

HOW BEST TO RESPOND TO A GOVERNMENTAL INQUIRY DURING THE COURSE OF A PROJECT

Introduction: Investigations and audits in the safety context have been a part of the construction industry for many decades. More recently however, investigations and audits, particularly in the government contracting sphere, have also become an increasingly regular part of our business. In the United States in particular, the past decade has seen a dramatic rise in legislation and related regulatory enforcement focused on the construction industry.

The most typical investigation and enforcement actions arise in one of three contexts: (i) health, safety, and environmental issues; (ii) contractual compliance, including small business participation and accounting/audit issues and, more rarely, (iii) allegations of criminal misconduct. Beyond complying with the applicable governmental regulations, a contractor needs to know what to expect in the event of an investigation or audit and ensure that managers that will be dealing directly with the auditors or investigators in the field are prepared.

Even when a contractor's internal compliance program is thorough and capable of dealing with any investigation, for the individual employee who is faced with an investigation for the first time, the experience can be stressful and unnerving. This article's goal is to provide some simple, straightforward steps that any employee can follow in the event that an investigator unexpectedly appears on a project site and begins asking for information, interviewing employees and subcontractors, or attempts to access project documents. These steps are designed to supplement information contained in a contractor's safety and compliance program and to act as a ready-reference in the immediate moments following the initiation of an unanticipated investigation at a project site or place of work. The majority of investigations begin with the investigators contacting site personnel. Accordingly, this article focuses primarily on the responses and actions those project level managers should take.

One of the most important things a contractor can do to minimize the impacts an investigation has on a jobsite, and to minimize the chances of an employee's inappropriate reaction to an investigation is to ensure "frontline" managers (foreman, project engineers, superintendents, etc.) are aware of what normally happens during initial contacts with investigators. Most experienced contractors have employees who have been through almost every type of field-level governmental investigation. It is important to use these employees' experiences as teaching examples for employees who have never gone through an investigation. This is a simple, yet often overlooked training that all field managers should receive. The world of governmental compliance revolves around its own acronym-laden language and forms referred to by their numbers (WH-347, CDOT 205, EPA 8700-23, etc.). Many, if not most, investigators and auditors are more concerned with the proper execution of the required paperwork than with true compliance. Simply knowing what is likely to be asked of them, and basic terminology regarding the associated forms, will give an employee confidence and the ability to quickly and affirmatively address any basic questions or requests. A field engineer who does not know the jargon used to refer to common forms can pique an investigator's interest and cost a project team valuable time.

This article contains three hypothetical scenarios in order to explore some straightforward best practices every employee should employ in the event of an impromptu investigation. Three guiding principles apply, however, to every investigation scenario that might arise on a construction project:

- (1) You must be honest;
- (2) You must immediately notify your supervisor of the investigation
- (3) You must not obstruct any investigator. Except in very unusual circumstances, a contractor should always affirmatively cooperate with any investigation. If an employee is unsure about what actions he or she is authorized to take, they must **ask** a supervisor **before** taking action or responding to an investigator.

Employees must not interfere with or otherwise obstruct any official investigation, regardless of the purpose. To do so could be a violation of law independent from any underlying non-compliance that may be being investigated. However, it is also important that a contractor take affirmative steps to obtain an understanding of (i) who is undertaking the investigation, (ii) the purpose and scope of any investigation, (iii) the authority under which the investigation is taking place, and (iv) the potential consequences of any investigation. Any one of these factors may influence the response a contractor determines to be necessary and appropriate.

Hypothetical One – My project is being investigated for an alleged failure to comply with my contract and civil statutory obligations, in this case MBE/WBE/DBE/SBE guidelines. An investigator has arrived on site and wants to interview workers and review project records. What do I do?

The failure to comply with MBE/WBE/DBE/SBE guidelines may be investigated by a governmental agency as both a criminal and civil (non-criminal) violation of the contract or local, state or federal rules. As a result, it may initially be difficult to determine whether the investigation is seeking penalties in a criminal or civil context. Generally speaking, the initial steps you must take in response to this hypothetical scenario, regardless of the criminal or civil implications, are effectively the same, unless the investigation is initiated pursuant to an authorized search warrant. Search warrants and criminal investigations are addressed in Scenario 2, so for the purpose of this scenario we will assume the investigation is non-criminal.

