

Corruption Risk in the Construction Industry

Corruption risk within the construction industry is high. A 2013 survey from the Chartered Institute of Building found that 49% of the construction professionals surveyed believed corruption to be common within the UK construction industry. These findings reinforced Transparency International's (the leading global anti-corruption organisation) 2011 Bribe Payer's Index which ranked the construction sector as having the highest propensity, out of 19 industry sectors, to pay bribes abroad.

When taken together with the complex and fragmented contractual nature of construction projects (reliant as they usually are on third party contractors and consultants), the prospect of regular interaction with government officials and the global reach and active enforcement of anti-corruption legislation, the construction industry can present a daunting corruption risk profile.

Examined here are the reasons why both companies and individuals should be alive to corruption risks as well as what those risks look like in practice and the pro-active steps available to identify, mitigate and manage those risks.

Criminal exposure

A failure to properly identify and mitigate corruption risk brings with it the potential for criminal investigation and prosecution of both a construction company and its individual managers and directors.

Paying and receiving bribes (in both the private and public sector) and bribing foreign

public officials are illegal under the Bribery Act 2010 (the "Bribery Act"). Significantly, section 7 of the Bribery Act also provides that a company can be held liable for bribery, wherever in the world it takes place, that is committed by associated persons acting on its behalf (e.g. third party contractors), even where the company had no awareness of the bribery.

The only defence is for a company to show that it had adequate procedures in place to prevent bribery being committed by those third parties associated with it.

The consequences of a successful criminal prosecution can be dramatic and may include:

- the imposition of unlimited fines;
- imprisonment;
- director disqualification;
- the confiscation of assets;
- debarment from participating in, or tendering for, government contracts;
- a diversion of management and board time; and
- reputational damage and adverse media attention.

These risks are real. The UK Serious Fraud Office and the US Department of Justice have both successfully prosecuted, and levied huge fines on, household names in the construction sector, including, amongst others: Balfour Beatty plc; AMEC plc; Mabey & Johnson Ltd; Technip and M.W. Kellogg Limited.

Inside the Industry

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Inside the Industry

Compliance pressure points

The first step in addressing corruption risk is for a company to be able to identify what these 'compliance pressure points' look like in practice. Each construction project will have its own set of facts but the following list reflects some of the most common pressure points:

- Facilitation payments. Public officials often request payments to facilitate the smooth transit of construction supplies through ports and airports or for obtaining visas for employees. Whilst such requests are common, facilitation payments are illegal under the Bribery Act.
- Tender risk. During a competitive tendering or bidding process construction companies should be alive to the risks of any excessive corporate gifts and hospitality expenditure being made around the time of the tender award.
- Partner risk. Construction projects are heavily reliant on a web of third parties, including sub-contractors, consultants and venture partners, amongst others. This can cause huge problems given a company can be liable for bribes paid or solicited by a third party under the Bribery Act.
- Construction permits, licences and planning permissions. Most construction projects rely on being granted a government permission or licence of some kind. Seeking such approvals will inevitably increase the opportunity for corrupt payments to be made or demanded.

Compliance response

A well-designed compliance programme needs to be bespoke, risk based and proportionate. Whilst there is no one-size-fits-all approach, there are certain hallmarks of any effective anti-bribery and corruption compli-

ance response, including:

- A public and unequivocal tone from the top, making it clear that corruption, in any form, will not be tolerated. This should be evidenced by anti-corruption being a standing item on the Board's agenda.
- Carrying out a regular, by-country risk assessment, to effectively identify and prioritise corruption risk.
- In response to the risks identified as part of the risk assessment, crafting and implementing a written set of policies and procedures that cover off, amongst other items; facilitation payments, gifts and hospitality expenditure, procurement, political and charitable contributions and sponsorships. It is crucial that such policies and related internal controls are subjected to routine external verification to regularly test that they are not being bypassed in practice. Regular training should be provided and include a process of annual certification for those staff members who are 'on the ground'.
- Proportionate, risk based due diligence should be undertaken prior to entering into any contractual arrangements with third parties. This should include local site visits and in-person interviews where appropriate.
- All third party contracts should be drafted to include terms that provide for audit rights over a third party's books and records, a unilateral right of cancellation in the event of a corruption related breach and a fixed annual term.
- Establishing an effective and well-resourced whistleblowing programme. To ensure that this works

well in practice it should be available in the relevant local language and ideally be available for use by third parties.

- Actively participating in sectoral anti-corruption initiatives with stakeholders such as governments, suppliers, contractors and joint venture partners.

Conclusion

Whilst corruption risks in the construction sector are real and can have potentially debilitating consequences, it is hoped that this article makes it clear that they are also more than capable of being identified and mitigated against in a proportionate manner.