

Current opportunities and risks in selling to the government

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Agenda

- Introduction
- Course overview
 - Opportunities in the federal market
 - The differences from commercial markets
 - Risks in selling to the government
 - Best practices for mitigating the risks
- Questions
- Closing remarks

Opportunities in the federal market

Opportunities in the federal market

- Value of government purchases
 - Diversification of sales
 - Recession-proof
- Departments and agencies
 - U.S. government is the single largest procurer of goods and services in the world
 - Hundreds (more than 350 at last count) of US federal agencies, offices, bureaus, programs, quasi-governmental entities, etc. who are procuring goods and services
 - Countless state and local entities buying offices
- The government procures a variety of goods and services across all sectors and industries
 - “Commercial item & services”, e.g., COTS
 - Research and development (R&D), construction, manufacturing, acquisition of real estate, leases
- Growth areas – increased government procurement activity in several areas including IT, health care, agile development (project management, product development)

Opportunities in the federal market (cont'd)

Types of government contracts

- Direct contract award
 - Various types depending on supply or service being procured
 - Fixed price
 - Cost reimbursement or flexibly priced
 - Prime or subcontractor
- General Services Administration (GSA) schedules
 - Long-term government-wide contracts with commercial entities to provide access to commercial products and services at volume discount pricing
- Government-wide Acquisition Vehicles (GWACs)
 - Pre-competed, multiple-award, indefinite delivery, indefinite quantity (IDIQ) contract that agencies can use to buy total IT solutions
- Other ways to do business with the government
 - Grants
 - Cooperative agreements
 - Cooperative Research & Development Agreements (CRADAs)
 - Other Transaction Agreements (OTAs)
 - Special vehicle used by federal agencies for obtaining or advancing research and development (R&D) or prototypes
 - NOT a contract, grant, or cooperative agreement, and there is no statutory or regulatory definition of "other transaction"
 - Only those agencies that have been provided OT authority may engage in other transactions

The difference from commercial markets

The difference from commercial markets

- Commercial contracting
 - Freedom of negotiation
 - Uniform Commercial Code
 - Common law
- Government contracting is highly regulated
 - Award process is subject to competition and procedural requirements set by statute and regulation
 - Procurement statutes
 - Competition in Contracting Act (CICA)
 - Truth in Negotiations Act (TINA)
 - Federal Acquisition Reform Act / Federal Acquisition Streamlining Act (FARA/FASA)
 - Antideficiency Act – appropriations / fiscal law limitations
 - Regulatory authority
 - Federal Acquisition Regulation (FAR)
 - Other agency supplements – e.g., HHSAR, DFARS
 - Agency-specific government contract clauses
 - “Christian Doctrine”

The difference from commercial markets (cont'd)

- Terms favor the government
 - Termination for default
 - Government right following actual or anticipated failure to perform
 - Government not liable for undelivered work
 - Preceded by cure notice or show cause letter
 - If successfully challenged, can be converted to termination for convenience
 - Termination for convenience
 - Government can terminate at any time for its “convenience”
 - You must stop work
 - Government pays for work completed as well as termination costs; no anticipated profit
 - If you have a dispute, generally you must continue working while dispute is pending
 - The process for resolving contractual disputes between contractor and the government is provided by the Contracts Disputes Act (CDA)
 - The government has broad audit rights
 - Any costs claimed or support for any price proposed, including corporate office costs
 - Contractor system audits
- Non-compliance is subject to extra-contractual remedies
 - Cost disallowance or delays in payment
 - Criminal penalties for knowing concealment of facts and false representations
 - Civil False Claims Act liability
 - Suspension and debarment

The difference from commercial markets (cont'd)

- Ethics and compliance requirements
 - Government contracts contain clauses that require contractors to adhere strictly to certain ethics standards and implement internal controls to ensure compliance
 - Code of business ethics and conduct
 - Contractors must have a written code of business ethics and conduct
 - Internal company controls must, among other things:
 - Provide for anonymous employee reporting
 - Take affirmative steps to detect unethical conduct
 - Perform due diligence on all “principals”
 - Provide for full cooperation with government auditors and investigators
- Mandatory disclosure (FAR § 52.203-13)
 - Contractors must disclose credible evidence of any of the following in connection with a government contract or subcontract
 - Violations of federal criminal law involving fraud, conflicts of interest, bribery, or gratuities
 - Violations of the civil False Claims Act (FCA)
 - Substantial overpayments by the government

