



**GUIDANCE ON
THE BRIBERY ACT 2010
FOR THE INFRASTRUCTURE SECTOR**

Abridged version





The Bribery Act 2010

The infrastructure sector internationally is one of the most vulnerable to corrupt practices, for several reasons:

- The number of different parties and large sums of money often involved, and the variety of countries and cultures involved.
- The client may not be well known to you, or even clearly visible.
- In some regions it is normal to employ agents, and it will be difficult to ensure that their activities remain within the law.
- There is often a complex supply chain, and possibly, joint venture partners.

These factors all create higher risks. If individuals working for you bribe someone, they face prosecution under the Bribery Act 2010; but they may also expose your company to corporate prosecution under the Act.

Even if the bribe is paid by another company to which you are contractually linked, your company may still face prosecution. The guidance contained in this paper is mainly concerned with how you can reduce the risk of corporate prosecution under the new Act.

The UK Anti-Corruption Forum believes that the best approach for companies to take is through risk assessment: you assess what risks exist in a given situation, and what is needed to mitigate each of them through due diligence, training and good management. A risk-based approach requires the development of clear procedures and lines of responsibility within the company, as well as a culture of awareness. This guidance suggests what procedures may be developed and followed in different situations that may be encountered in large infrastructure projects. It is not intended to be prescriptive, and what is appropriate will depend on the particular circumstances. While there is no certainty that the procedures recommended will always be effective, we believe that they will afford the best protection against corporate prosecution under the Act.

The Scope and Purpose of the Act

The purpose of the Act is to reform the criminal law to provide for a new scheme of offences to cover bribery, both in the UK and abroad.

The Act replaces the common law offence of bribery, and several statutes, with two general offences:

- Offering, promising or giving an improper advantage (broadly, bribing another person).
- Requesting, agreeing to receive or accepting an improper advantage (broadly, seeking or receiving a bribe).

The formulation of these two offences abandons the agent/principal relationship on which the previous law was based, in favour of a model based on an intention to induce improper conduct. The Act also creates two further specific offences:

- An offence of bribery of a foreign public official in order to obtain or retain business.
- A new offence applicable to a commercial organisation that fails to prevent a bribe being paid by a person associated with it with the intention of obtaining or retaining business or an advantage in the conduct of business for the organisation. **It will be a defence if an organisation has 'adequate procedures' in place to prevent bribery. Much of what follows is concerned with what a prosecutor or court might view as 'adequate procedures'.**

The Act provides for a maximum penalty of ten years imprisonment, but an offence committed by a company will carry an unlimited fine and the prospect of debarment from public sector tendering throughout the European Union. The Act introduces extra-territorial jurisdiction to prosecute bribery committed abroad by persons

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Foreword

The UK Anti-Corruption Forum was founded in 2004. It is an alliance of UK business associations, professional institutions, civil society organisations and companies, mainly but not entirely those with interests in the domestic and international infrastructure sector. The Forum's objective is to help create a business environment that is free from corruption.

The Forum has been very much involved in the efforts to reform the law on bribery in recent years that have led to the Bribery Act 2010. The Forum believes that while no law is perfect, the Act will do a great deal to bring the UK into line with international best practice, and will further encourage British companies to avoid corrupt business practices.

The full guidance document is intended to advise British companies in the infrastructure sector on what the new Bribery Act is intended to do when it comes into force on 1 July 2011; what procedures they will need to consider putting in place to be compliant with the new law; and to offer a series of case studies that we hope will be helpful in illustrating the scope of the law and the potential liability of companies. The UK Ministry of Justice issued formal guidance on this aspect of the Act on 30 March; but as the formal guidance must apply to companies in all sectors, it is very general. What follows is an abridged version of our sector Guidance document intended to be of direct and practical help to companies involved in the design and construction of infrastructure projects internationally. We believe that it will be of value to companies wishing to do business ethically, and not simply seeking a minimum level of compliance with the law.

I should like to thank the sponsors of our Guidance, who have given enormous assistance in its drafting and have funded its production. They are Arup, Balfour Beatty, Halcrow, Mabey Bridge, Mott MacDonald and WSP.

For a copy of the complete document please go to page 6 for details on how to order.



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Co-ordinator of the Forum

June 2011



ordinarily resident in the UK as well as UK nationals and UK corporate bodies, and it is important to note that bribery by any third party associated with an organisation can lead to a conviction of that organisation, as well as the offender.

Adequate Procedures

As noted above, the guidance in this paper is not intended to be prescriptive. It is intended to highlight the key areas which are likely to be considered important by a court seeking to establish whether ‘adequate procedures’ were in place at the time of an offence.

