

# ICC BUSINESS INTEGRITY COMPENDIUM



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Prepared by the ICC Commission on Corporate  
Responsibility and Anti-corruption

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## Preface

The International Chamber of Commerce is proud to present its *Business Integrity Compendium*, which brings together for the first time all of its guidance and rules for anti-corruption and corporate responsibility in one publication.

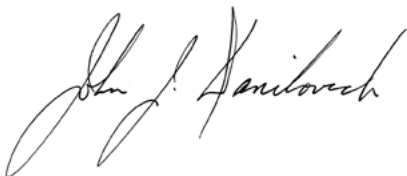
The aim of this *ICC Business Integrity Compendium* is to provide, in a practical, easy-to-use format, all of the ICC tools that are indispensable for companies big and small, around the world, that are committed to doing business in an ethical and responsible way.

ICC has long upheld the critical role of enterprises' compliance with self-imposed rules, while recognizing the basic responsibility of international organisations and national governments in the fight against corruption and in the promotion of responsible business conduct.

ICC was the first business organisation to issue anti-corruption rules with the publication as early as 1977, with its ICC Rules to Combat Extortion and Bribery. We have since developed a robust suite of practical rules and guidelines for responsible business conduct, developed for business by business.

We would like to thank the members of the ICC Commission on Corporate Responsibility and Anti-corruption who contributed to the development of these ICC rules and guidelines, and in particular the Commission Vice-Chair, François Vincke.

We hope that the *ICC Business Integrity Compendium* will be an indispensable reference tool for managers, compliance officers, lawyers and all working in the area of anti-corruption and responsible business conduct, and we welcome feedback from users and readers so that we can continue to improve this publication.



John Danilovich  
Secretary General  
International Chamber of Commerce



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# Introduction

## 1. A PIONEERING ROLE

ICC, the world business organization, has spearheaded the drive for greater integrity in business transactions as ICC believes that only a corruption-free system will enable all participants to compete on a level-playing field. ICC has also been a pioneer in asserting the business community's commitment to act responsibly by taking into account human rights, social requirements, and environmental considerations when conducting business.

ICC emphasizes the critical role of corporate compliance and responsibility through self-imposed rules while recognizing the basic role of international organisations and national governments in the fight against corrupt practices and in favour of corporate responsibility.

Enterprises' compliance with strict self-regulatory rules and precise recommendations will help them fulfill their legal obligations in a more natural, effective, and sustainable manner. Businesses' adoption and implementation of their own corporate compliance programmes is therefore strongly recommended.

## 2. THE KEY INTERNATIONAL ANTI-CORRUPTION CONVENTIONS

ICC was the first business organisation to issue anti-corruption rules by publishing in 1977 the Rules of Conduct to Combat Extortion and Bribery (the "ICC Rules"). The ICC Rules have been updated in 1996, 1999, 2005, and 2011 to reflect the adoption of key laws and international legal instruments, such as the Convention on Combating Bribery of Foreign Public Officials of the Organization for Economic Cooperation and Development and the United Nations Convention Against Corruption. These conventions are recognized as major milestones in the fight against Corruption and their adoption, implementation, and enforcement have garnered the strong support of the business community at large.

## 3. CODIFYING GOOD COMMERCIAL PRACTICE

ICC's aim in issuing the Rules on Combating Corruption was also to provide business with precise and practical guidelines on how to put into place, on a voluntary basis, effective processes and mechanisms for concrete action against corruption and extortion. The ICC guidelines which were subsequently



issued are of a general nature constituting what is considered good commercial practice but are without prescriptive legal effect.

#### 4. THE ICC TRAINING PROGRAMMES

To further promote business integrity, ICC published four editions of its *Ethics and Compliance Training Handbook* (the “Handbook”), a publication designed by business for business, which sets forth specific guidance on ethics and compliance. Also, in keeping with the Handbook, ICC released in March 2017 its ICC Ethics and Compliance Training for Anti-corruption to its national committees, for their deployment of face-to-face trainings in different national contexts.

#### 5. THE NEED FOR A COMPENDIUM

As a response to many Enterprises’ genuine interest in a comprehensive publication featuring ICC’s tools and recommendations in the area of anti-corruption, the ICC Commission on Corporate Responsibility and Anti-corruption developed the *ICC Business Integrity Compendium* (the “Compendium”) to enhance ethical corporate conduct and responsibility.

The Compendium compiles the self-regulatory tools which have been developed over the last decades by international business experts and practitioners from all sectors of industry, commerce and finance. These tools reflect best international practices and provide guidance to companies of all sizes ranging from multinationals, to small and medium-sized Enterprises (SMEs). The recommendations set out in the *ICC Business Integrity Compendium* are not prescriptive and do not replace state laws and regulations but rather aim to provide concrete guidance on how to implement legal and ethical requirements in the present day business world.

The original texts, as adopted by the ICC governing bodies, were adjusted when needed with a view to harmonize the key terminology referenced in the Glossary included at the beginning of the Compendium.

The various documents appearing in the *ICC Business Integrity Compendium* have been distributed, read, and commented everywhere around the world. All were originally written in English and, to further enhance the outreach of the recommendations contained in the ICC business integrity documents, many of them have been translated in different languages and are available on the ICC website.

## 6. ETHICS AND COMPLIANCE: A WORK IN PROGRESS

Fighting corruption and building an even stronger sense for corporate responsibility and good corporate governance is an ongoing process and requires sustained efforts from all parties—whether they are public officials or business people, and at all levels of the corporate world. ICC is committed to contribute to this daunting task namely in part by continuing to raise awareness worldwide on the role of business in this process.

## 7. THE ICC ETHICS AND COMPLIANCE NETWORK

ICC's commitment to promote business integrity worldwide is reinforced by the engagement of its national committees to act locally, hence, creating a global ethics and compliance network to help businesses of all sizes. Vibrant mirror Anti-corruption and Corporate Responsibility Committees within ICC national committees throughout the world, extend the impact and reach of ICC's Business Integrity programme through their achievements and initiatives.

This work was made possible thanks to the enthusiastic cooperation of ICC national committees, member companies, and a number of great corporate experts whose engagement and dedication were instrumental in the publication of these innovative and practical anti-corruption tools. All contributors should find herein a sincere recognition for their valuable efforts in helping businesses behave responsibly and ethically.

The preparation of this *ICC Business Integrity Compendium* has required the steadfast and intense commitment of a small team of dedicated persons. ICC would like to convey its appreciation to François Vincke, Viviane Schiavi, and Caroline Inthavisay.

## Glossary

In order to avoid undue repetition, definitions referenced in the documents are gathered in this Glossary.

**Board of Directors** refers to the body with ultimate responsibility for an Enterprise.

**Bribe** can consist of money or of any other advantage, such as expensive gifts, a discount, a waived fee, an inflated fee for a consultancy contract, an inflated price for an item, a position for the bribed person or a person close to him/her, a medical treatment, or a vacation.

**Bribery** is the offering, promising, giving, authorizing or accepting of any undue pecuniary or other advantage to, by or for a public official at international, national or local level, a political party, party official or candidate to political office, and a director, officer or employee of an Enterprise, or for anyone else in order to obtain or retain a business or other improper advantage, e.g. in connection with public or private procurement contract awards, regulatory permits, taxation, customs, judicial and legislative proceedings.

Bribery often includes (i) kicking back a portion of a contract payment to government or party officials or to employees of the other contracting party, their close relatives, friends or Business Partners or (ii) using intermediaries such as agents, subcontractors, consultants or other Third Parties, to channel payments to government or party officials, or to employees of the other contracting party, their relatives, friends or Business Partners.

Bribery has a narrower meaning than **Corruption**, which is sometimes used to include practically any perversion of integrity.

**Business Partners** is a term used to refer to any party associated with another party in the pursuit of business; the term includes (i) Third Parties and (ii) joint venture and consortium partners as well as (iii) contractors and suppliers.

**Conflicts of Interest** arise when the private interests of an individual or of individuals close to him/her diverge from those of the organisation to which the individual belongs. Conflicts of interest are a particular form of Corruption where an individual grants himself/herself an improper advantage by exercising his/her decision-making power to his/her advantage (or to that of a person close to him/her). Typical conflicts of interest include hiring relatives or favouring relatives as suppliers of goods or services.

**Contractors** and **Suppliers** are parts of an Enterprise's supply chain, linking together a supplier of materials or components, a manufacturer, a distributor or retailer, and ending with the consumer. Outsourcing by an Enterprise of certain functions to e.g. local partners can be used by this Enterprise as a way to avoid direct involvement in areas particularly exposed to Corruption.

**Corruption** or **Corrupt Practice(s)** is sometimes used restrictively as a synonym for Bribery and sometimes extensively to connote any perversion of integrity. Corruption includes Bribery, Extortion or Solicitation, Trading in Influence and Laundering the proceeds of these practices.

**Enterprise** refers to any person or entity, incorporated or not, engaged in business and other economic activities, whether or not organised for profit, including any entity controlled by a State or a territorial subdivision thereof; it includes a parent and its controlled subsidiaries.

**Extortion** or **Solicitation** is the demanding of a bribe, whether or not coupled with a threat if the demand is refused.

**Facilitation Payments** are unofficial, improper, small-value payments made to a low-level official to secure or expedite the performance of a routine or necessary action to which the payer of the facilitation payment is legally entitled. This is a widespread form of Bribery, despite being illegal in almost every country.

**Foreign Public Official** means any Public Official (person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected) exercising a public function for a foreign country, including for a public agency or public enterprise, and any official or agent of a public international organisation.

**Gift** means any payment, gratuity, gratification, present or advantage, pecuniary or not, offered, promised, given or received, without any direct or indirect material or immaterial compensation.

**Hospitality** means all forms of social amenity, entertainment, travel or lodging, or an invitation to a sporting or cultural event

**Joint Venture** or **Consortium Partners** are partners of an Enterprise for a specific project or activity. Joint venture or consortium arrangements can take the form of a partnership or of a joint subsidiary Enterprise. They may, however

be used as a subterfuge for corruption, especially when they involve a local partner in a country with high corruption risk.

**Laundering the proceeds of Bribery, Extortion or Solicitation or Trading in influence** is the concealing or disguising the illicit origin, source, location, disposition, movement or ownership of property, knowing that such property is the proceeds of crime.

**Private sector Corruption, Private Corruption, Private-to-Private Corruption or Commercial Bribery** is any form of Corruption or Bribery where the purpose of the Bribe is to entice a private person, such as a director, officer or employee of a private sector Enterprise to breach his/her duties towards that Enterprise.

**Public Official** is any person holding a legislative, administrative, or judicial office at any level of government, national, or local. International civil servants are also public officials. Employees of public enterprises (enterprises over which a government exercises a dominant influence) are public officials unless the enterprise operates on a commercial basis on its market like a private enterprise. Employees of a private enterprise performing an activity in the private interest such as customs inspections or tasks delegated in connection with public procurement are also considered as public officials in that respect.

**Public sector Corruption or Public Corruption** is any form of Corruption where the purpose of the Bribe is to obtain an undue advantage from an act or omission of a Public Official in relation with his/her public duties.

**Solicitation or Extortion** is the demanding of a bribe, whether or not coupled with a threat if the demand is refused.

**Third Parties** are individuals or entities subject to the control or determining influence of an Enterprise, including but are not limited to agents, business development consultants, sales representatives, customs agents, general consultants, resellers, subcontractors, franchisees, lawyers, accountants or other intermediaries, acting on an Enterprise's behalf often in connection with marketing or sales, the negotiation of contracts, the obtaining of licenses, permits or other authorizations, or any actions that benefit an Enterprise or as subcontractors in the supply chain.

**Trading in influence** is the offering or solicitation of an undue advantage in order to exert an improper, real, or supposed influence with a view to obtaining from a public official an undue advantage for the original instigator of the act or for any other person.

# ICC Rules on Combating Corruption<sup>1</sup>

## Introduction

The ICC Rules are designed as a method of self-regulation by business against the background of applicable national law and international legal instruments. Their voluntary acceptance by Enterprises will promote high standards of integrity in business transactions, whether between Enterprises and public bodies or between Enterprises themselves. These Rules play an important role in assisting Enterprises to comply with their legal obligations and with the numerous anti-corruption initiatives at the international level. They also provide an appropriate basis for resisting attempts at Extortion or Solicitation of bribes.

These Rules are general in nature and constitute what is considered good commercial practice. They reflect, and should be read in accordance with applicable international legal instruments.

All Enterprises should comply with the applicable laws and regulations of the countries in which they are established and where they operate, and should observe both the letter and the spirit of these Rules.

*ICC Model Contracts* contain references to Part I of the present Rules. Enterprises are equally urged to incorporate, in full or by reference, Part I of the present Rules in their commercial contracts, in order to prevent their contractual relationships from being affected by any form of Corruption.

Enterprises are advised to collaborate with each other as well as with relevant international, regional, and sectoral initiatives to promote and develop the practices reflected in these Rules. They are further encouraged to cooperate with national and foreign law enforcement authorities conducting corruption related investigations. Enterprises are also urged to resist Extortion or Solicitation for bribes e.g. by using tools such as RESIST.

Although these Rules do not change according to the size of an Enterprise or the nature of its activities, their implementation will have to be adapted according to a risk assessment and notably to the nature of the business conducted by small and medium-sized Enterprises. The success of these ICC Rules will depend on the “tone at the top”: there should be a clear message from the Chair of the Board of Directors (or other body with ultimate

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<sup>1</sup> 2011 edition (first published in 1977) available at <https://iccwbo.org/publication/icc-rules-on-combating-corruption/>

responsibility for the Enterprise) and/or the Chief Executive Officer of the Enterprise that corruption is prohibited and that an effective corporate compliance programme will be implemented. Buy-in by all employees of the Enterprise is also essential.

These ICC Rules consist of three parts: Part I states the Rules proper, Part II deals with policies which Enterprises should enact to support compliance with the Rules, and Part III lists the suggested elements of an effective corporate compliance programme.

## I Anti-Corruption Rules

### ARTICLE 1

#### *Prohibited Practices*

Enterprises will prohibit Bribery, Extortion or Solicitation, Trading in influence, and Laundering the proceeds of the aforementioned Corruptive Practices at all times and in any form, in relation with a Public Official at international, national or local level, a political party, party official or candidate to political office, and a director, officer or employee of an Enterprise, whether these practices are engaged in directly or indirectly, including through Third Parties.

Enterprises will oppose any attempt of Extortion or Solicitation and are encouraged to report such attempts through available formal or informal reporting mechanisms, unless such reporting is deemed to be counter-productive under the circumstances.

### ARTICLE 2

#### *Third Parties*

With respect to Third Parties, Enterprises should instruct them neither to engage nor to tolerate that they engage in any act of corruption; not use them as a channel for any corrupt practice, hire them only to the extent appropriate for the regular conduct of the Enterprise's business, and not pay them more than an appropriate remuneration for their legitimate services.

## II Corporate Policies to Support Compliance with the Anti-Corruption Rules

### ARTICLE 3

#### *Business Partners*

- A.** Enterprises should, with respect to a Third Party and to the extent that it is within their power:
- a. make clear that they expect all activities carried out on the Enterprise's behalf to be compliant with the Enterprise's policies; and
  - b. enter into a written agreement with the Third Party:
    - › informing it of the Enterprise's anti-corruption policies and committing it not to engage in any Corrupt Practice;
    - › permitting the Enterprise to request an audit of the Third Party's books and accounting records by an independent auditor to verify compliance with these Rules; and
    - › providing that the Third Party's remuneration shall not be paid in cash and shall only be paid in the country of incorporation of the Third Party, (i) the country where its headquarters are located, (ii) its country of residence or (iii) the country where the mission is executed.
- B.** Enterprises should further ensure that their central management has adequate control over the relationship with Third Parties and in particular maintains a record of the names, terms of engagement and payments to Third Parties retained by the Enterprise in connection with transactions with public bodies and State or private Enterprises. This record should be available for inspection by auditors and by appropriate, duly authorized governmental authorities under conditions of confidentiality.
- C.** Enterprises should, with respect to a Joint Venture or Consortium, take measures, within their power, to ensure that a policy consistent with these Rules is accepted by their joint venture or consortium partners as applicable to the Joint Venture or Consortium.



- D.** With respect to Contractors and Suppliers, Enterprises should take measures within their power and, as far as legally possible, to ensure that they comply with these Rules in their dealings on behalf of, or with the Enterprise, and avoid dealing with contractors and suppliers known or reasonably suspected to be paying Bribes.
- E.** Enterprises should include in their contracts with Business Partners a provision, such as the ICC Anti-Corruption Clause, allowing them to suspend or terminate the relationship, if they have a unilateral good faith concern that a Business Partner has acted in violation of applicable anti-corruption law or of Part I of these Rules.
- F.** The Enterprise should conduct appropriate due diligence on the reputation and the capacity of its Business Partners exposed to corruption risks to comply with anti-corruption law in their dealings with or on behalf of the Enterprise.
- G.** The Enterprise should conduct its procurement in accordance with accepted business standards and to the extent possible in a transparent manner.

#### **ARTICLE 4**

##### *Political and Charitable Contributions and Sponsorships*

- A.** Enterprises should only make contributions to political parties, party officials, and candidates in accordance with applicable law and public disclosure requirements. The amount and timing of political contributions should be reviewed to ensure that they are not used as a subterfuge for corruption.
- B.** Enterprises should take measures within their power to ensure that charitable contributions and sponsorships are not used as a subterfuge for corruption. Charitable contributions and sponsorships should be transparent and in accordance with applicable law.
- C.** Enterprises should establish reasonable controls and procedures to ensure that improper political and charitable contributions are not made. Special care should be exercised in reviewing contributions to organisations in which prominent political figures, or their close relatives, friends and Business Partners are involved.

## ARTICLE 5

### *Gifts and Hospitality*

Enterprises should establish procedures covering the offer or receipt of gifts and hospitality in order to ensure that such arrangements (i) comply with national law and applicable international instruments, (ii) are limited to reasonable and *bona fide* expenditures, (iii) do not improperly affect, or might be perceived as improperly affecting, the recipient's independence of judgment towards the giver, (iv) are not contrary to the known provisions of the recipient's code of conduct, and (v) are neither offered or received too frequently nor at an inappropriate time.

## ARTICLE 6

### *Facilitation Payments*

Facilitation Payments<sup>2</sup> are prohibited in most jurisdictions.

Enterprises should, accordingly, not make such Facilitation Payments, but it is recognized that they may be confronted with exigent circumstances, in which the making of a Facilitation Payment can hardly be avoided, such as duress or when the health, security or safety of the Enterprise's employees are at risk.

When a Facilitation Payment is made under such circumstances, it will be accurately accounted for in the Enterprise's books and accounting records.

## ARTICLE 7

### *Conflicts of Interest*

Conflicts of interest<sup>3</sup> should be disclosed and, wherever possible, avoided because they can affect an individual's judgment in the performance of his/her duties and responsibilities. Enterprises should closely monitor and regulate actual or potential conflicts of interests, or the appearance thereof, of their directors, officers, employees and agents and should not take advantage of conflicts of interests of others.

If their contemplated activity or employment relates directly to the functions held or supervised during their tenure, former public officials shall not be hired or engaged in any capacity before a reasonable period has elapsed after

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2 As defined in the Glossary.

3 As defined in the Glossary.

their leaving their office. Where applicable, restrictions imposed by national legislation shall be observed.

## ARTICLE 8

### *Human Resources*

Enterprises should ensure that:

- A. human resources practices, including recruitment, promotion, training, performance evaluation, remuneration, recognition and business ethics in general, reflect these Rules;
- B. no employee will suffer retaliation or discriminatory or disciplinary action for reporting in good faith violations or soundly suspected violations of the Enterprise's anti-corruption policy or for refusing to engage in corruption, even if such refusal may result in the Enterprise losing business; and
- C. key personnel in areas subject to high corruption risk should be trained and evaluated regularly; and the rotation of such personnel should be considered.

## ARTICLE 9

### *Financial Reporting and Accounting*

Enterprises should ensure that:

- A. all financial transactions are adequately identified and properly and fairly recorded in appropriate books and accounting records available for inspection by their Board of Directors, as well as by auditors;
- B. there are no "off the books" or secret accounts and no documents may be issued which do not fairly and accurately record the transactions to which they relate;
- C. there is no recording of non-existent expenditures or of liabilities with incorrect identification of their objects or of unusual transactions which do not have a genuine, legitimate purpose;
- D. cash payments or payments in kind are monitored in order to avoid that they are used as substitutes for bribes; only small cash payments made from petty cash or in countries or locations where there is no working banking system should be permitted;

- E.** no bookkeeping or other relevant documents are intentionally destroyed earlier than required by law;
- F.** independent systems of auditing are in place, whether through internal or external auditors, designed to bring to light any transactions which contravene these Rules or applicable accounting rules and which provide for appropriate corrective action if the case arises; and
- G.** all provisions of national tax laws and regulations are complied with, including those prohibiting the deduction of any form of bribe payment from taxable income.

### III Elements of an Efficient Corporate Compliance Programme

#### ARTICLE 10

##### *Elements of a Corporate Compliance Programme*

Each Enterprise should implement an efficient Corporate Compliance Programme (i) reflecting these Rules, (ii) based on the results of a periodically conducted assessment of the risks faced in the Enterprise's business environment, (iii) adapted to the Enterprise's particular circumstances and (iv) with the aim of preventing and detecting Corruption and of promoting a culture of integrity in the Enterprise.

Each Enterprise should consider including all or part of the following good practices in its programme. In particular, it may choose, among the items listed hereunder, those measures which it considers most adequate to ensure a proper prevention against Corruption in its specific circumstances, no such measure being mandatory in nature:

- A.** expressing a strong, explicit and visible support and commitment to the Corporate Compliance Programme by the Board of Directors and by the Enterprise's senior management ("tone at the top");
- B.** establishing a clearly articulated and visible policy reflecting these Rules and binding for all directors, officers, employees and Third Parties and applying to all controlled subsidiaries, foreign and domestic;
- C.** mandating the Board of Directors, or the relevant committee thereof, to conduct periodical risk assessments and independent reviews of compliance

with these Rules and recommending corrective measures or policies, as necessary. This can be done as part of a broader system of corporate compliance reviews and/or risk assessments;

- D.** making it the responsibility of individuals at all levels of the Enterprise to comply with the Enterprise's policy and to participate in the Corporate Compliance Programme;
- E.** appointing one or more senior officers (full or part time) to oversee and coordinate the Corporate Compliance Programme with an adequate level of resources, authority and independence, reporting periodically to the Board of Directors or to the relevant committee thereof;
- F.** issuing guidelines, as appropriate, to further elicit the behaviour required and to deter the behaviour prohibited by the Enterprise's policies and programme;
- G.** exercising appropriate due diligence, based on a structured risk management approach, in the selection of its directors, officers and employees, as well as of its Business Partners who present a risk of corruption or of circumvention of these Rules;
- H.** designing financial and accounting procedures for the maintenance of fair and accurate books and accounting records, to ensure that they cannot be used for the purpose of engaging in or hiding of Corrupt Practices;
- I.** establishing and maintaining proper systems of control and reporting procedures, including independent auditing;
- J.** ensuring periodic internal and external communication regarding the Enterprise's anti-corruption policy;
- K.** providing to their directors, officers, employees and Business Partners, as appropriate, guidance and documented training in identifying corruption risks in the daily business dealings of the Enterprise as well as leadership training;
- L.** including the review of business ethics competencies in the appraisal and promotion of management and measuring the achievement of targets not only against financial indicators but also against the way the targets have been met and specifically against the compliance with the Enterprise's anti-corruption policy;

- M.** offering channels to raise, in full confidentiality, concerns, seek advice or report in good faith established or soundly suspected violations without fear of retaliation or of discriminatory or disciplinary action. Reporting may either be compulsory or voluntary; it can be done on an anonymous or on a disclosed basis. All *bona fide* reports should be investigated;
- N.** acting on reported or detected violations by taking appropriate corrective action and disciplinary measures and considering making appropriate public disclosure of the enforcement of the Enterprise's anti-corruption policy;
- O.** considering the improvement of its Corporate Compliance Programme by seeking external certification, verification or assurance; and
- P.** supporting collective action, such as proposing or supporting anti-corruption pacts regarding specific projects or anti-corruption long term initiatives with the public sector and/or peers in the respective business segments.



# ICC Guide to Responsible Sourcing<sup>4</sup>

## Introducing responsible sourcing

Responsible sourcing, also referred to as supply chain responsibility, is a voluntary commitment by Enterprises to take into account social and environmental considerations when managing their relationships with suppliers.

This strategy is now an integral part of effective supply chain management. As production chains expand, Enterprises of all sizes and sectors are devoting more efforts to managing supply chain risks and building long-term supplier relationships. Improving social and environmental performance in production chains is becoming a major element of this process.

As experience has shown, one bad incident with one supplier can lead to a disproportionate amount of adverse publicity, damaging an Enterprise's reputation and brand image. This has led a growing number of Enterprises to develop and promote responsible sourcing practices.

Indeed, effective supply chain management is a way for businesses to build a competitive advantage, especially in sectors where production is largely outsourced, such as clothing, footwear, electronics, or food products.

For many Enterprises, working towards improving social and environmental standards in the supply chain has become a natural extension of their commitment to Corporate Responsibility and, as such, forms part of their overall business model.

## Six steps to responsible sourcing

The following guidance presents basic steps that Enterprises can take to influence and monitor social and environmental performance in their global supply chains. Because not all suppliers pose risks, and many have good business practices already in place, an Enterprise should focus on high-risk areas, concentrating efforts where they are needed most and most likely to bring about change.

<sup>4</sup> 2008 edition available at <https://iccwbo.org/publication/icc-guide-to-responsible-sourcing/>



## STEP 1: SELECTING A SUPPLIER

A careful selection of suppliers is one of the best ways to ensure continuity and long-term efficiency of the global supply chain as well as enduring brand support.

When choosing a supplier, in addition to making a final determination on cost, Enterprises often need to evaluate a range of supply chain issues: product quality and safety, continuity of supply and speed of delivery, and intellectual property protection. Criteria such as working conditions, environmental practices, safety standards, and Human Rights policies should also be factored into the selection process.

When sourcing from low-income countries, a risk analysis should be conducted at the beginning, so that labor and environmental issues can be identified early on and integrated into a cost-benefit analysis.

As a first step, Enterprises should check basic facts about the social and environmental legislation and the level of enforcement in the country of production, to assess potential production risks.

## STEP 2: SET CLEAR EXPECTATIONS ON COMPLIANCE WITH THE LAW

When contracting with a supplier, Enterprises should make it known that they expect their business partners to comply with all national laws and regulations, including labor and environmental laws, and as appropriate, to take into account principles from relevant international instruments, which may sometimes go beyond local legislation.

These instruments include the International Labor Organization (ILO) Declaration on Fundamental Principles and Rights at Work, other ILO conventions, and the Universal Declaration of Human Rights. Another useful reference is the Global Compact and its “10 principles” covering Human Rights, labor standards, the environment, and anti-corruption.

An Enterprise can also adopt a supplier code of conduct. Before doing so, it should consider the possible difficulties for suppliers to comply with the proliferation of such codes and their requirements.

To ease the compliance burden on suppliers, which are often small and medium-sized enterprises, an Enterprise may consider partnering with a sector association that has developed an industry-wide supplier code of conduct.

Examples of such initiatives include the Business Social Compliance Initiative, the Electronics Industry Citizenship Coalition and the International Council of Toy Industries CARE Foundation.

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### **STEP 3: INTEGRATE RESPONSIBLE SOURCING INTO BUYING PRACTICES**

By integrating responsible sourcing into its own buying practices, an Enterprise should avoid undermining the capacity of suppliers to respect social and environmental standards. Inefficient practices, such as rush orders, last-minute changes or placing orders that surpass suppliers' capabilities, which often lead to excessive overtime work and other compliance violations, should be avoided.

An Enterprise can initiate direct improvements in two ways: (i) by raising awareness among its corporate buyers of the impact their decisions might have at factory level, and (ii) by encouraging more coordination among corporate buyers, a supplier's sales team, and production units when planning production schedules.

### **STEP 4: SUPPORT SUPPLIERS IN SETTING THEIR OWN BUSINESS STANDARDS**

An Enterprise should encourage suppliers to develop their own responsible practices rather than imposing requirements on them. In doing so, it is essential to stress the commercial benefits of responsible business practices on quality, productivity, contract renewals, and lowering employee turnover.

In order to help them implement change, suppliers should be directly involved in the shaping of performance objectives. In this way suppliers can integrate these objectives into their own business strategy based on their individual capacity and needs.

If useful, an Enterprise can provide training to its suppliers to help them improve their management practices and performance. Such support is an integral element of the knowledge transfer that comes with sourcing. Training programmes for management and employees may cover supervisory skills, environmental management, and raising awareness of health and safety practices.

In sectors where labor or health and safety risks may be present further down the supply chain, an Enterprise can also work with its direct suppliers to ensure that social and environmental considerations in turn play a role in their relations with second and third tier suppliers.

## STEP 5: TRACK SUPPLIER COMPLIANCE

Enterprises can ask their suppliers to provide comprehensive information about their social and environmental practices. Onsite visits can also be organised to monitor suppliers' progress, or lack of progress, in meeting social and environmental performance objectives. Evaluating this information may become part of an Enterprise's regular assessments of business requirements, such as quality control.

To make performance checks truly effective, Enterprises should involve their suppliers' factory management and workers in monitoring, and give them the training and tools to develop their own compliance system and to identify problems.

Taking a risk-based approach can help with a large base of suppliers when monitoring social and environmental compliance. Enterprises should focus on high-risk suppliers rather than monitoring across the board, as well as on suppliers in charge of the main steps in the production process.

An Enterprise can save monitoring costs by collaborating with other Enterprises from the same sector and developing common approaches for auditing suppliers.

To harmonize monitoring practices and ease the compliance burden of suppliers, several sector associations have brought together manufacturers of branded goods, suppliers, retailers and customers with a view to developing common tools and rationalizing supply chain requirements.

Initiatives which bring together non-governmental organisations, trade unions and Enterprises can also help encourage dialogue and build overall confidence in the compliance process.

## STEP 6: MANAGE STAKEHOLDER EXPECTATIONS AND REPORTING

To build customer trust, Enterprises can collect information on supplier performance across markets, and publish it in an annual report or other publicly-available format. Reporting efforts should be used to measure performance and flag areas for improvement.

