



### The Cost of Corruption: \$770m AgustaWestland helicopter deal cancelled by Indian government amidst bribery allegations

India's Ministry of Defence has sought to "terminate with immediate effect" a \$770m deal with AgustaWestland for the supply of 12 transport helicopters, due to allegations of bribery and corruption during the procurement process.

AgustaWestland, a British helicopter manufacturer owned by Italian company Finmeccanica, had secured the deal with India's Ministry of Defence in March 2010, which included a five year logistic support service and initial aircrew and technician training. The firm, which had planned to build the helicopters in Yeovil, had staved off competition from US rival Sikorsky to secure the deal.

However, in February 2013, allegations emerged that AgustaWestland had engaged and paid large sums of money to middlemen to help facilitate the deal. The suggestion was that these middlemen had then used this money to bribe Indian defence officials during the procurement process. Giuseppe Orsi, the chief executive of Finmeccanica, was arrested in Italy for having allegedly paid €30m to British "middleman" Christian Michel to persuade the then Indian Air Force chief SP Tyagi to alter the altitude specifications for the helicopter tender so that they better suited AgustaWestland's AW-101 VVIP model, and since then three other individuals connected to the deal have also been arrested.

Upon Mr Orsi's arrest in February 2013 India's Ministry of Defence suspended the contract, but on Wednesday 1 January 2014 it announced that it was terminating the contract with immediate effect. It claims that it has cancelled the deal due to breach by AgustaWestland of a "Pre-contract Integrity Pact" which is reported to have prohibited the use of "middlemen" and the payment of commissions.

Despite the Indian government's decisive action, the future of the deal is still uncertain. AgustaWestland has denied all allegations of corruption, and in accordance with the contract an arbitrator has been appointed by the parties to try to resolve the dispute.

This case is a particularly high profile example involving senior directors of a well-known company, however, it acts

as a reminder that bribery – at whatever level – can have commercial, as well as legal, implications. It also demonstrates the Indian government taking a strong approach to corruption, which was a defining political issue in the country's general election this year.

Although the prosecutions in this case are being brought under Italian law, as AgustaWestland is a British company it is subject to the Bribery Act 2010, even in its operations overseas. The case is therefore a useful reminder that it remains crucial for companies to understand the key provisions of the Bribery Act, and to take the practical steps needed to minimise the risk of commission of offences under it, particularly when tendering for contracts and operating in emerging markets.

#### The Bribery Act 2010: key provisions

The Bribery Act creates one of the most stringent anti-bribery legal frameworks in the world. The offences of bribing, receiving bribes, and bribing a foreign public official can be committed by individuals or companies, but the most significant from many companies' point of view is the "strict liability" corporate offence.

1. **Giving a bribe:** It is an offence for a person to offer, promise or give a financial or other advantage to another person, where that advantage is intended to induce that other person to perform his functions or activities improperly, or reward that person for improper performance.
2. **Receiving a bribe:** It is an offence for a person to request or accept a financial or other advantage if it is intended that, as a result of receiving that advantage, he will perform his functions or activities improperly.
3. **Bribing a foreign public official:** It is an offence to offer or provide a financial or other advantage to a foreign public official with the intention of

obtaining or retaining business or an advantage in the conduct of business.

4. **The “Corporate Offence”:** An offence will be committed by a commercial organisation if a person “associated” with it (e.g. an employee, agent or sub-contractor) bribes another person with the intention of obtaining or retaining business or an advantage in the conduct of business for the organisation. However, it is a **defence** for the organisation to show that it had in place “**adequate procedures**” designed to prevent persons associated with it from committing acts of bribery.

### Extra-territorial effect

One of the most significant features of the Bribery Act is its extremely broad extra-territorial effect.

The offences of giving or accepting a bribe and bribing a foreign public official can be committed by anyone, anywhere in the world, as long as the person committing them has a “close connection” with the UK (for example, a British citizen, a person ordinarily resident in the UK, or a UK company). In this sense, a British national carries the Act “in their pocket” with them.

The “Corporate Offence” can be committed by any organisation incorporated or formed within the UK, or which carries out business (or even part of a business) in the UK. The offence will be committed by the corporate no matter where the associated person making the bribes on its behalf is in the world.

Therefore, companies operating in the UK must ensure that both they and their employees are careful not to commit offences under the Bribery Act, whether through their activities in the UK or abroad, and especially when operating in high corruption risk jurisdictions. The maximum penalties for such offences include 10 years imprisonment and unlimited fines.

### Ministry of Justice guidance: best practice

A starting point for businesses concerned about the Bribery Act should be the Ministry of Justice Guidance on “adequate procedures” for the purposes of the defence to the “Corporate Offence.” This is accompanied by a useful “Quick Start Guide”.<sup>1</sup>

The Ministry of Justice Guidance highlights six key principles that should shape the procedures that businesses put into place in order to seek to protect against the commission of the corporate offence (as well as the general offences):

- 1 Proportionate Procedures
- 2 Top-level Commitment

- 3 Risk Assessment
- 4 Due Diligence
- 5 Communication
- 6 Monitoring and Review

### Practical steps businesses should take

To reduce the risks of falling foul of the Act, businesses should consider taking the following steps, if they have not done so already:

1. **Coordination:** Appoint a person (e.g. compliance officer) to be responsible for leading efforts to ensure that you have proportionate and adequate procedures in place. This person should report directly to senior management and may also be given the task of being the primary point of contact for corruption issues.
2. **Engagement from the top:** Draft and issue an all-staff memorandum from senior management setting out a zero tolerance approach to corruption by or on your behalf.
3. **Risk assessment:** Carry out a documented risk assessment programme in order to identify key areas of vulnerability and high risk practices (e.g. business dealings in higher risk jurisdictions). Draft a report setting out these risks, what risk mitigation measures you currently have in place, and what further action needs to be taken.
4. **Policies and procedures:** Draft and disseminate a clear, overarching bribery policy document. Such a policy may refer to existing procedures and policies (e.g. policies on gifts and hospitality). Update existing policies where necessary (e.g. employee code of practice).
5. **Contract review:** Review existing and proposed contractual arrangements and amend where necessary in order to specifically prohibit corruption and include as a ground for termination (e.g. subcontractor contracts).
6. **Due diligence:** Conduct additional due diligence of associated persons, especially if they may be considered to pose a higher risk of corruption (e.g. agents located in higher risk jurisdictions).
7. **Training and awareness:** Develop a training and awareness programme to be delivered to relevant staff.

<sup>1</sup> <http://www.justice.gov.uk/guidance/docs/bribery-act-2010>

8. **Whistleblowing and investigation:** Develop whistleblowing and investigation mechanisms to ensure that corrupt activities can be safely reported to a nominated individual who will be able to instigate an independent and comprehensive investigation.

It is important to note, however, that businesses must be proactive in their approach to reducing exposure to bribery - it is the continual monitoring and updating of internal policies, rather than simply putting a policy in place, which will enable businesses to reduce the risks presented by the Act.

## Conclusion

The collapse of AgustaWestland's deal with India's Ministry of Defence acts as a reminder that bribery can have serious consequences, both commercial (the loss of a deal worth \$770m) and legal (the corruption charges faced by the senior individuals involved). Bribery can occur at any level in a business. It is therefore important both that directors and senior managers understand that bribery does not pay, and that businesses have adequate procedures in place to minimise the risk of bribery occurring at lower levels. Organisations that are involved in overseas projects in the developing world in particular must be most sensitive to such risks, and therefore need to be even more pro-active in their anti-bribery measures.

## Contacts

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