The difference from commercial markets (cont'd)

- Statutory and regulatory restrictions on business development activities
 - Former government officials are subject to restrictions on what type of work they can perform after leaving the government (18 U.S.C. § 207)
 - Gratuities (FAR 52.203-3)
 - Limitation on payments to influence certain federal transactions (FAR 52.203-12)
 - Covenant against contingent fees (FAR 52.203-5)
 - Anti-Kickback Act (FAR 52.203-7)
- Socioeconomic requirements
 - Small business policies
 - Set asides, 8(a) program; small disadvantaged business programs; subcontracting plans
 - Environmental policies
 - Equal employment
- Labor requirements
 - Defense Base Act (42 U.S.C. § 1651)
 - Requires government contractors provide certain employees working outside the US with workers' compensation benefits
 - Applies to “public work” contracts—construction, removal, repair, operations under service contracts and projects in connection with the national defense or war activities (FAR 28.305)
 - Mandatory flowdown to subs
 - Service Contract Act (41 U.S.C. § 451)
 - Must pay “prevailing wages” on service contracts
 - Davis Bacon Act (40 U.S.C. 3141) creates similar requirement for public works projects

The difference from commercial markets (cont'd)

- Domestic preferences
 - Buy American Act (BAA) (41 U.S.C. § 10a-d)
 - Domestic supplies and construction materials requirement (FAR Subpart 25.2)
 - Several exceptions (e.g., impracticability, unreasonable cost, nonavailability)
 - Designated country products excepted under the Trade Agreements Act (TAA) (19 U.S.C. § 2501)
 - Berry Amendment (10 U.S.C. § 2533b; DFARS 225.7002 & 7003)
 - Tents, food, clothing, other natural fibers, silk, synthetic fabrics, canvas and measuring tools
 - Specialty metals in defense items
- Subcontracting requirements
 - Required to compete subcontracts “to the maximum practical extent,” unless
 - Sole source
 - Urgency
 - Lack of competition may create unreasonable costs
 - Sub must be responsible; not suspended or debarred
 - Flowdowns
 - Mandatory under prime contract (TINA, CAS, audit rights, mandatory disclosure, etc.)
 - Necessary to meet obligations (termination, warranty, data rights, etc.)
 - All negotiable from sub’s perspective

The difference from commercial markets (cont'd)

- Intellectual property rights
 - The government takes a broad license to certain intellectual property conceived, developed, reduced to practice, or otherwise produced under government contracts
 - Certain such IP must be disclosed to the government or the contractor risks losing ownership of the IP
- Who can bind the government?
 - Contracting Officers (CO) (or their designees) within the bounds of their authority (“Christian Doctrine”)
 - Only the CO can direct contract changes, waive requirements, add funds, obligate the government to pay funds, etc.
 - Contract specialists often handle routine matters (e.g., invoicing, deliverables, etc.)
 - Contracting Officer Technical Representatives (COTR) may be delegated CO authority
- Who can bind the contractor?
 - Almost anyone!
 - Although contractors can only rely on representation by officials with authority to bind the government, the government may rely on representations of almost any contractor employee (unless the individual is clearly unauthorized)
- Only the prime contractor has privity of contract with the government
 - Prime contractor is responsible for contract performance—including performance of its subcontractors at all tiers

Risks in selling to the government

Sources of risk

- Direct risks of a prime contractor
- Indirect as a supplier or subcontractor
- Buying risk – acquisition of a government contractor

Primary risk areas

- Pricing
- Cost charging
- Sourcing
- Technical conformance
- Small business representations
- Catch all – implied certification
- Hot areas

