

# PRATT'S GOVERNMENT CONTRACTING LAW REPORT

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# Preparing for the Coming Onslaught of Government Investigations and Audits of COVID-19 Relief Funds and Contracting—Part III

*By Merle M. DeLancey Jr., Craig Stetson, and Jennifer A. Short\**

*This is the third in a series of articles concerning the audits and investigations related to the contracts and grants awarded, and relief funds provided, in response to the COVID-19 pandemic. This article addresses how to know whether you or your company is under investigation or review or being considered for investigation or review.*

In our previous articles, we discussed the multiple government enforcers and regulators charged with authority to oversee the application, eligibility, and use of COVID-19 relief funds. This article addresses how to know whether you or your company is under investigation or review or being considered for same. Sometimes it is obvious—for example, when the Federal Bureau of Investigation (“FBI”) along with other agencies raid your offices. Other times, the signs are subtle.

The federal government has an arsenal of tools it uses to gather information for investigations and audits. These tools are not new and are not specific to COVID-19 relief funds. However, some of the “new” entities created by COVID-19 relief legislation (e.g., the Special Inspector General for Pandemic Recovery (“SIGPR”)), as well as the coordination of agency inspectors general on the Pandemic Response Accountability Committee (“PRAC”)), can use those same old tools to hone in on recipients of COVID-19-related funding.

Below are some practical tips to understand whether you are being investigated based upon investigative tools used by the government.

## **GRAND JURY SUBPOENA**

A grand jury subpoena is a fairly clear indication that the government is conducting an investigation into potentially criminal conduct. Grand juries are

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charged with collecting and evaluating evidence—documents and testimony—and deciding whether to bring criminal charges. Even though the subpoena is issued in the name of the grand jury, as a practical matter, the subpoena is drafted by and comes directly from Department of Justice (“DOJ”) prosecutors who plan to present evidence to the grand jury.

The first step in responding to a grand jury subpoena should be to consult an attorney, preferably a criminal defense attorney. Frequently, the attorney can talk to the prosecutor who issued the subpoena and get at least some feedback on whether you are the target of the investigation, or perhaps simply a witness. The attorney can also advise you on how to respond to the grand jury subpoena; because the investigation is clearly criminal in nature, individuals have constitutional protections—but companies typically do not. A host of other issues can also arise, all of which are best discussed with counsel.

### **CIVIL INVESTIGATIVE DEMAND**

The next investigative tool indicating an active government investigation is a Civil Investigative Demand (“CID”). A CID is a request for records, information, or testimony in connection with a civil investigation—meaning the government is interested in recovering money, but not (absent a parallel criminal investigation) putting people in jail. The DOJ and certain other federal agencies have authority to issue CIDs, and the rules and requirements vary according to agency and the particular CID authority being invoked. Failing to appropriately respond to a CID can lead to court-ordered relief and even sanctions.

Given the likely short timeframe to respond, a company needs to identify as early as possible the nature of the investigation. Helpfully, CIDs generally provide a description of the government’s investigation. The specific agency issuing the CID also provides some clues. For example, the Federal Trade Commission (“FTC”) investigates, among other things, consumer fraud schemes. The DOJ has CID authority in False Claims Act (“FCA”) cases involving potential fraud involving government funds.

As with grand jury subpoenas, the recipient of a CID will want to retain experienced counsel who can contact the issuing agency to gather information. Counsel also can assist with the specific requirements concerning responding or challenging the CID, issuing a “legal hold” to prevent the destruction of potentially responsive documents, and negotiating deadlines and other terms of compliance.

### **CONGRESSIONAL SUBPOENA OR REQUEST FOR INFORMATION**

Congressional committees have the authority to issue subpoenas requiring individuals to appear and testify and/or to produce documents. In addition to

standing House and Senate committees, the CARES Act created the COVID-19 Congressional Oversight Commission. Separately, the House established the Select Subcommittee on the Coronavirus Crisis.