General Actions:

- Step 1:** Inform the investigator that the company will not impede or obstruct the investigation, but that it needs to be provided information regarding the nature of the investigation.
- Step 2:** Ask the investigator his or her name, title, and what government agency s/he works for or represents. If you have any doubts whatsoever about this person's authenticity, request identification and contact the investigator's office to confirm this information. If the investigator will not answer these questions, immediately contact your supervisor and any internal legal department in your company.
- Step 3:** Ask the investigator to specify what information is being sought from your company (or others for whom your company may be responsible, such as our subcontractors) in connection with the investigation. If the investigator is seeking documents, ask the investigator to prepare a written list of the documents sought. If the investigator requests to speak to personnel, ask the investigator to provide a list of the persons s/he requests to interview. If the investigator will not answer these questions, immediately contact your supervisor and any internal legal department in your company.
- Step 4:** Ask the investigator to identify his/her authorization to obtain the information requested (for example, the contract's audit provisions).
- Step 5:** Inform the investigator that you will need authorization to take further action on his/her requests.

Step 6: Contact the most senior management employee on the project team and, in conjunction with that person, immediately contact your company's legal department to provide any information you have been able to gather and to discuss any further response to the investigation.

Requests to Interview Personnel

Generally speaking, absent a subpoena to testify (and even then only under certain circumstances), neither a contractor's personnel nor its subcontractors' personnel are obligated to respond to questions from investigators. As noted however, under the majority of circumstances, it is in a contractor's interests to affirmatively cooperate with any investigation. As a general rule however, it is important to have a good understanding of what is being investigated prior to responding to substantive questions posed by an investigator. Therefore, employees should follow the general Steps 1-6 above before consenting to be interviewed by an investigator in connection with any matter. This is important to preserve your company's right to have others participate in the interview. Supervisors should periodically remind their subordinate personnel of this guidance.

In the event a manager sees an employee is being interviewed under circumstances in which Steps 1-6 above were not followed then, unless it is appropriate to do so under the circumstances, it is recommended that you do not interrupt the interview, but instead later remind the employee of his/her responsibilities under Steps 1-6 and this guideline. Although no employee is obligated to answer an investigator's questions, under no circumstances should you instruct anyone not to answer the questions of an investigator. If you learn that an employee has been interviewed by an investigator under circumstances in which general Steps 1-6 above were not followed, please notify a supervisor.

When an investigator either (a) requests to interview subcontractor employees, or (b) is found to be actually in the process of interviewing subcontractor employees, please approach the investigator and follow Steps 1-6, above. Although subcontractor personnel are generally also not under any obligation to respond to investigator questions, it is recommended that you do not attempt to interrupt the interview by informing the subcontractor employee of his/her right not to respond, as this could be misinterpreted as interference with or obstruction of the investigation, particularly if the subcontractor company does not have any guidelines in place for its employees regarding responding to investigations.

Requests for Access to Documents

Investigators commonly seek access to documents. This may be done in several ways:

- informal verbal requests
- more formal written requests
- invocation of contractual audit rights
- a subpoena for documents, or
- a search warrant

While the nature of the request will have some influence on the response, generally speaking Steps 1-6 also apply to written requests for information or any verbal document requests. Also remember that, to the extent that any documents are provided to an investigator after Steps 1-6 have been followed, (i) only copies of documents should be provided; avoid providing original documents, and (ii) keep a record of what

documents have been provided. Of course, in the event of a search warrant, the government may have a legal right to take possession of original documents, but the likelihood of being served with a search warrant is exceedingly small.

Typically, requests for documents are couched in very broad terms which go far beyond the scope of any investigation. Accordingly, in virtually every instance a contractor should communicate with the investigator, in writing, to narrow the scope of document requests in order to minimize the burden it puts on your company and to be more responsive to the actual issues being investigated. In addition, under certain circumstances it may be necessary to review the documents requested for privileged or confidential information which a contractor may be under a legal obligation not to disclose. An attorney can assist with these efforts in connection with Step 6, above.

Hypothetical Two – Law enforcement officers have arrived at the project with a search warrant and indicate that they are investigating possible criminal activity and intend to seize project records and computers. What do I do?

In the exceedingly unlikely event that this should occur, the first two things that you must do are:

- (i) obtain a copy of the search warrant, and
- (ii) contact the most senior project manager on site immediately for further instructions and assistance.

