

## Who's bribing whom? Do you know, and should you care, what your suppliers are up to?

*What have tickets to the men's Olympic 100m final got to do with outsourcing?* While this may sound like the opening line to a bad joke, it is actually a reference to the new bribery laws which came into force this summer. The Bribery Act 2010 ('the Act') creates a number of offences, one of which specifically affects organisations which have outsourcing and other service arrangements in place.

The Act creates two general offences (of bribing and being bribed). It also creates a new offence of bribing a foreign public official and, interestingly for those engaging outsource providers, a new corporate offence of failing to prevent bribery. This last offence means that:

- a 'relevant commercial organisation' (which includes UK companies/partnerships, or foreign companies/partnerships which carry on any part of their business in the UK) is guilty of an offence if a person associated with it bribes another person *anywhere in the world* intending either to obtain or retain business or a business advantage for that organisation. The definition of an associated person covers those who perform services for or on behalf of the organisation and so would cover outsourcing and similar service providers as well as employees and agents. It does not cover those just selling goods;
- the organisation (i.e. the customer in an outsource arrangement) will be guilty whether or not they knew the practice was happening. However, it is a defence for the customer to show that, despite that particular case of bribery, it had 'adequate procedures' in place to prevent its service providers and other persons associated with it from bribery on its behalf; and
- if an organisation is found guilty of the offence it may face unlimited fines or be barred from public contracts (under public procurement rules).

It is therefore important that customers have adequate procedures in place. But what does this mean in practice?

### ADEQUATE PROCEDURES: GUIDANCE

The Government has issued 'Guidance about procedures which relevant commercial organisations can put in place to prevent persons associated with them from bribing' ('the Guidance'). While this gives some practical pointers on things organisations should consider, it is not prescriptive and recognises that what is 'adequate' will depend on the particular circumstances of any arrangement and the risk factors involved – the industry sector and location of service providers for example. It also captures, in its forward, the Government's view that 'combating the risks of bribery is largely about common sense not burdensome procedures.'

The Guidance sets out six principles that organisations should use to help determine what procedures will be necessary for their particular business:

- Principle 1: Proportionate procedures
- Principle 2: Top-level commitment
- Principle 3: Risk assessment
- Principle 4: Due diligence
- Principle 5: Communication (including training)
- Principle 6: Monitoring and review

### ADEQUATE PROCEDURES: IN PRACTICE

So, what does this mean in practice? Customers in any outsource or commercial supply arrangement must consider the Act at all stages of the relationship. For example they should:

- develop general anti-bribery procedures, informed by the six principles set out in the Guidance – while this is a general corporate governance issue which is wider than just outsourcing / procurement, it is important the procedures cover contracting with service suppliers;
- periodically assess and document the risk in each outsourcing to see, for example:
  - who will be classified as an 'associated person'? The Guidance discusses some issues raised by complex supply chains. It recognises that customers tend to only have control over the main contractor with whom they have a contract (their 'contractual counterparty'), and may not know the identity of others in the supply chain. The Guidance states that in such circumstances 'it is likely that persons who contract with that counterparty will be performing services for the counterparty and not for other persons in the contractual chain.' It goes on to suggest that supply chain risks may be addressed by employing the types of risk-based anti-bribery procedures referred to elsewhere in the Guidance (such as risk-based due diligence), including anti-bribery terms and conditions in its contract with the prime contractor, and requesting that the prime contractor take a similar approach with its sub-contractors.
  - what external risk factors exist. The Guidance categorises five broad groups of external risk – country, sectoral, transaction, business opportunity and business partnership, as well as some common internal factors, such as a bonus culture which rewards excessive risk taking. So, for example, is a supplier based in a high risk country or is the transaction itself high risk (does it involve public procurement contracts, is there a risk that facilitation payments may be requested or made, does it involve intermediaries or does it require lots of permits for example)?
- carry out appropriate proportionate and risk-based due diligence on the supplier. This may be added to general due diligence being undertaken, or it may involve a specific anti-bribery questionnaire. Interestingly the Guidance recognises that the appropriate level of anti-bribery due diligence required for an IT services contract is likely to be low, to reflect the low risks involved, however increased due diligence may be required if the IT services contract is primarily to be performed out of a high risk territory.

- communicate their anti-bribery policies to relevant suppliers, for example through a code of conduct. The Guidance discusses the importance of internal and external communications, training, 'speak up' procedures, and sending the correct management led anti-bribery message. For new suppliers, information could be included in tender documentation.
- include appropriate anti-bribery contractual provisions in their arrangements. The Guidance and attached case studies mention some contractual provisions which may be appropriate in different circumstances – these could include express obligations not to commit bribery and audit, notification and termination rights.

## COMMENT

The public sector, and those that contract with it, are used to seeing anti-corruption clauses in their commercial agreements. However, this is a new area for many private organisations. While much of the media focus on the Act has concentrated on what hospitality is acceptable (we're back to those Olympics tickets), the new 'corporate offence' is equally important for organisations engaging service providers. Supply chains are complex and business is increasingly global and increasingly regulated. It is therefore important that customers keep on top of their bribery risk profile and the affect their suppliers have on it.

*This article was written by Rob Sumroy, partner and head of Slaughter and May's Strategic Sourcing practice, and Natalie Donovan, a professional support lawyer in his team. If you would like any more information on any of the issues raised in this article, or would like to discuss outsourcing matters generally, please contact Rob or your usual Slaughter and May contact.*

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