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# Innovation Doesn't Stop With Revenue Generation:

*How to design and implement an innovative compliance program*

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Presented to the Facilities Maintenance and Hardware Acquisition Center  
13<sup>th</sup> Annual Industry Event

St. Louis, MO

28 February 2012

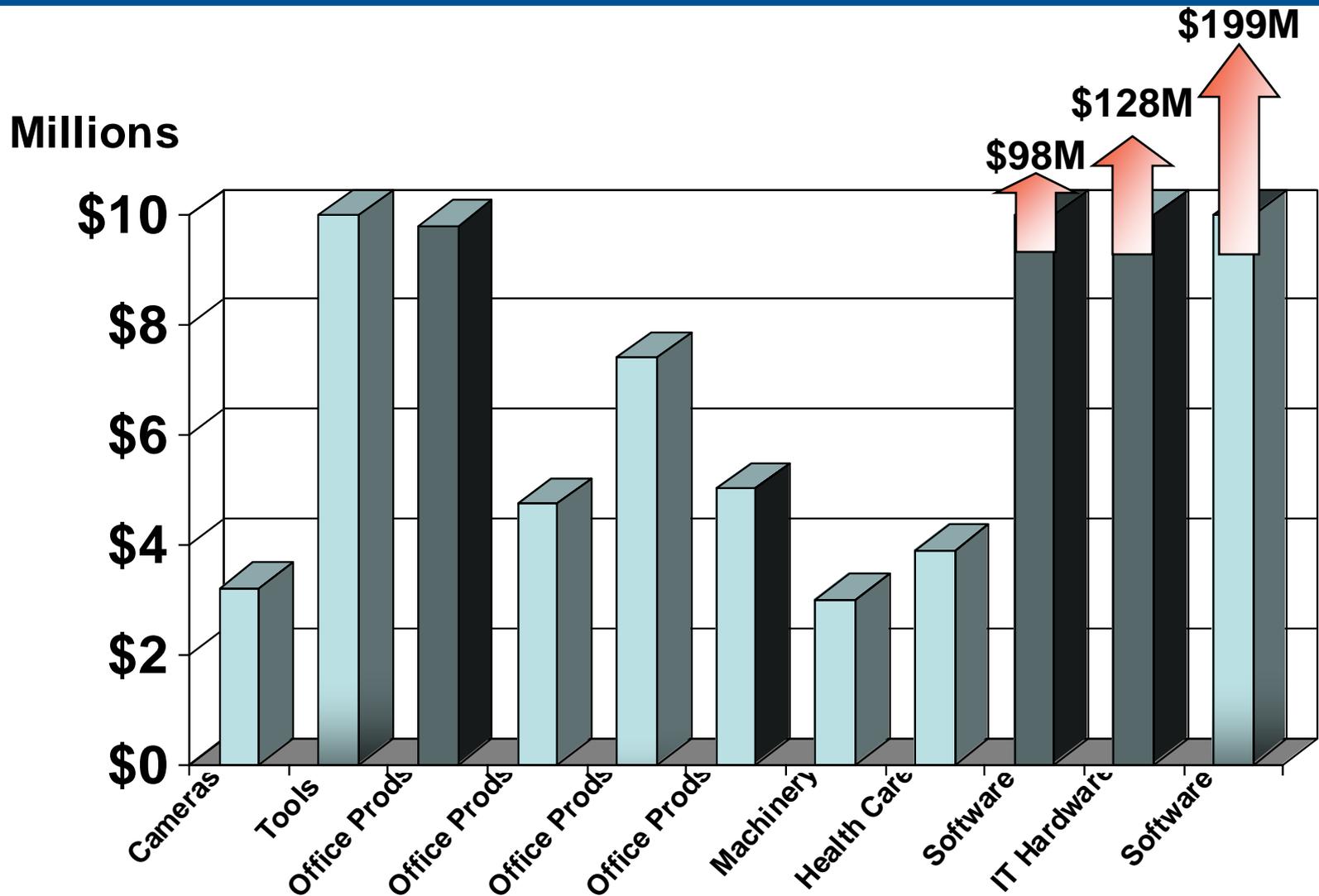
# Parade of Horribles . . .

- Breach of contract
- Price adjustments (retroactive)
- Price reductions (prospective)
- Cancellation/Termination
- Civil False Claims Act
  - DOJ initiated
  - Relator initiated
- Suspension/Debarment
- Collateral suspension/debarment
- Criminal prosecution

# Elements Of An FCA Action

- A contractor violates the civil False Claims Act when it makes a material false statement or submits a material false claim to the United States
- Elements of the False Claims Act
  - A claim
  - That is false
  - That is submitted to
    - (1) the United States government; or
    - (2) a contractor, grantee, or other recipient, and the money/property is spent/used on the government's behalf or to advance a government program or interest, and the government provided the money/property or will reimburse the contractor/grantee/recipient for the money/property demanded
  - That is made “knowingly”
    - Intentionally
    - With deliberate indifference
    - Recklessly

