask the inspection team, rather than the audit team, to look into hot-button issues that demand immediate attention due to intense agency, congressional or public interest. This is because inspections do not require the laborious fact-checking process that audits require. And because of the compressed time frame, inspections typically have a more limited scope than audits, which can cover a proverbial waterfront of issues. As with audits, draft inspection reports are shared with applicable agency officials for their comments. A final report will reflect any revisions made in response to inaccuracies or gaps identified by management, and it will typically contain recommendations and management's response to them. (Classified inspection reports are handled in the same manner as classified audit reports.)

Investigations are an entirely different matter from audits and inspections. Investigations are not merely examinations, broad or narrow, of Government programs or operations. Instead, they are inquiries into whether agency employees, contractors or grantees have broken the law. To use the above examples, an investigation of an implicated employee would ensue if a financial audit determines that the employee used a Government credit card for personal purposes. And an investigation would ensue if a contractor hired to train Afghan forces overcharges for the training provided, or fails to provide all of the training for which it has charged the Government.

IG investigators (also known as "agents") are federal law enforcement officers who are empowered by the IG Act to seek and execute warrants for arrest, search premises and seize evidence upon probable cause to believe that the law has been violated. They also carry a weapon in the performance of their official duties, and administer to or take from any person an oath, affirmation or affidavit. Their authority extends throughout the U.S. and is not limited to a particular jurisdiction.

If, during the course of fact finding, investigators conclude that they have reasonable grounds to believe that there has been a violation of federal criminal law, they must report it to the Department of Justice, and refer the matter to DOJ for a prosecutorial determination. Likewise, if investigators determine that there has likely been a violation of federal civil law, they will make a referral to DOJ for its consideration. If investigators determine that no laws were broken, but there was a violation of agency rules, policies or procedures, they will refer the matter to agency management for appropriate administrative action. If investigators determine that there were no illegalities or other misdeeds, they will close the case.

How Do IGs Decide What to Audit, Inspect and Investigate?—But for the national security/national interests exception noted above, which, again, is rarely invoked, IGs may audit or inspect any matter they choose, as long as it relates to the programs or operations of the agency over which they have jurisdiction. So, IGs can initiate an audit or inspection if, for some reason, a given matter interests them and warrants attention in their view. The more important or controversial the issue, or the more money at issue, the greater the likelihood of interest on the IG's part.

Alternatively, IGs will almost always initiate an audit or inspection at the request of an agency head.

Given their dual reporting responsibility, i.e., to Congress as well as to an agency head, IGs will almost always initiate an audit or inspection at the request of the authorizing or appropriations committee of jurisdiction. Generally, IGs will also honor requests from any individual member of those committees. And, where warranted (meaning the subject matter is relevant, the IG has the time and resources to do the work, and there is no more appropriate body to examine the matter), IGs will initiate audits or inspections at the request of a legislator who is not even a member of one of the committees of jurisdiction.

The IG Act requires IGs to consult regularly with GAO, Congress' investigative (the term is used here colloquially) arm, so as to avoid duplicative efforts.

But there is often competition between GAO and IGs to be the first to look into matters, especially high-profile ones, and so a GAO inquiry can trigger an IG inquiry, and vice versa.

Press interest in a given matter often leads an IG to open an inquiry, and, likewise, referrals from "good government" and other outside groups like the Project On Government Oversight and Citizens Against Government Waste can lead to the opening of inquiries. Government employees and ordinary citizens can file complaints in person, by mail or e-mail, or anonymously via IG hotlines.

With respect to investigations specifically, all of the above can be sources of referrals, including mere interest on the part of the IG, with or without probable cause to believe that a legal violation has occurred. In addition, auditors or inspectors will occasionally uncover something during the course of their work that will suggest criminal or civil wrongdoing, as noted above.

IGs are increasingly investigating companies that contract with the Government, and not merely employees or those who receive Government grants. This is understandable given the trend over the last quarter-century or so, for budgetary and ideological reasons, of turning to the private sector to perform functions previously performed entirely or mostly by the Government.

Further, certain statutes and regulations have increased the number of IG investigations that target companies. For example, the False Claims Act, 31 USCA §§ 3729–3733, makes those who knowingly submit or cause to be submitted a false or fraudulent claim to a federal agency for payment liable for treble damages and a per-claim penalty, and the Mandatory Disclosure Rule, Federal Acquisition Regulation 52.203-13(b)(3)(i), provides,

> The Contractor shall timely disclose, in writing, to the agency Office of Inspector General (OIG), with a copy to the Contracting Officer, whenever, in connection with the award, performance, or closeout of this contract, or any subcontract thereunder, the Contractor has credible evidence that a principal, employee, agent, or subcontractor of the Contractor has committed—(A) A violation of Federal criminal law involving fraud, conflict of interest, bribery, or gratuity violations found in Title 18 of the United States Code; or (B) A violation of the civil False Claims Act (31 U.S.C. 3729–3733.

