

The Bribery Bill and how it will impact construction companies (when it becomes law)

The construction industry received a sharp reminder of how costly corrupt practices can be when 103 construction firms were fined a total of £129.5m by the OFT in September 2009 for “illegal anti-competitive bid rigging activities”. However, the publication of the Bribery Bill demonstrates that construction firms will need to be even more vigilant in ensuring that they conduct their businesses in accordance with the law. The Bill has sufficient teeth to tackle corruption committed by UK companies both at home and abroad. It also requires new disciplines predominantly for those dependent on winning public sector work to have internal procedures that prevent bribery occurring.

In light of the House of Lords second reading of the Bill on 9 December 2009 this article looks at how companies in the UK will be affected by the Bill, and the steps that can be taken to prepare for when it becomes law.

Aim of the Bribery Bill

The Bill was published on 25 March 2009 for pre-legislative scrutiny. It aims to provide a modern and comprehensive scheme of bribery offences in order to allow investigators, prosecutors and courts to deal with bribery effectively.

It has been suggested that the current law on bribery is out of date and unsuitable for today’s global market place. The Law Commission concluded in 1998 that the current law is ‘obscure, complex, inconsistent and insufficiently comprehensive’ and in need of replacement. If the Bill is passed, it will repeal the succession of Prevention of Corruption Acts 1889-1916¹, and the complex common law, and replace them with one comprehensive Act.

Significant Changes

Companies should pay particular attention to the following three changes the Bill will introduce:-

- (1) The Bill introduces a new corporate offence of failing to prevent bribery. This will apply to any corporate body or partnership which carries on business in the UK. This means that a business will not only be vicariously responsible for acts of bribery committed by their employees, they will also have a positive duty to prevent acts of bribery occurring throughout the organisation.

¹ Including the Prevention of Corruption Act 1916, the Prevention of Corruption Act 1906, and the Public Bodies Corrupt Practices Act 1889

- (2) There is also a new offence of bribing a foreign public official (“FPO”), which will mean bribery offences committed abroad by UK nationals will be capable of prosecution here. This means businesses must take great care in how they handle international business transactions.
- (3) The offence of bribery will apply in a wider commercial context and not just in relation to public officials.

There is pressure on the UK Government to bring the law on bribery in line with international standards. The UK signed the Organisation for Economic Co-operation and Development (OECD) Anti-Bribery Convention in 1997 but is yet to amend UK law so that it complies with the Convention.

The Government’s Draft Legislative Programme, published on 29 June 2009, aims to introduce the Bill in the next parliamentary session. The Queen’s Speech on 18 November 2009 confirmed these plans.

The proposed offences

The Bill will be broken down into four principal offences:

- (1) The new corporate offence of failure of a commercial organisation to prevent bribery. This offence can only be committed by a “relevant commercial organisation”. Basically, this means UK companies and partnerships, wherever they do business, and overseas companies and partnerships doing business in the UK.

This offence is committed by the organisation where a person who is associated with the commercial organisation bribes another person with the intention of obtaining or retaining business or an advantage in the conduct of business for the organisation.

Importantly, in order to mount a defence to this, the commercial organisation will need to show that it had adequate procedures in place to prevent bribery offences. However, this defence will not apply if the person who carried out the bribery was a director, manager, or equivalent person within the organisation.

- (2) The new offence of bribing a FPO, which is specifically required so as to comply with the OECD Convention. This offence is committed by any person (which expression in each case includes a company) who offers, promises or gives to any FPO any financial or other advantage with the intention of influencing that FPO in his official capacity. In doing

so, the person carrying out the act complained of must intend to obtain or retain a business advantage. The FPO is of course a public official. The offence is not committed if the bribery was of a person in a commercial organisation overseas.

FPOs are widely defined to include anyone who: (i) holds a legislative, administrative or judicial position of any kind; (ii) exercises a public function for any country, or for any public agency or public enterprise; or (iii) is an official or agent of a public international organisation.

- (3) The offence of giving, promising or offering a bribe. A person will be guilty of this offence if he offers, promises or gives a financial or other advantage to another person to perform, or to reward a person for performing, a public or business activity improperly. An example might be the payment to a competitor for them to submit a “cover price”.
- (4) The offence of agreeing to receive or accept a bribe. A person will be guilty of this offence if he requests, agrees to receive or accepts a financial or other advantage intending that, in consequence, a public or business activity should be performed improperly (either by himself or by another person).