Some Enterprises also choose to validate their first or second-party monitoring (audits conducted by the Enterprise or on behalf of an Enterprise by another organisation) by third-party monitoring (conducted by independent bodies). An Enterprise's strategy in this area will often be shaped by the way it manages its broader stakeholder relationships, for example its relations with consumers and local communities.

### Minding supply chain gaps

The various steps set forth in this Guide are meant to help Enterprises define their basic approach to responsible sourcing.

However, it is important to bear in mind that integrating social and environmental considerations in global supply chains is a shared responsibility that embraces a wide range of actors.

## THE ROLE OF GOVERNMENT

Responsible sourcing can go a long way towards improving social and environmental practices across industries and production chains. But no long-term progress is possible without greater government involvement in passing and enforcing laws.

The positive role of many governments in this area should be highlighted. In some parts of the world, however, the will or capacity of governments to enforce basic rules is lacking. In such cases, voluntary initiatives by Enterprises can help fill the gap, but should not be considered as a substitute to government action.

Some governments should be reminded of the significant economic and social benefits that flow from effective regulation and enforcement. The drive for higher social and environmental standards can lead to increased productivity and greater competitiveness, which in turn attracts investment and helps local businesses move up the value chain.

Government action also captures entire economies, since national social and environmental regulations are not confined to export-oriented sectors, thereby contributing to broad economic development and the achievement of higher living standards.

## HOW TO DEAL WITH NON-PERFORMANCE

Improving social and environmental performance in global supply chains can only be achieved with the effective participation of stakeholders at all levels, including suppliers which are directly in charge of integrating social and environmental standards into their business operations.

However, Enterprises should be prepared to face the risk of non-compliance in their supply chain.

When suppliers do not meet expectations, or when an Enterprise discovers a serious compliance violation, the Enterprise should agree with the supplier on a realistic timetable of improvements.

If solutions cannot be found and performance does not improve, termination of relationship should be seriously considered, but only as a last resort. Deciding to terminate a supplier relationship should be carefully weighed as it may deprive a supplier of the resources necessary to improve business practices and lead to worsening worker conditions.

## Moving forward with responsible sourcing

### A CHECKLIST FOR ENTERPRISES ENGAGED IN SUPPLY CHAIN RELATIONSHIPS

The following checklist summarizes some of the important steps that Enterprises can take when entering supply chain relationships:

- › Check basic facts about the social and environmental legislation in the countries of production of prospective suppliers. Find out about the level of enforcement in these countries to assess production risks.
- › Check whether prospective suppliers qualify for independent certification of conformity with recognized social and environmental standards.

- › Clearly define your expectations to your suppliers. Make clear that compliance with all applicable laws is a minimum.
- › Explore potential risk areas with suppliers and agree on the desired level of performance. If necessary, use a supplier code of conduct as a benchmark for compliance and incorporate supplier requirements into commercial contracts.
- › Raise awareness among your purchasing officers of the impact that their purchasing practices might have on production at factory level.
- › Carry out assessments of suppliers' facilities and practices, including through independent monitoring where appropriate, or by organizing on-site visits and worker interviews.
- › Find out about sector initiatives which can help conduct assessments and provide information and training to suppliers on responsible business practices.

## SOME EXAMPLES OF RESPONSIBLE SOURCING INITIATIVES

A number of initiatives led by sector associations and multi-stakeholder bodies have emerged with a view to providing more specific guidance on basic requirements which can be expected from suppliers, as well as to develop operative frameworks for conducting supplier assessments and training programmes.

Participation in such initiatives can come with important benefits in terms of harmonizing approaches and fostering dialogue. Examples of well-known initiatives include the following:

- › The Business Social Compliance Initiative ([www.bsci-eu.org](http://www.bsci-eu.org)), a European business-driven platform for the improvement of social compliance in all supplier countries and for all consumer goods;
- › The ICTI-CARE process ([www.icti-care.org](http://www.icti-care.org)), the international toy industry's ethical manufacturing program, aimed at ensuring safe and humane workplace environments for toy factory workers worldwide;

- › The Electronic Industry Code of Conduct ([www.eicc.info](http://www.eicc.info)), a code of best practices adopted and implemented by some of the world's major electronics brands and their suppliers with a view to improve conditions in the electronics supply chain;
- › The Fair Labor Association ([www.fairlabor.org](http://www.fairlabor.org)) a network of Enterprises, civil society organisations, and universities protecting workers' rights and improving working conditions worldwide by promoting adherence to international labor standards;
- › The Ethical Trading Initiative ([www.ethicaltrade.org](http://www.ethicaltrade.org)) an alliance of Enterprises, non-governmental organisations and trade union organisations which promotes the implementation of corporate codes of practice covering supply chain working conditions;
- › Worldwide Responsible Apparel Production ([www.wrapapparel.org](http://www.wrapapparel.org)), an independent organisation dedicated to the certification of lawful, humane and ethical manufacturing in apparel production;
- › SA8000 ([www.sa-intl.org](http://www.sa-intl.org)), a comprehensive system for managing ethical workplace conditions throughout global supply chains.
- › Whatever mechanism is used, it is important to remember that the most effective way to achieve sustained improvement over time is by developing a long-term collaborative approach between Enterprises and their suppliers, through the involvement of local management and employees in the shaping of social and environmental performance objectives.

# RESIST<sup>5</sup>

## RESISTING EXTORTION AND SOLICITATION IN INTERNATIONAL TRANSACTIONS

This document was prepared by ICC, Transparency International, the United Nations Global Compact and the World Economic Forum/Partnering Against Corruption Initiative.

### Introduction

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#### PURPOSE

Increasingly, Enterprises are implementing robust compliance programmes aimed at preventing Bribery and Corruption in business transactions. New anti-corruption laws, growing enforcement and the rise of corporate responsibility are making a compelling case for Enterprises to counter corruption.

Nevertheless, many Enterprises report that they continue to face demands for bribes in the conduct of their business and that these demands sometimes constitute extortion. Bribe Solicitation and Extortion therefore remain daily challenges for business and they have received minimal attention in the current legal framework against corruption. Leading international anti-bribery instruments, such as the Organization of Economic Cooperation and Development Anti-Bribery Convention, do not address this problem.

But times are changing. Several explicit provisions in international legal instruments such as the 2005 United Nations Convention against Corruption prohibit “passive” Corruption, Extortion or Solicitation in either the public or the private sector. Recent OECD guidance recommends that Enterprises implement measures to address major risk areas, including Solicitation and Extortion. It also emphasizes the need to provide Enterprises, in particular small and medium-sized enterprises (SMEs) with general advice and support on resisting Extortion and Solicitation.

This is where RESIST (Resisting Extortion and Solicitation in International Transactions) can help. Based on real-life scenarios, RESIST is designed as a training tool to provide practical guidance for employees on how to prevent

<sup>5</sup> 2011 edition available <https://iccwbo.org/publication/resisting-extortion-and-solicitation-in-international-transactions-resist/>



and/or respond to an inappropriate demand by a client, business partner or public authority in the most efficient and ethical way, recognizing that such a demand may be accompanied by a threat. RESIST is intended primarily as a training tool to raise employee awareness on the risk of Solicitation, including through frank discussion, and to propose practical ethical responses to dilemmas.

## CONTENT

The Enterprises that participated in the design process of RESIST identified a total of 22 scenarios and responses that illustrate a range of Solicitation scenarios, but these are not exhaustive or applicable to all situations.

Based on the project life cycle, RESIST scenarios are organised in two sections representing the presales and bidding stage as well as the post-award project implementation stage. Scenarios 1 to 7 deal with Solicitation in the procurement process. Scenarios 8 to 22 examine Solicitation in the context of project implementation and day-to-day operations.

Each of the 22 scenarios addresses two basic questions in a concrete and specific manner:

- › How can the Enterprise prevent the demand from being made in the first place?
- › How should the Enterprise react if the demand is made?

In addition, the Annex includes a series of good practice recommendations that can apply to most situations. Users of the RESIST tool should study these generic recommendations before reviewing the individual scenarios. The specific recommendations of each scenario should be read together with the overall recommendations of the Annex to RESIST.

Responses to the dilemmas presented comprise either individual Enterprise responses or collective action.

Competing bidders intending to cooperate in resisting Solicitation should first seek legal advice to ensure that such cooperation does not violate applicable antitrust or procurement laws.

## AUDIENCE

This tool will be of interest to all Enterprises that may be exposed to Solicitation risks in conducting international business. Solicitation is often a key problem for SMEs, which are generally more vulnerable to Solicitation than larger Enterprises and have fewer resources to face such situations. Although the responses provided can apply to all Enterprises, implementation may differ according to Enterprise size, industry sector, place of operation and the specific circumstances of the bribe Solicitation.

Within Enterprises, this tool is mainly directed to those responsible for ethics, compliance and integrity training and to individual employees involved in sales, marketing and operations. The scenarios aim to make employees more aware of potential Solicitation and Extortion risks and provide the opportunity for an open discussion on how to best address Solicitation dilemmas in an effective and practical way.

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## Scenario 1

In a bidding round, the terms of reference (including technical specifications) are biased to favour one supplier or to exclude potential competitors.

## DESCRIPTION

Your Enterprise is preparing to submit a bid for the supply of telecommunications equipment to a state-owned Enterprise. You are an experienced supplier of such equipment and know that several of your competitors are planning to submit bids as well. While studying the tender documents, you notice that they include specifications that only the equipment of one of your less-experienced competitors meets. You are surprised because these specifications have no impact on the performance of the equipment. In fact, your technical experts consider these specifications outdated and that your equipment, and that of most of the other competitors, outperforms any equipment meeting the required specifications. Some days later, you are approached by a person who suggests that the tender documents could be changed in your favour in exchange for a payment.

## DEMAND PREVENTION: HOW TO REDUCE THE PROBABILITY OF THE DEMAND BEING MADE?

Should the procurement agency rely on a technical expert, request that the procurement agency disclose links and business dealings of this expert with any of the bidders.

- › Check and, if applicable, challenge (legally and/or publicly) the qualifications of the members of the body defining the terms of reference.
- › Check if there are any specific relations between the Enterprise whose equipment fits the specifications and the procurement agency (or its directors or officers).
- › Have the terms of reference been reviewed by a qualified Third Party (such as an expert, civil society or employers' organisation)?
- › Engage with the procurement agency to discuss the results of the review of the terms of reference and explain your technical specifications.
- › Suggest to other Enterprises bidding with you to collectively address the procurement agency.
- › Engage in a dialogue with the procurement agency to improve procedures in the following areas:
  - Get agreement from the procurement agency on the appointment of an independent consultant (individual, Enterprise or international organisation such as the World Bank) to supervise the entire bidding process;
  - Request a pre-qualification round to exclude bidders lacking technical and financial delivery capacity (either through their own organisation or through relevant contractors);
  - Request a meeting with the procurement agency to better explain technical aspects of your product or services.
- › Suggest publishing the terms of reference widely.
- › Challenge the terms of reference publicly and/or by reference to local laws or applicable procurement rules.

- › Approach the industry association or trade association that provides technical specifications for your industry to ensure that guidance for specifications is generic enough to allow all Enterprises to bid and that the specifications are up to standard.

### RESPONSE TO A BRIBERY DEMAND: HOW TO REACT IF THE DEMAND IS MADE?

- › Reject the demand.
- › Keep a detailed record of the circumstances of the bribe demand made.
- › Inform a relevant representative of your client that you have been approached with such a suggestion and report the demander.

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## Scenario 2

An intermediary offers the Enterprise to win bidding upon payment of a loser's fee during the pre-bidding or bidding stage.

### DESCRIPTION

Enterprises A and B have been pre-qualified by a ministry to bid for the supply of an infrastructure project. An intermediary allegedly close to the ministry approaches both bidders with the following proposal: should Enterprise A win the project, it would contribute to a "loser's fee" payable to the intermediary; if Enterprise B accepts to lose, it would receive adequate compensation for its bid preparation.

Demand prevention: How to reduce the probability of the demand being made?

- › Review likelihood that intermediaries will attempt to become involved in the contract negotiations.
- › Engage in a dialogue with the procurement agency to improve procedures in the following area: agree with procurement agency that no intermediaries can be added to the process after bid submission.
- › Be aware that a donation or a subcontract requested by the intermediary from Enterprise A could be a channel for the payment of a loser's fee to Enterprise B.

## RESPONSE TO A BRIBERY DEMAND: HOW TO REACT IF THE DEMAND IS MADE?

- › Solicited employees should immediately stop discussions with the intermediary on the grounds that the loser's fee falls outside the scope of the bidding process, thus could derail it.
- › Request from the intermediary a proposal in writing to test the legitimacy of the demand.
- › Report to the ministry about the demand made by the intermediary who claims to act on behalf of the ministry.
- › Refuse to engage intermediaries that have not been selected prior to bid submission.
- › Challenge the merits of the loser's fee that could increase the contract price to the detriment of the government budget or negatively impact the profitability of the project to the detriment of the Enterprise's interests.
- › Explain to the intermediary/procurement agency that the proposed scheme could expose all the parties (individual or Enterprise) to a prosecution risk not only in the country where the deal occurs but also in countries that ratified the OECD or related UN Conventions fighting corruption or money laundering.
- › Refuse payment on the grounds that the loser's fee violates the business principles of your Enterprise and may violate applicable laws, more specifically, competition laws in your country and/or the host country of investment and procurement regulations in the host country, e.g. bid-rigging.
- › Solicited Enterprise should inform the other Enterprise of its refusal to accept the bid-rigging scheme.

### Scenario 3

Bribe Solicitation for confidential information during the pre-bidding or bidding stages.

## DESCRIPTION

You are running an overseas field office for a multinational Enterprise and still need a big deal to reach the annual sales target. You are preparing the bid for a big contract that you are eager to win. A consultant who is close to the customer approaches you and offers to reveal the evaluation criteria and provide you with information on bids already submitted by some of your competitors against the payment of a fee.

## DEMAND PREVENTION: HOW TO REDUCE THE PROBABILITY OF THE DEMAND BEING MADE?

- › Establish effective, clearly communicated policies for employees involved in the bidding process:
  - Identify and openly address incentives to pay Bribes, especially towards the end of the year;
  - Identify and openly address incentives to pay Bribes, especially towards the end of the year;
  - Train employees on standard bidding procedures and rules of interaction with agents and other intermediaries;
  - Consider incentives to report Bribery demands;
- › Perform due diligence on agents/ consultants/intermediaries involved in bids: Awareness of “red flags”, as agents/consultants/intermediaries is often used to pay bribes to extortionists.
- › Eliminate any intermediaries that are nonessential to the bid, ask to prove need.
- › Maximize opportunities for detection by employing additional control procedures to detect Bribes:
  - Reviews of heightened risk payments to agents/consultants/intermediaries used in the bidding process;
  - Implement regular, independent internal monitoring function that reports to a senior executive on heightened risk payments to agents/consultants/intermediaries or to financial institutions outside of the project location.

- › Avoid putting financial information in your bid until the last minute to avoid leaks.

## RESPONSE TO A BRIBERY DEMAND: HOW TO REACT IF THE DEMAND IS MADE?

- › Refuse payment.
- › Ask consultant to put request in writing.
- › Record meeting, keep minutes and report to management.
- › Disclose to contracting party that you have been approached with information and that there might be a leak in the process.
- › Disclose to competitors that you have been approached with confidential information and suggest jointly approaching procurement agency with a non-governmental organisation for increased scrutiny of the bidding process, which will limit the value of the confidential information.
- › Industry initiatives: expose known extortionists for future reference.
- › Regulators: in regulated industries, alert authorities of bribery demands.

## Scenario 4

“Kickback” scenario: your sales representative is offered hidden compensation by the customer or by an intermediary.

### DESCRIPTION

Your Enterprise is bidding for a large foreign government contract where one or several intermediaries are involved. One of the intermediaries approaches one of your employees and suggests entering into a contract to support the employee in the bid preparation and states that the intermediary can arrange to win the bid against payment of an extra commission. The intermediary offers your employee a portion of this commission as a hidden compensation (“kickback”) if your employee accepts such an arrangement and secures from the Enterprise the approval for this extra commission.

## DEMAND PREVENTION: HOW TO REDUCE THE PROBABILITY OF THE DEMAND BEING MADE?

- › Always operate as a team consisting of at least two employees who must comply with strict reporting directives and control mechanisms.
- › Set up clear corporate directives including a whistleblowing policy and related (severe) sanctions for non-compliance.
- › Set up specific guidelines dedicated to negotiations that expressly address the kickback issue with the obligation to immediately report any Solicitation to management.
- › Emphasize in training sessions the criminal and reputation risks not only for the Enterprise but also for the exposed employees themselves.
- › Send regular reminder communications to the exposed employees.
- › Include expressly the kickback case in consultants' contracts as an event of immediate termination for material breach, and reserve legal actions.
- › Provide competitive remuneration for staff exposed to such offers.
- › Check market rates for commission of intermediaries.
- › Require employees to sign a code of conduct statement regularly.
- › Try to establish an integrity pact that clearly states that Enterprise staff does not accept hidden compensation.
- › Include in terms of contract/bid that sale representatives accepting a kickback will be sanctioned and that your Enterprise does not condone the practice.

## RESPONSE TO A BRIBERY DEMAND: HOW TO REACT IF THE DEMAND IS MADE?

- › Immediately report to management or the appropriate officer assigned with matters involving the code of conduct (e.g. compliance officer).
- › Start an internal investigation by an independent party (*i.e.* corporate internal audit, compliance officer), in particular, perform audits on earlier transactions with the soliciting person(s).



- › Review bid terms with final terms and analyse whether the Solicitation has negatively reflected on the evaluation of your Enterprise.
- › Protect the exposed employee if he or she reported the incident (otherwise sanction), *i.e.*:
  - Transfer the exposed employee;
  - Appoint another employee to accompany the exposed employee in the negotiations until the transfer is effective (this only applies if the employee operates on his/her own and not in a team).
  - Record the incident and inform the customer at the appropriate level; and
  - Terminate any business relationship with the intermediary.

Note: During discussions, it was noted that the most difficult aspect is for an Enterprise to detect fraud by its own employees. The answers under point two were made under the assumption that the employee has reported the incident.

## Scenario 5

A host country may impose or imposes a partnership with a designated local Enterprise that may present high corruption risks.

### DESCRIPTION

In a call for tender, your Enterprise may be asked or is asked to contract with a designated local Enterprise (such as a co-contractor, sub-contractor or consultant) as a pre-condition to bid. The designated Enterprise might not or does not have the necessary qualifications to perform the task.

### DEMAND PREVENTION: HOW TO REDUCE THE PROBABILITY OF THE DEMAND BEING MADE?

- › Encourage local professional and business associations to engage with the government to enact laws and rules favouring freedom of contracting.
- › Seek the leverage of international financial institutions to enhance the freedom of contracting.

- › Engage in a dialogue with the procurement agency to improve procedures in the following areas: allow for freedom of sub-contracting for bids, *i.e.* pre-selection of eligible local Enterprises should be made on the basis of objective financial, legal and technical criteria, including capacity to deal adequately with health, safety, environment and Human Rights requirements; in such a pre-qualification process, compliance to generally accepted corporate social responsibility should be considered.
- › As a deterrent to prevent an imposed partnership, select (after due diligence), prior to an upcoming bidding process, a local Enterprise with good reputation and sign with it a joint bidding agreement with anti-corruption provisions.

### RESPONSES TO A DEMAND: HOW TO REACT IF THE DEMAND IS MADE?

- › Resist the request from the government or governmental entities using financial and technical arguments highlighting the inability of the imposed local Enterprise to meet the requirements of the project and the standards of your Enterprise or those shared with other venture partners.
- › Negotiate with the government or governmental entity and propose to substitute the imposed Enterprise with another local Enterprise of your choice with a good reputation and higher financial and technical records.
- › Discuss this pre-condition with other bidders and civil society organisations and jointly approach the government to remove this requirement and allow for open selection of local contractors.
- › If a local Enterprise is effectively imposed on your Enterprise and if, in your judgment, such Enterprise appears to be acceptable, insert adequate safeguard provisions in the contract with the imposed local Enterprise (including termination clauses); such contract should include a detailed description of the scope of work and market price remuneration, proportional to the services to be rendered.

## Scenario 6

A client demands a last-minute “closure fee” to close a deal that is now too late to lose.

## DESCRIPTION

Your Enterprise is bidding for a large government contract. After two or three years of costly negotiations, your Enterprise is eventually awarded the contract. But just before the contract is being signed, you get solicited for a bribe by a member of the purchase committee. How can your Enterprise overcome this situation in a legally acceptable way without losing the contract?

## DEMAND PREVENTION: HOW TO REDUCE THE PROBABILITY OF THE DEMAND BEING MADE?

- › Elaborate a strict framework to support the negotiations: submit a detailed offer including terms and conditions and/or propose (if relevant) a draft contract, that both includes anti-bribery clauses and termination for default in case of Bribery.
- › Define the scope of negotiation: make sure that the negotiation team has a clear mandate; inform the customer that the team is empowered with a specific limited mandate for negotiation, which excludes any request out of the scope of the call for tender terms.
- › During negotiations, including at closing time, identify decision-makers (technical, budgetary, etc.) within the procurement organisation to determine where the Solicitation could come from.
- › At bidding stage, consider involving main actors in fighting Corruption such as banks and export credit agencies that might have a good knowledge of the customer's decision-makers and their practices.

## RESPONSES TO A BRIBERY DEMAND: HOW TO REACT IF THE DEMAND IS MADE?

- › Immediately inform your management and define an appropriate strategy (e.g. changing the negotiation team).
- › Go back to the soliciting person with at least one witness (management, adviser, bank representative) with the following position:
  - Reaffirm your willingness to sign the contract and ignore the Solicitation.
  - In case the Solicitation is reiterated: First, inform the person that the request is not acceptable. Secondly, threaten to back off from the bid

with public communication of the reasons for doing so, or actually back off from the bid.

- › Set a deadline for signature based on the terms and conditions previously agreed.
- › Go to customer that established the purchase committee to check the bid and inform him/her that the Enterprise has the impression that they are being subjected to a Solicitation; ask the customer to inquire and suggest repeating the bid if necessary
- › If sufficient evidence is available, address the national anti-corruption body/ agency/ombudsman.
- › Go public and expose the situation; be prepared to back off from the project.

## Scenario 7

An Enterprise complaining about an unfair procurement process is threatened with a spurious criminal prosecution that will lead to a heavy fine.

### DESCRIPTION

Enterprise A knows that its competitor Enterprise B has won the public bid because Enterprise B bribed the Public Official in charge of the bidding process. Enterprise A makes a report to the police. Enterprise B reacts with threats of phony accusations against Enterprise A that would result in unjustified criminal proceedings against Enterprise A unless it withdraws the report.

### DEMAND PREVENTION: HOW TO REDUCE THE PROBABILITY OF THE DEMAND BEING MADE?

- › Instead of making a report on its own, Enterprise A could approach other competitors that also lost the tender as a result of the Bribe payments by Enterprise B to the Public Official and make the report together. Enterprise A thus reduces the probability of the demand being made as Enterprise B would have to issue the threat against all of the Enterprises involved, which is rather unlikely (subject to antitrust laws or with the help of local counsel).

- › Instead of making a report to the police, Enterprise A could address the Public Official's superior or the competent fraud investigation unit in the Public Official's department and thus make it obvious that any allegations by Enterprise B would only be acts of revenge and thus deter Enterprise B from making threats in the first place.
- › Enterprise A could also inform the press and the public that it has evidence of Bribe payments by Enterprise B to the Public Official in question. This would also reduce the likelihood of the demand by Enterprise B being made in the first place.

### **RESPONSE TO A BRIBERY DEMAND: HOW TO REACT IF THE DEMAND IS MADE?**

- › Explain to Enterprise B that hard evidence has already been submitted and that even if the accusation is revoked, the case would very likely go ahead anyway as the proceedings have now been started.
- › Threaten to (and then do) inform the perpetrator's supervisor, superior or compliance officer or, as a last resort, the chief executive of Enterprise B, and likewise the superior of the Public Official.
- › If the tender in relation to which the threat is made is financed by a multinational corporation or other foreign institution/donor, contact the compliance department of the donor institution.
- › Inquire whether criminal proceedings can be brought forward against the competitor in the competitor's home jurisdiction.
- › Inform the public about the threats made by Enterprise B and thus increase the negative consequences for the extortionist (Enterprise B).

## **Scenario 8**

A local government agency demands a fee for technical approval of equipment.

### **DESCRIPTION**

Your Enterprise is running a relatively new operation in a remote territory. You have received an unannounced visit from the local Public Official whose agency is responsible for technical approval of the equipment that you have been

waiting for. The Public Official makes it clear that the approval of the goods will not be given unless you pay a “fee” in cash directly to him/her.

### DEMAND PREVENTION: HOW TO REDUCE THE PROBABILITY OF THE DEMAND BEING MADE?

- › Inform your management in advance that logistical and other support for obtaining the approval will be necessary.
- › Include in the contracts the maximum amount of lead time to allow permits to be issued.
- › Implement a corporate policy and guidelines prohibiting bribery, including how to reject demands for Facilitation Payments whenever possible, and communicate these to employees.
- › Establish and implement systems allowing employees to report demands for bribes and/or Facilitation Payments.
- › Provide anti-corruption training, which includes definition of Extortion and Facilitation Payments and what to do when they are demanded.
- › Establish good relations with relevant government bodies, licensing agencies and local and traditional authorities where you operate.
- › Discuss with authorities the problems that employees face with payment demands from local Public Officials and ways to prevent such situations from occurring.
- › Work with local commercial associations to document and publish the official procedures, time and fees involved for technical approval of the equipment.
- › Prohibit payment of non-documented expenses not compliant with laws or contractual provisions and establish guidelines requiring that all expenses are documented to include at least the amount, date and identities of persons making and receiving payments.

## RESPONSE TO BRIBERY DEMAND: HOW TO REACT IF THE DEMAND IS MADE?

- › Refuse to pay.
- › Immediately report the incident to management and obtain authority to take appropriate action.
- › Inform the official that making the payment as requested is prohibited by your Enterprise and explain that the demand is illegal and could also lead to the termination of the employee making the payment.
- › Take the name of the person and state that all fees must be paid directly to the government office in return for an official receipt that includes all payment details, including the identity of officials receiving payment.
- › If it is logistically impossible to make a direct payment to a government office, request that the Public Official provide a receipt on government letterhead.
- › Make use of existing relationships to identify a more senior person in the licensing body whom you can approach instead, in order to explain the dilemma.
- › Seek the assistance of other Enterprises and trade organisations, including contractors, and of other Public Officials within the licensing body with whom the pre-existing relationships exist.
- › Explain to the relevant parties within the licensing body that the project/operation is in jeopardy and will fail if the demand is maintained.

Take proactive and cooperative action with relevant authorities and business groups (e.g. chambers of commerce and other importers and industry organisations, the relevant embassy) aimed at stopping future demands for such payments.

## Scenario 9

Newly-hired employees cannot obtain work permits unless an employment surcharge is paid.

## DESCRIPTION

Your Enterprise has started hiring personnel for the fulfillment of various tasks for a project that was recently awarded to you. The recruitment process is almost complete and local and foreign candidates have been preselected. You must obtain work permits from the local authorities for all (local and foreign) candidates. Local Public Officials have requested you pay an unofficial “surcharge” for each work permit. A delay in hiring your employees would have a significant adverse effect on the project timeline.

## DEMAND PREVENTION: HOW TO REDUCE THE PROBABILITY OF THE DEMAND BEING MADE?

- › Implement a corporate policy and guidelines prohibiting Bribery, including how to reject demands for Facilitation Payments whenever possible, and communicate these to employees.
- › Insert provisions in your bid and in your contract requiring the application of your code of ethics during all the phases of the contract.
- › Establish an internal Human Resources process that explicitly forbids any undue payment to obtain work permits.
- › Brief the manager in charge of the hiring of the risks of undue Solicitation to obtain work permits.
- › Become familiar with local labor and immigration laws and practices during the pre-bidding phase.
- › Implement a corporate policy prohibiting any cash payment not explicitly agreed at the appropriate management level, and requiring documentation of any such approved payment.
- › Obtain written permission to hire local and foreign employees from the relevant authorities during the bidding process, include a relevant provision in the project contract and provide the relevant local authorities with a copy of this permission when applying for work permits.
- › Negotiate into the contract that the local customer will provide you with reasonable assistance in obtaining the candidates’ work permits.



- › Apply for all work permits in one or more large blocks to make it harder for officials to turn them down.
- › Ensure that each permit application is completed properly and is accompanied by all required documentation.
- › If the candidates come from foreign countries, request that the relevant embassies facilitate the process by interfacing with local authorities.
- › Engage in a wider discussion on the procedures for hiring foreign workers; work with the local authorities (ministry of labor, local business association) in preparing an official guide on the process and costs of obtaining work permits and ensure this information is publicly available and displayed in the relevant offices.

### **RESPONSE TO A BRIBERY DEMAND: HOW TO REACT IF THE DEMAND IS MADE?**

- › Refuse to pay, explaining that your Enterprise does not allow payment of such “surcharges” to obtain permits unless expressly required by law or written official procedures, and then only in return for official receipts from the local authority for payments made to the bank account of the authority, never to an individual.
- › Notify the authority’s senior management or supervising body of the surcharges demanded.
- › Alert the customer, explaining that these demands may jeopardize the continuation of the project unless the customer intervenes to assist in stopping them.
- › Engage with the project’s other stakeholders to gather support for your efforts to stop the payment demands:
  - Approach local unions for support in hiring local employees and obtaining work permits legitimately;
  - Approach local business associations/chambers of commerce/ICC national committees to get support in obtaining the work permit legitimately;

- Discuss with other Enterprises operating in the country the legal requirements and practices and seek advice on how they have responded to similar demands; and
- Consult other Enterprises involved in the project to ensure a common position on refusing to pay the bribes demanded.

## Scenario 10

A local police officer requests a payment to allow an expatriate worker to cross an internal border within a country.

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### DESCRIPTION

Your Enterprise operates in a country that previously required expatriates to obtain permission to travel from one province to another, but this regulation has been abolished by the central government. As you travel from the province where your Enterprise's office is located to an operating site in a different province, you are stopped by a local police officer who asks to see your ID documents and permits. The police officer informs you that he/she has to withhold your passport, claiming that there is a "special" stamp missing and that you do not have the necessary authorization for internal travel. The police officer, however, offers to "solve the problem" and let you go in return for a small cash payment.