# Illustrative MAS FCA Settlements



# A Few High Risk Areas

- Commercial Sales Practices Format
- Price Reductions Clause
- Industrial Funding Fee
- Trade Agreements Act
- Labor Qualifications
- Subcontracting Plan
- Gifts, Gratuities, and Employment Discussions
- Internal Compliance Program
- Mandatory Disclosure Rule

# Commercial Sales Practices Format

- Summary of Requirement
  - Contractors must submit a current, complete, and accurate description of commercial sales policies or practices and deviations from those policies or practices.
- Risk of Non-Compliance
  - Audit/investigation
  - Price adjustment
  - FCA violation
- Innovative (and not so innovative) Best Practices
  - Appreciate breadth of disclosure obligations
  - Engage business “owners” in process; require sign-off
  - Internally document process

# Price Reductions Clause

- Summary of Requirement
  - Contractors must pass on to Schedule customers non-standard discounts given to Basis of Award customers.
- Risk of Non-Compliance
  - Audit/investigation
  - Breach of contract
  - Price reduction / price adjustment
  - FCA violation
- Innovative (and not so innovative) Best Practices
  - Negotiate (and document) a sensible Basis of Award
  - Code all customers/sales
  - Document reasons for non-standard pricing/discounting
  - Develop written policies; provide training to sales reps
  - Require advance approval for non-standard pricing/discounting
  - Discipline personnel who don't adhere to pricing policy

# Industrial Funding Fee

- Summary of Requirement
  - Contractors must collect and remit to GSA  $\frac{3}{4}\%$  of Schedule revenue.
- Risk of Non-Compliance
  - Audit/investigation
  - Breach of contract
  - FCA violation
- Innovative (and not so innovative) Best Practices
  - Clearly identify prices with/without IFF during negotiations
  - Code all customers/sales
  - Distinguish Schedule sales from Open Market sales
  - Do not pay IFF on non-Schedule sales

# Trade Agreements Act

- Summary of Requirement
  - Contractors must sell only TAA-compliant products and services on Schedule.
- Risk of Non-Compliance
  - Audit/investigation
  - Breach of contract
  - FCA violation
- Innovative (and not so innovative) Best Practices
  - Perform “substantial transformation” analysis on all manufactured products
  - Require TAA certifications from vendors
  - Clearly identify non-TAA Open Market items/sales
  - Develop written policies; provide training

# Labor Qualifications

- Summary of Requirement
  - Contractors must ensure that all personnel (and subcontractors) meet the qualifications set forth in the Schedule.
- Risk of Non-Compliance
  - Audit/investigation
  - Breach of contract
  - Price adjustment
  - FCA violation
- Innovative (and not so innovative) Best Practices
  - Clearly identify qualifications in Schedule
  - Incorporate sensible trade-offs
  - Maintain up-to-date resumes
  - Develop system to align personnel with appropriate labor categories
  - Obtain written CO approval for all deviations
  - Develop written policies; provide training

# Subcontracting Plan

- Summary of Requirement
  - Large contractors must develop, negotiate, and adhere to a Small Business Subcontracting Plan.
- Risk of Non-Compliance
  - Audit/investigation
  - Breach of contract
  - Liquidated damages
  - FCA violation
- Innovative (and not so innovative) Best Practices
  - Negotiate sensible Subcontracting Plan that clearly identifies scope and obligations
  - Do not include activities that you do not plan to perform
  - Identify and train a qualified Plan Administrator
  - Ensure process for collection of reportable data
  - Circulate, collect, and periodically update vendor size surveys

# Gifts, Gratuities, and Employment Discussions

- Summary of Requirement
  - Contractors must not give gifts and gratuities to federal customers, and must not engage in employment discussions.
- Risk of Non-Compliance
  - Audit/investigation
  - Breach of contract
  - FCA violation
  - Criminal violation
- Innovative (and not so innovative) Best Practices
  - Adopt a “just say no” policy
  - Develop written policies; provide training
  - Discipline personnel who violate policy

# Internal Compliance Program

- Summary of Requirement
  - Contractors must develop and promote awareness of an effective compliance program.
- Risk of Non-Compliance
  - Increased likelihood of non-compliance
  - Increased risk of FCA violation
  - Breach of contract
- Innovative (and not so innovative) Best Practices
  - Develop and promote awareness of a Code of Business Ethics and Conduct
  - Make a copy available to all employees and provide regular training
  - Use FAR 52.203-13(c) as a checklist
  - Discipline personnel who fail to comply with compliance program
  - Vest a senior official with responsibility for the program
  - Periodically evaluate effectiveness of program

# Mandatory Disclosure Rule

- Summary of Requirement
  - Contractors must timely self-report to the Government credible evidence of certain crimes, FCA violations, and significant Government overpayments.
- Risk of Non-Compliance
  - Breach of contract
  - FCA violation
  - Negative past performance evaluation
  - Suspension/Debarment
- Innovative (and not so innovative) Best Practices
  - Vest a senior official with responsibility for the program
  - Develop written policies; implement effective hotline; provide training
  - Discipline personnel who fail to comply with compliance program
  - Periodically evaluate effectiveness of program
  - Engage Law Department at first sign of potential non-compliance

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Thank you.

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