Rise in corruption and bribery prosecutions

Guest editor Laura Lintott of Beale & Company Solicitors LLP discusses the increasing number of prosecutions related to bribery and corruption. The Serious Fraud Office (SFO) is becoming increasingly focussed on such cases, and construction companies should take great care to comply with anti-corruption legislation, she warns.

The estimated global annual cost of bribery and corruption is currently more than £1tn. The Bribery Act 2010 (BA 2010) is the most severe piece of anti-corruption legislation in the world. It was first regarded with fear and after an initial panic a lull emerged, where no imminent prosecutions followed. This turned out to be the calm before the storm.

The last few years have seen a rise of successful enforcement of the BA 2010, as the SFO has started to apply its resources. The tables turned on 17 January 2017 with the largest ever settlement in connection with the BA 2010 – the SFO and Rolls-Royce agreed a deferred prosecution agreement (DPA) related to offences under ss 1 and 7 of the Criminal Law Act 1977 and s 17(1)(a) of the Theft Act 1968. Rolls-Royce agreed to pay £671m after reaching agreements with three authorities (the SFO, the US Department of Justice (DOJ) and Brazil’s Ministério Público Federal). The UK’s penal regime can no longer be accused of being ‘soft’ as the fines are likely to be similar, or in the case of Rolls-Royce even greater, than fines imposed in the US.

The construction industry is one of the most exposed to the risk of bribery and corruption and the vulnerability stems mainly from doing business in high risk jurisdictions where bribery is viewed as every-day reality. The growing demand for infrastructure in the emerging markets seems attractive for economic reasons, however careful adjustment and implementation of anti-bribery measures is necessary before getting involved.

Notable prosecutions since the BA 2010

The anti-corruption regime is tightening, as more SFO prosecutions emerge:

- **ICBC Standard Bank Plc (30 November 2015)**: The SFO entered into its first DPA. It was the first successful resolution of an allegation against a company under s 7 of the BA 2010. Standard had to pay over US$32m under the DPA.
- **Sweett Group Plc (19 February 2016)**: Sweett (UK-based construction and management services company) were ordered to pay £2.25m. They failed to secure a DPA (despite having pleaded guilty) as a penalty for failing to self-report promptly and for deliberately trying to mislead the SFO during its investigation. Sweett are the first UK corporate entity to be convicted under s 7 of the BA 2010. The bribery offence related to payments amounting to around £680k made by Sweett’s Cypriot subsidiary to secure the contract to project manage the building of a hotel in Dubai.
- **Odebrecht SA (17 April 2017)**: Odebrecht, a Brazilian-based conglomerate operating also in the engineering and construction industry, and Braskem (partially owned subsidiary of Odebrecht), bribed an official at Brazil’s state-owned oil company, Petrobras, and a number of Brazilian government officials in return for: the continuation of a joint-venture contract with Petrobras; supply contracts; and tax advantages. The resolution required Odebrecht and Braskem to pay a total sanction of US$3.55bn.
- **KBR Inc (28 April 2017)**: KBR, an engineering, procurement and construction company, are being investigated by the SFO in relation to suspected offences of bribery and corruption arising out of activities with Unaoil.
- **CDM Smith Inc (21 June 2017)**: The DOJ enforcement action under the Foreign Corrupt Practices Act against CDM Smith resulted in a ‘declination’ with disgorgement. CDM Smith agreed to disgorge about US$4m as it was found that they paid about US$1.18m in bribes to
government officials in India in exchange for highway construction supervision and design contracts and a water project contract.

**Practical steps to ensure compliance**

Construction projects in unfamiliar jurisdictions often involve local staff and agents and necessary intermediaries. Such individuals/entities may have different views on what amounts to bribery and what is a ‘necessary’ ordinary conduct to them (such as bribes to obtain licences or importing materials faster).

Having the anti-bribery measures down the chain assists in complying with anti-corruption.

**Before getting into trouble**

To have a defence in a prosecution under s 7 of the **BA 2010**, the affected company has to show that it has ‘adequate procedures’ in place. The Guidance to the **BA 2010** has six principles to help determine what exactly ‘adequate procedures’ are:

- ‘Proportionate procedures’: Includes warranties and undertakings against bribery and corruption in contracts to be entered into with associated persons (persons preforming services for/on behalf of a company, ie employees, subsidiaries, agents); requesting the right to audit accounts and correspondence of any counterparties if there is a material concern of activity that would fall short of the **BA 2010**.
- ‘Top-level commitment’: Ensuring management of the company is proactively involved in the company’s compliance with the **BA 2010**.
- ‘Risk assessment’: Assessment of high-risk jurisdictions, sectors, types of transactions, value of projects or business relationships.
- ‘Due diligence’: Increasing the level of detail required in integrity due diligence reports with regards to service providers in high risk jurisdictions.
- ‘Communications’: Ensuring staff receive appropriate training.
- ‘Monitoring and review’: Ensuring regular internal checks comply with the **BA 2010**.

In addition to having adequate procedures in place, companies are also strongly advised to adopt a zero-tolerance to facilitation payments; and if the company provides corporate hospitality, this needs to be reasonable, proportionate and regulated thoroughly by the company.

**After getting into trouble**

Once a company is under investigation by the SFO, it is strongly advised that the company co-operates to the fullest extent possible with the SFO, self-reports and self-investigates.

Whilst an offer of a DPA cannot be guaranteed, it is much more likely for the SFO to take a more approachable stance if the company does all it can to show co-operation with the SFO. A 30-50% discount to the financial penalty may be applied in cases of self-reporting.

**Current trends**

The UK anti-corruption regime is fast approaching the unforgiving attitude towards corruption in the US.

At the same time, there appears to be an inconsistency in the message to businesses active in the UK. On one hand, in each of the cases, where the SFO has agreed to a DPA, it stressed that self-reporting is a critical factor it takes into account when considering granting a DPA. On the other hand, in the case of Rolls-Royce, a DPA was approved despite the lack of self-reporting. This was because of the nature and extent of co-operation Rolls-Royce provided. Sir Brian Leveson’s clarification is particularly helpful to explain what seems to be a lenient approach:

> ‘The fact that an investigation was not triggered by a self-report would usually be highly relevant in the balance but ... in the particular circumstances of this case, I should not distinguish between its assistance and that of those who have self-reported from the outset.’

However, in cases where smaller companies are prosecuted, it is unlikely that the SFO would tolerate a lack of self-reporting.

The government has called for a consultation which ran in early 2017 for evidence as to criminal offences designed to punish and prevent economic crimes such as fraud, false accounting and money laundering when committed on behalf or in the name of companies. The government is considering extending the scope of the corporate ‘failure to prevent’ offence beyond bribery.

The construction industry is heavily affected by anti-corruption legislation and compliance is a prerequisite to continue business successfully. Companies should monitor the evolving trends in punishing corrupt behaviour in particular in the light of further ongoing current investigations by the SFO. **CL**