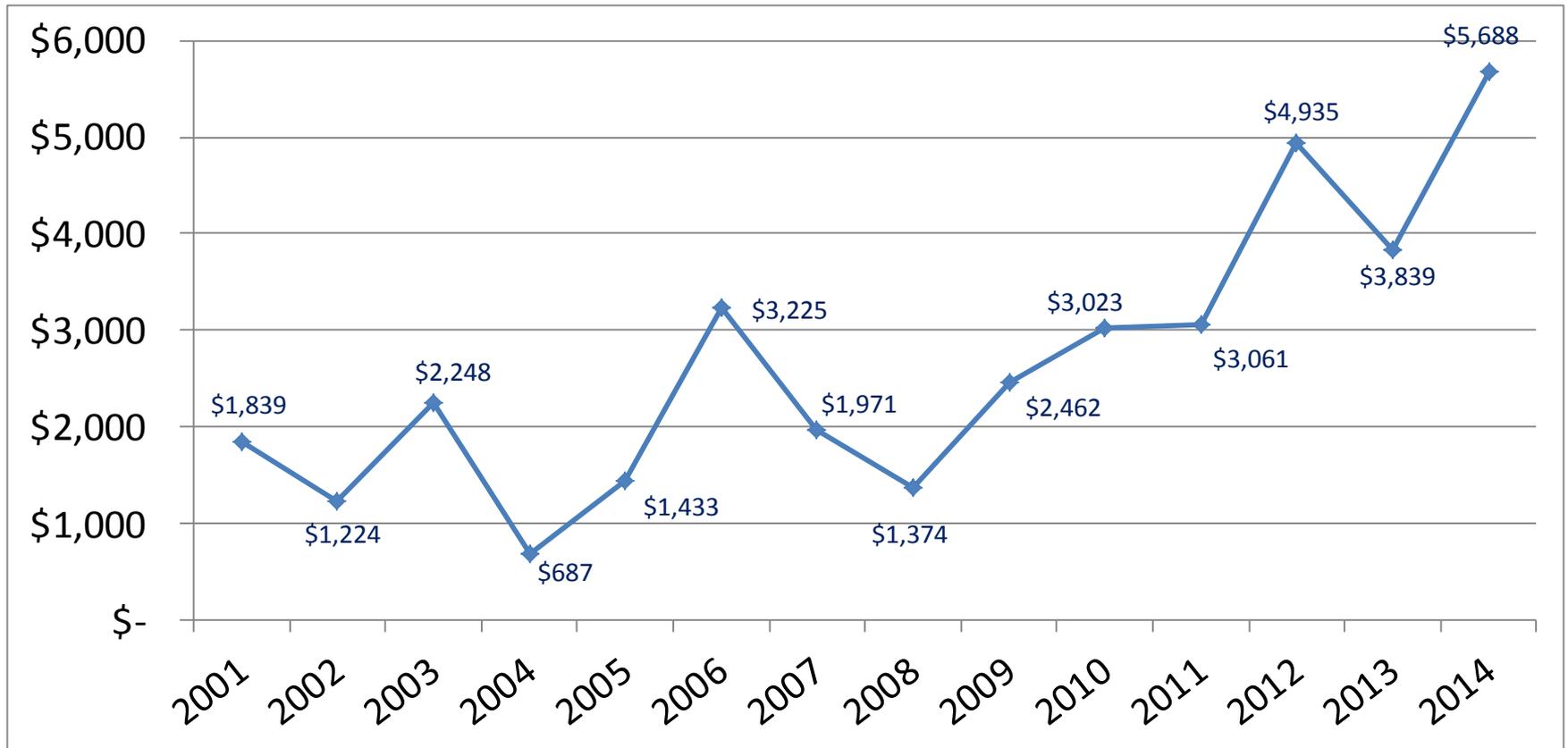
Sanctions

- Criminal violations:
 - False Claims Act
 - False Statements Act
 - Obstruction of a Federal Audit, 18 U.S.C. § 1516
 - Conspiracy
- Civil sanctions:
 - Civil False Claims Act
- Administrative:
 - Administrative fraud
 - Unnecessary costs, adverse findings, and penalties
 - Bad relationship and spillover