These will vary with the particular circumstances, including the size and nature of the organisation, its business activities and relationships, and the country in which business is transacted. In particular, a large company will need and will have greater capacity to apply more elaborate procedures than will an SME. What follows should be interpreted in the light of all these considerations.

1 Board Responsibility for the Anti-Corruption Programme

The Board of Directors should take responsibility for establishing a culture within a company in which corruption is outlawed, and for the effective design and implementation of the company’s anti-corruption programme.

The Board should take steps to ensure that there is a thorough understanding of its policy in respect of corruption, and that the programme is understood and accepted. The chief executive, owner or managing partner should make a clear statement about the culture he or she expects, and the consequences for any employee who breaks the rules laid down to support company policy in this area. We see a strong analogy with the development of a health and safety culture in UK business in recent years; the same effort will be needed to create and maintain an anti-corruption culture. Without the right culture, led from the top, procedures will not be effective.

2 The Compliance Function

It is important that someone should take responsibility for oversight of the anti-corruption programme.

Nominating a senior company officer may be an appropriate step, and providing him or her with proper authority to implement and monitor all programme activities. Regular briefings could be provided to the Board on implementation, as well as developments in the law and practice.

3 An Ethical Code of Business Conduct

Commercial organisations should have a code of conduct which includes a clear and unambiguous anti-corruption element.

They should give this code wide publicity internally and ideally externally through the company’s publications and website.

4 Risk Management and Due Diligence

A clear understanding of the corruption risks a company is running or is likely to run is key to implementing a successful policy to combat corruption.

Procedures should be established to assess the likely risks of corruption arising in an organisation’s business. This assessment will vary according to the geographical location in which work is to be carried out, and the business relationships that are needed. Before entering into any new business relationship, project or country, the organisation should carry out a risk assessment. This assessment will guide the due diligence that is then needed.

5 Decision-Making Processes

An organisation should consider formalising its decision-making processes, so that where an enhanced risk of corruption is perceived to exist, the decision to proceed is taken by a suitably trained or experienced senior individual or committee within the organisation.

6 Financial Controls

An organisation should consider carefully the financial controls it may need to minimise the risk of becoming involved in a corrupt act.

Either in relation to another individual or organisation (eg employees, clients, business partners, sub-contractors or suppliers), or in relation to the company by another individual or organisation. These controls can be verified and assisted by the organisation’s internal audit arrangements, where these exist.

7 Supply Chain Management

An organisation should use procurement and contract management procedures which minimise the opportunity for corruption by sub-contractors and suppliers against the company, clients, or other members of the supply chain.

An organisation should consider what steps might be appropriate to ensure that its partners, suppliers, contractors, agents and other third parties with which it does business, will not make corrupt payments. A certain level of verification of this requirement will usually be advisable. Wherever possible, partners and others should be asked to enforce the same requirement on their supply chains, and confirm in writing that this has been done.

8 Employment Procedures

While it may not be appropriate for all organisations, wherever possible:

- **Employees should be vetted before they are employed to ascertain as far as is reasonable that they are likely to comply with the company’s ethical policies.**
- **Employment contracts should include express contractual obligations and penalties in relation to corruption.**
- **Disciplinary procedures should be in place that entitle the company to take appropriate disciplinary action against an employee who commits a corrupt act.**

9 Gifts and Hospitality Policy

A commercial organisation should develop and implement an appropriate gifts and hospitality policy.

The policy will give guidance to employees regarding the giving and receiving of gifts, hospitality and entertainment related to the organisation’s business, and put in place measures to monitor this activity. The Bribery Act does not outlaw gifts and hospitality; but care is needed to ensure that wrongful motives for their use cannot reasonably be imputed or perceived, externally or internally. Different policies are likely to be appropriate in different types of business, depending on the risks involved.

10 Training

It is important for commercial organisations to ensure that their codes of conduct and other policies are properly embedded throughout the business.

Anti-corruption training should therefore be provided, with reminders on a regular basis to all relevant employees, to make them aware of the types of corruption they may encounter, the risks of engaging in corrupt activity, the organisation’s anti-corruption code, and how they may report corruption. The most effective training will usually be in person, but a range of online and other tools are also available.

11 Reporting and Investigation Procedures

An organisation should put in place appropriate channels and procedures (‘whistle blowing’ procedures) that enable employees to report corruption in a safe and confidential manner to a responsible senior officer of the organisation.