Likewise, the new Whistleblower Protection Enhancement Act of 2012, P.L. 112-199, 126 Stat. 1465, will surely increase IG investigations. Among other things, it broadens the universe of protected whistleblowers to include additional federal employees beyond the first one to disclose fraud, waste or abuse, and to include employees of the Transportation Security Administration. And last July, in *U.S. ex rel. Little v. Shell Exploration & Prod. Co.,* 690 F. 3d 282, 286–91 (5th Cir. 2012); 54 GC ¶ 257, the U.S. Court of Appeals for the Fifth Circuit ruled that even a federal employee whose job is to investigate fraud may bring a qui tam action under the FCA. (The Sixth, Ninth, Tenth and Eleventh circuits have ruled similarly.)

The National Defense Authorization Act for Fiscal Year 2013 includes provisions that will further encourage whistleblowers, which will doubtless lead to still more IG investigations. Section 827 protects from retaliation the employees of Department of Defense or NASA contractors or subcontractors who report instances of gross mismanagement, an abuse of authority, or a violation of law, rule or regulation. Also covered is information regarding a specific danger to public health or safety, and employees have up to three years to make such complaints. Section 828 establishes a four-year pilot program to the same effect for employees of other agencies' contractors, subcontractors and grantees. These provisions will take effect six months after the date of enactment, which was January 2, and they apply to all contracts awarded on or after that date; to all task orders issued on or after that date pursuant to contracts awarded on, after and even before that date; and to contracts awarded before that date that are modified subsequently to incorporate these provisions.

What Happens When an IG Investigates a Company?—There is a "rulebook" that prescribes how IGs are to conduct investigations. See, for example, Council of Inspectors General on Integrity and Efficiency, "Quality Standards for Investigations," *www.ignet.gov/pande/standards/invstds2011.pdf*; and Attorney General Guidelines for Offices of Inspector General with Statutory Law Enforcement Authority, *www.ignet.gov/pande/standards/agleguidelines.pdf*. However, there is no rulebook indicating how companies should respond to IG investigations.

Needless to say, at the first hint of such an investigation, counsel should be engaged. Occasionally, an agent will simply show up at a company's offices and

start asking questions. There is, of course, no obligation to answer those questions without the benefit of counsel, and no obligation to provide any documents requested without a subpoena.

It is more likely that an investigation would start with simply a telephonic or written request that a company voluntarily supply certain information. Depending on the kind and volume of information requested, and the time frame (if a deadline is specified), generally the best approach is a cooperative, proactive one. If the information sought is not privileged, and the volume and time frame are such that producing it would not be burdensome, it makes sense to comply with the request.

After all, if the information requested relates to the company's Government contracts, subcontracts or other Government benefit of some kind (and it should; otherwise, the IG ordinarily will not have jurisdiction with regard to the matter), the IG can obtain it by subpoena. Failing to comply suggests that a company has something to hide, which will only make IG investigators more suspicious and even more determined to leave no stone unturned in trying to find evidence of illegalities.

If the information is not privileged, but proprietary or otherwise confidential (tax-related information, for example), IGs tend to be respectful of requests for "eyes only" treatment, and certain statutes (including exceptions to the Freedom of Information Act, for example) require such treatment. A smart course of action when a request for information is received is for counsel to reach out to the IG and try to initiate a dialogue about the purpose, scope and timing of the investigation. Generally, investigators or the IG's general counsel (with whom investigators will work closely), will be willing to engage in this kind of dialogue and to respond in, if not minute detail, then at least enough detail to be helpful.

And, speaking of "engaging counsel," it matters enormously whom you engage as counsel, and when. Companies inexperienced in Government investigations generally, and in IG investigations in particular, often fail to recognize that investigations are a legal subspecialty all their own, like, for example, oil and gas law, tax law, or antitrust litigation. There is a tendency for a company to think that an investigation is a kind of litigation and, therefore, to turn to their preferred litigation counsel, whether that counsel has particular experience with and expertise in Government investigations or not.

It is probably fair to say that IG investigations are more like litigation than anything else, but there is often a political aspect to them that is rarely present in garden-variety litigation. The best counsel are those who have a litigator's familiarity with the nitty-gritty substantive and procedural aspects of criminal law and civil litigation, *and* a lobbyist's familiarity with the details and nuances of politics, public policy and public relations. Engaging counsel with IG experience or other directly relevant expertise will signal that a company understands and appreciates the unique role and powers of IGs, and can convey credibility and respect that can yield substantive dividends down the road.

The sooner such expert counsel is engaged the better. If an unnecessarily adversarial or otherwise maladroit approach is taken at the beginning, an otherwise preventable bad outcome might become inevitable.