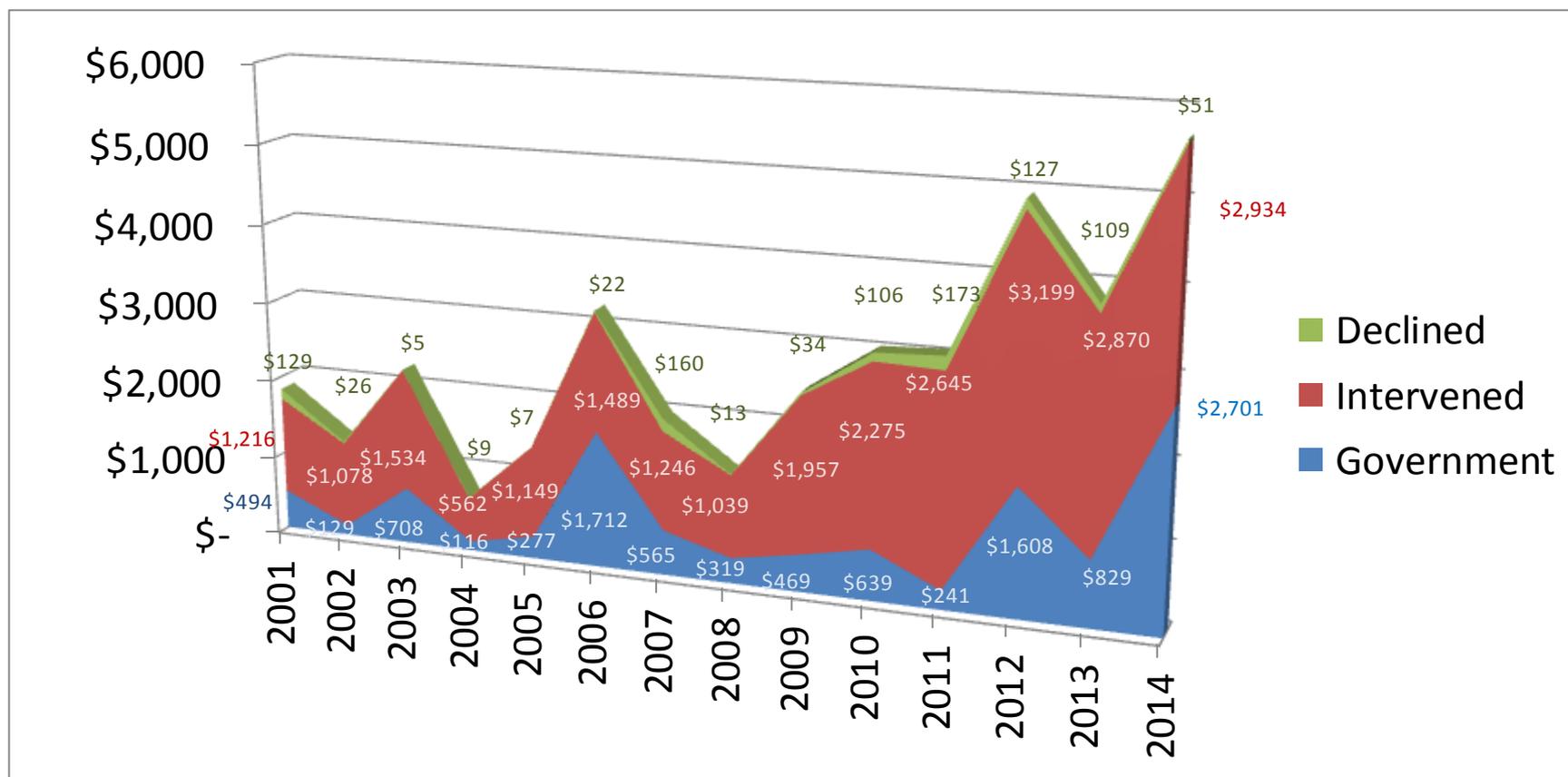
Primary sanction

- FCA, 31 U.S.C. § 3729, imposes liability on anyone who:
 - Knowingly submits, or causes another to submit, a false claim for payment to the government
 - Knowingly makes a false statement in support of a false claim
 - Knowingly avoids or decreases an obligation to pay the government, or retains an overpayment (“reverse false claim”)
- Can be brought by government or “*qui tam* relator” – relator suits can be barred by “public disclosure” or “first-to-file” bars