There are different ways of providing this facility: by telephone, web-based facility, or in person. Measures may need to be put in place to ensure the safety and security of any employee using these procedures. Similarly, organisations should ensure that all allegations of corruption are properly investigated by properly qualified individuals. Where appropriate, the results of the investigation should be reported back to the individual who made the original report.

12 Verification

Anti-corruption procedures will require regular review, and consideration should be given as to how best to audit the effectiveness of the programmes.

This is to ensure that they remain effective and up to date; but it is also important because if something goes wrong, the company must be able to demonstrate to the appropriate authorities, and potentially to a Court, that adequate procedures were in place. If an offence is committed, it implies that the procedures were in some way less than adequate, and a robust audit trail will be needed to refute this.



Specific Situations and Case Studies

There are many situations in which corruption may occur in the context of an infrastructure project.

The UK Anti-Corruption Forum has produced a full set of Guidance notes to advise British companies in the infrastructure sector and has worked carefully to produce information that provides real practical help. This synopsis highlights the key areas and specific scenario and case study information for companies involved in Joint Ventures.

The case studies included in the full version have been assembled by industry practitioners, often based on real situations.

They are illustrative and not all-inclusive.

They are grouped under the following headings:

■ Joint Ventures

■ Agents and Distributors

■ The Supply Chain

■ Clients

■ Facilitation Payments

■ Gifts, Hospitality and Sponsorship

In each case the context is explained, case studies are given and summary guidance is offered. In many cases, guidance provided in relation to one scenario will also apply to many of the other scenarios.

The full version of the Guidance including scenario and case study examples is available for £20 per copy plus VAT, postage and packing.

To order please contact the [UK Anti-Corruption Forum c/o British Expertise](http://www.britishexpertise.org) email: ts@britishexpertise.org

Please allow 14 days for delivery.

Disclaimer

Please note that the Forum and its members, including the contributors to this document, do not intend to represent, warrant or in any way imply that compliance with the procedures described herein will prevent any person from committing any offence or act as a defence in any prosecution.

The scenarios are illustrative and non-exhaustive, and every case is different. We believe that the procedures outlined above are consistent with best practice, but UK and international best practice is constantly evolving. The Forum and its members hereby disclaim any and all liability or responsibility for any loss, damage or injury that any person may suffer or incur as a result of anything in this document, or any use of or reliance upon it, including any inaccuracy or omission.



Joint Ventures

A joint venture (JV) is an alliance in which two or more persons or organisations contribute services and/or capital to a common commercial enterprise.

There are inherent risks in forming JVs, particularly in unfamiliar or high-risk territories.

One JV partner can incur legal liability or reputational damage as a result of the corrupt actions of the other, and lack of knowledge of what the partner may do is no defence. The JV partner stands to share in the profits from work won by the JV through the other's corruption. The Guidance issued by the Ministry of Justice in March 2011 suggests that a partner in a JV may not be liable for the corrupt acts on the other partner, simply by virtue of sharing in the benefits conferred on the JV as a result of those corrupt acts. However in our view, prudence still demands that you should go to reasonable lengths to identify and mitigate such risks.

A Typical Situation

Your company is interested in undertaking a construction project in country X. You perceive that corruption risks in country X may be high. Given that you are not familiar with the market, your company has decided it needs a local partner in country X. The project team has visited X and identified a few potential local JV partners. The process is not altogether straightforward though, as there are some language difficulties and a lack of clarity in relation to the regulations dealing with employment, tax, company registration, permits and visas, and exporting foreign exchange revenues out of the country.

The project team is receiving different messages from the short-listed possible business partners as to how easily those regulations may be complied with.

This guidance considers several scenarios in which an organisation wishes to form a JV relationship with another. We set out what procedures should be considered before going ahead with the JV.

Your company needs to be satisfied that it understands, and can manage, the corruption

risks associated with a JV in this country, with this partner, on this project and similar projects that may subsequently arise. This requires making sure that the selected partner can and will operate to acceptable standards.

The following should be considered regardless of how the two companies agree to structure the JV. However, for each of the scenarios described below, the nature and extent to which these core principles apply may differ. In every case, you should take an informed, risk-based approach and consider the opportunity and incentive for corruption to occur and the likelihood of it occurring, with or without appropriate controls.

Risk-based Due Diligence

Depending on the circumstances, due diligence in the following areas may be appropriate.