### DEMAND PREVENTION: HOW TO REDUCE THE PROBABILITY OF THE DEMAND BEING MADE?

- › If you do not already have one, establish a corporate policy and guidelines for prohibiting Bribery, including dealing with the risk of Extortion and demands for Facilitation Payments.
- › Obtain local legal advice on the legal status of Facilitation Payments locally. Clearly state that your Enterprise will not make Facilitation Payments.
- › Analyse the risk of occurrence of Facilitation Payment demands in a given country, make plans to reduce the risk and design responses, discuss with personnel in which situations Facilitation Payments are most likely to occur and identify alternative ways of resolving the issue.

## RESIST

- › Communicate to all employees the corporate anti-corruption policy and guidelines, ensuring especially that those employees who may be exposed to such situations, are familiar with them.
- › Use every opportunity to announce externally in the country of operation that the Enterprise will not accede to demands for Facilitation Payments and will implement your policies consistently with this stance.
- › Provide anti-corruption training that specifically covers Extortion and Facilitation Payments, appropriate responses to demands (*i.e.* dilemma training). This could include the levels of risk in different countries and for different administrative processes.
- › Establish and implement systems encouraging employees to report demands for Facilitation Payments.
- › Establish an advisory function employees can call upon when faced with such situations (e.g. designated contact persons within the Enterprise such as local managers, security officers or legal counsel), preferably someone who is a country national and has the necessary authority to enforce the policy.
- › Engage a local security or emergency assistance firm, or a local law firm for assistance in such situations and instruct them to comply with your policies.
- › Ensure that your employees have all documents necessary to travel within the country and that these are valid.
- › Establish good relations with relevant government agencies, local and national authorities in areas of operation and discuss with relevant Public Officials the problems that employees can face (e.g. demands for Facilitation Payments) and ways to prevent such situations from occurring.

### **RESPONSE TO BRIBERY DEMAND: HOW TO REACT IF THE DEMAND IS MADE?**

- › If you are sure that your documents are valid and there is no need for a “permit”, you should explain this to the police officer who is requesting the payment.

- › You should make clear to the police officer that small payments of this kind are against corporate policy and are illegal, (which is almost always the case).
- › Record the name of the police officer requesting the payment and ask to see his/her official identification.
- › If the police officer insists on payment, call the Enterprise's advisory function for assistance or, if possible, your manager, explaining that you should obtain a receipt signed by the police officer, and record the details of any payment made, including the police officer's identity, for corporate records.
- › If the payment is unavoidable without perceived risk to life or limb, negotiate it to a minimum amount, make the payment, get the receipt indicating the amount of the fee, the reason for the fee, the name of the police officer who requested it, and his/her position, preferably signed by the officer.
- › Immediately report the payment to your manager. The payment should be justified to your manager, who should sign the incident report and the documentation of the payment.
- › Ensure that the payment is recorded in the Enterprise's accounting system in the correct amount, with a clear explanation of its purpose.
- › Report the incident externally to relevant authorities, such as that country's ministry of the interior, your home country's local embassy, etc.
- › Analyse the incident in the organisation, devise plans to reduce the risk of recurrence, and design responses to future demands.

## Scenario 11

An employee of the State electricity Enterprise demands cash for a connection to the grid.

### DESCRIPTION

Your Enterprise is about to receive the equipment necessary for connecting a project site to the electrical grid when an employee of the State electricity Enterprise approaches your project manager explaining to him/her that the

connection to the grid will be delayed for days or weekly, if not indefinitely, for some obscure reason.

An immediate cash payment to the employee would, of course, accelerate the connection and therefore facilitate the timely completion of your project.

### **DEMAND PREVENTION: HOW TO REDUCE THE PROBABILITY OF THE DEMAND BEING MADE?**

- › Have specific discussions with the customer during the bidding stage to identify the exact process for completion of the project, to include the steps necessary to connect to the electricity grid; also, ensure alignment with the customer on how to react if demands for illegitimate payments are received.
- › Identify in advance and ensure compliance with all official requirements for connecting to the electricity grid.
- › Identify in advance time requirements for connecting to the grid, taking delays into account.
- › Clarify in the contract with the customer which party is responsible for the grid connection and the consequences of delays on the time schedule.
- › Implement a corporate policy prohibiting any type of Bribery, including whenever possible Facilitation Payments.
- › Ensure employees clearly understand which types of payments are not permitted and ensure easy means of reporting illicit payments.
- › Make employees aware of the consequences of such violations.

### **RESPONSES TO A BRIBERY DEMAND: HOW TO REACT IF THE DEMAND IS MADE?**

- › Refuse to pay.
- › Explain your Enterprise's legal concerns/obligations and program commitment to fight Corruption.
- › Develop an action plan to deal with the project demands for connecting to the power grid.

- › Report the demand to the supervisor of the person making the demand.
- › If the demand persists, explain that any payment must be recorded in your Enterprise's files, including the name and other identifying details of the employee making the demand.
- › Report such demands to the employee's superiors in the State electricity Enterprise and work with them to ensure that future demands for illegitimate payments will not occur.
- › Consider working with your own power generators in the meantime, if feasible.

## Scenario 12

Long-awaited essential equipment is stuck in customs for clearance and only the payment of a "special" fee can secure its prompt release.

### DESCRIPTION

You are the local manager of your Enterprise's operation in a foreign country. For weeks, the shipment of critical technical equipment has been delayed by red tape at headquarters. When the equipment finally arrives in the country, your personnel is told by a customs official that the paperwork is "incomplete". This will prevent the release of the equipment until the problem is solved. The customs official indicates that a solution could take several weeks. He/she adds, however, that the problem can be solved quickly through an expeditor's fee or a cash payment of US\$200, which would ensure customs clearance of the equipment in one business day.

### DEMAND PREVENTION: HOW TO REDUCE THE PROBABILITY OF THE DEMAND BEING MADE?

- › Communicate to employees the Enterprise's anti-corruption policy that includes Extortion and Facilitation Payments and provide training on how to avoid and deal with demands, especially the employees who may be more exposed to such situations.
- › Establish and implement systems available to employees to report and seek advice for demands for small payments.

- › Order goods early, avoid time pressure on delivery.
- › Have an adequate supply of parts and consumables that have to be imported. Perform due diligence on customs procedures at various points of entry to the country (*i.e.* seaports, roads, airports), determine which ones pose the highest and the lowest corruption risks, and find out the time required to clear goods; set out primary and alternative import routes accordingly.
- › Switch to an alternative import route and point of entry if obstructions are experienced at the primary point of entry.
- › Research official customs procedures and familiarize necessary personnel with the procedures; clarify unclear parts of the procedures with the central customs authorities.
- › Take steps to make the official customs procedures widely available in the country to counteract ignorance and opaqueness, e.g. with the help of business associations, in cooperation with customs authorities or other government departments.

### **RESPONSE TO A BRIBERY DEMAND: HOW TO REACT IF THE DEMAND IS MADE?**

- › Quality-check your customs clearance paperwork to ensure full compliance with procedures.
- › Verify whether customs procedures provide for any official expedited services.
- › If so, verify size of fees for such services; never pay for any such services without an invoice and/or receipt.
- › Ensure that any payment made is recorded in the Enterprise's accounting system in the correct amount, together with the invoice/receipt and an explanation of the purpose of the payment.
- › If the customs procedures do not provide for expedited services or are not clear on the size of fees for such services and an invoice or a receipt is not provided:

- Make it clear to the customs official that a payment to a public official for a service to which one is already entitled is against corporate policy and is illegal.
  - Refuse to pay Facilitation Payments to expedite customs clearance of goods.
  - Demand reasons why the goods are stuck and do so on a daily basis.
  - Demand that measures be taken to mitigate such reasons.
  - Make it clear that normal customs procedure should be followed.
  - Do not reveal that you are under time pressure.
  - Ask for the name and position of the customs official and request to meet his/her superior.
- › If the customs clearance delays have impacts on the Enterprise's business relationships, inform business partners of the situation and of the potential consequences, explore if and how to approach the customs authority jointly.
  - › Request a meeting with the central customs authority or relevant ministry to request that actions be taken.
  - › Explore whether other Enterprises face similar problems and jointly address the customs authority.
  - › Report the incident internally in the Enterprise; analyse the case, develop a plan to reduce the risk of recurrence and design responses for future demands.

## Scenario 13

Perishable goods are held up in customs and will only be released if a cash payment is made.

### DESCRIPTION

Your Enterprise's goods, some of which are perishable or have limited shelf life, are stuck in customs for a pro-longed period awaiting clearance. A customs official has informed you that the only way to prevent further delay is to provide



him/her with a cash payment. Your Enterprise's legal counsel has informed you that Facilitation Payments are illegal in this country.

### **DEMAND PREVENTION: HOW TO REDUCE THE PROBABILITY OF THE DEMAND BEING MADE?**

- › See Scenario 12.
- › Consider purchasing goods locally to the extent practicable.
- › Try to understand what might cause backlogs in customs clearance. If potential delays are a result of it being a traditionally busy part of the week, month or year, then try, to the extent possible, to schedule the shipment of your Enterprise's goods during periods when the customs office experiences less volume.
- › Build your Enterprise's reputation for refusing to pay Facilitation Payments as a matter of corporate policy.

### **RESPONSE TO BRIBERY DEMAND: HOW TO REACT IF THE DEMAND IS MADE?**

- › Refuse to pay any Bribe or Facilitation Payment to expedite customs clearance.
- › Report the demand to the Enterprise's legal counsel promptly.
- › When meeting with the customs official to discuss the delay, request to be accompanied by a lawyer or police officer to reduce the probability of being asked to make a Bribe.
- › State the Enterprise's anti-corruption policy and its commitment to following the law.
- › Explain that making a payment that is against the law exposes not only the employee and the Enterprise but also the customs official to potential criminal prosecution and other sanctions. Consider informing the customs official's supervisor of the Solicitation.
- › Explain the nature of the goods, the demand in the country and the negative consequences of loss of all goods due to their perishable nature.

- › Make public the loss of perishable goods due to delay in customs and Bribe demands.

## Scenario 14

A tax inspector asks for a “kickback” in exchange for granting a discharge or accepting a settlement in a tax dispute.

### DESCRIPTION

Following a tax audit, your Enterprise has received a reassessment notice in a foreign country where a subsidiary or branch operates. There are solid arguments in favour of challenging the proposed tax adjustment. The issue is under discussion with the tax authorities. The tax auditor proposes a discharge or a settlement in return for the payment of a “kickback”.

### DEMAND PREVENTION: HOW TO REDUCE THE PROBABILITY OF THE DEMAND BEING MADE?

- › Establish a policy addressing Bribery and Extortion risks, including the proper handling of demands for kickbacks.
- › Secure your tax position in the country with the help of your tax department or a reputable local tax adviser by:
  - being fully compliant with local tax regulations;
  - avoiding tax schemes that could be considered dubious or not compliant with local standards;
  - developing a good working relationship with the tax authorities; and
  - ensure that the local tax adviser you work with has a sound reputation and does not have an inappropriately close relationship (*i.e.* conflict of interest) with the tax authorities.
- › While the tax audit is ongoing:
  - try to agree with the tax auditors on a method of operation that will provide a paper trail of the audit (*i.e.* written questions and answers).

- make sure that your local tax adviser attends, together with the Enterprise's representative, all meetings with the tax auditors.
- try to identify the tax auditor's supervisor.

## RESPONSE TO A BRIBERY DEMAND: HOW TO REACT IF THE DEMAND IS MADE?

- › Alert your management and your tax department immediately.
- › Refuse to pay and:
  - point out the fact that you have solid arguments to challenge the tax adjustment and that you are prepared to appeal before the appropriate court should this be needed;
  - inform the tax auditor that no additional tax payment is allowed by the Enterprise unless it is expressly authorized by management at headquarters (and/or by the tax director) and only if an official receipt from the tax authorities is to be issued; and
  - in the event of a settlement, request that an official written position be issued by the tax authorities.
- › Alert the tax auditor's supervisor.
- › Bring the kickback request to the attention of the trade department of your embassy.

## Scenario 15

A union leader demands payment to an employee welfare fund before allowing his/her members to unload a ship.

### DESCRIPTION

A union sets up a picket line on the docks. Its leader demands recognition of the union as the sole bargaining representative for all workers employed by the project and a US\$1 million contribution to the union's welfare fund. The union leader and two members of his/her family are the welfare fund's trustees.

## DEMAND PREVENTION: HOW TO REDUCE THE PROBABILITY OF THE DEMAND BEING MADE?

- › Establish a policy addressing Bribery and Extortion risks, including the proper handling of charitable contributions, with disbursement mechanisms, limits for expenses and approval levels.
- › Provide anti-corruption training to local management.
- › Provide labor law/relations training to local management.
- › Issue instructions to your local management team that site recognition of unions and collective bargaining with local unions are subject to corporate monitoring and supervision.
- › Decide which unions are to be recognized as parties to collective bargaining, and establish agreements.
- › Agree “rules of interaction” (for non-collective bargaining issues) with local union chapters, including integrity issues, conflict resolution and complaints mechanisms (to Enterprise head office and union head office).
- › Develop and maintain good working relations with unions represented at the site.

## RESPONSE TO BRIBERY DEMAND: HOW TO REACT IF THE DEMAND IS MADE?

- › Refuse payment on grounds of Enterprise policy, anti-corruption provisions in laws, OECD Anti-Corruption Convention and United Nations Global Compact 10th Principle (if appropriate).
- › Disclose demands and responses to corporate management, local government, union head office and International Labor Organization (where appropriate).
- › Explore possibility of International Labor Organization disclosure/proceedings/ sanction.
- › Consider legal action against the union.

- › Investigate and provide a full report to Enterprise management and, where appropriate, other bodies as indicated above.
- › To solve the conflict, suggest the establishment of a transparent agreement for a welfare fund under the auspices of neutral third parties so the issue is decoupled from shipments and not under the direct influence of the union leader; negotiate the contribution to an amount that is acceptable to the Enterprise.

## Scenario 16

A client asks your Enterprise to arrange and pay for a check-up at a prestigious hospital while on a visit to your home office.

### DESCRIPTION

In the course of the performance of a contract, you have arranged a training session in the Enterprise's home country for the benefit of designated customer representatives. Prior to the trip, the head of delegation asks for a check-up in a prestigious hospital during his/her stay.

### DEMAND PREVENTION: HOW TO REDUCE THE PROBABILITY OF THE DEMAND BEING MADE?

- › Define a clear Enterprise policy for gifts, hospitality and personal expenses such as pre-approval and control mechanisms.
- › Clearly state publicly this policy on your Enterprise website or any other appropriate means for internal and external purposes.
- › Train your personnel on how to implement this policy.
- › Provide in the contract detailed provisions describing eligible expenses according to their nature and amount and consistent with the Enterprise's gift and hospitality policy.

### RESPONSE TO A BRIBERY DEMAND: HOW TO REACT IF THE DEMAND IS MADE?

- › State your gift and hospitality policy and show that you are not allowed to give in to this request.

- › Explain that this practice may violate international conventions (of the Organization for Economic Cooperation and Development and of the United Nations) and applicable laws.
- › If appropriate, offer logistical support to arrange the visit, but without paying for any expenses.
- › Ask for a formal written request by a superior, which should be enough to put an end to the Solicitation process.

## Scenario 17

A Public Official requests free product samples for private use.

### DESCRIPTION

A minister (or other high-ranking Public Official) asks your Enterprise—to provide free product samples for his/her son's 16th birthday party. Your Enterprise feels pressure to comply with the request to maintain its good relationship with the Public Official.

### DEMAND PREVENTION: HOW TO REDUCE THE PROBABILITY OF THE DEMAND BEING MADE?

- › Implement a clearly articulated Enterprise anti-corruption policy on gifts that restricts the value and frequency of gifts to Public Officials.
- › Promote awareness of this policy by posting it on your Enterprise's internal and external websites.
- › Train your personnel on the policy, especially those who may interact with Public Officials.

### RESPONSE TO BRIBERY DEMAND: HOW TO REACT IF THE DEMAND IS MADE?

- › Politely explain that your Enterprise policy prevents you from being able to satisfy this request.

- › Explain that providing these products for the official's personal benefit may constitute a Bribe, or have the appearance of being a Bribe, under the law.
- › Explain that providing free product samples as a gift exposes the employee and the Enterprise to potential criminal prosecution and other sanctions.
- › Consider putting this answer in writing in the form of a letter to the Public Official.
- › Promptly report the request to your Enterprise's legal counsel.

## Scenario 18

A government representative requests sponsorship for an activity linked to the private interests of high-level Public Officials.

### DESCRIPTION

In executing a construction contract for a ministry in a developing country, your Enterprise is asked to sponsor an activity closely linked to the private interests of individuals associated with the ministry. Your Enterprise is made to understand that its response to this demand will impact its future business in the country. This is a common scenario in this country where Enterprises are often approached by organisations or governmental bodies requesting sponsorship for activities as a means of overcoming budget limitations.

### DEMAND PREVENTION: HOW TO REDUCE THE PROBABILITY OF THE DEMAND BEING MADE?

- › If you do not have one, establish an Enterprise policy and guidelines for handling Bribery and Extortion risks, including risk associated with sponsorships and political contributions.
- › Use every opportunity to communicate the Enterprise policy externally.
- › Develop internal guidelines for sponsorships with transparent criteria, *i.e.* indicating that your Enterprise only sponsors projects that directly benefit communities around your Enterprise's projects and that are linked to your Enterprise's overall corporate social responsibility/sustainability strategy.

- › Establish a sponsorship board or similar function within your Enterprise to analyse every sponsorship proposal according to internal criteria established in the sponsorship guidelines; ensure that decisions about sponsorships are documented.
- › When projects are sponsored, maintain necessary control and influence to avoid any misuse of the funds (e.g. through a reputable, independent Third Party).
- › Ensure that sponsorship payments are made to organisations and not to individuals, that the sponsorships are covered by written agreements and receipts, and that no conflicts of interest are involved.
- › Remain aware that sponsorships and political contributions that benefit public officials directly or indirectly, materially or immaterially, are likely to be regarded as Bribery by law enforcement agencies.
- › Communicate to government agencies how the Enterprise operates and what its vision, values and strategies are. Inform these agencies of your Enterprise's corporate social responsibility programmes to avoid misunderstandings.
- › Establish a sponsorship budget and a prioritized list of potential sponsorship areas or projects.
- › Identify credible local stakeholders with whom to develop alternative sponsorship activities in compliance with Enterprise guidelines.
- › Publicize internally and externally the sponsorships in which the Enterprise engages.

### **RESPONSE TO A BRIBERY DEMAND: HOW TO REACT IF THE DEMAND IS MADE?**

- › Refuse to sponsor the activity.
- › The refusal should be decided by the sponsorship board or a similar function within the Enterprise and the rationale duly recorded, thereby reducing the exposure of the employees dealing with the customer.
- › Clearly explain the reasons for refusal, which should be communicated and explained to the government agencies or Public Officials—making the



demand and, if possible, involving other authorities that are relevant to the activities to be sponsored.

- › Explore eligible sponsorship at the time of refusal to show goodwill while resisting the Solicitation.

## Scenario 19

A financial services intermediary demands incentives over and above the regulated commissions and fees for referral of clients to financial product providers.

### DESCRIPTION

A client consults an intermediary in the financial services industry for advice. The intermediary approaches a financial services provider and offers to advise his/her client to do business with that specific provider in exchange for an additional commission or fee that will not be disclosed to the client. The intermediary makes it clear that this additional commission or fee will secure the business with the financial services provider.

### DEMAND PREVENTION: HOW TO REDUCE THE PROBABILITY OF THE DEMAND BEING MADE?

- › Adopt clear corporate policies and codes, including a code of ethics, which include clear provisions on:
  - how to identify and manage conflicts of interest;
  - which gifts and incentives may be received or given;
  - the Enterprise's approach to combating financial crime in general, and specifically corrupt practices; and
  - the "zero-tolerance" policy in the implementation of its policies and codes.
- › Communicate your Enterprise's policies and codes to all levels of management, staff and intermediaries as well as other stakeholders:
  - All directors, employees, contracted workers and contracted intermediaries;

- Suppliers, vendors and business partners of the Enterprise;
  - All customers; and
  - Ideally, post the policies and codes on your corporate website to demonstrate your position to the public and competitors.
- › Engage at the industry level with other stakeholders to address undesired behaviour:
- Get regulatory bodies and representative bodies of intermediaries involved in the relevant industry to discuss problem areas;
  - Approach law enforcement agencies to intervene if the situation does not change;
  - Consider the establishment of new structures aimed specifically at addressing corrupt practices in the industry, such as an integrity initiative; and
  - Involve civil society groups when relevant.
- › Engage at the industry level to stimulate a discussion on the relevant issues and the threat to the integrity of the industry as a whole.
- › Formulate the position of the financial services industry on corruption and communicate it clearly to:
- the public at large to create an understanding of the industry position;
  - all intermediaries and intermediary bodies;
  - existing and potential clients; and
  - the regulatory bodies and law enforcement agencies.

### **RESPONSE TO BRIBERY DEMAND: HOW TO REACT IF THE DEMAND IS MADE?**

- › Determine whether meeting the demand would constitute a violation of the Enterprise's codes or policies.

- › Determine whether meeting the demand constitutes behaviour that would violate relevant legislation, regulations, industry codes or standards.
- › Refuse any demand for compensation that could be considered a breach of the Enterprise's code, policy or standards, regulations, statutes and/or relevant legislation, or industry codes or standards.
- › Clearly indicate to the person making the demand that it is in breach of the expressed position of the Enterprise and the industry.
- › Report any unlawful demand to law enforcement agencies and regulatory bodies without delay.
- › Disclose the demand to the appropriate management level within your Enterprise.
- › Disclose to any appropriate industry body where there are agreed reporting procedures.
- › Adopt disciplinary measures against any employee involved in facilitating the demand.
- › Inform any clients to whom an intermediary has made an illicit demand for bribes, if feasible.
- › Name and shame where a criminal conviction was obtained.

## Scenario 20

A supplier offers a Bribe to a contract manager to overlook "out of spec" or inferior goods or services.

### DESCRIPTION

A supplier makes a delivery of 10,000 widgets. Upon inspection of the goods, a contract manager on the customer side notes that the quality of the fasteners on the widgets does not meet contract specifications. The fasteners could cause a malfunction of the widgets and create a potential safety hazard to users. The contract manager phones his/her contact at the supplier and explains the discrepancy. The supplier's employee offers the contract manager money to ignore the issue and pass the goods on, indicating in the paperwork that the goods are in conformity with the contract.

## DEMAND PREVENTION: HOW TO REDUCE THE PROBABILITY OF THE DEMAND BEING MADE?

- › Perform due diligence on suppliers, customers and intermediaries involved in bids.
- › Identify “red flags”, e.g. reputation for corruption, family relationship with government officials, no registered office or refusal to reveal owners.
- › Gather information from relevant embassies, chambers of commerce and trade associations, national anti-corruption bodies, other Enterprises, government agencies and other sources.
- › Establish clear rules and procedures for acceptance of goods and incorporate these into the contract:
  - Goods must strictly conform with contract specifications, and deviations may be accepted only through a written confirmation from customer employees; and
  - Acceptance of goods requires sign-off from more than one customer employee.
- › Contract managers must maintain professional relationship with supplier employees, avoiding excessive familiarity.
- › Train relevant employees on rules and procedures for acceptance of goods, emphasizing the risk to the Enterprise of accepting nonconforming goods.
- › Ensure that suppliers are aware of the customer’s rules for acceptance of goods.

## RESPONSE TO BRIBERY DEMAND: HOW TO REACT IF THE DEMAND IS MADE?

Customer:

- › Refuse the corrupt payment on the grounds that such a payment violates the business principles of the Enterprise, may violate applicable laws and could lead to the dismissal and criminal prosecution of the employees concerned.
- › Make a record of the relevant interaction.

- › Reject the goods as not conforming to the contract.
- › Immediately report the offer of a Bribe to customer management or the appropriate officer responsible for matters involving the code of conduct.
- › Report the offer to the appropriate level in the supplier's organisation, indicating that the goods have been refused and that the Bribe offer may lead to termination of the contract.
- › Follow up on corrective actions taken by the supplier.
- › Investigate the entire engagement as well as past deals with the same supplier and determine whether nonconforming goods from this supplier were previously accepted. Review relevant documents and interview contract managers and customers who have dealt with previous deliveries from this supplier.
- › Include legal, operational and risk management specialists.
- › Determine whether the non-conformity of goods was inadvertent or deliberate—if deliberate, terminate the contract.
- › Develop a strategy to promptly assess possible legal, operational and reputational risks and remedies.
- › Conduct an independent audit to assess any actual risks to product or consumer health and safety that may result.
- › Ensure that product recall and other contingency plans are up-to-date.
- › Accept return of the goods, and remanufacture the goods in conformance with the contract.
- › Investigate, perhaps in conjunction with the customer, both the attempted Bribe and the non-conformity of the goods.
- › Discipline all employees involved in the Bribery offer, including termination of employment.
- › Notify customer of corrective action taken.
- › At the conclusion of the matter, document and apply lessons learned (e.g. make relevant changes to operations, review processes).

- › Retrain relevant employees on policies against Corruption, any process changes and possible sanctions for non-compliance.

## Scenario 21

A customer representative demands a fee that was not previously agreed as a condition to a contract change.

### DESCRIPTION

Your Enterprise has signed a contract with a customer to carry out a project. During project implementation, your Enterprise asks for a legitimate change to the contract to secure a justified market rate increase in your price, as a result of a necessary change in the scope of work. The representative of the customer informs you that the contract modification will not be signed unless your Enterprise makes a payment to the said representative.

### DEMAND PREVENTION: HOW TO REDUCE THE PROBABILITY OF THE DEMAND BEING MADE?

- › Be aware that, once you have signed the contract, you are committed to complete the project on time and within the agreed price; therefore, your Enterprise is highly vulnerable if the contract does not include safeguards addressing the risk of Solicitation.
- › Perform due diligence on the past record of the customer with respect to incidents of Bribery (“know your customer”).
- › Develop relations with external parties who may help while you carry out the due diligence process as well as during contract implementation (e.g. local embassy, business associations).
- › Re-evaluate the likelihood of demands for Bribes at each stage of the project.
- › Develop an overall action plan, including security issues, to deal with the possibility of retaliation against Enterprise staff, contractors and Enterprise assets in the event of a refusal to pay Bribes wherever your Enterprise operates.

- › Consider collective action among competitors and customers through integrity undertakings promoting ethical behaviour; first, ensure that such undertakings do not violate applicable antitrust or procurement laws.
- › Your Enterprise's bid for the project must take into account the fees and costs related to expert advice (legal, technical, administrative,) necessary to mitigate the Corruption risk in the contract terms and conditions and for a rigorous follow-up until project completion.
- › Negotiate the following terms in your contract:
  - A contractual provision that prohibits hidden and/or illicit payments, and allows the party exposed to undue Solicitation from the other party to suspend or terminate the contract due to material breach or willful misconduct by the soliciting party and to be indemnified for the consequences of the Solicitation;
  - A change of contract or variation order clause (e.g. clauses related to modification, suspension, interruption, cancellation or termination or the contract, force majeure and act of God), including clauses related to the financial aspects of the contract;
  - Rigorous technical and financial terms and conditions (e.g. payment schedule and delays, currency of payment and bank account, strict conditions relating to the date of entry into force of the contract), including provisions addressing the payment of extra costs in case of an unusual or unforeseen change in the conditions of the contract to avoid the possibility of Extortion;
  - A dispute resolution clause (specify a well-known arbitration centre and a place of arbitration outside the country of execution of the project if the courts of this country are not deemed reliable); and
  - A clause designating an independent technical expert to facilitate the resolution of any disagreement among the parties.
- › Build the financial aspects of the offer/contract on a cash neutral basis so you may stop the project at any time without incurring major financial losses.
- › Check the possibility of an insurance programme (through an export credit agency, multilateral bank or commercial bank) covering any risk (damages and/or retaliation) triggered by your refusal to pay Bribes.

- › Include terms in your contract providing that all payments will be done exclusively through bank wire transfers between corporate accounts of the parties to the contract, therefore excluding cash payments to the bank account of physical persons.
- › Identify Enterprise assets, receivables and/or employees in the country of the project that may be exposed to retaliation due to a refusal to pay Bribes.
- › If the pressure to pay a Bribe becomes too strong, assess the consequences of terminating the project.

### **RESPONSE TO BRIBERY DEMAND: HOW TO REACT IF THE DEMAND IS MADE?**

- › Refuse to pay.
- › Use all available channels to inform the head office or your parent Enterprise as well as your compliance officer, supervisor or other relevant manager.
- › Examine the legal, technical and financial consequences of your refusal to pay the Bribe.
- › Analyse how the local authorities may react and how the legal authorities of the country where your Enterprise is based may be of assistance.
- › In circumstances where financing is extended or insured by the World Bank, other multilateral development banks and/or other bilateral agencies, immediately seek the support of these institutions in resisting the Solicitation.
- › In cooperation with authorities (e.g. police or other relevant authority) collect evidence wherever feasible to prove the Solicitation.
- › In accordance with the contract terms and conditions as recommended above, demand contractual remedies such as a notice to the customer of the suspension, cancellation or termination of the contract, claims for compensation, indemnity. Give thorough consideration to the criminal implications of such Solicitation by the customer representative.
- › Anticipate and manage the reputational impact deriving from the rejection of such Solicitation (e.g. possible reprisal through media coverage).



- › Approach local business associations and/ or your embassy to expose the situation and obtain support; if appropriate, seek additional support from relevant non-governmental organisations that may help expose the problem of Solicitation.
- › Contact your ECA and/or insurance broker and check whether Solicitation qualifies as a breach of contract triggering insurance policy coverage

## Scenario 22

For a fee, a “businessperson” offers to help reinstate client progress payments that were stopped for no apparent reason.

### DESCRIPTION

Your Enterprise has obtained a contract for the supply of telecommunication equipment to a government-owned Enterprise. The contract also covers engineering and installation services over a period of 18 months. Progress payments are due at the end of each month based on the work performed and the equipment supplied in the previous month. An amount of 10% is retained on each payment and shall be paid together with the last payment after acceptance of the work and the equipment.