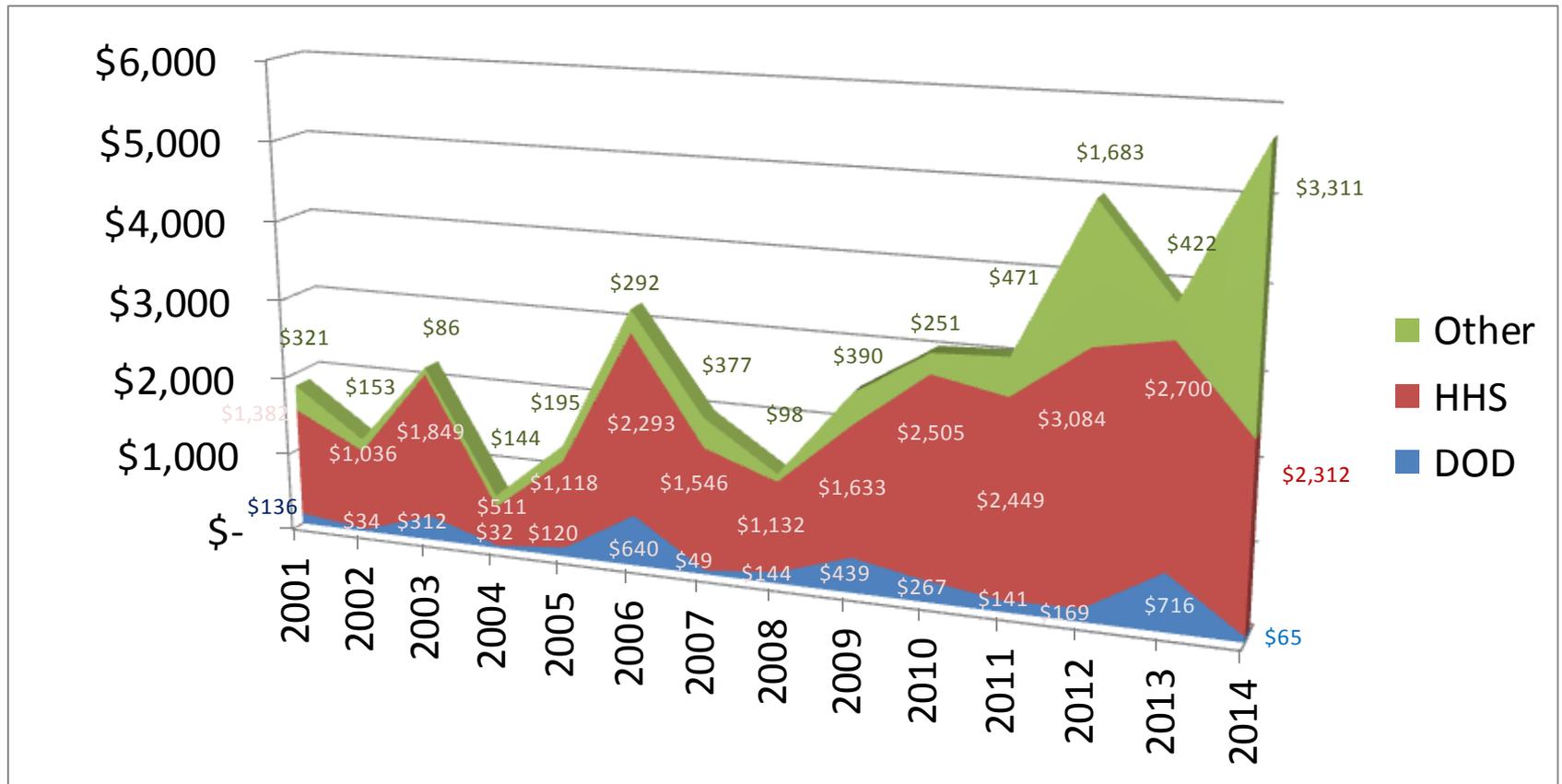
Total FCA recoveries (millions)



FCA recoveries: relator vs. US (millions)



FCA recoveries by lead agency (millions)



Best practices for mitigating the risks

Best practices for mitigating the risks

- Contracting with the US government requires compliance with a new and unique regime of regulatory requirements
 - Various procurement statutes and regulations
 - Appropriations / fiscal law limitations
- Regulations and government contract clauses impact virtually all aspects of a contractor's business
 - Human resources
 - Purchasing / subcontracting
 - Inventory management
 - Accounting and billing
 - Internal controls and audit
 - Marketing
 - Public relations
 - Business development and sales

