

## Government Contracts Blog

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### **From Attestation Reviews To Examinations: The GSA OIG Expands The Scope Of Its Pre-Award Audits**

*By Jonathan S. Aronie*

So there I was, just sitting there minding my own business. It was the third day of the GSA OIG's site visit being conducted as part of a routine pre-award audit (or as the OIG called it, a pre-award "attestation review"), and all was going well. The auditor, who was quite a nice guy frankly, had had many questions, as was to be expected, but nothing for which this particular mid-sized GSA Schedule contractor did not have a reasonable response. No Price Reductions Clause violations. No overbillings. No resume qualification issues. Overall, a pretty darn good preliminary report if you ask me. But then, out of the blue, he says, "okay, I'd like to interview your personnel now." Interview my personnel?! Come again!?

I've worked with GSA Schedule contractors for years, have been through countless audits and investigations, and this was the first time *ever* the OIG had requested to interview my client's personnel in the context of a pre-award audit. "Why?" I asked. "It's a new element of our standard pre-award audit program," the auditor responded. "We're conducting 'examinations' now. Other agencies have been doing it for years." Not recalling the memo advising that the OIG was moving from Attestation Reviews to Examinations (and frankly not even really understanding the difference between the two), I figured I probably should make some calls and do some reading. We agreed to table the issue of his interviews until a future meeting.

A few calls confirmed the auditor's explanation. The GSA OIG no longer conducts pre-award Attestation Reviews as it turns out. They now conduct Examinations. The difference, as best I can tell, is that now, as a standard part of a routine pre-award audit, the OIG auditor will want to ask a few contractor employees a series of questions designed to help "detect instances of fraud," as contemplated by the 2010 Exposure Draft of the Government Auditing Standards, more commonly known as the "Yellow Book." Seemingly driving the OIG's new questions is the following Yellow Book discussion concerning the requirements of an "Examination Engagement":

## **Fraud, Noncompliance with Provisions of Laws, Regulations, Contracts, and Grant Agreements, and Abuse**

5.08 In addition to the AICPA's requirement concerning fraud, when performing a GAGAS [Government Accepted Government Auditing Standards] examination engagement, auditors should design the engagement to detect instances of fraud, noncompliance with provisions of laws, regulations, contracts, and grant agreements that could have a material effect on the subject matter or the assertion thereon of the examination engagement. Thus, auditors should assess the risk and possible effects of fraud, noncompliance with provisions of laws, regulations, contracts, and grant agreements that could have a material effect on the subject matter or an assertion about the subject matter of the examination engagement. When risk factors are identified, auditors should document the risk factors identified, the auditors' response to those risk factors individually or in combination, and the auditors' conclusions. . .

To assess the "risk and possible effect of fraud" in my case, the auditor (actually, the auditor's supervisor) asked 42 questions, divided between staff members and management.

The 18 questions for staff members focused on whether they received training regarding ethical behavior, knew of the company's internal procedures for reporting wrongful conduct, or ever were pressured by a manager to engage in fraud. The questions also explored the financial viability of the company. For example, one question asked about management and employee turnover, apparently on the theory that high turnover reveals financial problems, and financial problems increase the likelihood of fraud.

The 24 upper level management questions were not unlike those asked of the staff, but with an additional focus on the company's compliance program and internal controls.

While none of the 42 questions was particularly objectionable – except perhaps for one that asked about ongoing litigation – and, I'll admit that, in my case at least, the auditor and his supervisor were extremely courteous and professional, the incorporation of employee interviews in the context of a pre-award audit is new and presents a number of new issues for Schedule contractors (and their counsel). Here are just a few.

- **Does the OIG have the authority to conduct employee interviews in the context of a contractually-based pre-award audit?** Well, the OIG certainly thinks it does. And its position, admittedly, is bolstered by the "Comptroller

General Examination of Records Clause,” which provides the Comptroller General *and representatives of the OIG*, with the right to “interview any officer or employee” regarding “transactions” relating to the contract. See FAR 52.215-5(d). It is unclear, however, whether an interview focusing on general compliance issues qualifies as involving “transactions relating to” the contract, or whether this clause applies to an audit conducted prior to the execution of the contract.

Beyond the Examination of Records Clause, the OIG’s position also is supported somewhat by the 2008 revisions to FAR 52.203-13, which require “[f]ull cooperation with any Government agencies responsible for audits, investigations, or corrective actions,” and defines “[f]ull cooperation” as, among other things, “providing timely and complete . . . access to employees with information.” This provision, however, technically deals with the Mandatory Disclosure Program, and its application here may exhibit some overreaching on the part of the OIG. Moreover, the “full cooperation” provision of 52.203-13, by its express terms, does not apply to commercial items contracts.

Authority or not, though, contractors should think long and hard before they go to the mat on this one.

- **Must you compel your employees to meet with the OIG?** No. As discussed in the ABA’s *Guide to the Mandatory Disclosure Rule* in a similar context, companies need not compel their employees to speak to auditors. Employees may have reasonable and lawful reasons not to speak to the Government. A reasonable course of action in most situations – assuming the company has decided to allow the interviews to take place at all – would be to advise your employees that the company intends to cooperate in any audit or investigation, but that you recognize that whether they want to meet with the Government is up to them, and that they will not be disciplined for either speaking or not speaking to the Government. You must not in any way, however, indicate to your employees that you would prefer they not talk to the Government.
- **Should counsel participate in the interviews?** Most companies will want counsel to participate in Government interviews of current employees. Although some Government auditors may react negatively to such participation, they shouldn’t. Again, as recognized in the ABA’s *Guide to the Mandatory Disclosure Rule*, participation of counsel in employee interviews is important (i) to protect the company’s privileged information, and (ii) to stay aware of the types of information that the employee discloses to the Government in order to allow the company to further investigate any potential noncompliance or wrongdoing.

Putting aside the strategy for handling the interviews themselves, the focus of the interview questions should serve as yet another reminder that the Government takes GSA Schedule contractor compliance seriously. If the prior incorporation of FAR 52.203-13 into all Schedule contracts was not enough to kick every contractor’s ethics

and compliance program into high gear, the newly expanded scope of the OIG's pre-award audits (excuse me, "examinations") should be. So take a moment and ask yourself the following questions:

- Do I have a written code of business ethics and conduct?
- Have I made a copy available to every employee engaged in performance of the contract?
- Do I exercise due diligence to prevent wrongdoing, and can I demonstrate that to an auditor?
- Do I promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law, and, again, can I demonstrate that I do?
- Do I have a program designed to identify, investigate, and disclose to the Government (if appropriate) wrongdoing, and are my employees well aware of that program?
- Do I have an effective Internal Control System that meets the requirements of FAR 52.203-13?

Whether you have a pre-award examination in your near future or not, there is no time like the present to start kicking the compliance tires and looking under the ethical hood.

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