The work has advanced according to schedule and the progress payments have been made with little or no delay for the first 11 months. However, the payment due for the 12th month is made with two months delay and no other monthly payment has been made since. Given that you cannot easily demobilize and remobilize your staff, you have completed the work and supplied all the equipment while claiming the late payments without success. At the acceptance inspection, you are provided with a long list of deficiencies and asked to provide a large number of documents for review, although tests run by your experts show that the equipment is performing according to the contractual specifications or better.

At a reception organised by the ministry of communications, you are introduced to a businessperson who hints that he/she can facilitate acceptance of the work and equipment and prompt payment for a commission of 10% of the outstanding amounts.

## DEMAND PREVENTION: HOW TO REDUCE THE PROBABILITY OF THE DEMAND BEING MADE?

- › Implement an Enterprise policy and guidelines prohibiting Bribery, including how to reject offers to facilitate government relations through Bribes.
- › Obtain a letter of credit to cover payments or provide for an escrow account where sums to cover payments are deposited or for a down payment at the beginning of the contract to serve as a guarantee for outstanding payments.
- › Provide for dissuasive interest on outstanding payments and possibly for a discount for prompt payment.
- › Provide for intermediary work acceptance at defined stages of the contract to avoid a long list of deficiencies at the end of the contract.
- › Provide for an accelerated neutral arbitration procedure to establish delivery of services and supply of goods in conformity with the contract.
- › State in contracts that contractual disputes will be submitted to international arbitration on neutral ground.
- › Provide for the right to terminate the contract and charge demobilization costs if payments are outstanding for more than a certain time or if outstanding payments exceed a certain amount also, ensure that work cannot be completed by a Third Party unless demobilization costs and all amounts outstanding are paid.
- › If services are rendered or products supplied to a government, provide for direct payment by the private beneficiaries of the service or for payment by them in an escrow account.
- › Try to ensure that payments are specifically included in the national budget.
- › Obtain surrender of its diplomatic and jurisdictional immunities from the government.
- › Provide contractually for disputes to be submitted to the jurisdiction of the International Centre for the Settlement of International Disputes (ICSID) if the host country and the country of the investor are parties to the ICSID Convention.

- › Apply for guarantee by the Multilateral Investment Guarantee Agency (MIGA) if the host country and the country of the investor are MIGA members, or by a similar national organisation of the country of the investor.
- › Enter into a public-private partnership with the government to give the government a stake in the results of the operations.
- › Never accept any unsolicited assistance.

### **RESPONSE TO BRIBERY DEMAND: HOW TO REACT IF THE DEMAND IS MADE?**

- › Say no to the person making the Solicitation and have no further contact.
- › Expose that person to the government and query the reason for his/her approach.
- › Appoint a local representative to follow up the payment procedure and, if possible, circumvent the customer employee blocking payment.
- › Suspend the work in case of outstanding payments—cash in amounts in escrow—use right of offset with guarantee payment if any.
- › Take the case to arbitration.
- › Ask (informally) the International Monetary Fund to review the case and/or to include the review in a project audit.
- › Request the assistance of the government of the investor's country.

## Annex

### **GUIDANCE ON GENERIC GOOD PRACTICE RELATED TO EXTORTION AND SOLICITATION**

The 22 RESIST scenarios highlight a wide variety of Corruption risks often encountered in many types of commercial dealings with Public Officials and commercial partners.

Many scenarios call for common responses that are applicable to most Solicitation situations. While the answers are partially repeated in the individual scenarios, this Annex provides an overview of generic responses to demands for these types of payments, as well as addressing major aspects of these individual risks.

The suggested actions below are intended as a broad, but not exhaustive, spectrum of practical actions to avoid or combat Solicitation or Extortion scenarios. Not all of them will be relevant in each situation, nor will all of them be feasible depending on the size of Enterprises and their resources. Further, these are intended as practical suggestions, but are not intended as alternatives for sound ethical management judgment and common sense, based on appropriate professional legal, accounting, tax and other specialised advice when addressing a specific situation, in particular the advice necessary to understand and comply with national laws and regulations.

### **DEMAND PREVENTION: HOW TO REDUCE THE PROBABILITY OF THE DEMAND BEING MADE?**

General Enterprise anti-corruption policies

- › Implement and enforce a zero-tolerance anti-bribery policy based on applicable laws and ethical values.
- › Establish a no-bribe and zero-tolerance reputation by publicizing anti-corruption policies efforts and the related anti-corruption programme.
- › Ideally, policies should be publicly available, but they should at least be available to all employees, business partners, relevant government agencies, charities, labor unions and other relevant stakeholders.

- › Set up clear Enterprise directives including a whistleblowing policy and related effective sanctions for non-compliance.
- › Provide training to operational and field personnel on relevant regulations and competition laws, the consequences of Bribery and anti-competitive deals for the Enterprise and the involved employees, how to respond to such demands (*i.e.* alert process, compliance department) and to whom to report such demands.
- › Emphasize in training sessions the criminal and reputation risk not only for the Enterprise but also for the exposed employees themselves.
- › Send regular reminder communications to exposed employees.
- › Provide competitive remuneration for your Enterprise staff at risk to reduce incentives to solicit and/or accept kickbacks.
- › Require high risk employees to sign a code of conduct statement regularly.
- › Introduce anti-corruption clauses and audit rights in contracts with business partners, suppliers and sub-contractors, agents and consultants.
- › Ensure that employees understand they should not refuse payment if faced with threats of violence.
- › Policies on Facilitation Payments.
- › Whenever feasible for your operations, implement a zero-tolerance policy against Facilitation Payments.
- › Otherwise, implement a policy that rejects Facilitation Payments whenever possible, permitting only payments that are clearly unavoidable, requiring clear documentation of any such payment and having as an ultimate goal the elimination of such payments.
- › Clearly identify the limit of a Facilitation Payment, e.g. maximum US\$ 100 made on a one-off basis or only occasionally to the recipient.
- › Make demanding Facilitation Payments more difficult, e.g. having employees advise Public Officials demanding payments that they must record and escalate within the Enterprise the payment and the relevant details, including the Public Official's name.

- › Ensure that employees can quickly contact managers or other designated persons when faced with payment demands.
- › Work with other Enterprises and international organisations towards eliminating Facilitation Payments, e.g. agreeing with competitors in a market that all of them will refuse to make such payments.

### **POLICIES FOR ENTERPRISE REPRESENTATIVES WHO MAY BE EXPOSED TO THESE RISKS**

- › Train and discuss anti-corruption policies with relevant personnel before the start of a project.
- › Identify and openly address incentives to pay Bribes.
- › Introduce “excuse pages” that explain why the usual answers and justifications that Bribes need to be paid are not valid.
- › Perform background checks on personnel involved in transactions and/or projects, including potential conflicts of interest, while respecting applicable employment and data privacy laws and other legal considerations.
- › Provide training to at-risk personnel on the consequences of Bribery (such as legal, financial, and reputational).
- › Prepare employee guidance on how to respond to Bribery demands (*i.e.* whistleblower hotlines, compliance training and consultation) that incorporates cultural, industry and function specific advice.
- › Consider incentives to report Bribery demands.
- › Before, during and after projects and/or transactions, prohibit or strictly regulate gifts, entertainment, hospitality, sponsorship and political and/or charitable contributions activity through policy, guidance, training and a formal approval process.
- › Establish thresholds appropriate to the local environment.
- › Zero-tolerance policy for parties directly or indirectly involved in the bid process.

- › Consolidate disbursement mechanisms for personnel involved in projects and/or transactions.
- › Avoid petty cash funds that would enable staff to respond positively to any Solicitation.
- › Avoid cash payments whenever possible, using instead checks or electronic transfers.
- › Consolidate bank accounts.
- › Conduct a risk management review to approve the opening of project-based accounts.
- › Be clear with your employees about categories of expenses for which claims for reimbursement will be approved or rejected or for which a prior application should be made, to avoid the risk of a *fait accompli* and exposure for the Enterprise and its management.
- › Whenever feasible, replace face-to-face:
  - payment of invoices, customs duties, fees, taxes, with electronic transfers directly to official bank accounts of government agencies, service providers or business partners; and
  - communication required for official approvals with electronic communication and documents.
- › Whenever possible, operate as a team consisting of at least two employees who must comply with strict reporting directives and control mechanisms.
- › When meeting with other parties, request to be accompanied by a lawyer, other professional adviser or another Third Party to reduce the probability of being asked for a Bribe.
- › Be on alert for inappropriate schemes; consult experts familiar with international transactions (financial, tax and legal) where concerns exist.
- › Set up an action plan, in particular security measures, that can be relied upon to anticipate and manage the retaliation risk against people and assets of your Enterprise as the result of the rejection of a Solicitation or Extortion attempt the protection of the exposed staff is of paramount importance.

## DEALING WITH SPECIFIC RISKS

- › Establish a zero-tolerance policy against payment or receipt of kickbacks from private business partners.
- › Treat Bribery of Public Officials or business partners the same.
- › Ensure that business partners are aware of the kickback policy.
- › Have a clear policy addressing conflicts of interest.
- › Require all employees to state any economic or other personal interests they might have directly or indirectly—in any project or transaction or in any Third Party having any business, financial or regulatory dealings with your Enterprise; and
- › Ensure whenever possible that employees with potentially significant conflicts of interest are not involved in such projects or transactions.
- › If it is not possible to isolate employees from such projects or transactions, ensure that their roles are completely transparent and that they obtain no undue gains.
- › Ensure that transactions and projects are transparent and planned and executed according to clear, objective standards and procedures, e.g. if your Enterprise funds a research and development project at a university, ensure that the criteria for funding are clear and objective.
- › Whenever feasible, ensure that more than one person makes key decisions, e.g. a committee or several persons must agree to a supplier or business partner or to an investment (R&D or other funding decision).
- › Have a clear policy addressing gifts, entertainment and hospitality:
  - Balance the need for reasonable, business related gifts and hospitality with the risk that these could be perceived as Bribes, e.g. taking into account local customs and laws; and
  - Provide guidelines clearly explaining what is business related and what types of gifts and hospitality are permitted, e.g. travel expenses, dining, entertainment and lodging.



- › Ensure that guidelines state permitted hospitality. Have a clear policy addressing political and/or charitable contributions and sponsorship.
- › Clearly describe what types of contributions/sponsorships at which levels are permissible, and clearly identify permissible recipients.
- › Balance the benefits of legitimate contributions/sponsorships with the risks of donations being perceived as Bribes, e.g. taking into account local customs and laws.
- › Establish a group implementing the contribution/sponsorship policy, with transparent and well documented procedures.
- › If payments are made to unions or other employee groups, ensure that amounts, payment procedures and dates, and all relevant persons are identified, and ensure payments are made directly into bank accounts of the organisations in question.
- › Have a clear policy and clear guidelines on obtaining payment of outstanding receivables to avoid kickback demands.
- › Publicizing Enterprise anti-corruption materials, e.g. policies and guidelines, is encouraged, because this sends a strong message to employees, business partners and other stakeholders about an Enterprise's firm stand against Corruption.

## **DUE DILIGENCE AND MANAGEMENT OF AGENTS AND OTHER INTERMEDIARIES**

- › Perform due diligence on agents, consultants and other intermediaries (including their owners and managers) involved in dealings with government agencies or business partners:
  - Identify “red flags” since these parties are often used to pay Bribes to Public Officials, extortionists, e.g. family relationship with Public Officials, no registered office, refusal to reveal owners;
  - Eliminate any intermediaries that are nonessential to the project or transaction; and

- Implement risk management/compliance approval for payments to intermediaries, cost thresholds or give clear examples of permitted cost levels.
- › Ensure that employees can quickly obtain guidance when arranging gifts, or
- › Ensure the level of proposed compensation for the intermediary is commensurate with the nature and scope of services and whether the services are legitimate ones; document this compensation.
- › Include in contracts that compensation should be paid electronically into a corporate account in a bank located in the country of the intermediary's operations. Never pay cash.
- › Have clear guidelines governing selection of intermediaries, e.g. who has the authority to hire, criteria for selection, use of standard contracts; the need for an intermediary must be justified.
- › Ensure internal authorizations are obtained by appropriate corporate officials (at least one of the two approvers must have no personal sale incentives) prior to engaging a consultant or agent and making any fee payments. Enter into written agreements with intermediaries that include description of services provided, anti-corruption undertakings, maximum commission, termination and legal compliance clauses, including prohibition against payment to Public Officials and the right to audit intermediaries' accounts.
- › Ensure, if necessary, that all payments made by intermediaries are approved and/or co-signed by the Enterprise, and that Enterprise employees or representatives (e.g. lawyers) attend meetings between agent and Public Officials.
- › In large Enterprises, establish and review each year lists of approved intermediaries.

### IMPLEMENTATION OF ADDITIONAL CONTROL

- › Before beginning operations in a country, ensure that your Enterprise has sufficient knowledge of relevant rules and procedures involving:
  - Legal requirements for obtaining necessary approvals and permits;

- Processes for obtaining permits and licenses required for conducting business in a country, including:
  - health, workplace and product safety and environment;
  - employment permits;
  - passport, immigration, border controls;
  - customs duties, procedures and payment rules, such as official rules for expedited service for higher fees;
  - time-frames for processing applications
  - tax regulations, including procedures for tax payment to official agency accounts.
- Before negotiating contracts, dealing with government agencies or beginning operations, obtain professional advice on:
  - relevant laws;
  - accounting rules and procedures.
- › Linking up to utilities and infrastructure, e.g. electrical and telecommunications networks, water, roads, ports, including the timeframe.
- › Plan for project delays caused by your refusal to pay Bribes.
- › Ensure that your Enterprise complies with all relevant regulations and official requirements for operations in a country.
- › Identify relevant key Public Officials and make them acquainted with your Enterprise and its anti-corruption policy and programmes.
- › Challenge illegitimate claims by Public Officials after seeking professional advice.
- › Attend negotiations and other meetings only when accompanied by professional advisers.
- › Challenge illegitimate claims in courts when necessary. Review payments involving heightened risk:

- to bank accounts with financial institutions outside the project location, to tax havens or to countries maintaining banking secrecy;
  - Require a bank certificate confirming the identity of the owner of the bank account to be credited;
  - Ensure contracts that clearly state rules and procedures for contract amendments, including who pays costs incurred by one party as a result of the other party's request for an amendment, who approves, notice period, criteria for agreement.
- › Implement contract clauses and procedures to ensure payment of your invoices:
- Letters of credit;
  - Early payment incentives, penalties for late payment.
- › Elevate concerns about and evidence of Solicitation. Internally in your Enterprise or senior management.
- › To relevant Public Officials:
- Supervising those soliciting Bribes;
  - Higher in the government, as required;
  - The embassy of the country where your Enterprise is headquartered.
- › Other stakeholders, including other Enterprises, non-governmental organisations or the media as appropriate. In particular, contact Enterprises that also are involved in anti-corruption activities, e.g. through local ICC or UN Global Compact networks, or local chapters of Transparency International.
- › Use anti-corruption technology to increase monitoring effectiveness.
- › Employ computer-assisted techniques to identify higher risk transactions.

## SUPPORT TRANSPARENCY OF PROCUREMENT PROCESSES WITH AUTHORITIES

- › Engage in a dialogue with agencies to improve procedures in the following areas:
  - Encourage adoption of best practice procurement guidelines (World Bank/OECD);
- › Make the procurement process transparent, including the publication of terms of reference.
- › Work with other stakeholders (e.g. civil society organisations) to influence procurement agency to adopt best practices.
- › Favor the establishment of an integrity pact (a tool developed by Transparency International to fight corruption in public contracting), or a similar type of agreement, between the local public authority and the various competitors, in order that all participating Public Officials and bidding Enterprises commit to not soliciting, offering, giving or accepting bribes or other undue benefits.
- › Secure agreement from the procurement agency on the appointment of an independent (*i.e.* no conflict of interest) Third Party (e.g. competent individual, Enterprise or non-governmental organisation or public international organisation such as the World Bank) to supervise the entire bidding process.
- › Request a pre-qualification round to exclude bidders lacking technical and financial delivery capacity (either through their own organisation or relevant contractors).
- › Suggest that all bidders should as a prequalification requirement have implemented anti-corruption policies and related programmes.
- › Agree with the procurement agency that no intermediaries can be added to the process after bid submission.

## ADDITIONAL PRECAUTIONS IN THE PROCUREMENT PROCESS INVOLVING STATE TENDERS

- › Include assessment of corruption risk as standard procedure when selecting proposal opportunities.
- › Assess corruption risks at the project level before engaging in the bidding process.
- › When bidding for large contracts, favour projects that are financed by multilateral financial institutions (e.g. World Bank) and that have a clear anti-corruption policy.
- › Standardize review of bids by non-project team members, including senior operational personnel, risk management and finance specialists.
- › Maximize opportunities for detection by employing additional control procedures to detect Bribes.
- › Segregate disbursement activities related to the bid from bid approval processes.
- › Ensure that the bidding approval process does not fall under the sole responsibility of the sales team involved in the bid if the size of your organisation allows it.
- › Carry out formal vendor review and approval process.
- › Use open bids for subcontracting activities whenever and wherever possible.
- › Hold regular market reviews of marketing fees per country:
  - to agents/consultants/advisers used in the bidding process;
  - to bank accounts with financial institutions outside the project location, to tax havens or to countries maintaining banking secrecy.
- › Require a bank certificate confirming the identity of the owner of the bank account to be credited.
- › Train and discuss anti-corruption policies with personnel involved in the procurement process before the start of the project.

- › Implement a regular, independent internal monitoring function that reports to a senior executive on:
  - high risk payments to agents/consultants or to financial institutions outside the project location;
  - regular, timely and detailed review of bidding process documentation.
- › Seek relevant information from major Enterprises, embassies, export credit agencies, banks or trade associations about the business practices in that country.
- › Consult country profiles on online tools such as [www.business-against-corruption.com](http://www.business-against-corruption.com). Assess levels of enforcement of existing anti-corruption policies and laws.
- › Monitor the living standards of the members of the body defining the terms of reference/procurement agency.

## INITIATION OF COLLECTIVE ACTION TO IMPROVE OVERALL BUSINESS INTEGRITY

- › Encourage local professional and business associations and non-governmental organisations to engage with the government to enact laws and rules for transparent projects and transactions.
- › Seek the leverage of international financial institutions to enhance the quality and predictability of public procurement.

## LEGAL AND FINANCIAL PRECAUTIONS

- › State in contracts that contractual disputes will be submitted to international arbitration on neutral ground.
- › Provide contractually for disputes to be submitted to the jurisdiction of the International Centre for the Settlement of International Disputes, if the host country and the country of the investor are parties to the ICSID Convention.
- › Apply for guarantees by the Multilateral Investment Guarantee Agency (MIGA), if the host country and the country of the investor are MIGA members, or by a similar national organisation of the country of the investor.

## RESPONSES TO A BRIBERY DEMAND: HOW TO REACT IF THE DEMAND IS MADE?

### *Immediate response*

- › Take time to think about the situation, do not act alone, and stick to your mandate.
- › Answer that the Solicitation (direct or indirect) is to be made in writing and needs to be reported to your management.
- › Refuse payment on the grounds that any Solicitation violates the business principles of your Enterprise and may violate applicable laws such as those covering accounting and/or anti-corruption in your country and/ or the host country, and money laundering, and could lead to the dismissal and criminal prosecution not only of the employees concerned but also of the soliciting party.

### *Report internally*

- › Immediately report to management or the appropriate officer assigned with matters involving the code of conduct (e.g. the compliance officer) and define an appropriate strategy (e.g. changing the negotiation team).
- › Record the incident and make an internal assessment to define corrective actions.

### *Investigate*

- › Investigate the deal and the intermediary, as well as past deals with the same counterparties (customer, authorities) and/or intermediary in same country or even other countries.
- › Include legal, operational and risk management specialists.
- › Retain investigation results for both legal implications and future risk assessments.

### *Discuss with relevant persons*

- › Go back to the soliciting person or his/her superior with at least one witness (management, adviser, bank representative) with the following position:



- Reaffirm your willingness to do business, perform the project or transaction, carry out the activity and ignore the Solicitation.
- In case the Solicitation is reiterated:
  - First, inform the person that the request is not acceptable;
  - Threaten to refuse to participate further with public communication of the reasons for doing so;
  - Stop further participation.
- › Report (directly or anonymously) to the appropriate level of the organisation allegedly represented by the person demanding the Bribe.
- › Assess whether the demand is part of systemic Corruption or simply the action of a rogue employee:
  - Rogue employees—expose to superiors;
  - Systemic corruption—report to organisation (directly or anonymously) and superiors.
- › Explain to the persons making the Solicitation that the proposed scheme could expose all the parties (individual and Enterprise) to a prosecution risk not only in the country where the deal occurs but also in OECD countries under regulations fighting Corruption or money laundering.
- › Convene meetings of all parties and discuss potential challenges to successful dealings such as requests for Bribes, without disclosing too many details this should serve as a deterrent to the guilty party.

*If your suspicions are substantiated, disclose externally to:*

- › Government—use various governmental agencies to report corrupt organisations.
- › Embassy or consulate representing your home country to seek guidance and support.
- › Financing institutions, if any export credit financing or coverage is proposed.
- › Competitors, if they are subject to a regulatory environment similar to yours.

- › Industry trade association in the host country to report on a “no name” basis and in a collective manner such Solicitation to relevant authorities.
- › Industry initiatives: leverage industry initiatives to communicate— Bribery demands.
- › Expose known extortionists
- › Regulators: In regulated industries, alert the regulators of Bribery demands that may stem from Officials of a state-owned Enterprise.
- › Media/non-governmental organisations: Leverage public scrutiny of bidding process.

## WITHDRAW

Withdraw from the project or transaction and disclose the reasons for the withdrawal to the public, to international organisations and/or selected Public Officials of the country organizing the tender.

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RESIST

# ICC Guidelines on Agents, Intermediaries and Other Third Parties<sup>6</sup>

## Introduction

Many Enterprises use intermediaries to obtain or retain business opportunities. Agents, consultants, intermediaries and other Third Parties, hereinafter referred to as Third Parties, are an effective means of developing, expanding and maintaining an Enterprise's international business. Even very large businesses need in a globalised economy to have recourse to Third Parties in order to allow them to reach all the areas and to market all the products and services they want to cover. Third Parties can, however, if not carefully selected or if inappropriately managed, create considerable risk and damage to the Enterprise.

The ICC Guidelines on Agents, Intermediaries and Other Third Parties (the "Guidelines"), which are for voluntary application by Enterprises, provide Enterprises with advice on how to select, remunerate and manage Third Parties, so as to obtain the best possible result without harm to the Enterprise's reputation. The Guidelines are of a general nature constituting what is considered good commercial practice but are without legal effect. They are the result of numerous consultations with input from many segments of business. These Guidelines are intended for Enterprises which have recourse to Third Parties or intend to do so, but they should also induce all Public Officials to abstain from any form of Extortion or Solicitation directed to Third Parties.

A large number of conventions and implementing national legislation criminalise Bribery in all its forms, direct Bribery as well as indirect, and Trading in influence, and sanction infringements by individuals and Enterprises with heavy penalties. In addition, more and more criminal law provisions require Enterprises to install in their organisations effective preventive systems, which should aim at avoiding any occurrence of Bribery. An increasing number of States, inside and outside the OECD area, are increasing their enforcement resources and efforts in order to detect, identify and punish Bribery, exposing Enterprises to extensive liability under a variety of anti-bribery laws.

All Third Parties, as defined in the Glossary, have as a common factor that they are subject to the control or determining influence of the Enterprise, and thus,

<sup>6</sup> 2010 edition available at <https://iccwbo.org/publication/icc-guidelines-agents-intermediaries-third-parties-2010/>

within its proper sphere of responsibility. It follows from the definition in the Glossary that Third Parties do not include service or goods providers. Bribery risks also may arise while employing Third Parties who act in the private sector. A growing number of mandatory international and national legal provisions make Commercial Bribery a criminal offence. It is therefore recommended for Enterprises that are subject to such legal provisions to apply the Guidelines to intermediaries acting not only in the public but also in the private sector. Enterprises also should consider applying the principles of the Guidelines to intermediaries who are not employed in the sales phase, but at a later stage of a transaction, such as customs agents or claim managers, since Bribery risks also may arise during the implementation phase of a contract or project.

It is the purpose of these Guidelines to provide guidance on due diligence processes on Third Parties that are designed to ensure that, to the extent possible, Enterprises engage, or do business with, only reputable and qualified Third Parties who will act with integrity, and in compliance with all applicable laws and Enterprise policies. After entering into a relationship with a Third Party, the Enterprise should have effective controls in place to mitigate the risks of non-compliance.

These Guidelines set out some due diligence processes and additional safeguards that Enterprises may wish to consider when dealing with Third Parties and are directed to all Enterprises that engage or wish to engage Third Parties. Small and medium-sized Enterprises may use them as a basis for creating their own internal guidelines; large Enterprises may wish to benchmark their own rules.

Many Enterprises that use the services of numerous and varied types of Third Parties find that a tiered due diligence programme allows an Enterprise to devote more resources to Third Parties that present a high level of Bribery risk while ensuring that all Third Parties are appropriately reviewed. Under a tiered system, higher risk Third Parties are subject to a more stringent review while lower risk Third Parties undergo a less comprehensive review. The first step in creating a due diligence protocol that is comprehensive as well as efficient and cost-effective is to create a complete and accurate inventory of the types of Third Parties (and activities performed on behalf of the Enterprise by such Third Parties) and their relations (with Public Officials or private to private), to identify levels of risk, red flags and exposure for the Enterprise and, finally, to define appropriate degrees of reviews.

## ICC Rules regarding Third Parties

Under Article 2 of the ICC Rules on Combating Corruption:

*With respect to Third Parties, Enterprises should instruct them neither to engage nor to tolerate that they engage in any act of corruption; not use them as a conduit for any corrupt practice; hire them only to the extent appropriate for the regular conduct of the Enterprise's business; and not pay them more than an appropriate remuneration for their legitimate services.*

These principles in the *ICC Rules on Combating Corruption* are an integral part of these Guidelines.

## Selecting a due diligence process

There is no standard due diligence process that is suitable for all Enterprises. Rather, an Enterprise should choose a due diligence process that is appropriate to its unique circumstances, including its size, resources, and risk profile.

An Enterprise's first step in developing an appropriate due diligence process is to define the scope of the process broadly enough to capture the Enterprise's exposure to Third Party risks. This step involves defining the categories of Third Parties that can create potential liability for the Enterprise, and deciding which of these categories of Third Parties must be subjected to a due diligence review prior to retention. In doing so, an Enterprise should be careful not to elevate form over substance, and should focus on the activities performed by and not on the title of the Third Party. For example, an Enterprise may need to re-categorize Third Parties, someone called a distributor may act more like a sales agent. Additionally, Enterprises operating in industries or geographical areas where Bribery is prevalent should consider conducting due diligence on Third Parties that are typically considered low-risk in other contexts.

Next, an Enterprise will need to decide on a suitable due diligence process (see chapter V below). Such process can be designed to provide an objective review of the candidate Third Party, and to collect information, subject to compliance with applicable personal data protection legislation, about the candidate Third Party and the transaction from the Third Party itself, the Enterprise's own employees, and other sources. Enterprises should consider inquiring about the Third Party's status (e.g. to determine whether they, or their beneficial owners, or directors, managers or employees are themselves Public Officials), background (e.g. qualifications for the services to be provided), and reputation.

Enterprises should also respond to red flags (e.g. reputation for cutting corners) that will alert Enterprises to the risk that a Third Party will make improper payments. This process can be as simple as requiring Third Parties and Enterprise employees to submit forms containing relevant information and verifying that information through internet research and conversations with references. Enterprises facing significant Third Party risks, however, may wish to subject Third Parties to reviews of greater depth, which could include interviews, consultations with outside attorneys, or hiring independent investigators such as law firms or providers that specialize in due diligence services.

Additionally, an Enterprise might—at least where a certain risk for Bribery is feared—establish a process for the due diligence review and approval of Third Party transactions that requires the participation of a designated function independent from the business unit that may have an interest in engaging the Third Party (the Sponsoring Department), e.g. Compliance or Legal (the Reviewing Departments). For SMEs that do not have the internal resources to support an independent Compliance or Legal organisation, the due diligence review and approval process could be managed by individuals who are independent of the Sponsoring Department. Some Enterprises may consider involving outside legal or compliance or accounting experts in the due diligence process.

Finally, an Enterprise may wish to implement safeguards to protect itself from Third Party risks going forward. In particular, an Enterprise may require written contracts, provide anti-corruption training to Enterprise employees and Third Parties, monitor Third Parties, and develop guidelines for making payments to Third Parties.

## Scope of due diligence

While each Enterprise can review and categorise, on the basis of a structured risk management approach, its own Third Party relationships to gain a clear understanding of its vulnerabilities, certain categories of Third Parties tend to expose Enterprises to greater risks than others.

These categories of high risk Third Parties, and any others identified by the Enterprise, can be subjected to a thorough due diligence review prior to retention:

- › Any Third Party that will be engaged to deal directly with a Public Official on behalf of the Enterprise where that Public Official has discretionary authority over some matter impacting or involving the Enterprise, and, in particular, such Third Parties that are located or doing business in a country with high levels of Bribery. Any Third Party engaged to interact with Public Officials that is compensated on the basis of their success in securing a contract, permit or increased business. Similarly, the Enterprise will also try to identify the circumstances in which Third Parties are the most exposed to Private-to-Private Bribery.
- › Any Third Party that is engaged to seek information that is not publicly available.
- › Any Third Party that may be, or may have been, a Public Official or an Enterprise in which a Public Official holds an economic interest (e.g. as an owner, shareholder, employee, or director).
- › Any Third Party who is or may be a relative or close associate of a present or former Public Official, or a Third Party that has a relative of a present or former Public Official as an owner, shareholder, employee, director.
- › Any Third Party that is owned or controlled by or closely linked to a government agency.

The scope of a due diligence review should be sufficient to assess whether the Third Party is unsuitable, that is, whether the Third Party is likely to engage in any improper practices that could expose the Enterprise to liability or that otherwise may be inconsistent with the Enterprise's business practices and ethics principles. If the Third Party is suitable, the due diligence review should confirm that the proposed transaction with the Third Party is legal under applicable law and provide a reasonable record supporting the presumption that the Third Party will not use its influence with the government, public entities or the private sector in order to corruptly obtain or retain business, other authorizations or permits or other improper advantage in the conduct of business. The amount of time and effort required for the review will depend on the number and complexity of the issues raised during the course of the review.