Best practices for mitigating the risks (cont'd)

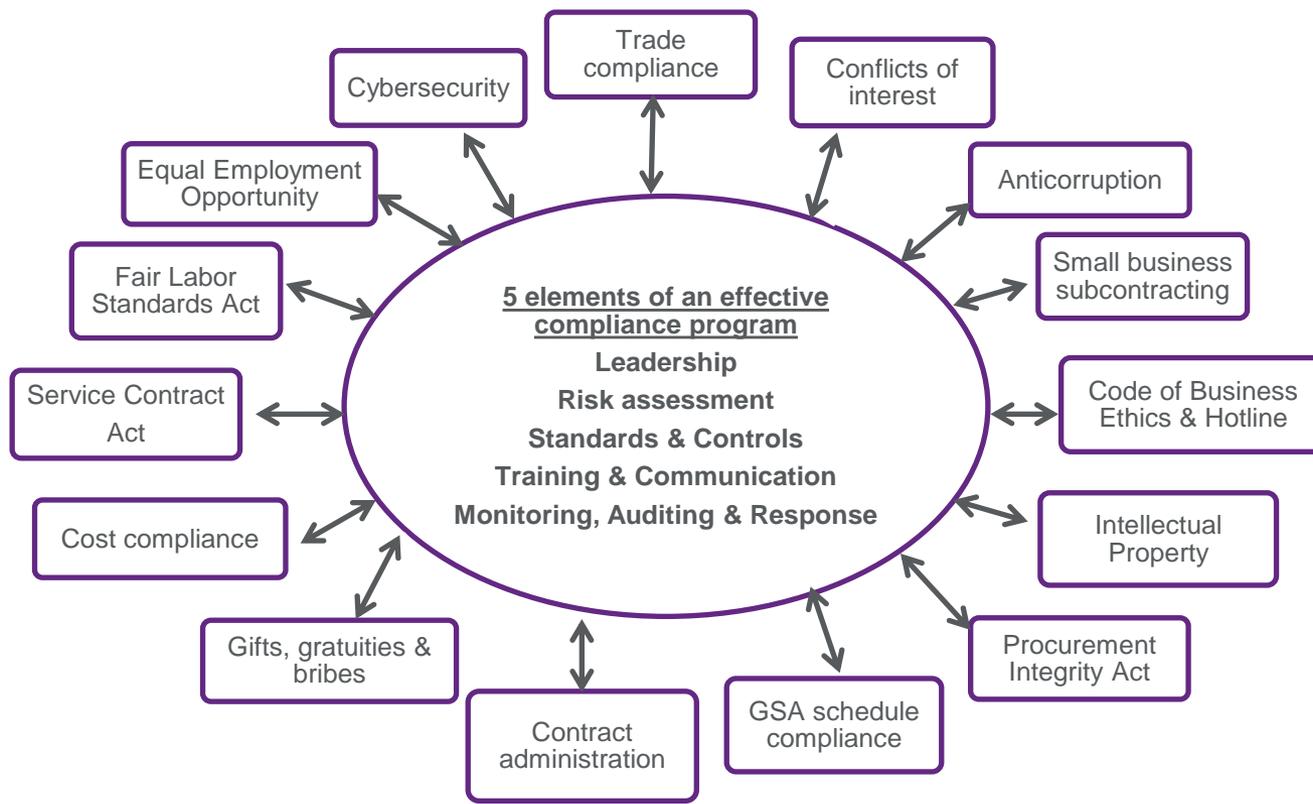
- Noncompliance has significant risks for contractors
 - Breach of contract / termination for default
 - Government may re-procure from another vendor and charge contractor for re-procurement costs
 - Negative past performance ratings
 - Government retains performance evaluations – negative evaluations make it hard to win future work
 - Suspension / debarment
 - Noncompliance or inadequate performance may result in preclusion from working as government contractor
 - Financial risks
 - Inadequate systems and noncompliance may result in a contractor not recovering its costs / paying penalties back to government
 - Civil and criminal liability
 - Inadequate systems may result in inaccurate billings and potential overcharging, which may lead to fraud allegations

Best practices for mitigating the risks (cont'd)

