Oops!

We're quite sure that Massachusetts-based **EMC Corporation** uttered that word (or worse) when the Department of Justice intervened in a whistleblower "qui tam" suit alleging, among other things, violations of the False Claims Act. **Here's the DOJ announcement**, reporting that EMC agreed to pay $87.5 million to settle various allegations stemming from its GSA Schedule.

EMC Corporation, a Fortune 500 company traded on the NYSE, is a multi-billion

dollar global provider of IT services

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The company describes itself thusly:

EMC's Information Infrastructure business provides a foundation for customers to manage and secure their vast and ever-increasing quantities of information, automate their data center operations, reduce power and cooling costs, and leverage critical information for business agility and competitive advantage. EMC's Information Infrastructure business comprises three segments – Information Storage, Content Management and Archiving and RSA Information Security.

EMC's VMware Virtual Infrastructure business, which is represented by EMC's majority equity stake in VMware, Inc. ("VMware"), is the leading provider of virtual infrastructure software solutions from the desktop to the data center and to the cloud. VMware's virtual infrastructure software solutions run on industry-standard desktop computers and servers and support a wide range of operating system and application environments, as well as networking and storage infrastructures.

We found an **EMC brochure** discussing its Federal government services.

Members of this website have access to our knowledge resources. Among those resources one might find a couple of discussion papers covering risk areas associated with GSA Schedules. Commonly thought to be “low risk” contracts with the Federal government, the reality is that GSA Schedule contracts are fraught with risk for unwary contractors. Contractors whose only government contract is their GSA Schedule contract, or contractors who consider themselves to be “commercial companies” are at the most risk—because such companies typically fail to invest in control systems that would help to reduce the risk of a contract compliance failure.

One of our discussion papers has this to say:

- Risk Area: Pre-award disclosure of commercial sales practices and discounts
- Contractor provides data on commercial sales practices and discounting policies.
- Commercial Sales Practices (CSP) Format needs to be current, accurate and complete at submission. If there is any doubt about category of customers, discounts or concessions, err on the side of disclosure.

- Risk Area: Identification of Price Reduction Clause “Basis of Award” customers and pricing relationship
- Contractor negotiates “Basis of Award” (BOA) category of customers and BOA/GSA pricing relationship.
- Designate a category of customers that is realistic and manageable, not too broad such as all commercial customers or all national accounts. Make sure the category of
customers
price is accurate.

- Ensure that underlying terms and conditions of the most favored customer pricing are clearly disclosed and understood.
- Be clear on pricing relationship between MAS contract price and BOA category of customers price (i.e., proportional vs. absolute relationship).

The DOJ had this to say about its allegations regarding EMC's Schedule contract:

… by misrepresenting its commercial pricing practices, EMC fraudulently induced the General Services Administration (GSA) to enter into a contract with prices that were higher than they would have been had the information technology company not made false misrepresentations. Specifically, the United States alleged that the … company represented during contract negotiations that, for each government order under the contract, EMC would conduct a price comparison to ensure that the government received the lowest price provided to any of the company's commercial customers making a comparable purchase. According to the government's complaint, EMC knew that it was not capable of conducting such a comparison, and so EMC's representations during the negotiations – as well as its subsequent representations to GSA that it was conducting the comparisons – were false or fraudulent.

Oops—EMC should have read our discussion paper! But that's not all the DOJ has to say about this particular contractor—

The United States also alleged that EMC engaged in an illegal kickback scheme designed to influence the government to purchase the company's products. EMC maintained agreements whereby it paid consulting companies fees each time the companies recommended that a government agency purchase an EMC product. These kickback allegations are part of a larger investigation of government technology vendors that has resulted in settlements to date with three other companies, with several other investigations and actions still pending. The kickback investigation was initiated by a lawsuit filed under the *qui tam*, or whistleblower, provisions of the False Claims Act, which allow private citizens to sue for fraud on behalf of the United States and share in any recovery.

EMC's latest quarterly 10Q report (May 7, 2010) had this to say in a footnote:

United States ex rel. Rille and Roberts v. EMC Corporation. Effective as of May 4, 2010, EMC entered into a settlement agreement (the "Agreement") with the United States of America, acting through the Civil Division of the United States Department of Justice (the "

DoJ
"). The Agreement relates to a previously disclosed "qui tam" action that followed an investigation conducted by the
DoJ
regarding (
i
)
EMC's fee arrangements with systems integrators and other partners in federal government transactions, and (ii)
EMC's compliance with the terms and conditions of certain agreements pursuant to which we sold products and services to the federal government, primarily a schedule agreement we entered into with the General Services Administration in November 1999. Pursuant to the Agreement, EMC will pay the United States $87.5 million. In consideration of this payment, the United States has agreed to release EMC with respect to the matters investigated and the claims alleged by the
DoJ
in the civil action. As set forth in the Agreement, EMC expressly denies any liability or wrongdoing in connection with such matters and claims, and the settlement
represents a compromise to avoid the costs, distraction, and uncertainty of continued litigation. As previously disclosed, EMC recorded an $87.5 million accrual for this contingency as of December
31, 2009.

Well there you go. Readers might recall our **recent article** on kick-backs. We told you they are a “no-no”—especially in the government contracting environment.

Saying “we told you so” somehow seems to lack the air of professionalism for which we generally try to achieve. But we will say this:

Sorry, EMC Corporation, but you should have checked this site before you decided to get into the GSA Schedule contracting business.