## Due Diligence Process

An Enterprise's interests are best served by a due diligence process that is effective and efficient. Due diligence is a thoughtful, collaborative process, not



a check-the-box exercise. Such process can either be conducted inside the Enterprise or outside of it by external qualified due diligence service providers. In the latter case, the final decision to retain or not the candidate Third Party should be taken by the Enterprise and not outsourced. If the process is conducted inside, all employees involved in a Third Party transaction should be equally responsible for the success of the process. Specifically, the Sponsoring Department should provide the Reviewing Departments with the factual background required to complete the due diligence process. The Reviewing Departments, in turn, should work quickly to identify issues and to try to resolve them in a manner that protects their Enterprise from risk while facilitating its efforts to compete in the marketplace.

In performing a due diligence review, Enterprises may wish to collect and verify detailed information from prospective Third Parties, internal sources, and other reliable sources outside of the Enterprise.

### **ENTERPRISES CAN COLLECT INFORMATION FROM THE SPONSORING DEPARTMENT BY:**

- › requiring the Sponsoring Department to complete an application form. Often, the employee proposing the engagement of a Third Party has an interest in the hiring of the candidate Third Party or the success of the deal. Because such interests have the potential to obscure the risks posed by a particular Third Party, this employee alone should not be allowed to make the final decision on the engagement of the candidate Third Party. Thus, a first step in the process should be to require the Sponsoring Department to submit written information regarding the candidate Third Party. Such information can be provided in a form that sets forth the business need for employing a Third Party, the business justification for the proposed compensation, an evaluation of the commercial and technical competence of the candidate Third Party (e.g. his knowledge of the Enterprise's products and services), specific information regarding the candidate Third Party's reputation for integrity, details on how the candidate Third Party was identified, whether any other Third Parties were considered, and why the candidate Third Party was proposed. The form can also contain a confirmation by the employee that, to the best of his/her knowledge, the candidate Third Party is qualified and suitable for engagement. The form can also provide information on the services that the candidate Third Party shall provide: the main terms of the contractual arrangement to be entered into with the candidate Third Party, a description of the amount of the proposed compensation payments, and an assessment of why the proposed

compensation is reasonable and appropriate in relation to the services to be performed.

### ENTERPRISES CAN COLLECT INFORMATION DIRECTLY FROM THE CANDIDATE THIRD PARTY BY:

- › requiring the candidate Third Party to complete a questionnaire and provide documentation supporting the answers. The topics covered by such questionnaires can include the candidate Third Party's basic information and qualifications (e.g. the candidate Third Party's principal officers, facilities and staff, principal product lines, and the nature and history of the candidate Third Party's business); ownership and other business interest (e.g. other Enterprises affiliated with, or owned or represented by the candidate Third Party); status (e.g. whether any of the candidate Third Party's owners, directors or employees are or previously were Public Officials); other connections with Public Officials (e.g. familial or other relationships); financial data; any current and previous litigation involving the candidate Third Party's activities; information about current and previous criminal investigations, sanctions, debarment and convictions under the criminal law of the territory or abroad for facts related to bribery, corruption, money laundering or violations of laws or regulations governing Enterprises; and contact information for business references (one should pay attention to possible restrictions arising from mandatory local law, e.g. data privacy issues with regard to the candidate Third Party's employees). Supporting documentation should for example include excerpts from the commercial registry, where available, as well as the candidate Third Party's articles of association.
- › interviewing the candidate Third Party, in person if feasible. Although not practical for all retentions, interviews conducted in person are generally more effective in assessing the responses to these inquiries, and provide a better setting to ask the often delicate questions necessary. Such in person interviews, particularly when conducted on-site, can aid Enterprises in verifying the information in the candidate Third Party questionnaire, following up on any red flags that have come to light, determining the candidate Third Party's business credibility, determining the candidate Third Party's ability to provide the types of services contemplated and to comply with the ethical standards of the eEnterprise. Such interviews can also be used as an opportunity to train the candidate Third Party regarding Enterprise policies and procedures, and to communicate the Enterprise's commitment to complying with applicable anti-bribery laws

and its own anti-bribery policies, its intent to monitor the candidate Third Party throughout the relationship, and its requirement that the candidate Third Party will provide services without making any improper payment to a Public Official. Ideally, such interviews should be conducted by or together with the Reviewing Departments, and the interview should be summarized and recorded in a memorandum and included in a due diligence file that should be kept in the Enterprise's records.

### **ENTERPRISES CAN COLLECT INFORMATION FROM THE BUSINESS UNITS BY:**

- › gathering further information regarding the candidate Third Party from internal sources other than the person who has proposed to engage the candidate Third Party. Such sources can provide the Enterprise with information about the candidate Third Party's past dealings with the Enterprise, including the scope of any other agreements with the Enterprise, amounts of past payments made by the Enterprise to the candidate Third Party and the potential amount of total payments to the candidate Third Party under all agreements between the Enterprise and the candidate Third Party, and the candidate Third Party's background and reputation.
- › comparing the candidate Third Party's proposed compensation to internally prepared compensation guidelines and any external benchmarks that are available. Such comparisons can assist Enterprises in determining whether the proposed compensation is appropriate remuneration for the services rendered by a Third Party. Compensation guidelines can take into account the services to be performed, past performance of the candidate Third Party, the candidate Third Party's competence and resources, the complexity of the activities involved, the duration and nature of the contract with the customer, and prevailing rates for such services in the market served.

### **ENTERPRISES CAN COLLECT INFORMATION FROM OTHER SOURCES OUTSIDE THE ENTERPRISE BY:**

- › contacting, as far as possible, Third Party's references (e.g. commercial and bank references);
- › searching publicly available news sources or local press clippings;

- › searching internet databases or obtaining reports from independent Enterprises that compile financial and other information about commercial entities;
- › searching government databases of parties subject to sanctions;
- › to the extent possible, consulting with embassy staff or other government sources about the candidate Third Party and the region in which the candidate Third Party operates;
- › engaging an Enterprise that specializes in performing due diligence;
- › seeking a local law opinion where there is an issue of whether the arrangement between an Enterprise and a Third Party is permissible under local law and under the terms and conditions of the relevant customer contract; and
- › in addition, an Enterprise may consider collecting or verifying information from independent sources.

Additionally, an Enterprise should observe its due diligence review and keep its information current. This can be accomplished by:

- › documenting, compiling, and maintaining the information gained during the review in a due diligence file; and
- › updating the due diligence performed on the candidate Third Party periodically, at least when the contract with the Third Party is being renewed or updated.

## Anti-Bribery “Red Flags”

In conducting anti-bribery due diligence, it is important that Enterprises be sensitive to circumstances that suggest Bribery risks. Circumstances that may indicate a Third Party’s propensity to make illegal payments to Public Officials or persons employed in the private sector are commonly referred to as red flags. Indeed, any fact that suggests commercial, financial, legal or ethical irregularity can constitute a red flag. Red flags can arise at any stage of a Third Party relationship, including during an Enterprise’s selection of the Third Party, during contract negotiations, in the course of operations, or at termination. Red flags that do not present serious issues at one stage of a relationship may pose significant risks of liability when they appear at a different stage or in

combination with a different overall set of facts. Thus, Enterprises may wish to evaluate the significance of red flags in the context of all of the facts, rather than in isolation. However, depending on the nature of their business and their Enterprise policies, Enterprises can define one or several of these red flags as general showstoppers.

Although such red flags may not themselves constitute violations of the anti-bribery laws, they are warning signs that need to be taken seriously and investigated. The presence of one or more red flags does not necessarily mean that the transaction cannot go forward, but it does suggest the need for a more in-depth inquiry and the implementation of appropriate compliance safeguards. Any red flags must be addressed to the satisfaction of the Enterprise engaging the Third Party prior to entering into the relationship.

Red flags that warrant further review when selecting or working with a Third Party are varied and numerous. The following are a few examples:

- › A reference check reveals the Third Party's flawed background or reputation, or the flawed background or reputation of an individual or Enterprise represented by the Third Party.
- › The operation takes place in a country known for corrupt payments (e.g. the country received a low score on Transparency International's Corruption Perceptions Index).
- › The Third Party is suggested by a Public Official, particularly one with discretionary authority over the business at issue.
- › The Third Party objects to representations regarding compliance with anti-corruption laws or other applicable laws.
- › The Third Party has a close personal or family relationship, or business relationship, with a Public Official or relative of a Public Official.
- › The Third Party does not reside or have a significant business presence in the country where the customer or project is located.
- › Due diligence reveals that the Third Party is a shell Enterprise or has some other non-transparent corporate structure (e.g. a trust without information about the economic beneficiary).

- › The only qualification the Third Party brings to the venture is influence over Public Officials, or the Third Party claims that he can help secure a contract because he knows the right people.
- › The need for the Third Party arises just before or after a contract is to be awarded.
- › The Third Party requires that his/her identity or, if the Third Party is an Enterprise, the identity of the Enterprise's owners, principals or employees, not be disclosed.
- › The Third Party's commission or fee seems disproportionate in relation to the services to be rendered.
- › The Third Party requires payment of a commission, or a significant portion thereof, before or immediately upon the award of a contract.
- › The Third Party requests an increase in an agreed commission in order for the Third Party to take care of some people or cut some red tape; or
- › The Third Party requests unusual contract terms or payment arrangements that raise local law issues, payments in cash, advance payments, payment in another country's currency, payment to an individual or entity that is not the contracting individual/entity, payment to a numbered bank account or a bank account not held by the contracting individual/entity, or payment into a country that is not the contracting individual/entity's country of registration or the country where the services are performed.

## Approval of Third Party transactions

Because of the potential for conflicts of interest described above, persons with responsibility or accountability for approving relationships with Third Parties may need to be situated outside of the Sponsoring Department because of the potential for Conflicts of Interest as described above. In addition, it may be useful for persons with this type of responsibility to have direct access to the Chief Executive Officer or the Board of Directors to ensure their independence and accountability. As a result, Enterprises may want to nominate Reviewing Departments to be responsible or accountable for all decisions regarding the approval of Third Parties that present Bribery risks. Alternatively, Enterprises could appoint a committee of individuals who are independent of the sponsoring entity or employee and, at minimum, comprised of representatives from e.g. the finance and legal/compliance departments.

## Written agreement in advance of services being provided by the Third Party

After an Enterprise has vetted a Third Party through a due diligence review and the Third Party has been approved by the relevant department but before any services are performed, it may be helpful to reduce the terms of the relationship to writing. Oral contracts pose considerably higher business and legal risks to Enterprises, and should be avoided. Enterprises might wish to engage Third Parties pursuant to a written contract that includes a provision which ensures compliance with applicable anti-bribery laws. Such contracts might be for a fixed term, describe in detail the services to be performed and the compensation to be paid, and contain termination rights for breaches by the Third Party. In particular, Enterprises might consider including the following anti-corruption provisions, representations, warranties, and covenants in contracts with Third Parties:

- › The Third Party is not a public official, and does not have any official status. The Third Party will notify the Enterprise of any changes to these representations.
- › The Third Party does not have any relationship with a current Public Official or any immediate relative or close associate of a Public Official who would be in a position to influence a decision in favour of the Enterprise, and the Third Party will notify the Enterprise of any changes to this representation.
- › The Third Party will comply with all applicable anti-corruption and anti-money laundering laws.
- › The Third Party is not and has not been the subject of a criminal investigation and has not been convicted under the laws of the relevant countries for facts related to Bribery, Corruption, money laundering or for violations of laws or regulations in force governing business Enterprises.
- › The Third Party will comply with the Enterprise's codes and guidelines, in particular, the Enterprise's rules on gifts and hospitality or has its own code or guidelines with equivalent standards and will comply therewith.
- › The Third Party represents that no payments, offers, or promises to Public Officials or other beneficiaries have been, or will be made, directly or indirectly, for an improper purpose.
- › The Third Party agrees to comply with Enterprise guidelines and limits for reimbursement of expenses.

- › The Enterprise has the right to suspend or terminate the contract immediately upon unilateral good faith concern that there has been a violation of any applicable anti-corruption law or provision of the agreement without paying any compensation to the Third Party, and the Third Party agrees to indemnify the Enterprise for expenses related to violations of the anti-corruption laws.
- › The Third Party agrees to a clearly defined scope of work that limits the Third Party's ability to act on the Enterprise's behalf.
- › The Third Party agrees to regularly report on its activities on the Enterprise's behalf, and to provide detailed invoices and detailed supporting documentation for its expenditures.
- › The Third Party agrees to provide audit rights to the Enterprise related to activities undertaken on the Enterprise's behalf in the previous three years.
- › The Third Party agrees to submit the retention of subcontractors or other persons or entities designated to perform similar services to the Enterprise for prior approval, if the subcontracted activity is of a high risk nature.
- › The Third Party is prohibited from assigning the contract or the compensation to be paid.
- › The Third Party agrees to payment provisions that include the safeguards identified further down in the Compendium.
- › The Third Party is required to update the information supplied during the due diligence review.
- › The Third Party is required to maintain accurate books and records and appropriate internal controls.
- › The Third Party is required to cooperate with any investigation into alleged breaches of the compliance provisions, including the requirement to provide access to documents and personnel.
- › Enterprises facing higher risks in connection with Third Parties may wish to consider the following additional safeguards:
  - Require the Third Party to submit certain actions to the Enterprise for prior approval (e.g. interactions with Public Officials);



- Include provisions that limit the Third Party's ability to act on the Enterprise's behalf in relation to government contracts; and
- Require, as appropriate, provisions for transparency of the relationship to local authorities.

## Raising awareness for Third Parties and training employees

Because Third Parties can expose Enterprises to liability, it is desirable for Enterprises to communicate their anti-corruption policies to the Third Parties they engage and to their own employees. For all Third Parties, a basic level of awareness can be accomplished by providing information on anti-corruption laws (e.g. of the country of origin or of the country of operation) and the Enterprise's compliance policies and by using printed and/or web-based training programs. Such information ideally should be supplemented by raising anti-corruption awareness in person at least for higher-risk Third Parties. Enterprises may consider running such sessions for the owners, director, officers and employees of the Third Party providing services to the Enterprise, as appropriate to the nature of the Third Party. For example, with a small, privately held sales agency or similar Third Party it is recommended that the owners be trained. In some jurisdictions, the Enterprise will want to take into account co-employment.

Regarding an Enterprise's own employees, at a minimum, the Enterprise might choose to provide training and compliance materials to all employees who work with Third Parties, employees who review and approve requests for Third Party relationships, employees who review, approve and process payments to Third Parties, and internal auditors, to ensure they adequately identify and respond to red flags during the relationship. Other groups of employees who interface with government agencies may also need training in anti-bribery compliance. Again, training could include the provision of written information on applicable laws and the Enterprise's anti-corruption policies and procedures, web-based training, and in person training sessions.

It is desirable to provide all such training programmes and materials in the local language. Enterprises also can increase the effectiveness of training programmes by providing periodic follow-up trainings.

## Monitoring the Third Party's activities

Once an Enterprise has retained a Third Party, it might monitor the Third Party's activities and expenses to ensure continued compliance with all applicable laws and Enterprise policies. If a Third Party makes or promises an improper payment, an Enterprise may be held liable under certain anti-bribery laws even if it did not authorize the payment. To guard against such liability, employees could:

- › insist on documentation of the services actually rendered before paying the contractual compensation and expenses;
- › review and approve payment requests and payments; Question unusual or excessive expenses; Refuse to pay a Third Party and notify compliance or legal personnel when the employee suspects that the Third Party has or will make or promise illicit or questionable payments or gifts, or when the employee discovers or comes to suspect the existence of any of the red flags listed above;
- › audit the Third Party on a risk-based, periodic basis and promptly if suspicions arise;
- › establish periodic anti-corruption internal audits to review the retention, and monitoring of and payments to Third Parties; and
- › require periodic, or annual, certifications of compliance by the Third Party.

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## Payments to Third Parties and record-keeping

Parties to a business relationship should be free to negotiate the reasonable, arms-length form and amount of compensation to be paid for the services of a Third Party. There may be good and sufficient business justifications for many different types of compensation arrangements, including so-called success fees or similar incentive payments. Whether or not a success fee constitutes a Red Flag will depend on the circumstances, the existence of other Red Flags such as the Corruption Perceptions Index of Transparency International (CPI) of the country where the services will be provided, and the identity and reputation of the agent or intermediary. For example, success fees are a traditional form of compensation in investment banking arrangements and if the intermediary is a well-known and respected investment banking firm performing services in an OECD country with a high CPI, the anti-bribery risks are different than if the

recipient of a sizeable success fee is a relatively unknown local agent without a well-established reputation for integrity and whose task is to get a discretionary permit from a Public Official.

However, when engaging an agent or other intermediary the type and amount of compensation to be paid for the Third Party's services may constitute a red flag that needs to be carefully analysed and mitigated before engaging the intermediary. Compensation unrelated to hourly fees for documented time worked can constitute such a red flag and a success fee or success bonus will, in some situations, constitute such a red flag. Although these Guidelines do not recommend the complete avoidance of success fees in all cases, it is recommended that there should be special consideration given to the reasonableness and the commercial justification for any such success fees or other similar lump sum compensation not tied to fees for hours of work. Careful documentation of the legitimate business case for the engagement of the intermediary and for the nature and extent of such compensation is a recommended safeguard to be employed along with the other anti-bribery safeguards recommended in these Guidelines for higher risk situations.

Enterprises may wish to establish clear guidelines for the review and approval of payment requests and payments, including currency and place of payment to the Third Party. Enterprises might decide that all payments should be by bank transfer or check payable to the Third Party at its principal place of business in the country in which the services are to be performed or the Third Party's well-established headquarters. It may be helpful to keep full and accurate records of all payments and the reasons therefore, and Enterprises may decide to prohibit cash payments and ensure that all payments are accurately recorded in the Enterprise's books and records. This would include keeping accurate records of all transactions with Third Parties, including the amounts paid, expenses reimbursed, evidence of the services rendered.

For high risk Third Parties, it might be necessary to request certification of compliance with anti-corruption laws and Enterprise policies and procedures by the Third Party in conjunction with each invoice for payment or reimbursement of expenses.

# ICC Anti-Corruption Third Party Due Diligence: A Guide for Small and Medium-Sized Enterprises<sup>7</sup>

## Introduction

### WHY SMES NEED THIS GUIDE

Small and Medium-sized Enterprises (SMEs) are often on the receiving end of burdensome due diligence procedures of large multi-national Enterprises. These requirements can be overwhelming and often Enterprises feel they do not have sufficient resources to meet them. The ICC Anti-Corruption Third Party Due Diligence: A Guide for Small and Medium-Sized Enterprises (the “Guide”) aims to address these concerns and inspire SMEs to engage in due diligence by creating achievable and manageable due diligence goals.

Following the Guide an Enterprise can:

- › know and have confidence in their counterparties;
- › through such knowledge and confidence meet the conditions for responsible investment;
- › avoid prosecution/reputational/financial damage from being implicated in an anti-corruption issue;
- › develop an ethical brand; and
- › provide assurance to business partners, in particular larger organisations that they are an ethical Enterprise.

SMEs must also develop robust anti-corruption ethics and compliance procedures to ensure they minimize the risk of corruption and adhere to international anti-corruption standards. Understandably, many SMEs are overwhelmed by the extensive international anti-corruption legislation and the complex ethics and compliance procedures in place in larger, multi-national Enterprises. However, ethics and compliance does not necessarily need to be on a grand scale and supported by a dedicated legal department. There are

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<sup>7</sup> 2015 edition available at <https://iccwbo.org/publication/icc-anti-corruption-third-party-due-diligence/>

manageable ways in which smaller Enterprises can protect themselves by better managing corruption risks. A key element to a simple but effective ethics and compliance programme is due diligence.

This is the focus of this Guide which sets out what due diligence is, why it is necessary, when it is necessary and how it can be implemented to protect an Enterprise from the risk of corruption as much as possible.

It provides practical advice on how SMEs can cost-effectively conduct due diligence on Third Parties they engage to perform services on their behalf. It focuses on corruption risks associated with engaging Third Party suppliers, contractors and consultants in an international and domestic setting and how those risks can be managed.

This tool will also assist SMEs create an effective due diligence procedure that fits into an overall ethics and compliance programme. For SMEs that do not have any ethics and compliance procedures in place, it can be considered a good starting point. The Guide can be used by any SME, of any size (even very small Enterprises) or industry and it can be adapted so that the due diligence programme is tailored to the specific needs and industry in which the Enterprise operates.

Adoption of this Guide by SMEs will provide reassurance to prospective customers and can be used as evidence of an overall compliance commitment. The commercial benefits of which should not be underestimated.

## WHY SMES SHOULD DO DUE DILIGENCE ON THIRD PARTIES

Corruption is “the abuse of entrusted power for private gain” and is “the single greatest obstacle to economic and social development around the world”.<sup>8</sup> Within business and government, corruption is used to induce a party to act improperly in return for any advantage. It can take the form of Extortion, Bribes, Bribe Solicitation<sup>9</sup>, Kickbacks, lavish Gifts and Hospitality, political and charitable donations. It is universally condemned and illegal in the majority of jurisdictions and the extent of international and national anti-corruption legislation and enforcement is increasing.

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8 Clean Business is Good Business, joint publication by the International Chamber of Commerce, Transparency International, the United Nations Global Compact and World Economic Forum Partnering against Corruption Initiative

9 “The act of asking or enticing another to commit bribery” <https://iccwbo.org/global-issues-trends/responsible-business/combating-corruption/>

Corruption costs economies trillions each year and stifles economic growth. Corruption is insidious and erodes not only national economies but also the profitability of individual businesses.

Both Enterprises that operate internationally or that are considering expanding their business into foreign jurisdictions and those that operate in a domestic setting often require Third Parties to provide services. It is this engagement of Third Parties that presents significant risks of corruption because the Enterprise has little control over the Third Party's actions but crucially, can be held liable for bribes paid by them. It is therefore imperative that all Enterprises ensure they know the background to the Third Parties they contract with in order to minimize the risk of engaging with a corrupt Third Party.

Due diligence is key to managing corruption risks associated with engaging Third Parties. It is a process of investigating their background. This will be particularly necessary when one considers retaining the services of an agent or other intermediary, who could be tempted to pay bribes in order to obtain business and thereby garner more easily a commission.

Many large international Enterprises have anti-corruption and ethics and compliance procedures in place which include due diligence. Indeed, it is smaller Enterprises that are often required to respond to these requirements but many SMEs do not have their own internal anti-corruption compliance procedures and do not conduct due diligence on the Third Parties they contract.

Enterprises that actively engage in due diligence, anti-corruption procedures and ethics and compliance more generally, benefit from the commercial advantages it brings. Principally, Enterprises that have anti-corruption procedures reduce the cost of doing business, as corruption is a drain not only on national economies but also on the micro economies of businesses.

Enterprises can expect to see other commercial benefits from positive engagement in anti-corruption practices such as:

#### REFERENCE

##### ASSURANCE OR OTHERWISE THAT THE THIRD PARTY:

- › Has the necessary skills and experience to provide the services for which they will be contracted;
- › Is a reputable and reliable business partner with a good track-record;

... / ...

... / ...

- › Is *bona fide* and will be less likely to defraud;
- › Is charging a fair market price for their services (an enterprise paying bribes may often charge more for its services in order to create a slush fund to pay bribes).
- › Not being associated with disreputable suppliers;
- › Being more readily and efficiently able to deal with the due diligence requirements of larger Enterprises and being more attractive as a prospective counterparty;
- › Competitive advantage over competitors who are not engaged in ethics and compliance and become therefore the preferred choice for customers.

In general terms, SMEs have not yet been a focus for prosecutors and so have not had an urgent need to implement anti-corruption and compliance procedures. This is changing: law enforcement agencies are now not only investigating and prosecuting large multi-national Enterprises, but SMEs with an international presence are increasingly also the focus of prosecutors.

Notably, the US prosecuting agencies, the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) have ever more resources to conduct Enterprise investigations.

Following a recent prosecution, the US Securities and Exchange Commission (the SEC) issued this warning “This is a wake-up call for small and medium-sized businesses that want to enter into high-risk markets and expand their international sales. When an Enterprise makes the strategic decision to sell its products overseas, it must ensure that the right internal controls are in place and operating.”

## Back to basics: the Law

It is not necessary for the purposes of this Guide to detail the plethora of national and international anti-corruption legislation<sup>10</sup>. It will suffice to note the following key points:

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<sup>10</sup> For example, The United Nations Convention Against Corruption (UNCAC) 2003, the Organization for Economic Cooperation and Development (OECD) Anti-Bribery Convention 1999, the United States' Foreign Corrupt Practices Act 1977 (FCPA), the United Kingdom's Bribery Act 2010 (UKBA), The Inter-American Convention Against Corruption (IACAC) adopted by members of the Organization of American States 1996 and the Council of Europe Criminal and Civil Conventions 1999.

In many jurisdictions bribery and corruption is criminalized within domestic legislation and generally speaking it will prohibit bribery of individuals in public office. Commercial bribery (*i.e.* not involving an individual who is in public office) is also a criminal offence in the majority of jurisdictions.

- › Bribery and Corruption of individuals in public office and who are in positions of influence is the most common and damaging form of corruption. For example, bribery is very common within public procurement. This is primarily the focus of international legislation and specifically the bribery of “foreign public officials”.
- › International anti-corruption legislation has extra-territorial reach meaning that Enterprises operating in jurisdictions other than their own can potentially be prosecuted under domestic law.
- › For example, this means that an Enterprise that operates primarily in Europe and is involved in corrupt activity in Europe, but also trades on the US Stock Exchange, can be prosecuted in the US under US law<sup>11</sup> for the corrupt activity.

## WHAT IS DUE DILIGENCE?

Due diligence is a term used to describe background investigation conducted on a Third Party which an enterprise is considering contracting with. It is a process of examining the background of a potential business partner in an effort to assess and mitigate risks of corruption<sup>12</sup>. The aim is to ensure that corruption risks are identified, but (as described) it also provides an associated commercial benefit. By conducting due diligence, an Enterprise can gain an understanding of whether there are any corruption risks associated with the potential business partner, mitigate any risks identified and then make an informed decision about whether to enter into the contract or not. In the context of due diligence, risks are termed as “red flags” across industries and this term will be used throughout this Guide.

Due diligence is not a tick-the-box exercise: it is a comparative and thoughtful process. Any red flags identified need to be considered in the context of the industry and jurisdiction in which the Third Party is operating in. The SME should not consider red flags as necessarily being preventative of contracting

<sup>11</sup> Foreign Corrupt Practices Act 1977

<sup>12</sup> Due Diligence is also an assessment of other business risks such as conflicts of interest, credit risk, fraud, trademark, and copyright infringement and others. This behaviour can often be dishonest and may also indicate a risk of potential corruption. This Guide is focused on anti-corruption and so does not discuss these risks.



with potential partners. Straight-forward and cost-effective mitigation to address red flags can often be identified which allow the progression of the engagement and simultaneously protects the Enterprise. Any red flags identified need to be considered by those within the enterprise who have experience of the industry and jurisdiction to enable them to make a careful judgment.

Due diligence can be conducted in a variety of ways and in varying degrees of depth and detail. This Guide will set out various approaches. For any Enterprise the most effective means of conducting background research on a Third Party will be to approach them directly and ask a series of carefully framed questions. This can be done in person; indeed in some circumstances it will be prudent to do so, or it can be conducted virtually depending on available resources. A standard questionnaire can be used to structure the interview (see Annex B). If a face-to-face or virtual interview is not possible, the questionnaire can be sent to the Third Party and an assessment can be made of the written responses which can be followed up with the Third Party. Not only will the responses to the questions provide the information the Enterprise is seeking, they will also provide an insight into the Third Party's attitude towards corruption and their understanding of applicable international anti-corruption legislation. Annex B of this Guide is a suggested questionnaire which is intended to be universal so that it can be sent to any Third Party an Enterprise is seeking to engage with (or indeed to Third Parties already engaged).

Due diligence is not conducted in isolation but is part of an overarching ethics and compliance programme. The following are the other common components of a typical ethics and compliance programme:

#### REFERENCE

- › A Code of Conduct, including proportionate anti-corruption policies
- › Top-level commitment or tone from the top
- › Training of staff
- › Assessment of potential corruption risks
- › A whistleblower programme
- › Internal monitoring and review
- › Installing an ethics and compliance function, with a full-time or part-time employee

While this Guide will not advise upon all of the above aspects of ethics and compliance, it is worth noting that many of these can be easily achieved and implemented by any Enterprise. For example an internal anti-corruption policy does not need to be extensive or burdensome. Those individuals working within the Enterprise who are contracting with Third Parties do not need to be trained comprehensively on the law; they simply need to know what the Enterprise requires of them.

## WHY IS DUE DILIGENCE NECESSARY?

Perhaps the most fundamental reason for an Enterprise to conduct due diligence is to ensure that it does not unwittingly conduct business with those who are involved in corrupt activity. This extends down the supply chain and so if a Third Party subcontracts services to be provided under the contract, the Enterprise needs to ensure, either by contractual provision or by using its influence, that proportionate due diligence is conducted by the Third Party on the subcontractor.

The reason why Enterprises can be liable for the actions of Third Parties is because international laws seek to prevent them from paying bribes indirectly through intermediaries. This form of conduct was envisaged by legislators and therefore international legislation seeks to ensure that an Enterprise does not avoid prosecution by indirectly engaging in corrupt activity via a Third Party. Taking the US Foreign Corrupt Practices Act 1977 as an example, it imposes liability not only on Enterprises with “actual knowledge of wrongdoing”, but also on those who deliberately avoid actual knowledge by “deliberate ignorance” or “unwarranted obliviousness” where an Enterprise should have been alerted to the probability of corrupt activity on the part of the Third Party<sup>13</sup>. In these circumstances and in many jurisdictions, it will not be a defense for an Enterprise to claim that it had no knowledge of the Third Party’s actions.

Competent due diligence will be critical in helping an Enterprise to assess whether there are any risks of corruption associated with the Third Party prior to engagement.

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13 FCPA: A Resource Guide to the U.S. Foreign Corrupt Practices Act (2012), pg. 22

## REFERENCE

### DUE DILIGENCE WILL ACHIEVE THE FOLLOWING:

- › Confirmation that there are no identifiable risks of corruption associated with the Third Party; or,
- › Provide actual knowledge of corruption risks, or red flags, associated with the Third Party and the opportunity to assess and mitigate those risks at the outset (for further information see sections 2 and 3 below) which will reduce the risk of prosecution for corruption; and,
- › Lower the risk of corporate or individual prosecution for corruption.