- Contractors must demonstrate that compliance program is long-established, consistently applied, and comports with the Standards of an Effective Compliance Program as set forth in the US Sentencing Guidelines
 - **Leadership**
 - Tone at the top
 - **Risk assessment**
 - Periodically assess the effectiveness of the measures put in place to address a compliance area
 - **Standards / controls**
 - Clear and consistent standards and requirements to which employees are held to comply (easily understand and measurable in an objective fashion)
 - **Training and communication**
 - Clear communication on policy and training requirements; refreshing training populations
 - **Monitoring, auditing and response**
 - Back-end procedures to verify compliance and procedures in place to address noncompliances
- Compliance cannot be just “on paper”
 - The culture and practices of your company must consistently demonstrate that the company is an ethical actor in the marketplace

Best practices for mitigating the risks (cont'd)

Goal: Design a program that will allow a third party to assess how you have met each of the five elements of an effective compliance program for each compliance area within your organization



Best practices for mitigating the risks (cont'd)

- Culture of compliance
 - Business leadership
 - Contract management
 - Support staff
- Compliance office
 - Compliance officer
 - Appropriately staffed
- Develop written policies and procedures
 - Periodic policy reviews
- Conduct training
 - Review training populations
 - Periodic training reviews and updating
- Perform internal compliance reviews and/or audits
- External monitoring
 - Track new rules and regulations
 - RACI framework to make sure new requirements are being addressed in policies, procedures and processes
- Incident response
 - Do your employees know how to respond if an incident occurs?
 - Who to call to report?
 - How to handle media inquiries?
 - What other actions to take?
- Understand the mandatory disclosure rules
 - What needs to be disclosed and to whom
 - What constitutes credible evidence
 - What constitutes timeliness

Best practices for mitigating the risks (cont'd)

Being awarded a contract is only the beginning—sound contract administration and oversight is the **KEY** to good government contracts compliance!



Best practices for mitigating the risks (cont'd)

- Fundamentals of contract administration
 - Centralized administration and oversight
 - Centralized contract files—recordkeeping
 - Meeting document retention obligations
 - Adopting and following policies and procedures
 - Consistent and up-to-date completion and tracking of reps and certs
 - Consistent and accurate completion of reporting requirements



Best practices for mitigating the risks (cont'd)

- **Contract administration best practices for facilitating compliance**
 - **Phase I (pre-award):**
 - Appoint a person to speak for the company and be responsible for adhering to RFP/contract requirements
 - Organize a compliance team consisting of program, contract administration, legal, and finance personnel
 - Begin modifying and developing policies and procedures as needed
 - Provide appropriate training

Best practices for mitigating the risks (cont'd)

- **Contract administration best practices for facilitating compliance**
 - **Phase II (post-award):**
 - Make sure responsible personnel have read the contract carefully; understand all terms and which must be flowed down; have trained others on key provisions
 - Create and maintain a well-organized complete contract file
 - Develop formal compliance program and ensure management understands the risks as well as the benefits and is committed to compliance
 - Conduct internal compliance reviews
 - Integrate government cost/price accounting compliance into your formal ethics/compliance program
 - Make sure your compliance program includes a written code of conduct, a hotline, procedures for periodic internal audits, and regularly scheduled training
 - Institute procedures for staying abreast of regulatory changes

Best practices for mitigating the risks (cont'd)

Tips for protecting your assets, brand and reputation

- Engage your business and functional teams
 - This is key to an effective compliance program
 - Everyone at the company—from the CEO to the administrative staff—need to “own” compliance
 - Need to ensure the correct individuals are involved in developing solutions to address enterprise risk
- Create a “rapid response” team
 - Know who you need to contact if a new, sudden or unexpected enterprise risk suddenly emerges (e.g., breaking news story, notice of lawsuit, etc.)
- Establish an Enterprise Risk Management (ERM) program
 - Process that identifies and prioritizes risk and establishes and tracks the leading indicators of mitigation (e.g., resources assigned to the issue, training accomplished, auditing performed)

Questions?

For further discussion, contact:



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Thank you

The logo for Dentons, featuring the word "DENTONS" in white, uppercase, sans-serif font inside a purple arrow-shaped box pointing to the right.

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