It should go without saying that, even if in-house counsel or corporate compliance or ethics officers have the requisite background and knowledge to handle an IG investigation, outside counsel is more likely to be perceived as independent and, therefore, credible. That said, of course, any in-house expertise should be tapped and incorporated into the defense team.

If the volume or time frame is such that compliance (whether with a voluntary request for information or a formal subpoena) would be burdensome, IGs generally are willing to work with counsel to lessen the volume and lengthen the time frame, either outright, or by agreeing to a "rolling production" schedule of items in priority order.

Depending on the circumstances, it may be appropriate and even advisable to take an adversarial stance with an IG. If, for example, a subpoena is unduly broad in its scope, unreasonable in terms of its timeline, given the volume of information at issue and the difficulty of compiling it, or vague as to the information sought; the information at issue is privileged; or the IG lacks jurisdiction to conduct such an investigation because of the lack of a financial nexus between the applicable agency and the company, a motion to quash can be filed in the cognizant federal district court.

Generally, materials provided (whether voluntarily or by subpoena) should be accompanied by an explanatory letter or memorandum that puts the materials provided in as favorable a context as reasonably possible, particularly if any of the material

is unfavorable, confusing or ambiguous. Left to their own devices otherwise, understandably, investigators will view such material in the worst possible light.

Counsel should seek an early opportunity to meet with the investigators or IG general counsel to put a human face with names, to try to disabuse the IG of any erroneous impressions it may have as to the applicable facts and legal standards, and to try to learn still more about the purposes of the investigation and the time frame. At best, such a meeting can put a stop to an investigation by demonstrating that whatever allegations or suspicions led to its initiation are misplaced. More likely, if properly handled, such a meeting can narrow the scope of an investigation, shorten the time frame, or contain the potential political and reputational fallout. At worst, such a meeting (properly handled, of course) can establish a constructive working relationship that can make the investigation less painful than it would otherwise be.

Once this meeting and any necessary follow-up meetings have concluded, and all requested documents have been provided, counsel should follow up periodically with IG general counsel or the investigators to check on the status of the investigation. While such an investigation may be priority number one for a company, it may be relatively low on the IG's priority list. And the longer an investigation takes, even if it ultimately concludes in a company's favor, the more damage the mere fact of the investigation can do to a company's reputation and, thus, to its bottom line.

Generally, investigators are overworked, juggling multiple cases of varying degrees of complexity. Considering the breadth of most agencies' jurisdiction, a given investigator may not have the necessary subject-matter expertise and may require more time than an investigation would otherwise take. For these reasons, investigations often take months, and, depending on the circumstances, can last even longer than a year.

It is important to note that investigators are fact-gathering law enforcement officers and not lawyers, and so, as noted above, it can be important, if the law is on the client's side of course, to educate them on what legal standards apply to the facts. If it can be demonstrated to them that a given set of facts, even if unfavorable to the client, does not establish a violation of statute or regulation, the investigation should end at that point without a referral to DOJ (although depending on the circumstances, the agency may take administrative action).

As noted above, some investigations will be triggered by congressional or press interest, and others will attract congressional or press interest. In those instances, the successful handling of an investigation will require even more of counsel. Such cases will require a keen understanding of congressional politics, the art and science of influencing public opinion, and how to manage the congressional and public relations aspects of the investigation in such a way that they complement the core legal aspects without creating additional, and perhaps still more serious, criminal or civil liability, or appearing to improperly influence the IG.

At the conclusion of the investigation, the chief investigator will draft a report of investigation (ROI), containing a summary of the facts and a recommendation for action, typically leading to a referral to DOJ for criminal or civil liability determination, a referral to the agency for administrative disposition, or the closing of the case. The ROI will be reviewed by the assistant IG for investigations, the general counsel and, depending on the circumstances, the IG, in an iterative process. The resulting final report is not shared with the target; the company is simply advised of the outcome, bad or good.

Companies in the defense, financial services, health care and energy industries (in particular) have long been the targets of Government investigations in general and IG investigations in particular. Given the amount of Government money at issue, the sometimes controversial nature of these businesses, the tight budgetary environment, and certain statutory and regulatory provisions, IG investigators in the relevant agencies will only be busier for the foreseeable future. Companies caught in an IG's crosshairs can benefit from a better understanding of the IG Act and knowledge of certain practical tips for dealing with IG investigations that are tried and true.

✦

This Feature Comment was written for The Government Contractor by* Clark K. Ervin*, a partner in the Washington, D.C. office of Patton Boggs LLP, where he specializes in Government investigations. He served as inspector general of three federal agencies, the departments of State and Homeland Security, and the Broadcasting Board of Governors, and was a member of the Commission on Wartime Contracting in Iraq and Afghanistan. He may be contacted at cervin@pattonboggs.com.