Most of these principles should in fact be considered for any project in a high corruption risk country, even when no JV is contemplated:

- a **Due diligence on country X**
 - The Transparency International Corruption Perceptions Index is a good starting point, but more detail and context are probably required:
 - Are corruption and other associated risks (eg political risks) high in this country?
 - How do those risks manifest themselves?
 - Is corruption rife from top to bottom?
 - Is the public sector more corrupt, and does the level of risk depend on whether the client/project owner is the federal, state or municipal government, a quasi-government organisation or private?
 - Are certain sectors more corrupt, and are certain activities (such as importing goods) more exposed to corruption risks?
 - Are facilitation payments common?
 - Do the courts uphold the law?



b Due diligence on the law

Your company should ensure it understands the anti-corruption laws in country X as well as those of your home jurisdiction. This may provide comfort as to how clear, strict and strongly enforced relevant laws are. In practice, however, you should assume that local law prohibits bribery, and aim to set a standard that meets or exceeds internationally recognised anti-corruption standards, including the UK Bribery Act, the US Foreign Corrupt Practices Act and OECD principles. Your company's policies and contractual controls should prohibit bribery and corruption in all forms, rather than seeking to focus, for example, only on bribery of public officials.

c Due diligence on the project owner/client (see also separate section on Clients)

- Who is the client, and who owns it?
- Is it governmental, quasi-governmental, local private or private multinational?
- Is the client linked to any governmental or quasi-governmental organisation?
- Is there any information to suggest that the client or any public officials or other individuals known to be connected with it have been involved in corruption?

d Due diligence on the project

- Has there been any publicity or rumour about corruption in connection with this project?
- How is the project funded? Does it have the backing and related scrutiny of the World Bank or other International Funding Institutions?
- Have you done this type of work before? In this market? For this client?
- Is the work inherently high-risk, such as construction or construction management?

e Due diligence on your JV partner(s)

- Have you contracted with this company before?
- Is it a 'blue chip' company or otherwise subject to significant regulatory scrutiny?
- Who owns it?

- Is it connected with public officials or other individuals associated with the project owner?
- Is it in any way connected to the client or project owner?
- Is there any information to suggest that the partner or any public officials or other individuals connected with it have been involved in corruption?
- Does it appear to operate to high ethical standards, and does it have an anti-corruption compliance programme, as described below?

f Due diligence on other third parties

If it becomes necessary to form a JV company with separate staff and the JV company needs to engage agents, consultants or sub-contractors, similar due diligence should be conducted on these third parties.

g Due diligence on key employees

At some point, it may be advisable to conduct due diligence on key employees, for example senior managers appointed to the JV by the partner company.

It may be that much or all of the due diligence can be conducted by your company using the internet, corporate and court filings and other publicly available information. Due diligence by specialist external firms may be expensive, but if it is focussed on key questions, it may be more efficient and reliable, and it should be considered when the risks are high. Such firms can use proprietary or subscription databases and search engines to which your organisation may not have access; they know what to look for and where to look for it; they generally have local sources; and they are experienced in sifting through the plethora of information that, for example, an internet search may throw up.

An Anti-Corruption Compliance Programme

Depending on the risks, the circumstances and structure of the JV, you should consider requiring that it adopts an anti-corruption compliance programme that contains the elements described in paragraphs 1 to 12 on pages 6 and 7.

Satisfy yourself that, as a minimum, your partner company has also adopted an appropriate anti-corruption compliance programme.

Management Control

In principle, the more management control or oversight you can exert over the joint venture, the better.

For example your senior management appointees may have oversight and control of the appointment and payment of key third parties. However, such control can create a false sense of security, as it does not necessarily mean that you can detect, let alone control, what the next levels of management within the JV, or anyone within your JV partner's organisation, may be doing.

Contractual Undertakings from your JV Partner

The stronger and more credible your partner's anti-corruption compliance programme, the more confident you can be that they will not engage in corrupt activities outside your control to benefit the joint venture.

Equally the more likely it is that they will agree to strong procedures and controls within the joint venture itself, and that their staff will comply with these and enforce them.

The elements of a compliance programme that you should look for in your partner are the same as described above. The absence of some or all of those elements is a red flag, but it may not be fatal to the partnership or indeed altogether surprising. Depending on the results of your due diligence on the partner, and if the joint venture adopts the controls described above, you may conclude that you can manage the risks of your partner engaging in corrupt activity to benefit the joint venture company through contractual provisions. For all joint ventures, you should require that both parties give reciprocal representations, warranties and undertakings about compliance with laws and, specifically about not making or accepting any corrupt or improper payments, gifts or hospitality. There should also be an express right of termination for breach of any such provisions.