### WHEN DOES DUE DILIGENCE NEED TO BE CONDUCTED?

#### *A risk-based assessment*

It will not be proportionate to conduct due diligence on every Third Party an Enterprise is considering contracting with; this is because the extent of the corruption risks will vary. Therefore, an assessment of the corruption risks should be made in order to focus due diligence on counterparties which pose the greatest risk. This will allow the most efficient use of limited resources.

The corruption risk of a Third Party will be determined on the basis of key factors (see below) and is a comparative process that requires judgment. There is no one formula that will be appropriate for every industry and Enterprise and so the Enterprise needs to bring its knowledge and experience to the process. This section will provide the Enterprise with an understanding of the factors to be considered in a risk-based assessment and how that knowledge can be used to determine whether a Third Party represents a high or low corruption risk. The outcome of this assessment will then inform the Enterprise about the extent of due diligence required (to be discussed in the section on “Conducting due diligence”).

It is possible to create a simple risk-assessment tool based on the factors most relevant to the Enterprise and industry it operates in, which will allow for Third Parties and contracts typical to the Enterprise to be easily determined as high or low risk. At the end of this section is a simple example of how this can be achieved.

## REFERENCE

### A RISK ASSESSMENT MUST INCLUDE THE FOLLOWING FACTORS:

- › Is the Third Party a public official (including entities that are owned or controlled by a government/government official) or will the Third Party be interacting with public officials in order to perform the contract?
- › The country the counterparty is based in and the country where the services are being performed;
- › Industry;
- › The value of the contract; and
- › The nature of the work/services to be performed.

### IS THE THIRD PARTY A PUBLIC OFFICIAL OR WILL THE THIRD PARTY BE INTERACTING WITH PUBLIC OFFICIALS IN ORDER TO PERFORM THE CONTRACT?

Third Parties that present the biggest risk of corruption or perception of corruption are those that are public officials, connected to public officials or Third Parties that are likely to interact with public officials in the course of the performance of the contract. This is because a public official is in a position of influence and could use this influence in relation to the contract or the contract could affect decision making in their official role. The public official and Third Party could be working in concert, with corrupt payments being made to the public official. Even if there is no evidence of corrupt activity, the mere association of a public official could create the perception of a corrupt relationship. As noted above, international legislation generally, expressly prohibits the bribery of foreign public officials.

Accordingly, contracts with Third Parties who are public officials, connected to or likely to interact with public officials are high risk and due diligence should always be conducted.

## REFERENCE

### **A (FOREIGN) PUBLIC OFFICIAL CAN INCLUDE BUT IS NOT LIMITED TO THE FOLLOWING:**

- › An official or employee of any government, or any agency, ministry or department of the government (of any level).
- › Any individual acting in an official capacity for a government regardless of rank or position.
- › Official or employee of an Enterprise wholly or partially state-owned.
- › A political party or official of a political party.
- › A candidate for political office.
- › Officer or employee of any public international organisation, such as the United Nations or the World Bank.
- › Family member of any of the above.

### **THIRD PARTIES CONNECTED TO PUBLIC OFFICIALS OR THIRD PARTIES THAT ARE LIKELY TO INTERACT WITH PUBLIC OFFICIALS CAN INCLUDE, BUT ARE NOT LIMITED TO THE FOLLOWING:**

- › Processing agents: freight forwarders, customs agents, couriers, visa processors or persons providing similar services.
- › Commercial agents: consultants, business agents, or other persons, including joint ventures or joint venture partners, who assist in obtaining government contracts, concessions, permits or other Government-issued rights.
- › Professional agents: attorneys, accountants, lobbyists or other persons engaged on a professional basis to represent an Enterprise in government business (including delivery of documents to government bodies) or to lobby for a change in law.

A state-owned Enterprise poses additional risk because all employees will be government officials. An Enterprise will be state-owned if it is wholly (100%) or partially (50% or more) owned or controlled directly or indirectly by a government.<sup>14</sup>

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<sup>14</sup> The company can be owned or controlled via shareholding, right to vote or appointment of directors.

## THE COUNTRY THE COUNTERPARTY IS BASED IN AND THE COUNTRY WHERE THE SERVICES ARE BEING PERFORMED;

The most indicative factor is the country where the counterparty is based and if different, where it is actually providing the service. Transparency International publishes annually its Corruption Perceptions Index (CPI) which ranks countries in the world from being “highly corrupt” to “very clean”. A common approach is to separate the results of the index into high and low risk and use this as the basis of the risk assessment.

When a determination of high or low has been reached, the Enterprise needs to go on to consider the remaining factors and make an overall comparative judgment about whether due diligence needs to be conducted and if so, to what extent.

## INDUSTRY, VALUE OF THE CONTRACT AND NATURE OF THE CONTRACT

The value of the contract will be an important consideration; the more valuable the contract, the more potential risks will be associated with it and the more serious the potential implications will be should any corrupt activity take place.

The industry the Third Party operates in will also be an important indicator of the risk associated with a Third Party because some industries will require more interaction with public officials than others.

## INDUSTRIES WHICH ARE CONSIDERED HIGH RISK ARE AS FOLLOWS:<sup>15</sup>

The nature of the contract can also be a useful tool in determining corruption risks. For example, contracts with sales agents who sell to public officials and/or governmental agencies will be high risk (for reasons explained above). Whereas a contract is for rudimentary maintenance services, where work being performed by the Third Party leaves less room for corrupt activity to take place, will be low risk.

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<sup>15</sup> Transparency International Bribes Payers Index Report 2011 which ranks 19 economic sectors from the most bribery- prone to the least bribery-prone.

## REFERENCE

› public works/construction	› Arms, defense and military
› Utilities	› Transportation and storage
› Real estate, property, legal and business services	› Telecommunications
• Oil and gas	› Consumer services
• Mining	› Forestry
› Power generation and transmission	› Banking/finance
› Pharmaceuticals and health care	› Information Technology
› Heavy manufacturing	› Civilian aerospace
› Fisheries	› Light manufacturing
	› Agriculture

Whilst the focus may be on new contracts with entities that the Enterprise has not contracted previously, there is also a possible corruption risk from existing engagements and Third Parties. If due diligence was not conducted at the outset, there may be issues with a counterparty that are unknown; there is a risk that the Enterprise may be unwittingly complicit in corrupt behaviour without having made the initial assessment of their business partner.

Therefore, as part of the implementation process of a system to determine risk, an inventory of all existing contracts should be conducted. This will allow the Enterprise to determine and consider the activities that are already being performed by Third Parties, the type of Third Parties currently engaged and the exposure that those Third Parties may represent. This information will assist in refining which Third Parties and contracts present the highest risk to the Enterprise.

## REFERENCE

### EXAMPLES OF RISK ASSESSMENT:

- › A contract with a Third Party that is based in a low risk country but involves the engagement of an agent that will interact with a public official will be a high risk contract regardless of the value of the contract.

... / ...

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- › A contract in a high risk jurisdiction and a high risk industry but where the value of the contract is low will still be high risk. Where the jurisdiction is low risk, the contract may still be high risk depending on whether there is interaction with public officials and the risk associated with the industry.
- › A contract in a high risk country and high risk industry in certain circumstances might be low risk, for example if the nature of the services to be performed means that the risk of corruption is very unlikely combined with the fact the value of the contract is low.

### EXAMPLE OF SIMPLE RISK ASSESSMENT TOOL:

High risk industry	High	High
Low risk industry	High/Low	Low
High value contract	High	High/Low
Low value contract	High/Low	Low
Any contract involving public officials (or connected – for definition of public official see section 1)	High	High
RESULTS		
High = due diligence is required		
Low = due diligence is not required		
Mix of High and Low = due diligence is required and the extent is to be determined by the Enterprise (see section 2)		

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## Conducting due diligence

### HOW TO CONDUCT DUE DILIGENCE?

Due diligence can be conducted cost-effectively and it is not necessary to instruct external agents. There are six essential pillars of due diligence that



should be covered. This is not as burdensome a process as it may seem at first. A great deal of background information can be gathered from the Third Party itself and an assessment can be made on the basis of not only the information provided but also the tone and the way in which it was communicated. Again, it is not a tick-the-box exercise but a considered process.

## THE SIX PILLARS

The six broad topics or pillars of due diligence upon which background information should be sought are as follows:

### REFERENCE

- › Beneficial ownership
- › Financial background and Payment of Contract
- › Competency of Third Party
- › Public Records Resources: History of Corruption and Adverse News
- › Reputation: Consulting Commercial References
- › Approach to Ethics and Compliance

#### 1. *Beneficial ownership*

Beneficial ownership refers to the individual or legal entity that ultimately owns and has control of, or entitlement to an Enterprise. It is crucial that the ownership of a potential Third Party is established because ownership that is unidentified presents corruption risks. It also presents money laundering and terrorist financing risks but these are outside of the scope of this Guide.

An Enterprise needs to know who they are contracting with and how that party conducts business. This cannot be known unless all principal shareholders (those with more than 5% shareholding—see below) are identified. If ultimate beneficial ownership is not established it will not be known who has control of the Enterprise. Hidden individuals present a risk of corruption because they may be involved in corrupt activity and such activity could be the very reason why the individual is seemingly hidden.

Beneficial ownership can be determined by asking the counterparty for the Enterprise registration documentation relevant to that jurisdiction.

Documentation provided by the prospective Third Party purporting to evidence beneficial ownership needs to be independently verified. This is why official Enterprise registration documentation is the most effective means of determining ownership. The registration documents will confirm that the entity exists and who owns it.

Documentation that is produced by the Third Party itself which has not been officially verified as accurate will not prove beneficial ownership. Often Enterprises will provide the list of board members or directors and suggest that this is proof of ownership. There is no way of knowing whether such information is accurate and if this occurs, repeated requests for the Enterprise registration documentation should be made.

In identifying ownership of an entity it is important that all individuals who have significant shareholdings in the Enterprise are identified as they will have control over the business. Typically, across industries, all shareholders with 5%–10% shareholdings or more should be identified. Any shareholders with shareholdings less than 5% will have limited input or influence into the operations of the entity and as such do not pose a significant corruption risk.

If a Third Party seems reluctant to provide this information then this may be a red flag in itself. Caution should be taken with regard to Third Parties where ownership is registered in a 'low disclosure jurisdiction'. While there will be many legal and ethically sound Enterprises operating in these jurisdictions, caution is advised as those with criminal intent can use the low disclosure requirements of these jurisdictions to their advantage.

There may also be other means of determining beneficial ownership through open sources depending on the jurisdiction. For example, there may be information available from the relevant government agency that governs Enterprise registration and this may be available online, by post or in person. The website of the Third Party may also provide some useful information in respect of ultimate ownership, although this will not be information that is independently verified and so not authoritative.

If difficulties are experienced in determining ultimate beneficial ownership and the Third Party is reluctant to provide this information or, gives reasons why it cannot provide this information or, provides documentation purporting that it is evidence of ultimate ownership, whereas, upon analysis, is not, these will all be red flags and caution is recommended. Consideration could be given to instructing external investigators to determine beneficial ownership at this point.

## 2. *Financial background and Payment of Contract*

The financial background of a Third Party can be useful in determining whether there are corruption (and money laundering) risks. The simplest approach is to ask the counterparty to provide their latest financial reports/statements.

The prospective Third Party's financial statement will provide a formal record of its financial activities. It should be ensured that the statement has been produced by a reputable accountant and is sufficiently detailed. A basic assessment can be made about whether the Third Party's financial statements are consistent and commensurate with its purported size, the services it performs, the industry it operates in and how it markets itself.

It is not necessary to conduct a detailed review or to approach the financial statements as if conducting audit but to simply look for any discrepancies and payments which may seem unusual or inconsistent.

### REFERENCE

#### BELOW ARE SOME EXAMPLES:

- › Are there any payments that are not transparent where it is not clear who the payment is being paid to or why? E.g. are there vague or non-specific payments such as “consulting expenses”?
- › Is there anything unusual about the frequency of payments?
- › Is there anything unusual in the value of payments?
- › Consideration should also be given to expenses—particularly if they are excessive. This could be an indication of bribes.
- › Have the Third Party's fees been commensurate with the services provided?

The Third Party's financial report may also provide details of beneficial ownership and this can be verified against the Enterprise registration documentation (see above section, Beneficial Ownership).

The internet can also be a useful tool in determining whether there has been any adverse news relating to the financial activities of the Enterprise. This information will also allow for an assessment of the financial viability of the entity which depending on the contract may be an important consideration albeit not necessarily related to corruption. Searches of online trade magazines can also prove useful for determining the financial status of a Third Party. More

generally an assessment can be made as to whether the extent of the Third Party's internet presence is commensurate with the size of the Third Party and the services offered.

Remuneration is also a key consideration in due diligence and in particular, success fees will carry corruption risks. This is because they can motivate an entity/individual to engage in bribery in order to ensure that they meet the targets required to trigger the success fee. Most crucially, extreme caution should be exercised if the Third Party proposes success fees because this could be an indication of an intention to pay bribes or create a slush fund from which to pay them.

Similarly, the location of the bank account the Third Party nominates for payment will also be a key consideration. Entities and individuals that engage in corrupt activity often funnel corrupt money to bank accounts in jurisdictions outside the country the Enterprise is based in or the country of operation in an effort to hide the funds and avoid detection. Again, extreme caution should be exercised if a Third Party suggests a bank account in another jurisdiction and further investigation into the Third Party will be necessary.

### 3. Competency of the Third Party

A significant corruption risk will exist where Third Parties offer a service which they are not competent to provide, especially where they will be interacting with government officials. This is because the government official and the Third Party could be working in concert, and corrupt payments being made to the official. Enterprises should also be aware of the perception of corruption where foreign officials are associated to an engagement. In order to mitigate the risk of actual corrupt activity and the perception of corrupt activity, it is crucial that there is a clear business justification for engaging with a Third Party. The Business Anti-corruption Portal can be referred to in this regard.<sup>16</sup>

The Enterprise should consider the following:

#### REFERENCE

##### DOES/HAS THE THIRD PARTY:

- › Have experience of the industry and country where the services will be provided?

<sup>16</sup> The Business Anti-corruption Portal is a website that contains comprehensive information on corruption and tools on how to avoid it, free of charge, <http://www.business-anti-corruption.com/>

.../...

- › Have the qualifications and experience to provide the services required under the contract?
- › Provided a competitive estimate for the work?
- › Have a business presence in the country where the services are to be provided?
- › Been recommended by a public official?
- › Requested urgent payments or unusually high commissions?
- › Requested payments to be made in cash, to a Third Party, or to different country?
- › Suggested they know all the 'right people' to secure the contract?
- › Been selected in a transparent way?
- › Finally, are there sufficient business reasons for awarding the contract to this Third Party? In particular, are the services necessary?

The above steps will minimize the risk of engaging with a Third Party for the wrong reasons and also, in the event of queries being raised about the legitimacy of the engagement, the business justification for the selection will be clear.

#### *4. Public record resources: history of corruption and adverse news*

A fundamental step in the due diligence process is to find out whether there is any adverse news associated with the Third Party and in particular, whether there is any history of unethical business practices, corruption or other criminal activity or investigations into or allegations of the same.

Research should be conducted to find out if there is any information in the public domain to suggest a history of such activity. This research can be performed with simple internet searches.

## REFERENCE

### INTERNET SEARCHES CAN BE CONDUCTED OF PUBLICLY AVAILABLE INFORMATION, AS FOLLOWS:

- › General internet searches of the media, including national and local news
- › FCPA Blog<sup>17</sup>
- › Trade magazines
- › Court listings

### SUGGESTED SEARCH TERMS:

“Name of the Third Party AND”:

- › “corruption”
- › “bribery”
- › “conviction”
- › “investigation”
- › “allegations”
- › “indictment”
- › “crime”/ “criminal”
- › “kickbacks”
- › “customer review”

For more in-depth research, for higher risk counterparties, there are a number of more specific, publicly available resources that could be searched:

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17 [www.fcpablog.com](http://www.fcpablog.com)

## REFERENCE

- › Department of Justice website (USA)<sup>18</sup>
- › US Securities and Exchange Commission website (USA)<sup>19</sup>
- › System for Award Management (SAM)<sup>20</sup>
- › Office of Foreign Assets Control (OFAC) Specially Designated National and Blocked Persons Lists (SDN)
- › U.S. Department of Commerce, Bureau of Industry and Security, List of Parties of Concern<sup>21</sup>
- › The Serious Fraud Office (UK)<sup>22</sup>
- › The World Bank Listing of Ineligible Firms<sup>23</sup>
- › European Bank List of Ineligible Entities<sup>24</sup>
- › European Union External Action, Consolidated list of persons, groups and entities subject to EU financial sanctions<sup>25</sup>
- › Interpol—red notices<sup>26</sup>
- › Debarment and sanctions lists—relevant governments will have information available online

A useful resource in finding out about the history of the Third Party can be to conduct a face-to-face interview (if practical) or similar (e.g. a phone call) and ask the Enterprise directly about their history. This interview could be conducted at the outset of the due diligence but it may be advantageous

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18 [www.justice.gov/](http://www.justice.gov/)

19 [www.sec.gov/](http://www.sec.gov/)

20 <https://www.sam.gov/>

21 <http://www.bis.doc.gov/complianceand enforcement/liststocheck.htm>

22 [www.sfo.gov.uk/](http://www.sfo.gov.uk/)

23 [http://web.worldbank.org/external/default/main?theSitePK=84266&contentMDK=64069844&menuPK=116730&pagePK=64148989&piPK=64148984&sort\\_on=SUPP\\_CTRY\\_NAME&sort\\_order=ascending&sort\\_data=text](http://web.worldbank.org/external/default/main?theSitePK=84266&contentMDK=64069844&menuPK=116730&pagePK=64148989&piPK=64148984&sort_on=SUPP_CTRY_NAME&sort_order=ascending&sort_data=text)

24 <http://www.ebrd.com/ineligible-entities.html>

25 [http://eeas.europa.eu/cfsp/sanctions/consol-list/index\\_en.htm](http://eeas.europa.eu/cfsp/sanctions/consol-list/index_en.htm)

26 <http://www.interpol.int/INTERPOL-expertise/Notices>

to find out if there are any identifiable red flags first in relation to unethical, corrupt or other criminal activity.

If red flags are identified that relate to improper activity, this will not necessarily mean that the Third Party cannot be engaged; it will often be possible to take steps that will mitigate the risk. Mitigation can often simply involve finding out further information to better understand and quantify the risk; in many circumstances this can be obtained directly from the Enterprise itself. For example, it may be that the Third Party or an employee of the Third Party was convicted of corruption a number of years ago and, since then the Third Party has dismissed the individual, implemented an anti-corruption compliance programme and there is evidence of a strong “tone at the top” and a good ethics and compliance culture. In this instance the red flag can be considered mitigated. Mitigation is dealt with in more detail below in section on “What to do with the outcome”.

#### *5. Reputation: consulting commercial references*

The reputation of a Third Party is clearly connected to the history of the Enterprise and the question of whether there is any adverse news, but reputation should also be considered more generally. The most straight forward means of assessing a Third Party’s reputation is to seek references from those who have worked with them previously. The Third Party can be approached directly for the contact details of those who will be able to provide the references which can be verbal or written. If they are verbal, a contemporaneous record should be made of the conversation.

The Enterprise should ensure that those providing references are asked the following key questions:

#### **REFERENCE**

- › How long have you known the Third Party?
- › In what capacity do you know the Third Party?
- › Have you experienced any problems with the Third Party?
- › Have you ever had any concerns of corruption in respect of the Third Party?
- › Are you aware of any allegations of criminal activity against the Third Party or any of its employees?
- › Do you consider the Third Party to be honest in its business dealings?

... / ...



... / ...

- › Do you know if the Third Party has any connections with government officials or government agencies?
- › Do you know if any of the Third Party's employees or family members of the employees have any connections with government officials or government agencies?

For Third Parties that are new entities and may not have existing relationships it may not be possible to obtain references. In these instances background research on the owners of the entity and general searches for adverse news can be relied upon.

#### 6. *Approach to Ethics and Compliance*

Throughout the ethics and compliance process an assessment should be made of the Third Party's approach to due diligence and the questions asked. It will be possible to assess an entity's general attitude towards due diligence and more generally to ethical business. There are a number of key indicators to a positive culture in this regard which should be noted throughout the process.

### REFERENCE

#### THE KEY INDICATORS ARE AS FOLLOWS:

- › Does the Third Party have its own anti-corruption ethics and compliance programme in place? If so, this will provide reassurance that the Third Party takes the issue seriously. If there is no ethics and compliance programme, enquiries should be made directly about how the Third Party intends to manage corruption risks. In particular, they might be asked how they manage Gifts and Hospitality or engagements that involve government intermediaries.
- › Does the Third Party have its own due diligence procedure in place? If it uses subcontractors, how will it assess and address the risks which they may pose? It will be imperative that the Enterprise ensures that due diligence is conducted on subcontractors who perform work on the contract for which the Third Party has been engaged (see Standard Safeguards below for further details).

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.../...

- › Connected to an existing ethics and compliance procedure is whether there is “tone from the top”—this means whether there is support for anti-corruption compliance from the senior leadership of the organisation. This will give an indication as to how much of a priority ethics and compliance is for the Third Party.
- › Similarly, if there is reluctance from the Third Party to engage with the due diligence programme, provide information or if there is a lack of transparency about any stage, this can be an indication of a corruption risk and a lack of understanding.
- › The Third Party can be asked to provide any anti-corruption policies it has in place and about the anti-corruption training requirements of its employees. This is a good indicator of “tone at the top” and culture.
- › The Enterprise can share its own anti-corruption policies and ensure the contract includes a clause requiring the Third Party to comply with the requirements contained in the policies. The Third Party’s response to this and comments on the policies will also provide a useful insight into their culture.
- › In the event there are red flags about the attitude or understanding of anti-corruption requirements but which are not so significant that the engagement cannot progress, the Enterprise might suggest providing anti-corruption training to the Third Party. This can prove to be useful mitigation of the red flags identified.

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## What to do with the outcome

The next stage of due diligence is to deal with the outcome of the investigations undertaken; this can be done in one of two ways;

### REFERENCE

- › Red flags have been identified that must be resolved or mitigated; or,
- › No red flags have been identified during the due diligence process and so the engagement can proceed.

.../...

If no red flags have been identified at any stage of the due diligence investigations then the Enterprise can proceed with the engagement, in the

confidence that reasonable steps have been taken to check the corruption risk of the Third Party. Ideally, the decision to proceed should be made by an individual within the Enterprise who is not directly involved in the contract and can make an unbiased decision. When making the judgment, all stages should be considered and carefully compared with attention given to the overall culture the Third Party has demonstrated during the process.

If red flags have been identified then it is critical that further work is undertaken prior to entering into any contract. The red flags will need to be resolved or mitigated. In many circumstances the most straight forward means of resolving a red flag will be to contact the Third Party directly and ask it to provide further information to clarify the issue highlighted by the due diligence. In particular, the Third Party should be asked what measures it has taken to prevent the same activity happening again.

If red flags cannot be resolved then actions to mitigate the risks will need to be taken. Often risks can be mitigated with simple common sense actions. Some examples of which are below.

## REFERENCE

### PREVIOUS ALLEGATION OR CONVICTION FOR CORRUPTION:

- › If a red flag relates to a previous allegation or corporate conviction for corruption this does not necessarily mean that progression of the engagement is not possible. Indeed, many Enterprises significantly improve their anti-corruption compliance procedures following settlement with law enforcement authorities for violations of anti-bribery laws; in some cases such improvement will be a condition of settlement.
- › If the corrupt activity is historic (a number of years old) and ethics and compliance procedures were put in place to deal with the circumstances that led to the corruption, such as the dismissal of the relevant employees then the red flag could be deemed to be no longer relevant.
- › If there is concern that although the previous historic issue was dealt with adequately, there remains a lack of understanding of anti-corruption laws and ethics and compliance within the Third Party (although no corrupt intention), then the Enterprise can request anti-corruption training be provided to the relevant employees of the Third Party as a condition of the engagement.

... / ...

.../...

- › Similarly, the Enterprise could impose as a condition of engagement that the Third Party adopts an anti-corruption policy approved by a recognized Non-Governmental Organization.

## REFERENCE

### INVESTIGATIONS INTO CORRUPT ACTIVITY

- › If the red flags relate to an historic investigation in corrupt activity where no convictions resulted, then the red flag can be considered mitigated, although it will be prudent to seek further information about the circumstances and background to the investigation. An Enterprise might also consider imposing conditions to reduce any perceived risk such as training or anti-corruption policies; this should be reinforced by contractual provisions.
- › Similarly, if an investigation is on-going this does not necessarily prevent an engagement progressing but caution should be exercised and careful consideration given to the Third Party's response to the investigation: does the investigation and allegations relate to the services which the Enterprise seeks to receive and in the country/ies where they will be performed? Other relevant considerations will be: are they being open and transparent, are they engaging with the investigation and are they seeking to take remedial steps to identified issues?
- › It may be that the red flag is unsubstantiated rumors which have not been formally investigated by the authorities or law enforcement agencies or proven in a court, tribunal or equivalent. In these circumstances it may be possible to proceed with the contract. It is advisable to monitor to see if the situation changes.

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## REFERENCE

### RED FLAG RELATING TO THE CONDUCT OF A SPECIFIC EMPLOYEE

A red flag that relates to a specific employee could also be a case of mistaken identity and so this should always be borne in mind. Particular regard should be given to names of individuals which may be common in the relevant jurisdictions. Where this may be the case the red flag can often be mitigated by seeking verification of the employee's identity and checking this against the information provided in the identified publication\*

The other steps in the due diligence process and in particular the questionnaire may provide sufficient comfort to mitigate a red flag and allow progression of the engagement without having to raise the matter with the prospective Third Party. Where this is not possible or where the allegations are more serious it will be necessary to seek the counterparty's comments.

Enterprises are encouraged to rely on the existing experience and knowledge of the business and industry which their senior managers will possess. An in-depth understanding of the industry will assist in assessing the risks identified and deciphering whether any mitigation needs to be taken. It will also assist in devising common sense but robust solutions. Ideally, it should be a senior manager who is not directly involved in the award of the contract who considers the mitigation.

*\* Prior to contacting a prospective Third Party in respect of any red flag, please consider the note of caution in the following box.*

## REFERENCE

### CAUTION WHEN APPROACHING A PROSPECTIVE THIRD PARTY WITH ADVERSE NEWS

In circumstances where it is deemed necessary to directly seek the Third Party's comments, such an approach should be done with caution and diplomacy because there is a potential risk of defamation. If this approach is going to be taken, the red flag needs to be put to the counterparty in a non-accusatory manner and in a way that makes it clear that the Enterprise does not hold the opinions of the publication, has in no way formed any formal view and is simply drawing the Third Party's attention to the adverse news so that it has the opportunity to comment.

The most prudent approach will be to meet face-to-face and provide a copy of the relevant publication so that the Third Party can read it. If it is not practical or economical to conduct a face-to-face meeting, the Enterprise could provide details of where the adverse news was found, such as the website, the author and date of publication. By doing this, the Third Party can find the publication and then comments could be sought via email or telephone. It is recommended that advice is sought from a defamation legal advisor if there are concerns about this step. This above information is not legal advice on defamation but simply a recommendation.

In circumstances where the red flags are so serious that they cannot be mitigated by the actions above or there is on-going concern, and where the Enterprise has the financial resources available it may be necessary to instruct an external provider to conduct due diligence. There are also subscription databases available which again if the Enterprise has available resources, can be used to identify red flags such as the Third Party appearing on sanctions lists, being state owned, and criminal activity/investigations<sup>27</sup>.

## Standard safeguards

Following due diligence, if a decision has been made to proceed with the engagement, then some further safeguarding actions should be taken prior to finalization of the decision to engage to ensure that the Enterprise is sufficiently protected.

### INDEPENDENT OVERSIGHT

The Enterprise should ensure that there is independent oversight of the due diligence process. There needs to be independent accountability and so a suitably senior employee who is not directly involved in the engagement should have oversight of the process. The employee who has proposed the engagement may not be able to objectively assess the information gathered in due diligence and make an unbiased assessment. Dependent on the resources within the Enterprise it may be appropriate to appoint an individual in an ethics and compliance function to conduct this role.

### CONTRACT – ANTI-CORRUPTION CLAUSES

The Enterprise should ensure that the contract contains anti-corruption clauses which require the Third Party to abide by the applicable anti-corruption laws. Doing so can provide some protection. For further guidance, refer to the *ICC Anti-Corruption Clause*.<sup>28</sup>

### SUPPLY CHAIN DUE DILIGENCE

The risks associated with contracting a Third Party to perform services on the Enterprise's behalf remain further down the supply chain. This means that an Enterprise can be held liable for the actions of a subcontractor a Third Party

<sup>27</sup> For example, World Check, World Compliance and Dow Jones Risk and Compliance.

<sup>28</sup> <https://iccwbo.org/publication/icc-anti-corruption-clause/>

has contracted, who is found to have been involved in corrupt activity. If a Third Party is going to subcontract services to be provided under the contract, due diligence needs to be conducted on the subcontractor. The extent of due diligence will depend on the size of both the Third Party and subcontractor.

The Enterprise should ensure that there is a clause within the written agreement which obliges the Third Party to request consent to subcontract. If services are subcontracted, proportionate due diligence should be conducted on the subcontractor. Depending on the size of the Third Party, the Enterprise may assist with conducting the due diligence on the subcontractor in order to protect itself. This will be a consideration for the Enterprise and a judgment based on the risks associated with the subcontractor and resources available. Depending on the nature of services to be provided and the extent of the contract, the subcontractor may have a limited role and so due diligence may be straight forward and require minimal resources. In the event that a large portion of the contract is being subcontracted, this may be a red flag in itself and require investigation on the part of the Enterprise.

## MONITORING

Once a Third Party has been engaged to provide services, due diligence is not complete. Ongoing supervision should be given to the conduct and activities of the Third Party. The Enterprise should continue to monitor the Third Party.

