



Welcome to the first edition of **Insight**, Fenwick Elliott's latest newsletter which provides practical information on topical issues affecting the building, engineering and energy sectors.

In this inaugural issue find out what you need to know about the long awaited Bribery Act

Insight

The Bribery Act 2011

The act

The long awaited Bribery Act (the Act) is now slightly over a week old. But what is it all about?

As of 1 July 2011, the Act created four new criminal offences: paying a bribe; receiving a bribe; bribery of a foreign official; and the corporate offence of failing to prevent bribery.

This Briefing Note concentrates on the latter offence which will be of most interest to the construction industry and represents the most significant departure from the previous law on bribery.

Should you wish to receive further information in relation to this Briefing Note or the source material referred to, then please contact Lisa Kingston. lkingston@fenwickelliott.com. Tel +44 (0) 207 421 1986

Fenwick Elliott LLP
Aldwych House
71-91 Aldwych
London WC2B 4HN
www.fenwickelliott.com

What needs to be done?

The key point about the Act is that provided your organisation is properly prepared, you can advance a defence to any prosecution under the Act on the basis that you had "adequate procedures" in place. In other words, it may be very difficult for an organisation to raise a defence to any prosecution which might be brought under the Act unless it can demonstrate that not only proper procedures are in place but that compliance with them is properly monitored.

But what do those procedures look like and how do you go about putting them in place? Fortunately, the Ministry of Justice has published some guidance (<http://www.justice.gov.uk/guidance/docs/bribery-act-2010-guidance.pdf>) which identifies 6 key principles organisations need to consider:

Risk assessment

Firstly, a detailed risk assessment should be conducted to identify where the exposure to bribery may lie. Remember, the Act is wide enough to catch the actions of staff and agents abroad. An 'out of sight, out of mind' approach will fall foul of the Act.

Proportionate procedures

The results of the risk assessment will then inform the procedures that may need to be put in place proportionate to the risks you face. So if your organisation operates abroad on large Government sponsored infrastructure projects (traditionally regarded as a high risk area) you may well need far more comprehensive procedures in place to prevent bribery than if most of your work is domestic. However, there is no shortage of instances of corruption in the domestic construction market and organisations who ignore the requirements of the Act simply because they do not operate abroad will be doing so at their peril.

These procedures may include:

- * implementing a formal whistle blowing policy under which staff are encouraged to report potential offences under the Act;
- * producing a code of conduct setting out what is and is not acceptable behaviour;
- * offering training for staff; and
- * implementing a corporate hospitality policy which gives clear guidance for staff (both in terms of giving and receiving hospitality)

Communication

Make sure the policies and procedures are communicated to staff.

Due diligence

Know who you are dealing with. The Guidance suggests carrying out background checks on staff before allowing them to represent the organisation in circumstances where bribery is a potential risk.

Monitoring and review

It is not enough to implement the procedures and then sit back. If your organisation changes, perhaps in the nature of the projects it carries out or the location of them, it is likely the procedures will need to be updated.

Top level commitment

The Guidance suggests that those in the most senior positions in organisations are best placed to prevent bribery. Consider allocating responsibility for the implementation and monitoring of anti bribery procedures to a director or member of senior management.

Will the act be enforced?

The Director of the Serious Fraud Office (SFO), Richard Alderman, who is primarily responsible for enforcing the Act has said:

"The Bribery Act is good news for the UK and UK businesses. It confirms our commitment to helping eradicate bribery from business practices. It will help ensure that ethical businesses do not lose out to others that use bribery and corruption to win contracts. We shall enforce the act vigorously, but we are still very keen to listen to specific issues that companies have. I want to work with ethical businesses to resolve problems pragmatically and fairly."

But in the current climate of public sector cuts, it remains to be seen how many organisations will be investigated and prosecuted. That said, the SFO's most recent press release warns that its current conviction rate is more than 80% which is high by any standard and particularly so in light of the onerous standard of proof (that of beyond reasonable doubt) attached to criminal prosecutions. If convicted, organisations face an unlimited fine and would be unable to tender for public authority work pursuant to Regulation 23(1)(c) of the Public Contracts Regulations 2006.

Despite the financial constraints, enforcement is probably inevitable as the Act is in its youth and the SFO will want to be seen to be taking decisive enforcement action at the very least for deterrent purposes. And no doubt, the SFO's response to the Act will be scrutinised by the international anti-bribery community.

Inevitably, any prosecution(s) would be likely to be high profile and attract similar attention to the corporate manslaughter prosecution to which Cotswold Geotechnical Holdings was subject in February of this year.

Conclusion

In undertaking enforcement, the SFO would be most likely to target organisations who are not able to demonstrate (publically or otherwise) that they have "adequate procedures" in place and any enforcement action taken would probably be successful. It is therefore important that organisations take steps to put these procedures in place as soon as possible.