If law enforcement has a search warrant it means they have probable cause that evidence of a crime is contained in what they are authorized to seize in the warrant. The contractor needs to have their in-house and/or outside counsel involved immediately. In addition, please follow the following guidelines:

- (1) Be sure not to interfere with or obstruct the officers' efforts to execute the warrant.
- (2) Read the warrant and, in the event that the officers appear to be exceeding the scope of the warrant, for instance, accessing files which appear to be unrelated to the warrant, document this deviation and mention it to the officer in charge. DO NOT prevent the officers from executing the warrant as they interpret it; simply note the issue and permit them to take (or not take) any action they deem appropriate in response. You may ask questions regarding what information is being sought and why, but it is unlikely the officers will provide any information which is not contained within the written warrant.
- (3) Do not respond to any substantive questions or requests to be interviewed unless you deem it appropriate under the circumstances to do so. Inform all employees present that they are under no obligation to respond to any questions. Do not instruct anyone present not to answer any questions.
- (3) If practicable, dismiss any non-essential personnel for the day.
- (4) Request identification (business cards, or name/number) from the officer(s) in charge.
- (5) If the officers permit it, accompany them and make an inventory of the documents, computers or other data seized. If the officers will not allow you to accompany them, do your best to create an inventory after they have left and request that the officers provide a receipt for everything seized. Also, take photographs to document the condition of the office location following the execution of the warrant.
- (6) Ensure that the appropriate people in the company are contacted as soon as possible.

The key things to recall in the unlikely event that a search warrant is executed on a project or job location you are associated with are to (i) stay calm, (ii) allow the officers to do what they came to do, and (iii) make sure that your supervisor and any other appropriate managers are notified immediately. Also remember that a search warrant entitles the executing officers to seize original documents and other property, such as computers. While a contractor generally should never permit any investigator to take possession of any original documents or other property, such as computers, a search warrant is the narrow exception to this rule.

Hypothetical Three – We suffered a fatality on our project. What do I do?

A contractor must have a Health and Safety Plan that addresses in detail the steps to take following the unlikely event of a death at a job site. Those documents should be referenced and followed promptly in the event of a job site fatality. A contractor is required to notify OSHA within 8 hours of a fatality. A contractor's senior management, safety department, and legal department must also be immediately notified. OSHA will immediately initiate an investigation of any reported fatality.

The following comments in connection with an OSHA investigation of a jobsite fatality are intended merely to supplement a contractor's existing Health and Safety Plan policies, as well as the information provided elsewhere in this article, and deal primarily with the preservation of evidence. Of course, the most critical priorities for all employees under such circumstances are to contact local medical assistance, remove all employees from the danger zone, and take necessary action (but only so long as you can safely do so) to eliminate any remaining hazards. However, once these actions have been taken, and the notifications noted above have been initiated, a contractor is also required to take the following steps:

Step 1: The accident site and any associated equipment must be "frozen." No one should be permitted access to the area or equipment associated with the injury with the sole exception of removing a hazard which could result in further injury. This status must remain in place until OSHA personnel release the area/equipment.

Step 2: All existing project safety records, including hard copy files and electronically maintained files, must be preserved and may not be modified in any way. Any necessary action to ensure this occurs must be undertaken and documented.

Step 3: All personnel involved in the incident or with knowledge of the incident must be promptly identified and this information shared with the head of the contractor's safety team. This includes individuals that do not work for your company.

Step 4: A contractor is needs to perform its own investigation of any serious job site incident, however the contractor's obligations are trumped by OSHA's right to conduct an investigation, and the contractor's personnel must not take any action in connection with its own investigations (for instance, removing material from the job site to a testing facility) which may in any way interfere with OSHA's investigation.

In addition to issues surrounding the preservation of evidence, issues regarding the scope of the investigation, access to documents, the right to interview employees, employees' rights not to be interviewed, and the employer's ability to influence any of the above arise in connection with OSHA investigations just as they do in connection with other types of investigations. Those issues are largely

beyond the scope of this article, except to say that senior management and legal counsel should be immediately notified of OSHA investigations which have serious potential legal and reputational consequences for the company. Obviously, a job site fatality is one of these instances.

Conclusion: These guidelines are intended to assist only with the immediate and initial response to the initiation of an onsite investigation.