Case Studies

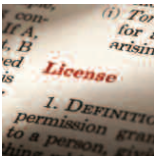
■ Scenario 1

How does the situation change if A decides to form a joint venture company with company B, but with A taking only a minority interest?

- It is implicit in this scenario that A will not retain management control of the JV company and will not be able to insist that the JV company adopt the policies, procedures and controls described in A Typical Situation, on page 11.

This is not necessarily the case: it depends on the parties' respective bargaining positions. If A's policies are not to be adopted, A needs to satisfy itself that similar policies are in place to govern the joint venture, and in any case, if A cannot be satisfied that the corruption risks are being adequately managed without those joint venture company controls, it may have to refuse to go ahead with a minority stake. As a minimum, A should ensure that there is total transparency of the projects accounts, including the activities of sub-contractors, the way they are selected and their costs.

All of the considerations and procedures discussed above remain just as important, or arguably more so, if A has less control over the joint venture company. However, the manner in which they are implemented and how compliance is ensured may differ. In addition to the due diligence described above, A will ideally want to ensure that all the compliance programme elements discussed above are in place. If this is not possible, then A must decide whether it is safe to proceed on the basis only of the knowledge gained from its due diligence into B, B's own compliance programme, and the contractual protections described above. A's minority interest may make it less logical (or acceptable) for the joint venture company to adopt A's Code of Conduct and the rest of A's compliance programme; but it is doubtful whether A could then safely proceed without the joint venture company adopting B's or its own equivalent compliance programme.



■ Scenario 2

As negotiations progress, it has been decided that no separate company will be formed and that A and B will form a contractual JV, not a JV company. What anti-corruption policies and procedures should A put in place?

- The same points made in relation to Scenario 1 apply here. This scenario does not alter the need to conduct due diligence and to seek assurances about B's anti-corruption compliance programme.

If B does not have an acceptable code of conduct equivalent to A's, then B should ideally undertake to comply with A's, as well as giving the anti-corruption representations, warranties and undertakings referred to above. However, it may be unrealistic to seek B's agreement to train all staff on A's code and to adopt and embed the other elements of a compliance programme. It may be possible to ensure that B's staff working on the JV are trained on A's code and have access to the external helpline, but it may not be practical to seek to implement most of the management, financial and commercial controls referred to in Scenario 1.

It therefore follows that, in this scenario, A is more exposed to the risk of potential corrupt conduct by B and its staff. A is placing heavy and possibly undue reliance on contractual protections, and may conclude that it is not safe to proceed unless B's own anti-corruption compliance programme is already strong and credible.

■ Scenario 3

A has shortlisted company B, a medium-sized firm in country X with a lot of experience and contacts in this particular type of project. The project team has decided that it would like to form a joint venture company with B and take a 51% controlling interest.

- When sufficient due diligence has been undertaken as described above and it has been decided that there are no obvious questions or risks that cannot be satisfactorily answered or managed, other elements of an effective anti-corruption programme should be addressed. In this case, A will be in partnership with B, the project works could go on for a considerable amount of time, and there is the possibility of the joint venture company winning more high-value contracts. Given A's lack of knowledge of the local market and its corruption risks, this means A would rely heavily on B, and B's contacts and local knowledge, to win bids and execute any project works successfully. Therefore there is the possibility that B's owners and employees, and employees of the joint venture company, would be engaging regularly with local agents, public officials and individuals representing private clients. Presumably, A's 51% interest will enable it to gain significant management control of the joint venture company. In this case, as A has a controlling stake in the joint venture, A also ought to be able to require that the joint venture company adopt the anti-corruption compliance programme described above. As a minimum, A should ensure that it has full transparency of B's financial dealings with the clients.

Summary Guidance

There is a risk that you could be held liable for the actions of a JV in which you are a partner, or if the JV partner engages in corrupt activity for the benefit of the JV.

- Controls adopted by the JV, and senior management oversight of the JV, are important but will not mitigate the risk of the JV partner engaging in corruption for the benefit of, or in connection with, the JV.
- Turning a blind eye to what a JV partner, or its staff working for a JV, may do is not a defensible option.
- Appropriate due diligence must be conducted, but a clean due diligence report does not mean that there

are no risks, or that no additional controls are warranted.

- In addition to contractual undertakings regarding corruption, you should look for evidence of clear ethical standards and a credible compliance programme within the partner company. Without this it may be possible to manage the risks, but the risk of failure is much greater.
- Ultimately, the test should be this: is it reasonable to conclude, and do you genuinely believe, that the partner organisation and all staff working in the JV will comply with the relevant anti-corruption policies, procedures and contractual provisions?