Typically, congressional committees seek the production of documents or testimony on a voluntary basis, through a letter or other form of communication. Only if the voluntarily request is ignored will a committee chair issue a subpoena. If non-compliance continues, Congress has a number of options; it can:

- Hold the recipient in contempt;
- Seek a civil order from a court; or
- Refer the matter to the U.S. Attorney's Office to pursue criminal contempt proceedings.

While a congressional request or subpoena might parallel other investigative tools, be mindful that the context of these requests is inherently political. In addition, unlike government agencies, congressional committees are less likely to agree to protect confidential and proprietary information or forego information protected by the attorney-client privilege. For these reasons, the recipient of a congressional subpoena should seek advice from counsel who understand the unique dynamics at play.

## **ADMINISTRATIVE SUBPOENA**

Federal administrative subpoenas can be used to seek documents (*duces tecum*) or, more rarely, testimony (*ad testificandum*). Numerous federal agencies have authority to issue subpoenas, including the FBI and Offices of Inspector General ("OIG"). A number of OIGs are playing a large role in COVID-19 relief fund audits and investigations.

Administrative subpoenas may be indicative of an ongoing investigation within the FBI's or OIG's scope of authority (e.g., the Small Business Administration ("SBA") OIG can investigate SBA-administered programs such as the Paycheck Protection Program ("PPP") or COVID-19 Economic Injury Disaster loans, but it does not have authority to investigate general consumer frauds). They can also be used for more routine audits of agency programs, where no wrongdoing is suspected.

As early as possible, the recipient of an administrative subpoena (or the recipient's counsel) should initiate discussions with the government entity that issued the subpoena to determine the nature of any potential investigation, and whether the recipient is the target of an investigation or simply a third party with potentially relevant information. Experienced counsel is the preferred party to conduct these discussions, as agency counsel often is less than

forthcoming with information—either to protect the agency’s investigation or, for example, because the subpoena relates to a *qui tam* that has been filed under seal.

### **AGENCY REQUEST FOR INFORMATION**

Similarly, an agency or OIG can seek information for an investigation or more routine audit informally, through a request for information. The recipient of a request for information should not assume that the request is benign, however. Information requests need to be seriously considered to discern whether the information sought could be the very initial stages of agency inquiry that is the precursor to an audit or investigation.

Alternatively, an agency may be seeking information to assess a competitor’s practices, the conduct of a government employee, or the veracity of a *qui tam* or whistleblower complaint. Again, the recipient of an agency request for information should engage counsel for purposes of determining the nature of the inquiry.

### **GOVERNMENT INQUIRIES TO RELATED/INVOLVED THIRD PARTIES**

Finally, in certain situations, you may learn of a potential investigation based upon an inquiry to a related third party.

Generally, although not required, most third parties will notify a company or individual if it has been requested to provide information. For example, if a financial institution receives a request for your company’s bank records or a company employee receives an interview request from an agency or FBI.

In such circumstances, but not all, the individual or company for which the information is being sought will generally learn of the inquiry and should consider whether to inquire about the circumstances leading to the information request. An individual or company in this situation would be wise to engage counsel to assist with any such inquiry.

In other situations, there may be no indication of the specific individual or company on which the government is focused. For example, a general inquiry to a bank regarding its procedures for approving PPP loans may be so broad that there is no way to identify any individual or company in the cross hairs.

Similarly, a company will not likely get notice of a Department of Defense (“DOD”) request to the SBA to determine if a company received a PPP loan, because the same company is also seeking an equitable adjustment from DOD under Section 3610 of the CARES Act. Here, unfortunately, the company is on its own until it subsequently learns of such inquiries.



## **CONCLUSION**

The government has multiple investigative tools to seek information necessary to investigate or audit an individual or company's eligibility or use of relief funds. The tool used as well as the information sought may indicate the focus of the applicable government agency's investigation—in particular, whether the recipient is considered a target. A recipient of any of the investigative tools discussed in this article should seek guidance from experienced counsel.