

Best Practices for Responding to an Audit Request from Trust Funds

Sooner or later, every contractor will receive a letter from their local trust funds or the national benefit funds seeking to conduct an audit of the contractor's books and records. The Department of Labor has made clear that multiemployer trust funds that rely on contractors to self-report contributions need to have in place a random audit program, in addition to audit procedures for when there is cause to suspect a delinquency.

We often get calls from contractors or chapter executives who are surprised at either the audit request or the extent and type of documents sought by the trust funds in such audits. Many contractors struggle with how to respond to an audit request, but the request should neither be ignored nor stonewalled.

This paper is intended to be general guidance on best practices for responding to an audit request by a trust fund. It cannot address specific circumstances unique to a contractor's business. It is always a good idea to consult with local legal counsel when there are questions regarding the appropriateness of an audit.

Scheduling an Audit

Trust fund audits invariably are initiated by a letter sent from the trust fund or its auditors. The letter will typically explain that the contractor has been selected for an audit and request that the contractor contact the auditor to schedule a time and date for the audit to occur at the contractor's place of business.

When it comes to scheduling an audit, the contractor can propose a date and time that is convenient to him/her but the contractor should not seek to unreasonably delay the process or appear to be uncooperative. The contractor should offer a reasonable schedule that includes normal business hours for the auditor to be present at the contractor's place of business. Keep in mind, an auditor generally has a right to perform the audit on-site at a time convenient to the auditor. If the auditor's proposed dates and time present a true hardship for the contractor, the contractor should advise the auditor of the conflict and work with the auditor to find a mutually convenient date for the audit.

The contractor can designate a place at its business for the auditor to review the documents requested. Contractors should look for a place that is sufficiently out of the way, so as not to interfere with the general business of the contractor, but where someone from the business is readily available to answer questions that may come up. It is generally helpful to have a clear point of contact for the auditor. The point of contact should be familiar enough with the business accounting processes that they can address the auditor's specific questions without offering non-responsive information that may lead to additional questions.

Documents For Review

A contractor will be informed ahead of the audit, often in the initial letter, what documents the auditors will want available during the audit. Nothing in the law specifically identifies the documents that a trust fund can review in an audit. The specific list of documents a trust fund seeks is often dictated by general accounting practices and the given circumstances of an audit. Below is a representative list of documents that may be requested:

Records for examination include but are not limited to:

- a. Original Time Cards/Sheets
- b. Payroll Registers
- c. Individual Earnings Records
- d. 941's, State U/C's, W-2's, W-3's and 1099's
- e. Cash Disbursement Journals
- f. National Benefit Funds remittance reports
- g. Remittance reports for any other fringe benefit fund to which the employer contributes
- h. Personnel records
- i. Such other records as are necessary to complete the audit.

This list is often surprising to a contractor, as it seeks more than just the payroll records related to bargaining unit employees and may seek information that a contractor views as confidential.

Many contractors incorrectly believe that they can withhold records for executives and other non-bargaining unit employees because these individuals do not participate in the trust fund. However, a trust fund in most cases has the right to review records relating to all employees, including executives and non-bargaining unit employees, to determine whether the company properly made contributions. The Supreme Court has found that the audit of all payroll records is a reasonable method for independently verifying the status of all individuals employed by an employer, to insure that the right amount of benefit contributions are being paid. (*Central States Pension Fund v. Central Transp.*) This applies not only to owners and managers' salaries but also to non-bargaining unit employees.

If a contractor is unsure about why a particular document is being sought as part of the audit or believes information contained therein might be confidential or proprietary, the contractor should reach out to the auditor before the audit to inquire as to why that document is being sought. In some cases, auditors may be willing to accept different documentation. Auditors may also be willing to enter into a confidentiality agreement, wherein they agree not to disclose

certain information, such as owner salaries; to the union and/or the trust fund to the extent it does not reveal a delinquency. Contractors should clearly express to the auditors the desire to be cooperative, while also seeking to reach a resolution on any documents which are of concern.

To the extent possible, prepare all of the materials the auditor has requested prior to the auditors arrival. It is also advisable to review the documentation to ensure it is complete and accurate.

Audit Reports

If delinquencies are found during the audit, the trust fund will likely issue a demand letter to the contractor explaining the basis for the delinquency. It is a good idea to go over the trust funds explanation carefully. Contractors should ask to see the auditor's report if it is not provided with the demand. Where significant discrepancies are found by the trust fund, it may be worthwhile to have your own auditor review the trust fund's audit report and if necessary, conduct an audit of the contractor's books and records. In many cases, it may be beneficial to meet directly with the trust fund to go over its demand and the basis for its findings.

If a contractor agrees that a portion of the delinquencies found by the trust fund are due and owing, it is in the contractor's best interest to pay the undisputed portion as soon as possible. Failure to pay the undisputed amounts promptly will only lead to the ongoing accumulating interest and/or penalties on those amounts. In doing so, however, the contractor should clearly indicate that it is not agreeing with the other delinquencies claimed by the trust funds or waiving any defense the contractor may have to those claims.

Self-audit

Contractors are well served by periodically reviewing their collective bargaining agreement to ensure they understand when fringe benefits are required and that they are making contributions for all work covered by the agreement. In particular, contractors may want to pay particular attention to whether fringe benefits relating to vacation, travel or premium pay were made appropriately, as well as examine whether contributions were made appropriately on all individuals doing covered work.

For those contractors in right-to-work states, it is also important to understand that even though certain employees may have elected not to join the union, trust fund contributions are still owed on those employees. The employee's election not to join the union has no impact on the employee's right to participate in the fringe benefit funds. Because union status is not determinate of the right to benefits, if an employee is performing work covered by a collective bargaining agreement the contractor must make contributions on behalf of the employee.

Contractors who self-audit are more likely to avoid unpleasant surprises resulting from a trust fund's audit.