

I Just Got a Subpoena for My SBIR Award. Now What?

The arrival of a subpoena, issued from a federal inspector general's office or another law enforcement agency, is an alarming event. It is often the first indication that a company and its principals may be the subject of a government investigation.

Government investigations can have serious consequences for the recipients of Small Business Innovation Research (SBIR) grants and contracts. A subpoena can scare investors and jeopardize the years of hard work to bring innovative technology to market. In the worst case, an investigation can lead to criminal charges of fraud or theft of government property or civil liability for violation of the False Claims Act. Even in the best case, when the investigation remains quiet and finds no evidence of misconduct, it can disrupt operations and discourage morale while the investigation plays out.

So, what are the next steps when a subpoena arrives? And how can you best position your company to respond?

Immediate Steps

When a subpoena first arrives, there are immediate steps you should take to protect the organization. First, don't do anything to make the situation worse. Deleting, concealing, or altering relevant documents can expose the company to separate criminal liability for obstructing a government investigation. See 18 U.S.C. § 1505. For example, in one case involving a SBIR award, a university professor who had received an SBIR grant responded to an inquiry from the inspector general by creating time sheets that gave the false appearance

that they were maintained and signed contemporaneously with the research project. See DOJ, *Morgan State University Professor Convicted In Scheme To Defraud The National Science Foundation* (Apr. 1, 2014). Similarly, providing inaccurate information to the government when responding to an investigation can compound anything that has happened in the past and expose the company and its employees to criminal liability for false statements. See 18 U.S.C. § 1001.

Second, consult legal counsel to engage the government. In criminal cases, the company and its employees have a constitutional right to do so. Counsel can engage the office that issued the subpoena, affirm the company's intent to cooperate with the investigation, and become a point of contact for future requests or inquiries, including employee interviews. Additionally, counsel can learn as much as possible about the investigation, including whether the company is a target, subject, or witness at that time. While government officials are sometimes reluctant to share much about an investigation or identify a company as a target, they may shed light on what they expect the company to provide. If any requests are unreasonably broad or demand more than can be produced by the deadline, counsel can work with the government to narrow or prioritize the requests and/or set a reasonable schedule for production.

Next, begin the process of identifying and securing documents called for by the subpoena. Securing documents usually requires specific instruction to employees, in the form of a written document hold notice, not to delete or destroy any sources of potentially responsive documents.

Additionally, to make sure nothing gets inadvertently deleted, work with the managers of your information technology systems and human resources and financial data to begin gathering the relevant content and suspend routine deletion of old files or emails.

Develop a Game Plan

After these immediate steps have occurred, you can develop a longer-range game plan for addressing the situation. Begin by gathering and producing potentially relevant documents to comply with the demands of the subpoena. In collecting electronic materials, consider whether to make forensic copies or to use in-house capabilities to copy or search. The best plan will depend on the demands of the government, the technological capabilities of in-house staff and systems, and, of course, cost. Key players may require special treatment.

Then, work with your counsel to develop the facts. With the protection of attorney-client privilege and attorney work product, counsel can interview key employees and review documents to start understanding how the situation arose. A solid grasp of the facts is critical for convincing the government not to take any enforcement action against the company or its principals.

Next, assess the risk. With a detailed understanding of the facts and knowledge of the program rules, counsel can determine whether any violations of the SBIR terms

and conditions occurred or if any civil or criminal exposure exists. This assessment should guide your strategy for the investigation.

Finally, take corrective actions to make sure this situation does not arise again. The appropriate corrective action depends on the situation, and each case is unique. But a range of options exists in these situations, such as strengthening the company's ethics and compliance program, disciplining bad actors, improving training, and developing new policies and procedures to prevent fraud or abuse in the future. It may be necessary or prudent to refund money to the government depending on the facts of the case. Even if no violation of law has occurred, taking corrective actions can show the company and its principals are acting responsibly, which will serve as a sign of goodwill with investigators and minimize the risk of another costly investigation in the future. It can also help convince an agency suspension and debarment officer not to take action against the company.



Government investigations are serious matters, and a subpoena is often the first sign of a larger problem. Engaging counsel early and moving swiftly to preserve documents and develop the facts are critical to positioning a company for success when faced with an investigation.



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SBIR awards are a great opportunity for organizations to leverage federal funding to advance their research and development goals. SBIR awardees should understand the key terms of their award to ensure successful—and fully compliant—performance of the award.



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