Bribery Act 2010 – what you need to know

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Bribery Act 2010 – what you need to know

Agenda

• Life before Bribery Act 2010

• Bribery Act 2010 – The Key Provisions

• Discussion: What does the Bribery Act 2010 mean for the Construction Industry?

• What do you need to take away from today?
Bribery Act 2010 – why is it relevant to the construction industry?

• Current Economic Climate

• Construction and Infrastructure industry is vulnerable to bribery and corruption activities
  – Due to the nature of projects and contracts undertaken
  – Projects are often in emerging markets
  – Involvement of government departments or officials
  – Local agents and intermediaries

• ‘Corruption in the UK Construction Industry, Survey 2006’ - Chartered Institute of Building (CIOB)

• Previous prosecution of high-profile construction companies are one indication that increased enforcement efforts worldwide
  – Balfour Beatty agreed to pay the Serious Fraud Office £2.25m in 2008
  – Mabey & Johnson was ordered to pay £6.6m in September 2009
  – BAE Systems agreed to pay the Serious Fraud Office £30m in 2010
  – AMEC had a civil recovery order imposed upon it
Life before the Bribery Act 2010

- **What law governed bribery prior to the Bribery Act 2010:**
  - Common Law Bribery offence
  - Public Bodies Corrupt Practices Act 1889
  - Prevention of Corruption Act 1906
  - Anti-Terrorism, Crime and Security Act 2001
  - Proceeds of Crime Act 2002

- Organisation for Economic Cooperation and Development (OECD) issued its October 2008 report

- Law Commission published detailed proposals in November 2008

Bribery Bill was introduced into parliament in November 2009

Bribery Act received royal assent on 8 April 2010

Bribery Act 2010 will come into force on **1 July 2011**
Bribery Act 2010 – the Key Offences

Bribery Act establishes four categories of offence:

1. offering, promising or giving a bribe (active bribery)
2. requesting, agreeing to receive or accepting a bribe (passive bribery)
3. bribing a foreign public official to obtain or retain business
4. failing to prevent bribery – known as the ‘corporate offence’

1. Individuals only
2. Individuals only
3. Individuals only
4. ‘Commercial Organisations’ – if fail to prevent an individual committing offences 1 or 3.

Directors & Senior Officials – consent/connivance

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Bribery Act 2010
– consequences of being found guilty

• Individuals – 10 years imprisonment or a fine (or both)

• ‘Commercial Organisations’
  – unlimited fine
  – debarment under the public procurement regime
  – proceeds generated by deals procured by corruption confiscated by the UK authorities

• Failure to prevent bribery could also render directors vulnerable to civil claims.
Bribery Act 2010 – The general offences

The general offences have two elements:

- the payment or acceptance of a financial or other advantage;
- in exchange for the improper performance of a function or activity.

‘financial or other advantage’
- not defined in the Act
- Will include items such as contracts, non-monetary gifts, facilitation payments and offers of employment

‘improper performance’
- Is deemed to occur when the expectation of good faith or impartiality has been breached; or,
- If the method of performance falls short of that expected of a person in a position of trust

Outside the UK?
Bribery Act 2010 – The **foreign public official offence**

**Offence 3 - ‘bribing a foreign public official to obtain or retain business’**

- Advantage is promised or offered to a foreign public official with the intention of influencing the official in the performance of his functions

- **Stand-alone offence**

- **Defence**
  - where the official is permitted or required by the local written law to be influenced by the financial or other advantage
  - If no local written law, local customs are disregarded
Bribery Act 2010
– The **corporate offence**

**Offence 4 - ‘failure by a commercial organisation to prevent bribery’**

- **a person associated** with a **commercial organisation**;

- is or would be guilty of offences 1 or 3 (bribing another person or a foreign public official); and

- this bribery was carried out in order to obtain or retain an advantage for the commercial organisation concerned.

- **strict liability** – subject to Adequate Procedures

- **Defence** – unless the commercial organisation takes the ‘**Adequate Procedures**’
Bribery Act 2010
– The **corporate offence**

‘Adequate Procedures’ –

The Act required the Secretary of State to publish guidance about procedures that relevant commercial organisations can put in place to prevent committing the corporate offence.

The extent of offence 4 has been the subject of much debate

If no risk of bribery – no need for Adequate Procedures

One-size does not fit all
Bribery Act 2010
– The **corporate offence**

The ‘*Adequate Procedures*’ – not defined in the Act but contained within the Guidance – 6 principles:

- **Risk assessment** – a commercial organisation should regularly & comprehensively assess the nature & extent of the bribery risks to which it is exposed
- **Top level commitment** – top level management must be committed to the prevention of bribery. A statement of commitment to counter bribery should be made
- **Due Diligence** – the commercial organisation should have anti-bribery due diligence procedures which cover all parties to a business relationship
- **Policies & Procedures** – the commercial organisation should have clear, practical & accessible policies and procedures covering gifts & hospitality, facilitation payments, charitable & political donations, whistle-blowing
- **Implementation** – commercial organisations need to go beyond “paper compliance” and embed anti-bribery in its controls and culture
- **Regular monitoring & review** – anti-bribery compliance should be audited and reviewed.
Drafting of the offences is very wide

- ‘associated person’ – the Act defines him/her as someone who performs services for a commercial organisation

- In practice, this could include an agent, contractor, consultant, joint venture partners or sub-contractors

- Adequate Procedures Guidance

Geography of offences
Bribery Act 2010 – what does it mean for the construction industry?

Facilitation payments
– The Act does not expressly permit facilitation payments so tread carefully

Corporate Hospitality
– Guidance says that the Government does not intend for bona fide hospitality and promotional expenditure to be caught by the Act

Procurement

Construction Documentation
– We may start to see construction contracts asking contractors to confirm that they have complied with the Act
Bribery Act 2010 – what does it mean for the construction industry?

Consultants, suppliers and other third parties

- employer should ensure that it has identified all potential “associated persons”
- adequate procedures are in place to act as a defence

Monitoring the construction project

Existing construction contracts
Bribery Act 2010 – what do you need to take away from today?

1. Individuals/Senior Officers

2. Corporate Offence
   • Adequate Procedures
   • Risk Management

3. Reasonable

4. ‘Common Sense’
THANK YOU

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