One simple, yet effective, way of doing so will be to maintain a continuous dialogue with the Third Party in which anti-corruption issues are raised. In practice, this may be an agenda item as part of routine and regular commercial contract management meetings. Another cost effective method will be to request clear documentation from the Third Party for services rendered prior to payment being made or at least have the contractual right to do so. The invoices should be reviewed and approved by a suitably qualified employee. Consideration should be given to whether there is anything unusual about the request for payment and whether the amount is commensurate with the services provided and in line with the original contract. If any red flags are identified, payment should be put on hold until the red flags are mitigated or resolved.

In circumstances where a contract is for prolonged periods, depending on the extent of risk (as will have been identified during the original due diligence procedure) it may be necessary to update the due diligence procedure. It will be up to the Enterprise to determine the frequency of due diligence. Due diligence should be more frequent for contracts that are higher risk, depending on the circumstances and resources available.

## RECORD MANAGEMENT AND RETENTION

It is vital that each step of the due diligence process is clearly documented so that there is clear evidence of the steps the Enterprise has taken to mitigate the risks associated with contracting Third Parties. Should any issues arise in the future, such as a Third Party being accused of corrupt activity connected with the fulfillment of its work for the Enterprise, it will be able to show that all reasonable steps have been taken by the Enterprise to avoid involvement in such activity. Whether this would provide a defense in the event the Third Party is prosecuted is dependent on the law governing the particular jurisdiction and the particular circumstance. Even if it is not an express defense, it is likely to be a powerful mitigating factor.

The records of due diligence, as with most records, can be stored electronically but need to be stored by the Enterprise for a sufficiently long period. Investigations into corruption can take years from start to conclusion; in addition many do not commence until years after the activity occurred. A timeframe of 10 years is recommended but the timeframe is to be determined by the individual Enterprise and may be dependent on the Enterprise's resources and local privacy laws. Indeed, in some circumstances it might be necessary to obtain legal advice in relation to local privacy laws.

### REFERENCE

#### THE FOLLOWING PRINCIPLES SHOULD BE REMEMBERED:

- › The Enterprise needs to maintain written records evidencing that due diligence has taken place and that any risks identified have been carefully considered and mitigated as practicably as possible.
- › Records should be retained for a significant period of time; this may depend upon local law, Enterprise policies and resources.
- › If there are no records of due diligence there is no way to prove it took place.



## Annex A

### INTERNAL DUE DILIGENCE QUESTIONNAIRE

This document is a tool to be used internally by those within the Enterprise who are responsible for conducting due diligence to ensure that each stage of the due diligence process has been completed; it is a checklist to be used each time due diligence is conducted. It will also serve as a summary document confirming the findings of the due diligence.

#### REFERENCE

##### DETAILS OF THIRD PARTY

- › Name of prospective Third Party
- › Contact at prospective Third Party
- › Enterprise activity
- › Size of prospective Third Party (*i.e.* approx. how many employees are there?)

#### REFERENCE

##### RISK

- › What country is the Third Party based in?
- › What country will the contract be performed in?
- › What is the value of the contract?

#### REFERENCE

##### GOVERNMENT OFFICIALS

- › Is the Third Party state-owned or partly state-owned? If so, please provide details and consider the employees to be public officials.
- › Are any of the owners, directors, officers or any employees of the Third Party current or former public officials? If so, please provide details.
- › Does any of the owners, directors, officers or any employees of the Third Party have personal, familial or any associations with public officials? If so, please provide details:

... / ...

.../...

## BENEFICIAL OWNERSHIP

Obtain from the entity Enterprise registration documentation and respond to the following:

- › Has ultimate beneficial ownership of the entity been verified with the documentation provided? If not, revert to the entity and seek further confirmation.
- › Does the documentation provided independently verify the ownership? Please note that documentation produced by the entity itself should not be relied on as this is not independent.
- › Have all shareholders who hold significant shareholdings (typically of 5% or more) been identified, with their percentage ownership confirmed? Please insert details below.

## REFERENCE

### FINANCIAL BACKGROUND

Obtain the latest financial reports from the prospective Third Party and answer the following:

- › Has the statement being produced by a reputable accountant?
- › Has the accountant identified any issues such as the following:
  - Repeated payments made to an unidentified Third Party, or an identified Third Party but for unclear reasons;
  - A significant payment to an unidentified Third Party, or an identified Third Party but for unclear reasons;
- › Is the revenue and profits commensurate with the size of the entity?
- › Where is the location of the bank account?

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## REFERENCE

### BUSINESS JUSTIFICATION FOR CONTRACT

- › What services are to be provided by the Third Party?
- › Why are these services required?

.../...

.../...

### COMPETENCY OF THIRD PARTY

- › What experience, qualifications and skills does the prospective Third Party have to fulfill this contract
- › How was the prospective Third Party selected?

### HISTORY OF CORRUPTION AND ADVERSE NEWS

- › Is there any evidence of a history of corruption (*i.e.* convictions), if yes please detail
- › Are there any allegations of corruption or investigations into corruption?
- › Is there any evidence of any other adverse news related to the Third Party?

## REFERENCE

### REPUTATION

- › Obtain three satisfactory references from existing counterparties of the prospective Third Party?
- › Ask the following key questions:
  - How long have you known the Third Party?
  - In what capacity do you know the Third Party?
  - Have you experienced any problems with the Third Party?
  - Have you ever had any concerns of corruption in respect of the Third Party?
  - Are you aware of any allegations of criminal activity against the Third Party or any of its employees?
  - Do you consider the Third Party to be honest in its business dealings?
  - Do you know if the Third Party has any connections with public officials or government agencies?
  - Do you know if any of the Third Party's employees or family members of the employees have any connections with public officials or government agencies?

.../...

.../...

- › Ensure you ask those providing references whether they have had any concerns regarding corruption or lack of ethical behaviour.
- › Please summaries the three references.

## REFERENCE

### COMPLIANCE CULTURE

- › How has the prospective Third Party responded to the due diligence process (positively or reluctantly?)
- › Has the Third Party been evasive at all?
- › Has there been any difficulty in obtaining the required information from the Third Party?

## Annex B

### ANTI-CORRUPTION QUESTIONNAIRE TO SEND TO THIRD PARTY

This document is the questionnaire described throughout this Guide which is to be sent to the Third Party as part of the due diligence process. If interviews are to be conducted with the Third Party (whether virtually or face-to-face) it can also be used as a basis for the interview structure.

#### REFERENCE

##### ENTERPRISE DETAILS

- › Individual/Entity name
- › Registered Business Address
- › Date of incorporation
- › City, Country, Post code, Telephone Number, Email, Enterprise Website
- › Bank Account details including location
- › Any previous names or other trade names
- › Any affiliate Enterprises (including subsidiaries)
- › Enterprise activity/activities
- › Country where the contract will be performed
- › Country of incorporation/location of headquarters
- › Relationship with our Enterprise
- › Please explain how this proposed contract has arisen? Do you have an existing relationship with our Enterprise?
- › How has your enterprise been selected for this contract?

#### REFERENCE

##### PROPOSED CONTRACT

Nature of proposed contract *i.e.* contract for one off services, retainer contract or a framework contract?

**REFERENCE**

**SERVICES TO BE PROVIDED**

How long have you/your Enterprise been providing the service you will provide under this contract?

Please describe your experience and qualifications for providing this service:

**PREVIOUS CONTRACTS**

Have you had a prior business relationship with our Enterprise? If yes,

- › Please describe the contract/s
- › Provide the dates of the contract/s
- › Who your key contacts were at this Enterprise for the purposes of the previous contract/s

Please provide details of existing and/or previous customers:

**REFERENCE**

**OWNERSHIP**

Please list all shareholders or owners who hold a financial interest in your business of 5% or more. (If an owner is a non-publicly-traded legal entity, please provide independently verified information to identify the ultimate beneficial owner/s)

Owner	Role in Enterprise	Country where based	% ownership
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**REFERENCE**

**Management and Key Employees including Managing Directors, Sales Directors, Contract Manager (not owners)**

List all individuals who have a leadership role within the Enterprise

Management/Key Employee Name	Job Title	Role
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## REFERENCE

### THE BELOW SECTION RELATES TO GOVERNMENT OFFICIALS—PLEASE REFER TO THE BELOW DEFINITION FOR GUIDANCE:

*Definition of government officials (whether domestic or foreign public officials)*

A government official can include, and is not limited to the following:

- › An official or employee of any government, or any agency, ministry or department of the government (of any level).
- › Any individual acting in an official capacity for a government regardless of rank or position.
- › Official or employee of an Enterprise wholly or partially state-owned.
- › A political party or official of a political party.
- › A candidate for political office.
- › Officer or employee of a public international organisation, such as the United Nations or the World Bank.
- › Immediate family member of any of the above.

*The OECD defines “Foreign public official” as any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; any person exercising a public function for a foreign country, including for a public agency or public enterprise; and any official or agent of a public international organisation”*

## REFERENCE

### Owners, Management, Employees who are Government Officials (including any representatives of the Enterprise)

Are any owners, management or employees Government Officials?

If yes, please detail:

Name	Job title	Role & influence on day to day business	Official position	Official duties
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**REFERENCE**

**ENTERPRISE RELATIONSHIPS WITH GOVERNMENTS AND GOVERNMENT OFFICIALS**

Do you perform any work for the government?

If the answer to the above is yes, could this conflict with your duties to our Enterprise under this agreement?

Do you need to interact with public officials in order to perform this contract?

If the answer to the above is yes, please provide details and explain the extent of the relationship your Enterprise has with the government official/s:

Does your Enterprise make any donations to political parties? If yes, provide details explaining

**Relatives who are government officials**

Do any owners, management or employees relative/s who are Government Officials? If yes, please detail:

Name of employee & Job title	Role & influence on day to day business	Relative's name and relationship	Official position of relative	Relative's official duties
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Does the relative have any influence over or connection to your Enterprise's business? Please provide details:

Is there any risk of perception that the relative could influence the business of your Enterprise or this contract? Please provide details:

5

**REFERENCE**

**ANTI-CORRUPTION AWARENESS**

Can you explain what corruption is?

Transparency International's [2011] Corruption Perceptions Index ranks [insert country] as number [insert rank] out of 178 countries—Do you think this is fair? Please explain.

Are you aware of international anti-corruption laws?

... / ...



.../...

Can you provide examples of international anti-corruption laws?

Are there any similar laws in your country?

Do you have any questions about our Enterprise's policy on anti-corruption?

## REFERENCE

### COMPLIANCE

Does your Enterprise have its own anti-corruption policies and ethics compliance programme? Please provide detail:

Have your employees being trained in anti-corruption practices? If yes, please detail (including frequency):

Does your Enterprise have any other communications about corruption?

## REFERENCE

### ANTI-CORRUPTION—INVESTIGATIONS/ALLEGATIONS

Have there ever been investigations or allegations of corruption concerning your Enterprise, any employees or Enterprise representative? If yes, please provide details:

If the answer above is yes, please state what remedial action your Enterprise took:

Have any of your subcontractors ever been the subject of investigations or allegations into corruption? If yes, please provide details:

If the answer above is yes, please state what remedial action your Enterprise took?

# ICC Guidelines on Whistleblowing<sup>29</sup>

## Introduction

### NO ABATEMENT OF CORRUPTION AND ECONOMIC FRAUD

Fraud remains one of the most problematic issues for business worldwide, no matter the Enterprise's country of operation, industry sector or size. An extensive survey, conducted in 2007 with 5428 enterprises in 40 countries, concluded that over 43 % of the respondents sustained one or more significant economic crimes during the two previous years. Despite the attention of regulators and Enterprises' investment in controls, the actual level of economic crime and the associated financial and non-financial damages have not significantly decreased.

Economic fraud destroys shareholders' value, threatens enterprises' development, endangers employment opportunities and undermines good corporate governance. Enterprises should therefore consider putting into place efficient and appropriate internal tools to combat economic fraud and to fight corruption. Research indicates that Enterprises that use effective guidelines and compliance programmes are much less vulnerable to economic crime<sup>30</sup>.

Potential fraudsters need to see that, due to internal risk management tools, there is a greater likelihood of detection and that those in breach of an Enterprise's ethical, regulatory and legal guidelines will be consistently subject to sanctions that fit the offences<sup>31</sup>. Fraud can be detected by internal audit, external audit, risk management, corporate security but also, and to a large extent, by whistleblowing.

An Enterprise's workforce represents a valuable source of information that can be utilized to identify a potential problem, and to deal with it, before it causes significant damage to the Enterprise's reputation or its stakeholders<sup>32</sup>.

29 Available at <https://icwbo.org/publication/icc-guidelines-on-whistleblowing/>

30 PricewaterhouseCoopers, Investigations and Forensic Services, "Economic crime: people, culture and controls", 4th biennial Global Economic Crime Survey, 2007, p. 22.

31 Ibidem, p. 4.

32 Institute of Chartered Accountants in England and Wales, "Guidance for audit committees", March 2004.

## WHISTLEBLOWING—AN EFFICIENT FRAUD DETECTION TOOL

Recent international professional research shows that whistleblowing, in addition to other instruments, such as people management and internal and external controls, provides the major source for detection of fraudulent behaviour in enterprises. A study performed by an international accounting firm<sup>33</sup> reveals that not less than 25 % of the occurrences of fraud discovered in the enterprises surveyed came to light thanks to a whistleblowing system put into place by these enterprises.

There is however still some reluctance in parts of the business world to resort to internal fraud reporting by the Enterprise's employees, as it appears from another professional survey covering 13 European countries<sup>34</sup> that only 33 % of the respondents state that their enterprise has a hotline. Cultural differences, legal requirements and psychological obstacles still make the introduction of whistleblowing problematic in certain jurisdictions.

## THE ICC RULES OF CONDUCT AND RECOMMENDATIONS

Convinced that self-regulation provides effective protection of corporate interests, ICC has developed over the years rules aiming at fighting corruption and other forms of economic fraud. In particular, ICC has encouraged Enterprises to put into place efficient preventive policies which can shield them from the grave consequences economic fraud can entail.

The 2005 ICC Rules of Conduct on Combating Extortion and Bribery recommend that anti-corruption policies and codes adopted by enterprises should “*offer confidential channels to raise concerns, seek advice or report violations without fear of retaliation*”<sup>35</sup>. This ICC Recommendation is extensively commented in Chapter Ten of the ICC corporate practices manual *Fighting Corruption*, written by Michael N. Davies, Q.C.

ICC France has taken the initiative to issue guidelines on the important question of putting into place whistleblowing mechanisms in enterprises.

33 KPMG Forensic, “Profile of a Fraudster”, Survey, 2007, p. 26.

34 Ernst & Young, “A Survey into Fraud Risk Mitigation in 13 European Countries”.

35 ICC Commission on Anti-Corruption, “Combating Extortion and Bribery: ICC Rules of Conduct and Recommendations, 2005 edition, article 7.

## PURPOSE OF THE ICC GUIDELINES ON WHISTLEBLOWING

The purpose of these Guidelines is to help Enterprises establish and implement internal whistleblowing programmes, by setting forth practical indications that can serve as a useful point of reference, while meeting, as much as possible, the objections formulated in certain countries about some aspects of a whistleblowing system. These Guidelines are based on the broad experience and practice of ICC member Enterprises across a wide range of sectors and jurisdictions. They are also inspired by a large number of international and national legal provisions.

## NATIONAL AND INTERNATIONAL SOURCES OF LAW ON WHISTLEBLOWING

Legal provisions covering whistleblowing, either internal or external, are listed below, as they serve as valuable indications for the organizing of reporting within Enterprises:

### *International conventions*

The Inter-American Convention against Corruption (article III, section 8) of 29 March 1996, requires Parties to consider adopting *systems for protecting public servants and private citizens who, in good faith, report acts of corruption, including protection of their identities.*

The United Nations Convention against Corruption of 9 December 2003 (article 33) requires each State Party to consider incorporating into its domestic legal system *appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with [the] Convention.*

The European Council Criminal Law Convention of 27 January 1999 (article 22) requires each Party to adopt *such measures as may be necessary to provide effective and appropriate protection for those who report the criminal offences established in accordance with [the relevant provisions of the Convention].*

The European Council Civil Law Convention of 4 November 1999 (article 9) requires that each Party provides *in its internal law for appropriate protection against any unjustified sanction for employees who have reasonable grounds to suspect corruption and who report in good faith their suspicion to responsible persons or authorities.*

The African Union Convention on Preventing and Combating Corruption of 11 July 2003 (article 5) requires State Parties to adopt *measures that ensure citizens report instances of corruption without fear of consequent retaliation.*

*Selected national legislation*

- A. United Kingdom: Public Interest Disclosure Act 1998 (PIDA) grants whistleblower protection to individuals who make certain disclosures in good faith and in the public interest and allows these individuals to bring action in respect of victimization.
- B. United States: Sarbanes-Oxley Act of 2002 (section 806) grants whistleblower protection for employees of publicly traded Enterprises against retaliation in fraud cases.

The New York Stock Exchange (NYSE) Listing Manual (Section 303A.10)<sup>36</sup> provides that listed Enterprises must adopt a code of ethics for directors, officers and employees. In the commentary, it is stressed that each code of ethics must contain compliance standards and procedures that will facilitate the effective operation of the code and *inter alia* whistleblowing procedures and whistleblower protection.

- C. France: Act nr. 2007- 1598 of 13 November 2007 (article 9) amends the Labor Code and prohibits any discrimination against a person, who has reported or brought a witness report to an employer or to the authorities about corruption. Any discriminatory act is to be declared null and void.

*Recommendations by international public organisations*

The OECD Guidelines for Multinational Enterprises of 2000 (chapter II, item 9) recommend that enterprises *“refrain from discriminatory or disciplinary action against employees who make bona fide reports to management or, to the competent authorities, on practices that contravene the law, the Guidelines or the enterprise’s policies”*<sup>37</sup>.

<sup>36</sup> See also Section 4350 of the NASDAQ Listing Manual.

<sup>37</sup> The Commentary on this provision reads as follows: Following from effective self-regulatory practices, as a matter of course, enterprises are expected to promote employee awareness of company policies. Safeguards to protect *bona fide* “whistleblowing” activities are also recommended, including protection of employees who, in the absence of timely remedial action or in the face of reasonable risk of negative employment action, report practices that contravene the law to the competent authorities. While of particular relevance to anti-bribery and environmental initiatives, such protection is also relevant to other recommendations in the Guidelines.

## Guidelines

Enterprises are encouraged to establish, within their organisation and as an integral part of their integrity programme, a whistleblowing system, commensurate with their size and resources.

**A.** Such whistleblowing system should aim to:

- › receive and entertain, in full confidentiality, all reasonable requests for advice and guidance on business conduct matters and ethical concerns raised by the employees of the enterprise and of its subsidiaries or affiliates (the group), but also, to any extent possible, by any of the group's agents, suppliers and customers; and
- › receive and handle, at the earliest stage possible, by the same categories of persons, all reports made about any occurrence, whether established or soundly suspected, of a breach of applicable laws and regulations, the enterprise's code of conduct or the *ICC Combating Extortion and Bribery Rules of Conduct and Recommendations*, which could seriously harm the enterprise or the group, if no remedial action is taken.

**B.** Enterprises should appoint high level personnel of undisputable repute and extensive work experience to be in charge of the management and administration of their whistleblowing units or ombud service. These personnel should be given a large autonomy within the enterprise and report to the highest echelon possible within the group.

As part of these arrangements, an enterprise may designate a firm, external to the group, specialized in receiving and handling whistleblowing reports. Such firm should be independent, of undisputable repute and should offer appropriate guarantees of professionalism and secrecy.

**C.** It is up to each individual enterprise to define the kind of communication channels it wants to use for whistleblowing purposes: oral or written communication, telephone-based communication (toll free call helplines or hotlines) or computer-based communication (Intranet) or any other tool which it considers adequate.

Enterprises should endeavour to use in these communication channels as many of the languages spoken in the different countries of operation as reasonably possible.

- D. A whistleblowing system, being part and parcel of the enterprises' voluntary integrity programmes, will only be successful if it is not overregulated from the outside.

Enterprises, however, should be aware that, in certain jurisdictions and cultural environments and because of inter alia data protection and labor law concerns, legal restrictions have been imposed on whistleblowing procedures, which they will have to comply with.

- E. Each individual enterprise may decide, taking into account the applicable law of every country, in which a whistleblowing system will be put into place:
- › whether reporting under the whistleblowing system will be made compulsory or voluntary, and
  - › whether reporting can be done on an anonymous as well as on a disclosed basis.

In deciding to opt for an anonymous whistleblowing system, an enterprise may take into account its cultural environment, as well as issues relating to the protection of privacy and the risk of unfair reporting.

If an enterprise considers that reporting is made on a voluntary basis, its employees may opt to report a serious occurrence, as defined under § A above, under any other internal or external procedure, which is available.

- F. All whistleblowers' reports should be diligently acknowledged, recorded and screened.

A whistleblower, whose report is not considered *bona fide*, should forthwith be told so and such report should be disregarded.

If there is abuse of the process, disciplinary action can be envisaged.

All *bona fide* reports should be investigated by the enterprise's whistleblowing unit and forwarded, under strict confidentiality rules, to the appropriate person(s) or department(s) in the enterprise or group.

As soon as reasonably possible, the main results of the due diligence examination should be appropriately communicated as feedback to the whistleblower.

The person, whose behaviour has been reported, should also be informed of the main object of the ongoing procedure, thereby allowing this person to present objections.

- G.** All employees should be in a position to report serious occurrences, as defined above, without fear of retaliation or of discriminatory or disciplinary action. Therefore, the whistleblower's employment, remuneration and career opportunities should be protected by the enterprise during a reasonable period of time.

Enterprises should maintain, to the fullest extent possible and at all times, the confidentiality of the data revealed through whistleblowing, and the identity of the whistleblower, subject to overriding legal requirements, and should protect such data with the most appropriate means.





# ICC Guidelines on Gifts and Hospitality<sup>38</sup>

## Introduction

In the conduct of their normal commercial activities, Enterprises are often asked, requested or even solicited to make gifts or to provide forms of hospitality. Enterprises may also wish, at their own initiative, to give their actual or potential customers or business contacts presents or other advantages in order to improve their image as a commercial organisation, to better present their products and services, to enhance relations or to create a favourable business climate and courtesy relations.

Such practices are quite common and are considered part of customary commercial policy or as affirmation of habitual courtesy in many regions and countries of the world. While Gifts and Hospitality are not *per se* contrary to present day legal and ethical standards<sup>39</sup>, they can in some cases, due to the giver's or recipient's position, their frequency, their value or importance, the context in which they are extended or even only due to the perception by Third Parties, create a suspicion of impropriety and be considered as a bribe.

Bribery is the offering, promising, giving, authorizing or accepting of any undue pecuniary or other advantage to, by or for any person (public officials in particular) in order to obtain or retain a business or other improper advantage<sup>40</sup>.

From a review of national legislation, it appears that there is no uniform standard but rather that each jurisdiction has its own rules, regulations and enforcement methods with regard to Gifts and Hospitality.

ICC recommends that Enterprises establish strict procedures covering the offer or receipt of Gifts and Hospitality in order to ensure that such arrangements: (i) comply with national law and applicable international instruments; (ii) are limited to reasonable and *bona fide* expenditures; (iii) do not improperly affect, or might be perceived as improperly affecting, the recipient's independence

<sup>38</sup> 2014 edition available at <https://iccwbo.org/publication/icc-guidelines-on-gifts-and-hospitality/>

<sup>39</sup> See Guidance to the UK Bribery Act 2010, page 12: "Bona fide hospitality and promotional, or other business expenditure which seeks to improve the image of a commercial organisation, better to present products and services, or establish cordial relations, is recognized as an established and important part of doing business and it is not the intention of the Act to criminalize such behaviour." and Resource Guide to the US Foreign Corrupt Practices Act, page 16: "The FCPA does not prohibit gift-giving. Rather, just like its domestic bribery counterparts, the FCPA prohibits the payments of bribes, including those disguised as gifts".

<sup>40</sup> Based on the ICC Rules on Combating Corruption 2011, article 1, sub a.

of judgment towards the giver; (iv) are not contrary to the known provisions of the recipient's Code of Conduct; and (v) are neither offered or received too frequently nor at an inappropriate time<sup>41</sup>.

Based on an extensive exchange of good practices among its members, from many countries and from different sectors, and on a thorough benchmarking of their approaches, ICC wishes to issue the present Guidelines, which take into consideration the most recent international, regional and national rules as well as commercial best practice and guidance at the date of these Guidelines.

These Guidelines can be applied, *mutatis mutandis*, by all organisations, public or private, for profit or non-profit alike.

## Definitions of terms used in these Guidelines

“Gift” means any payment, gratuity, gratification, present or advantage, pecuniary or not, offered, promised, given or received, without any direct or indirect material or immaterial compensation.

“Hospitality” means all forms of social amenity, entertainment, travel or lodging, or an invitation to a sporting or cultural event<sup>42</sup>.

“Advantages” means Gifts and Hospitality, as defined above and when collectively referred to.

“Policy” means enterprise-wide effective principles and rules or procedures relating to Gifts and Hospitality, including its implementation practices.

## GUIDELINES

- A.** Enterprises are recommended to establish a Policy relating to Gifts and Hospitality which provides that Advantages:
- › comply with applicable law and applicable international instruments;
  - › are limited to expenditures which are reasonable, proportionate and business-related like bona fide promotional or similar business expenditures;

<sup>41</sup> ICC Rules on Combating Corruption 2011, article 5.

<sup>42</sup> Which may refer to the offering, promising, giving or receiving thereof.

- › are made transparently, do not improperly affect, and would not reasonably be perceived as improperly influencing the recipient's performance of his/her duties;
  - › are not contrary to the known provisions of the recipient's Code of Conduct;
  - › are neither offered nor received too frequently nor at an inappropriate time<sup>43</sup>;
  - › are not offered in order to improperly obtain or retain a business or other advantage;
  - › are recorded fairly and accurately in the Enterprise's books and records; and
  - › are appropriate considering the culture and the standard of living in the country or region where the Advantage is given or received.
- B.** Although good judgment is important when giving or accepting Gifts or Hospitality, a Policy should be adequately specific and could be accompanied by easily understandable examples and/or best practices in order to give proper guidance.
- C.** In view of the complexity of Gifts and Hospitality and the risk of any Advantages being considered a bribe, a Policy should be properly implemented and communicated across the Enterprise. This means it should be binding for all directors, officers and employees of the Enterprise and easy to find e.g. on the Enterprise's website and in the offices. All directors, officers and designated<sup>44</sup> employees should receive regular web based and/or face-to-face training and should be encouraged to seek guidance, whenever they have concerns or questions about Gifts and Hospitality, from management or specially designated officers or departments.

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<sup>43</sup> Reference is made, for instance, to offering or receiving Advantages, which involve the interested parties in a tender phase, pending legal proceedings, concession/authorization processes, or sensitive negotiations.

<sup>44</sup> Who in view of their position and their assignments are exposed to bribery risks.

- D.** A number of countries are prohibiting Advantages to public officials<sup>45</sup>, while other countries allow such practices only under strict conditions. Accordingly, Enterprises can give Advantages to public officials only to the extent permitted under the applicable (national) laws and regulations.
- E.** Enterprises would likely breach anti-corruption laws when giving Advantages to Third Parties, such as a public official's family members, if such Advantages are intended as an indirect way of corruptly influencing an official<sup>46,47</sup>
- F.** A Gift or Hospitality to a person in the private sector should only be permitted if it is compliant with the known provisions of the recipient's Code of Conduct. Enterprises are not obliged to proactively seek information about the recipient's Code of Conduct in every case; instead, Enterprises must take into consideration what they do know about the recipient's Code, and may, in appropriate cases, wish to seek additional information if they do not have such knowledge.
- G.** No Gifts or Hospitality should be provided nor received in the form of cash or cash equivalent, such as vouchers, pre-paid cards or free services of the Enterprise.
- H.** Gifts of nominal (low) value can both be offered or received in reasonable quantities.
- I.** Examples are promotional gifts such as pens, T-shirts, mugs and agendas containing the logo of an Enterprise<sup>48</sup>.
- J.** Hospitality of low value (e.g. drinks or a simple lunch), which are extended as a matter of courtesy, are in principle allowed<sup>49</sup>.
- K.** Enterprises should promote their products, services and technology on the basis of their competitiveness and quality, not on hidden Advantages.

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45 For the meaning of public officials, foreign officials and foreign public officials, see Resource Guide to the US Foreign Corrupt Practices Act, page 19, OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Article 1, paragraph 4, sub a) and UK Bribery Act 2010, Article 6, sub (5) .

46 See Resource Guide to the US Foreign Corrupt Practices Act, page 16.

47 Charitable contributions are outside the scope of these Guidelines. For guidance see i.a. Resource Guide to the US Foreign Corrupt Practices Act, page 16.

48 However, in case of Gifts to public officials, see C 4 here above.

49 However, in case of Hospitality to public officials, see C 4 here above.

Hospitality in the form of paying reasonable travel and lodging expenses<sup>50</sup> for customers or government officials visiting an Enterprise's facilities for legitimate promotional or other business purposes is in principle allowed<sup>51, 52</sup>.

- L. A Policy could foresee that the giving or receiving of a Gift or Hospitality, the value of which exceeds nominal value, needs to be reported and that, if the value exceeds a certain defined level, it needs to be approved by a manager or a designated officer. Both monetary levels for reporting (at a lower level) and for approval (at a higher level) are recommended to be determined in the Policy<sup>53</sup>.
- M. Enterprises with an international or global reach and having introduced in their Policy a reporting and approval system, may consider putting in place different monetary values per country or region, taking into account differences in culture and/or standard of living.
- N. Enterprises that want to put a reporting and/or approval process in place for Gifts and Hospitality may consider putting a central (automated) register and clearance process in place along with establishing annual cumulative limitations and with limited exceptions for Advantages, approved by management or a designated officer<sup>54</sup>.
- O. Whenever practically possible, agents, intermediaries or other Third Parties representing the Enterprise or conducting business on its behalf should be informed of the Enterprise's Policy and be demanded to comply with its provisions or equivalent standards and to properly implement them.
- P. In addition to the recommendations under the "Guidelines" section, the following elements are recommended for a Policy:
  - › Objective—avoiding Gifts or Hospitality that could be considered a bribe or corruptive practice;
  - › Scope—applicable and binding for all directors, officers and employees of the Enterprise and, as far as possible, its business partners;

50 Reasonableness can be gauged on the basis of the duration of the travel, frequency, the number of people in the delegation and the role of each invitee, which should be proportional to the scope of the visit.

