Civil Litigation Can Sink Contractors

Most people picture high stakes civil litigation taking place in a courtroom where a party has the chance to persuade a judge or jury to validate or reject huge claims for damages.

But envision a different picture, one that takes place in a United States attorney's office, where only an investigator is running the show, along with a prosecutor, a court reporter and a company's ex-employee who was "in the know."

Law enforcement is questioning this former worker under oath, on the record, about claims against a company in a sealed complaint. And this testimony could lead to treble damages. The company doesn't know about this meeting or even that there is a complaint against it.

Welcome to the new front in high stakes False Claims Act litigation: civil investigative demands, or CIDs.

While the second scenario is not necessarily common place — usually companies eventually learn about an investigation or a whistleblower lawsuit — it can, and does, happen. Use of CIDs in False Claims Act investigations is increasing and defense contractors need to recognize the risks and implement best practices in the event a CID is served on one of its employees.

Civil investigative demands can request any combination of documents, answers to interrogatories or oral testimony. As to oral testimony, the witness has the right to be accompanied by an attorney and any other representative. CIDs are typically used to gather information and testimony prior to a lawsuit against a company or individuals or prior to intervening in a qui tam (a complaint filed under seal by a whistleblower). The government has no duty to notify a company when serving a current or ex-company employee with a civil investigative demand.

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The act gives the attorney general the power to issue civil investigative demands. In March 2010, he delegated to all 93 U.S. attorneys the power to issue CIDs in False Claim Act investigations. As a result, attorneys across the country are increasingly relying on them as an investigative tool — a trend likely to continue in investigations of defense contractors.

In fiscal year 2013, the Justice Department recovered $3.8 billion from FCA cases. While much of that came from health care fraud matters, $887 million came through settlements and judgments in procurement fraud matters, with most of those dollars relating to the defense industry. As stated by Justice, the act "is the government's primary civil remedy to redress false claims for government funds and property under government contracts, including national security and defense contracts. . . ."

While CIDs are issued by the civil division of the Justice Department or a U.S. attorney's office, either can share the information with the criminal division. In January 2012, an attorney general memorandum called for coordination of parallel criminal, civil, regulatory and administrative proceedings, and specifically noted that "[c]ivil attorneys can obtain information through the use of False Claims Act civil investigative demands and that information may be shared with prosecutors and agency attorneys."

The risk for defense contractors and employees is that the government has no obligation to give notice that information is being shared with criminal prosecutors. Therefore, a company should always assume information is being shared with the criminal division until learning otherwise.

Anyone served with a CID must assess criminal exposure, if any, with little or no information from the government. Typically, when a prosecutor issues a grand jury subpoena, it alerts the witness as to whether they are a "subject" or "target." With a CID, the civil prosecutor is unlikely to use these terms because the investigation is civil in nature, not criminal.

Yet, because the information that the civil prosecutor obtains can be shared with the criminal division, an individual must make a somewhat blind, early assessment of whether to testify or to assert the Fifth Amendment. If the witness does invoke the Fifth Amendment and is later named in a civil complaint, he or she may now be subject to adverse inferences based on the Fifth Amendment invocation. Those inferences can be used to establish FCA liability.

Companies in particular should assume that if a CID has been issued to a current or former employee there is a real possibility that a qui tam naming your company as a defendant has already been filed. Firms should treat it the same way they treat any new litigation. Take it seriously and act accordingly. Hire outside counsel to handle litigation, if necessary.

In addition, do not assume that the issuance of a CID is the initial phase of an investigation. For defense contractors in particular, the government may already have the documents it needs to proceed with an case through the company's routine document submissions. This is especially true if Defense Contract Management Agency representatives have a history of requiring explanations, memoranda and testing related to products a company provides to the Department of Defense. The government may already have what it needs but is using the civil investigative demands to find storytellers who can connect the dots.

Some suggested best practices for contractors include educating employees about civil investigative demands so they know to contact a company's legal department if one is served.

Also, discuss CIDs during employee exit interviews. It is good practice to inform employees who are leaving the company to contact the company's legal or compliance department if they are later served with any legal process, whether it be a subpoena, complaint or CID, related to work performed at or for the company.

At all times adhere to the company's record retention requirements, and upon learning of a civil investigative demand, preserve all documents and any other relevant evidence. This includes preserving all technology related documents such as metadata.

For legal counsel of employees, before a client speaks to law enforcement, strongly recommend to the prosecutor that an interview take place before any under-oath, on the record depositions. In many instances this is not only good for the client but for the government too, because it allows for issues to be sorted out on both sides before a final record is created.

Matt Cannon is a shareholder in Greenberg Traurig, LLP's litigation practice group. He is the former lead prosecutor for the LOGCAP working group. The opinions expressed are solely those of the author.