Penalty for committing an offence of bribery

The Bill proposes to increase the maximum penalty for bribery from 7 to 10 years imprisonment and to impose an unlimited fine. This is not to ignore the reputational damage for being shown to run a business that sanctions corruption and the affect this might have on being able to participate in future tenders.

Impact of the Bill on construction companies

Because of the international nature of business for many construction firms they will have to ensure that they do not fall foul of the new offence of bribing a FPO. Obviously it becomes increasingly difficult to prevent bribery when running a major organisation across multiple territories and markets. No longer will businesses be able to “turn a blind eye” to the business methods of those they engage to win work, or resolve disputes.

Firms must also ensure that all sales agents, distributors, advisors and business partners comply with the new offences. Many companies employ agents abroad to market and sell their services or act as intermediaries or facilitators of work. Significantly, under the new law, companies will become liable for the actions of not only their subsidiaries, but also their joint venture partners and agents.

For UK businesses, companies will need to implement a robust anti-bribery procedure to prevent bribery. Anti-corruption policies and procedures should therefore be well documented, with good internal communication, training and monitoring. It should be treated as being of an equivalent seriousness to health and safety, so that companies should have an ethical champion at board level responsible for implementing appropriate measures.

There is obviously overlap between some anti-competitive behaviour (paying another to provide cover pricing) and bribery. Construction companies involved in such behaviour may face a “double-whammy” as a consequence.

Some companies may also need to reconsider their approach to giving and receiving corporate entertaining. It is only in relation to excessive or lavish corporate hospitality that the distinction between acceptable commercial relations and bribery becomes blurred. Where the boundary lies will depend on each individual case, but companies may need to consider requiring staff to disclose all entertainment and gifts given and received to management who should record details in an entertainment register and monitor it so that anything inappropriate can be picked up early.

Suggested preparation for companies

It is not known when the Bribery Bill will become law, particularly given the short amount of time before the general election 2010. There has been speculation that even if the opposition Conservative Party win the upcoming election they will support the Bill as it is in both parties' interest to pass the Bill during the current legislative session. Companies are therefore advised to start preparing for a change in the law, in particular putting in place “adequate procedure” to prevent bribery offences.

So far no official definition of an “adequate procedure” has been provided, but in May 2009 the GC100 group² suggested that a commercial organisation should consider implementing the following:-

- having a clear code of compliance in place which is communicated to staff on induction and regularly as part of training sessions and published on the company's website;
- designating a responsible person to oversee compliance matters;
- ensuring that monitoring systems are in place at all levels, adopting a clear policy on gifts, expenses and corporate hospitality, keeping record of gifts and centrally monitoring payments;
- ensuring that directors or partners take responsibility for the anti-bribery programme - the 'head-in-the-sand' approach will no longer work;

² General Counsel and Company Secretaries of FTSE 100 companies

- establishing procedures to assess the likely risks of corruption arising in the commercial organisation's business;
- carrying out sufficient due diligence on any potential business partners, agents used, and the country in which business is to be conducted to identify as far as possible the risk of corruption;
- including anti-corruption terms in contracts entered into between the company and its business partners, particularly where agents are being used;
- including express contractual obligations and penalties in relation to corruption in employment contracts and putting in place appropriate disciplinary procedures; and
- developing and implementing reporting and investigation procedures.

Conclusion

When the legislation comes into force it will have a major impact on the way businesses conduct business and manage their international relations particularly in the field of procurement. The SFO, the Financial Services Authority, and the City of London police are already investigating and prosecuting bribery cases. It is therefore vital that businesses ensure that the necessary policies, procedures and structures are in place well before the date of implication.

Michael Archer (Partner)

Becky Purse (Trainee Solicitor)

Beale and Company Solicitors LLP

For further information, please contact the authors on 020 7240 3474 or email m.archer@beale-law.com or b.purse@beale-law.com

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Beale and Company Solicitors LLP

London: Garrick House · 27-32 King Street · Covent Garden · London · WC2E 8JB · T: +44 (0)20 7240 3474

Bristol: Venturers House · King Street · Bristol · BS1 4PB · T: 0117 915 4021

Dublin: Hamilton House · 28 Fitzwilliam Place · Dublin 2 · T: +353 (0) 1 775 9505