51 See footnote 1 above and Resource Guide to the US Foreign Corrupt Practices Act, page 17 for guidance.

52 However, in case of Hospitality to public officials, see C 4 here above.

53 In some countries, Enterprises use different values (than the general ones) for top or senior management. This practice is not recommended as such different values are contrary to the principle "tone at the top" and create an increased risk of such a more valuable Gift or Hospitality being considered a bribe.

54 Resource Guide to the US Foreign Corrupt Practices Act, page 16.

- › Definitions—clear definitions of Gifts and Hospitality;
- › General provisions—applying to both Gifts and Hospitality, including a prohibition to solicit or to induce and provisions that Advantages should not be given too frequently and that all Advantages should be recorded fairly and accurately in the Enterprise's books and records;
- › Specific provisions on Gifts, which may include a clear reporting and authorization procedure;
- › Specific provisions on Hospitality, which may include a clear reporting and authorization procedure;
- › A provision on communication and training on Gifts and Hospitality; and
- › A provision explaining where guidance could be obtained in case of questions or concerns.

## ICC Anti-Corruption Clause

The ICC Anti-corruption Clause (the “Clause”) is to be included in contracts whereby parties commit to complying with ICC Rules on Combating Corruption or commit to put in place and maintain a corporate anti-corruption compliance programme.

The Clause helps preserve trust between parties and prevents corruption in both the negotiation and performance of contracts.

### Introductory note on the application and the general purpose and structure of the Clause

The Clause is intended to apply to any contract that incorporates it either by reference or in full. While parties to a contract are encouraged to incorporate the Clause into their contract by its full name, it is anticipated that any reference in the contract to the Clause or related variations shall, in the absence of evidence to the contrary, be deemed to be a reference to the ICC Anti-Corruption Clause.

The general aim of the Clause is to provide parties with a contractual provision that will reassure them about the integrity of their counterparts during the pre-contractual period as well as during the term of the contract and even thereafter.

Three options are possible: either a short text with the technique of incorporation by reference of Part I of the ICC Rules on Combating Corruption 2011 (**Option I**) or the incorporation of the full text of the same Part I of the ICC Rules on Combating Corruption 2011 in their contract (**Option II**), or a reference to a corporate compliance programme, as described in Article 10 of the ICC Rules on Combating Corruption (**Option III**).

Where Options I and II have been chosen, if a party fails materially or on several repeated occasions to comply with the anti-corruption provisions incorporated in the contract, the non-complying party will be given the opportunity to remedy the non-compliance. Such party will also have the opportunity to invoke as a defense that it has put into place adequate anti-corruption preventive measures. In the absence of the non-complying party taking remedial action, or if remedial action is not possible and no defense is effectively invoked, the other party may suspend or terminate the contract, at its discretion.



Any entity, whether an arbitral tribunal or other dispute resolution body, rendering a decision in accordance with the dispute resolution provisions of the contract, shall have the authority to determine the contractual consequences of any alleged non-compliance with the Clause.

## ICC Anti-corruption Clause

### **OPTION I: INCORPORATION BY REFERENCE OF PART I OF THE ICC RULES ON COMBATING CORRUPTION 2011**

*Paragraph 1:* Each Party hereby undertakes that, at the date of the entering into force of the Contract, itself, its directors, officers or employees have not offered, promised, given, authorized, solicited or accepted any undue pecuniary or other advantage of any kind (or implied that they will or might do any such thing at any time in the future) in any way connected with the Contract and that it has taken reasonable measures to prevent subcontractors, agents or any other Third Parties, subject to its control or determining influence, from doing so.

*Paragraph 2:* The Parties agree that, at all times in connection with and throughout the course of the Contract and thereafter, they will comply with and that they will take reasonable measures to ensure that their subcontractors, agents or other Third Parties, subject to their control or determining influence, will comply with Part I of the ICC Rules on Combating Corruption 2011, which is hereby incorporated by reference into the Contract, as if written out in the Contract in full.

*Paragraph 3:* If a Party, as a result of the exercise of a contractually-provided audit right, if any, of the other Party's accounting books and financial records, or otherwise, brings evidence that the latter Party has been engaging in material or several repeated breaches of the provisions of Part I of the ICC Rules on Combating Corruption 2011, it will notify the latter Party accordingly and require such Party to take the necessary remedial action in a reasonable time and to inform it about such action. If the latter Party fails to take the necessary remedial action, or if such remedial action is not possible, it may invoke a defense by proving that by the time the evidence of breach(es) had arisen, it had put into place adequate anti- corruption preventive measures, as described in Article 10 of the ICC Rules on Combating Corruption 2011, adapted to its particular circumstances and capable of detecting corruption and of promoting a culture of integrity in its organisation. If no remedial action is taken or, as the case may be, the defense is not effectively invoked, the first Party may, at its discretion, either suspend the Contract or terminate it, it being understood that

all amounts contractually due at the time of suspension or termination of the Contract will remain payable, as far as permitted by applicable law.

*Paragraph 4:* Any entity, whether an arbitral tribunal or other dispute resolution body, rendering a decision in accordance with the dispute resolution provisions of the Contract, shall have the authority to determine the contractual consequences of any alleged non-compliance with this ICC Anti-Corruption Clause.

## OPTION II: INCORPORATION IN FULL OF PART I OF THE ICC RULES ON COMBATING CORRUPTION 2011

*Paragraph 1:* Each Party hereby undertakes that, at the date of the entering into force of the Contract, itself, its directors, officers or employees have not offered, promised, given, authorized, solicited or accepted any undue pecuniary or other advantage of any kind (or implied that they will or might do any such thing at any time in the future) in any way connected with the Contract and that it has taken reasonable measures to prevent subcontractors, agents or any other Third Parties, subject to its control or determining influence, from doing so.

*Paragraph 2:* The Parties agree that, at all times in connection with and throughout the course of the Contract and thereafter, they will comply with and that they will take reasonable measures to ensure that their subcontractors, agents or other Third Parties, subject to their control or determining influence, will comply with the following provisions:

*Paragraph 2.1:* Parties will prohibit the following practices at all times and in any form, in relation with a public official at the international, national or local level, a political party, party official or candidate to political office, and a director, officer or employee of a Party, whether these practices are engaged in directly or indirectly, including through Third Parties:

- A. **Bribery** is the offering, promising, giving, authorizing or accepting of any undue pecuniary or other advantage to, by or for any of the persons listed above or for anyone else in order to obtain or retain a business or other improper advantage, e.g. in connection with public or private procurement contract awards, regulatory permits, taxation, customs, judicial and legislative proceedings.

Bribery often includes:

- › kicking back a portion of a contract payment to government or party officials or to employees of the other contracting Party, their close relatives, friends or business partners or
- › using intermediaries such as agents, subcontractors, consultants or other Third Parties, to channel payments to government or party officials, or to employees of the other contracting Party, their relatives, friends or business partners.

**B. Extortion or Solicitation** is the demanding of a bribe, whether or not coupled with a threat if the demand is refused. Each Party will oppose any attempt of Extortion or Solicitation and is encouraged to report such attempts through available formal or informal reporting mechanisms, unless such reporting is deemed to be counter-productive under the circumstances.

**C. Trading in Influence** is the offering or Solicitation of an undue advantage in order to exert an improper, real, or supposed influence with a view of obtaining from a public official an undue advantage for the original instigator of the act or for any other person.

**D. Laundering** the proceeds of the Corrupt Practices mentioned above is the concealing or disguising the illicit origin, source, location, disposition, movement or ownership of property, knowing that such property is the proceeds of crime.

*Paragraph 2.2:* With respect to Third Parties, subject to the control or determining influence of a Party, including but not limited to agents, business development consultants, sales representatives, customs agents, general consultants, resellers, subcontractors, franchisees, lawyers, accountants or similar intermediaries, acting on the Party's behalf in connection with marketing or sales, the negotiation of contracts, the obtaining of licenses, permits or other authorizations, or any actions that benefit the Party or as subcontractors in the supply chain, Parties should instruct them neither to engage nor to tolerate that they engage in any act of corruption; not use them as a conduit for any corrupt practice; hire them only to the extent appropriate for the regular conduct of the Party's business; and not pay them more than an appropriate remuneration for their legitimate services.

*Paragraph 3:* If a Party, as a result of the exercise of a contractually-provided audit right, if any, of the other Party's accounting books and financial records, or otherwise, brings evidence that the latter Party has been engaging in material or several repeated breaches of Paragraphs 2.1 and 2.2 above, it will notify the latter Party accordingly and require such Party to take the necessary remedial action in a reasonable time and to inform it about such action. If the latter Party fails to take the necessary remedial action or if such remedial action is not possible, it may invoke a defence by proving that by the time the evidence of breach(es) had arisen, it had put into place adequate anti-corruption preventive measures, as described in Article 10 of the ICC Rules on Combating Corruption 2011, adapted to its particular circumstances and capable of detecting corruption and of promoting a culture of integrity in its organisation. If no remedial action is taken or, as the case may be, the defence is not effectively invoked, the first Party may, at its discretion, either suspend or terminate the Contract, it being understood that all amounts contractually due at the time of suspension or termination of the Contract will remain payable, as far as permitted by applicable law.

*Paragraph 4:* Any entity, whether an arbitral tribunal or other dispute resolution body, rendering a decision in accordance with the dispute resolution provisions of the Contract, shall have the authority to determine the contractual consequences of any alleged non-compliance with this ICC Anti-corruption Clause.

### **OPTION III: REFERENCE TO A CORPORATE ANTI-CORRUPTION COMPLIANCE PROGRAMME, AS DESCRIBED IN ARTICLE 10 IN THE 2011 RULES**

*Paragraph 1:* Each Party has put into place, at the date of the entering into force of the Contract, or undertakes to put into place soon thereafter, a corporate anti-corruption compliance programme, as described in Article 10 of the 2011 ICC Rules on Combating Corruption, adapted to its particular circumstances and capable of detecting Corruption and of promoting a culture of integrity in its organisation.

Each Party will maintain and implement such programme at least throughout the lifetime of the Contract and will on a regular basis inform the other Party about the implementation of its programme through statements prepared by a qualified corporate representative, appointed by it and whose name will have been communicated to the other Party.

*Paragraph 2:* If a Party brings evidence that the other Party's qualified corporate representative statement contains material deficiencies, undermining the other Party's program efficiency, it will notify the other Party accordingly and require such Party to take the necessary remedial action in a reasonable time and to inform it about such action. If the latter Party fails to take the necessary remedial action, or if such remedial action is not possible, the first Party may, at its discretion, either suspend the Contract or terminate it, it being understood that all amounts contractually due at the time of suspension or termination of the Contract will remain payable, as far as permitted by applicable law.

*Paragraph 3:* Any entity, whether an arbitral tribunal or other dispute resolution body, rendering a decision in accordance with the dispute resolution provisions of the Contract, shall have the authority to determine the contractual consequences of any alleged non-compliance with this ICC Anti-corruption Clause 2012.

## Commentary on the ICC Anti-corruption Clause

### OPTIONS I AND II

*Paragraph 1: Non-corruption undertaking covering the pre-contractual period*

The ICC Anti-corruption Clause aims at creating trust between Parties

Integrity is a key factor in bringing about a business environment that gives best value for money and rewards skill and competitiveness. Best results are achieved in business transactions when predictability and trust prevail between Parties. Combating bribery and other corrupt practices is also vital for protecting shareholders, taxpayers and other entities indirectly affected by business transactions.

While there is a need to ensure that corrupt practices do not bear fruit, there is also a need to maintain trust in the binding nature of the contractual undertakings (*Pacta sunt servanda*), as it is a core component of successful business life. There must, therefore, be a balance between the efforts to fight corruption and the treatment of corruption as a breach of a Contract justifying its termination.

Integrity must prevail throughout the lifecycle of a business transaction, from its negotiation to its performance and resulting remuneration. Very often a contractual transaction involves a multitude of Parties with a substantial number of personnel. Corrupt practices may not exist throughout an entire

organisation, and they may not be instigated by, or otherwise be attributable to, the management holding the principal responsibility for the negotiation or performance of the Contract.

When preparing their Contract, Parties want to make sure that during the negotiations leading to the Contract and during the drafting of the Contract (the pre-contractual period), no bribe, gift or other undue advantage has been granted or promised (or that no indication in this sense has been given for the future) in relation to the Contract by a Party to a public official at the international, national or local level, a political party, party official or candidate to political office or to a director, officer or employee of the other Party, either directly or indirectly through one of the Party's subcontractors, agents or other Third Party, subject to its control or determining influence.

Each Party also wants to ascertain that the other Party has put in place reasonable preventive measures to avoid that one of the other Party's subcontractors, agents, or other Third Parties engages in corrupt practices.

In sum, the Clause is written with the aim of achieving a balance between the interest of Parties to avoid corruption and their need to ensure the attainment of the objectives of the Contract. The Clause builds on the doctrine of good faith, the presumption of innocence, good cooperation between Parties and the idea that many illicit practices can be remedied without bringing the contractual relationship to an end.

#### Which are the Corrupt Practices covered by Paragraph 1?

The wording of Paragraph 1 mirrors that used in the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997) and the United Nations Convention against Corruption (2003).

The corrupt practices covered by Paragraph 1 include: (i) "active" as well as "passive" corruption (also referred to at times as "Extortion" or "Solicitation"); (ii) Bribery as well as trading in influence; (iii) Corruption of public officials, as well as private-to-private corruption; (iv) Corruption in the national and local as well as in the international sphere; (v) Corruption with or without the use of intermediaries; (vi) Bribery with money or through any other form of undue advantage; and (vii) Bribery with or without laundered money.

### Is Paragraph 1 referring to even the smallest undue advantages?

ICC recommends enterprises not to make “facilitation payments” (*i.e.* unofficial, improper, small payments made to a low-level official to secure or expedite the performance of a routine or necessary action to which the payer is legally entitled), unless their employees are confronted with exigent circumstances, such as duress or when the health, security or safety of their employees are at risk.

On the issue of gifts and hospitality offered to e.g., actual or potential commercial partners, ICC recommends that enterprises establish procedures to ensure that they (i) comply with the law; (ii) are reasonable and *bona fide*; (iii) do not affect (or appear to affect) the recipient’s independence of judgment towards the giver; (iv) are not contrary to the known provisions of the recipient’s code of conduct and (v) are offered or received neither too frequently nor at an inappropriate time.

### Which “reasonable preventive measures” have to be taken by the Parties with respect to their intermediaries?

A Party is not required to prevent by all means any of its subcontractors, agents or other Third Parties, subject to its control or determining influence, to commit any form of corrupt practice.

Each Party shall, however, based on a periodical assessment of the risks it faces, put into place an effective corporate compliance programme, adapted to its particular circumstances, exercise, on the basis of a structured risk management approach, appropriate due diligence in the selection of subcontractors, agents or other Third Parties, subject to its control or determining influence; and train its directors, officers and employees accordingly.

### To which circumstances is the undertaking of Paragraph 1 applicable?

Having regard to the fast evolution of the law and practice in the field of business integrity, the undertaking of Paragraph 1 should be concerned with only the very Contract itself and not other contracts concluded between the same Parties, or any other contracts.

*Paragraph 2: Non-corruption undertaking covering the period after execution of the Contract (contractual and post-contractual periods)*

### The term of the Parties' non-corruption undertaking

Parties agree, during the period following the entering into force of the Contract and after the term of the Contract, not to commit corrupt practices in connection with the Contract.

They will have to ensure that no phase of the performance of the Contract, such as obtaining the relevant licenses or official authorisations, the passing of operational tests, or inspections of goods or sites will be obtained through illicit means. They also undertake to take reasonable measures to prevent their subcontractors, agents and other Third Parties to do the same during such period. The Parties' non-corruption undertaking survives the term of the Contract.

### Paragraph 2 contains a provision for incorporation either by reference or in full

In order to memorialise their mutual non-corruption undertaking, Parties decide to incorporate the text of Part I of the ICC Rules on Combating Corruption 2011 in their Contract. They can choose either to make this incorporation by reference or in full. In the former case, they will opt for the text under Option I, in the latter for the text under Option II.

### The nature of the Parties' undertaking

The Parties' undertaking is absolute, while their undertaking in relation to their subcontractors, agents or other Third Parties, subject to their control or determining influence, is limited to the taking of reasonable measures in order to prevent the latter from engaging in corrupt practices.

This will include as a minimum: instructing subcontractors, agents and other Third Parties neither to engage nor to tolerate that they engage in any corrupt practice; not using them as a conduit for any corrupt practice; hiring them only to the extent appropriate for the regular conduct of the Party's business and not paying them more than an appropriate remuneration for their legitimate services.

### *Paragraph 3: Non-compliance, remedial action and sanctions*

#### Non-compliance with Part I of the ICC Rules

If a Party becomes aware that the other Party has committed material or several repeated breaches of the provisions of Part I of the ICC Rules on Combating Corruption 2011, it will notify the other Party accordingly.



A Party invoking corruption must bring evidence that corruption is at stake. Evidence is often difficult to find, as is the disclosure of it to the other Party without losing it or causing damage for the further use of it. Therefore, the requirement to bring evidence does not necessarily mean that corroborative evidence should be produced or that all evidence be disclosed to the other Party in every case. Evidence should, however, be sufficient to prove that suspicions of corruption are not invoked in a vexatious or otherwise unjustified manner.

The Clause includes no formal requirements as to how the Parties should make a notification of suspected breach under Part I of the Rules, but typically the mechanism applicable generally to contractual communications between the Parties, will apply to this notification as well. Thus, a Contract containing a requirement that any notification will be made in writing will cover notices on suspected corruption as well.

#### Possible remedial action

In order to ensure to the highest degree possible the continuity of a Contract, the allegedly non-complying Party will be allowed to remedy the situation to the extent possible. Necessary remedial action might include providing cooperation in evidentiary action in conducting an examination or calling for an external audit of the incident, issuing warnings, reorganizing work, terminating subcontracts or contracts of employment with persons or employees involved in corruption, or correcting the detrimental economic effect on the other Party of any proven non-compliance by, for example, adjusting the amount of the price of the Contract. The nature and quantity of the remedial measures required of the Party subject to allegation will depend on the circumstances of the case in question, e.g. on the gravity of the infringement and on the conclusiveness of the evidence provided. In some situations, a remedy may consist of simply providing counter-evidence regarding non-existence of any breach. The allegedly non-complying Party will as soon as possible inform the other Party about the measures it has taken to remedy the situation.

It is recognized, however, that not every infringement of the anti-corruption provisions can be remedied, but it is expected from the allegedly non-complying Party that it will do its utmost to repair the situation to the best of its abilities.

### Invoking the defense of adequate anti-corruption preventive measures

Where a remedy is not or cannot be taken, the Party allegedly in breach may invoke a defense by proving that it had, by the time the evidence of breach had arisen, put into place adequate anti-corruption preventive measures, as described in Article 10 of the ICC Rules on Combating Corruption 2011, adapted to its particular circumstances and capable of detecting corruption and of promoting a culture of integrity in its organisation. Such adequate anti-corruption prevention measures should (i) reflect the ICC Rules on Combating Corruption 2011, (ii) be based on the results of a periodically conducted assessment of the risks faced in the Party's business environment, and (iii) be adapted to the Party's particular circumstances.

### Evidence of non-compliance

Producing evidence of an infringement of the anti-corruption provisions, laid down in Part I of the ICC Rules on Combating Corruption 2011, will not be an easy task, as corruption very rarely occurs in the open.

One of the few means to produce such evidence will be to provide the conclusions of an audit of the accounting books and financial records of the allegedly non-complying Party. Witness statements (as a result of a whistleblowing mechanism or otherwise) may sometimes be used. Applicable criminal law should be taken into account when considering the involvement of law enforcement bodies.

### Audit right

The reference in the Clause to a contractually-provided audit right does not, however, imply that an audit right can be easily obtained in all circumstances nor that such audit right will be suitable for all situations. Although some Contracts give one or more Parties the right to conduct an audit on the other Party (ies), the reference in this Clause to an audit right does not mean that ICC advocates giving Parties an extensive audit right as a recommended business practice.

Parties will have to determine if their commercial relationship allows for an audit right, and if the circumstances surrounding the negotiation, execution and future implementation of the Contract warrant the need for such audit right.

## Sanctions

If the Party allegedly infringing the provisions of Part I of the ICC Rules on Combating Corruption 2011, does not remedy the situation within a reasonable period of time or if no such remedy is possible, and no defense of adequate anti-corruption preventive measures is effectively invoked, the other Party will have the right, at its discretion, to suspend the Contract or terminate it, it being understood that the amounts contractually due at the time of suspension or termination will remain payable, as far as permitted by applicable law.

When the other Party exercises its right of suspension or termination, it bears the full burden of proof that a breach or breaches of the provisions of Part I of the ICC Rules on Combating Corruption 2011 has taken place.

Applicable law may determine whether the Party may be held accountable for a breach or breaches of the provisions of Part I of the ICC Rules on Combating Corruption 2011.

Bringing a large or long-term Contract to an end due to an infringement might be disproportionate. This should also be borne in mind when Paragraph 3 of the Clause is applied.

### *Paragraph 4: Dispute resolution*

Parties refer all disputes related to the contractual consequences of any alleged non-compliance with the Clause to the entity provided for in the dispute resolution provisions of the Contract, such as an arbitral tribunal. However, the non-compliance may be the subject of parallel criminal proceedings which may result in criminal sanctions or other civil law consequences than contractual, in particular liability in tort.

## OPTION III

### *Paragraph 1: Corporate compliance programmes*

#### Corporate compliance programmes, as described in Article 10 of the ICC Rules

Many Enterprises have put into place a corporate compliance programme with the aim of preventing their business activity from being affected by corruptive practices. Such programmes can have different forms and content and will need to be adapted to each Enterprise's particular circumstances in order to be effective. They also should make it possible to detect Corruption and should aim at promoting a culture of integrity in the organisation. Article 10 of the ICC

*Rules on Combating Corruption* 2011 provides an extensive, non-comprehensive list of measures, which may be included in such programme. Each Enterprise will select from this list the measures it deems necessary or adequate for organizing its own anti-corruption prevention system.

### Putting into place a corporate compliance programme

When the Parties enter a Contract, it helps reinforce trust between them to know that their counterpart has put into place—or is going to put into place soon—a corporate compliance programme. Parties will commit to maintain their compliance programme and to implement its provisions at least during the term of the Contract, thus maintaining during that period of time an atmosphere of trust between the Parties.

### Designation of a qualified corporate representative

In order to evidence the effectiveness of the programme and the continuity of its implementation, each Party will designate among its personnel a qualified corporate representative, whose name will be notified to the other Party. These qualified corporate representatives will issue, at regular intervals, statements on the continued existence and implementation its Enterprise's programme.

*Paragraph 2: Deficiencies in a qualified corporate representative's statement, remedial action and sanctions*

### Deficiencies in a qualified corporate representative's statement

If a Party becomes aware that the other Party's qualified corporate representative's statement contains material deficiencies, undermining the efficiency of that Party's programme, it will notify the latter Party accordingly. A statement will be considered deficient if it contains materially untrue, false or incomplete declarations.

A Party invoking a deficiency in a qualified corporate representative's statement must bring evidence that either the statements are missing or that the statement contains materially untrue, false or incomplete declarations.

Evidence is often difficult to find, as is the disclosure of it to the other Party without losing it or causing damage for the further use of it. Therefore the requirement to bring evidence does not necessarily mean that corroborative evidence should be produced or that all evidence be disclosed to the other Party in every case. Evidence should, however, be sufficient to prove that

suspicions of deficiencies in a qualified corporate representative's statement are not invoked in a vexatious or otherwise unjustified manner.

The Clause includes no formal requirements as to how the Parties should make a notification of a suspected deficiency in a qualified corporate representative's statement, but typically the mechanism applicable generally to contractual communications between the Parties, will apply to this notification as well. Thus, a Contract containing a requirement that any notification will be made in writing will cover notices on suspected deficiency as well.

### Remedial action

In order to ensure to the highest degree possible the continuity of a Contract, the Party having allegedly issued a deficient statement, will be allowed to remedy the situation to the extent possible. Necessary remedial action might include providing a new, accurate, complete and sincere statement, giving a full and fair picture of the implementation by the Party concerned of the provisions of its corporate compliance program as well as any corrective action such Party will take to improve such implementation. The nature and quantity of the remedial measures required of the Party subject to allegation will depend on the circumstances of the case in question, e.g. on the gravity of the deficiency and on the conclusiveness of the evidence provided. In some situations, a remedy may consist of simply providing counter-evidence regarding non-existence of any deficiency. The allegedly non-complying Party will as soon as possible inform the other Party about the measures it has taken to remedy the situation.

It is recognized, however, that not every deficiency can be remedied, but it is expected from the allegedly non-complying Party that it will do its utmost to repair the situation to the best of its abilities.

### Other Commentary

The Commentary provided hereinabove under items 4, 5 and 6 on Paragraph 3 of Options I and II is applicable *mutatis mutandis* to Paragraph 2 of Option III.

#### *Paragraph 3: Dispute resolution*

Parties refer all disputes related to any alleged non-compliance with the Clause to the entity provided for in the dispute resolution provisions of the Contract, such as an arbitral tribunal. However, the non-compliance may be the subject of parallel criminal proceedings which may result in criminal sanctions or other civil law consequences than contractual, in particular liability in tort.

## Part I of the ICC Rules on Combating Corruption 2011

### ARTICLE 1

#### *Prohibited Practices*

Enterprises will prohibit the following practices at all times and in any form, in relation with a public official at international, national or local level, a political party, party official or candidate to political office, and a director, officer or employee of an Enterprise, whether these practices are engaged in directly or indirectly, including through Third Parties:

### ARTICLE 2

#### *Third Parties*

With respect to Third Parties subject to the control or determining influence of the Enterprise, including but not limited to agents, business development consultants, sales representatives, customs agents, general consultants, resellers, subcontractors, franchisees, lawyers, accountants or similar intermediaries, acting on the Enterprise's behalf in connection with marketing or sales, the negotiation of contracts, the obtaining of licenses, permits or other authorizations, or any actions that benefit the Enterprise or as subcontractors in the supply chain, Enterprises should: instruct them neither to engage nor to tolerate that they engage in any act of corruption; not use them as a conduit for any corrupt practice; hire them only to the extent appropriate for the regular conduct of the Enterprise's business; and not pay them more than an appropriate remuneration for their legitimate services.

### ARTICLE 10 OF THE ICC RULES ON COMBATING CORRUPTION 2011

#### *Elements of a Corporate Compliance Programme*

Each Enterprise should implement an efficient Corporate Compliance Programme (i) reflecting these Rules, (ii) based on the results of a periodically conducted assessment of the risks faced in the Enterprise's business environment, (iii) adapted to the Enterprise's particular circumstances and (iv) with the aim of preventing and detecting corruption and of promoting a culture of integrity in the Enterprise.

Each Enterprise should consider including all or part of the following good practices in its programme. In particular, it may choose, among the items listed hereunder, those measures which it considers most adequate to ensure

a proper prevention against corruption in its specific circumstances, no such measure being mandatory in nature:

- A.** expressing a strong, explicit and visible support and commitment to the Corporate Compliance Programme by the Board of Directors or other body with ultimate responsibility for the Enterprise and by the Enterprise's senior management ("tone at the top");
- B.** establishing a clearly articulated and visible policy reflecting these Rules and binding for all directors, officers, employees and Third Parties and applying to all controlled subsidiaries, foreign and domestic;
- C.** mandating the Board of Directors or other body with ultimate responsibility for the Enterprise, or the relevant committee thereof, to conduct periodical risk assessments and independent reviews of compliance with these Rules and recommending corrective measures or policies, as necessary. This can be done as part of a broader system of corporate compliance reviews and/or risk assessments;
- D.** making it the responsibility of individuals at all levels of the Enterprise to comply with the Enterprise's policy and to participate in the Corporate Compliance Programme;
- E.** appointing one or more senior officers (full or part time) to oversee and coordinate the Corporate Compliance Programme with an adequate level of resources, authority and independence, reporting periodically to the Board of Directors or other body with ultimate responsibility for the Enterprise, or to the relevant committee thereof;
- F.** issuing guidelines, as appropriate, to further elicit the behaviour required and to deter the behaviour prohibited by the Enterprise's policies and programme;
- G.** exercising appropriate due diligence, based on a structured risk management approach, in the selection of its directors, officers and employees, as well as of its Business Partners who present a risk of corruption or of circumvention of these Rules;
- H.** designing financial and accounting procedures for the maintenance of fair and accurate books and accounting records, to ensure that they cannot be used for the purpose of engaging in or hiding of corrupt practices;

- I. establishing and maintaining proper systems of control and reporting procedures, including independent auditing;
- J. ensuring periodic internal and external communication regarding the Enterprise's anti-corruption policy;
- K. providing to their directors, officers, employees and Business Partners, as appropriate, guidance and documented training in identifying corruption risks in the daily business dealings of the Enterprise as well as leadership training;
- L. including the review of business ethics competencies in the appraisal and promotion of management and measuring the achievement of targets not only against financial indicators but also against the way the targets have been met and specifically against the compliance with the Enterprise's anti-corruption policy;
- M. offering channels to raise, in full confidentiality, concerns, seek advice or report in good faith established or soundly suspected violations without fear of retaliation or of discriminatory or disciplinary action. Reporting may either be compulsory or voluntary; it can be done on an anonymous or on a disclosed basis. All *bona fide* reports should be investigated;
- N. acting on reported or detected violations by taking appropriate corrective action and disciplinary measures and considering making appropriate public disclosure of the enforcement of the Enterprise's policy;
- O. considering the improvement of its Corporate Compliance Programme by seeking external certification, verification or assurance; and
- P. supporting collective action, such as proposing or supporting anti-corruption pacts regarding specific projects or anti-corruption long term initiatives with the public sector and/or peers in the respective business segments.





The Commission advances corporate responsibility and anti-corruption through policy advocacy and practical instruments for responsible business conduct. ICC's due diligence-based and self-regulatory approach for fighting corruption and for corporate responsibility contributes to levelling the playing field for participants in global value chains. The Commission brings together over 300 company members from 40 countries, representing multinational companies, law firms, trade associations, and small and medium-sized enterprises. As such, the Commission is recognized as a leader on company-driven anti-corruption and corporate responsibility expertise and regularly shares the voice of business with intergovernmental fora such as the G20, the OECD, the UN and national governments.

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