



### **Bribery Act 2010: SFO targets construction and energy industries**

The Director of the SFO has announced that the construction and energy sectors will be subjected to a specific “sector sweep” anti-bribery investigation.

In a recent speech, David Green QC announced that the construction and energy industries have been identified as being particularly vulnerable to economic crime. These sectors will therefore be the subject of in-depth investigation as the SFO looks to follow on from its first prosecutions under the Bribery Act 2010 last year.

The identification of construction and energy as sectors which may be vulnerable to corruption may come as little surprise. In September last year the Chartered Institute of Building published a survey showing that 49% of construction industry professionals believe corruption to be common within the sector.<sup>1</sup> With high levels of competition between contractors,

the importance of tender processes, and overseas projects in high risk territories, opportunities for bribery and corruption arise frequently, and can be difficult to avoid.

It is therefore more important than ever that construction and energy companies understand the key provisions of the Bribery Act, and continue to take the crucial practical steps needed to minimise the risk of commission of offences under it.

#### **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.

- **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.
- **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.
- **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.

- **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.

<sup>1</sup> <http://www.ciob.org/sites/default/files/CIOB%20Corruption%20in%20the%20UK%20Construction%20Industry%202013.pdf>

## Extra-territorial effect

One of the most significant features of the Bribery Act is its extremely broad extra-territorial effect. This is of particular relevance to the often international construction and energy sectors.

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, construction and energy 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 construction and energy companies 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>2</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 in the construction and energy sectors should consider taking the following steps, if they have not done so already:

- **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.
- **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.
- **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.
- **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).
- **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).
- **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).
- **Training and awareness:** Develop a training and awareness programme to be delivered to relevant staff.
- **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.

<sup>2</sup> <http://www.justice.gov.uk/guidance/docs/bribery-act-2010>

## Gifts and hospitality

An important point to remember is that, contrary to much coverage in the press, the Bribery Act was not intended to, and does not, criminalise corporate gifts and hospitality. The Act criminalises the giving or receiving of a benefit which is intended to induce impropriety by the recipient in the performance of its duties. If the gift or hospitality is not intended to induce

such impropriety, but is simply part of fostering good business relations with a commercial counterpart, then it will not be found to be criminal under the Act. However, the division can often be unclear. The following are examples which may be relevant in the construction and energy sectors:

Gifts and corporate hospitality that are likely to be permitted:	Gifts and corporate hospitality which may constitute a bribe:
A celebratory event upon the completion of a project, at which reasonable and proportionate gifts are awarded to key players.	Gifts or hospitality directed at a key decision maker during a tender process for a project.
Reasonable and proportionate non-cash gifts as a reflection of good relations with another organisation, records of which are kept in a hospitality register and audited by senior staff.	Cash gifts at any stage of a project are likely to be viewed with suspicion.
Reasonable and proportionate refreshments at meetings or business lunches, where there is a legitimate reason for the meeting to be held.	"Wining and dining" potential customers with the purpose of persuading them to award contracts for non-business reasons.
Taking clients out to dinner or to sporting events, so long as it is not for an improper purpose, and is proportionate expenditure for your business.	Taking potential customers or public officials in decision-making roles out to dinner or to sporting events during a tender or public procurement process, with the purpose of influencing their decision.

## Conclusion

Following the SFO's announcement that the construction and energy industries will be specifically targeted in a new investigation under the Bribery Act, it is important that organisations within these sectors have adequate procedures in place to minimise the risk of committing offences.

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.

### Contact us

For more information, please contact the individuals below or a member of our **Construction & Engineering** or **Energy & Utilities** team.



**David Hall**  
Partner  
Tel: +44 (0)117 902 2798  
Mobile: +44 (0)7968 193330  
[david.hall@burges-salmon.com](mailto:david.hall@burges-salmon.com)



**Thomas Webb**  
Senior Associate  
Tel: +44 (0)117 307 6976  
Mobile: +44 (0)7794 030898  
[thomas.webb@burges-salmon.com](mailto:thomas.webb@burges-salmon.com)

Burges Salmon LLP, One Glass Wharf, Bristol BS2 0ZX Tel: +44 (0) 117 939 2000 Fax: +44 (0) 117 902 4400  
6 New Street Square, London EC4A 3BF Tel: +44 (0) 20 7685 1200 Fax: +44 (0) 20 7980 4966

[www.burges-salmon.com](http://www.burges-salmon.com)

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