

**TRANSPARENCY INTERNATIONAL**



**PREVENTING CORRUPTION ON  
CONSTRUCTION PROJECTS**

**RISK ASSESSMENT AND PROPOSED ACTIONS  
FOR CONSTRUCTION AND ENGINEERING COMPANIES  
AND CONSULTING ENGINEERING FIRMS**

**March 2005**

## **EXECUTIVE SUMMARY**

1. Corruption (which includes both bribery and fraud) imposes significant risks on any construction and engineering company or consulting engineering firm (“Company”) which is involved in a construction project.
2. There has been a material increase in international concern about corruption and its negative effect on poverty and the world economy. As a result, there have been significant international changes recently to law and business practice. In particular:
  - a) Several organisations have introduced conventions against corruption (e.g. United Nations, OECD, Council of Europe, European Union, Organisation of American States, African Union). These conventions vary in effect, but among their provisions are requirements that signatory countries criminalize bribery and other related offences, take preventive and enforcement measures, and provide effective extradition and co-operation between countries.
  - b) It is now a crime for a corporation or national of an OECD country to pay or receive a bribe, even if the offence takes place entirely outside that OECD country.
  - c) New international anti-money laundering measures increase the likelihood that the payers and recipients of bribes will be identified.
  - d) Corporate governance requirements and the trend towards ethical investment demand increasing standards of integrity.
  - e) The reporting and prosecution of corruption offences is increasing.
 These changes require companies to review their procedures to ascertain whether they are adequate to deal with the changed anti-corruption environment.
3. Bribery can lead to:
  - a) projects which are unnecessary, unsuitable, uneconomic or dangerous;
  - b) the specification of components which are over-priced, or expensive to operate and maintain;
  - c) increased project costs;
  - d) project delays;
  - e) the supply of defective equipment, materials or services;
  - f) payment for equipment, materials or services which were not supplied.
4. Bribery which is discovered can lead to the following consequences for the Company responsible, directly or indirectly, for the bribe:
  - a) termination of the contract by the project owner (“owner”), with consequent claims for compensation by all affected parties;
  - b) termination by funders and guarantors of all financing and guarantee arrangements made available to the Company in relation to the project;
  - c) even if the contract and related agreements are not terminated, claims for compensation by the affected parties for the consequences of the bribe;
  - d) a claim for repayment by the Company of an amount equivalent to the bribe;
  - e) seizure by criminal authorities of the proceeds the Company has received in relation to the project if it can be said that these proceeds are the proceeds of a criminal offence (the bribe) under relevant money laundering authorities;
  - f) criminal prosecution, fines and blacklisting;
  - g) reputational risk.
5. Fraud, such as tender collusion and inflated contract claims, can lead to increased costs. If the fraud is discovered, it can result in criminal prosecution, fines, blacklisting and reputational risk for the Company responsible.
6. Bribery and fraud can also result in criminal prosecution, fines, imprisonment, loss of professional status, disqualification from office, and loss of employment for the responsible directors and employees.

7. The Company is not only responsible for the acts of its employees. It may also in some circumstances be responsible, in both civil and criminal law, for the acts of its subsidiary and associated companies, agents, joint venture and consortium partners, sub-contractors and suppliers.
8. A Company needs to take urgent action to reduce the risk of corruption in relation to projects on which it is involved. These actions should include the following:

#### Immediate actions

- a) The Company should implement an **internal anti-corruption code of conduct and management programme** which commits the Company to a strict anti-corruption policy.
- b) Contractual documentation should include adequate **contractual safeguards**, such as anti-corruption warranties, termination and compensation rights in the event of corruption, and claims management codes.
- c) The Company should undertake greater **due diligence** to try to ensure that there is no corruption in relation to the project. Particular attention should be paid to the Company's staff in key posts, and to subsidiary and associated companies, agents, joint venture and consortium partners, sub-contractors and suppliers.
- d) The Company should support moves to make all pre-qualification, tendering and project management procedures more **fair, reasonable, objective and transparent**. Corruption is concealed. The greater the transparency, the more difficult it will be to conceal corruption.
- e) The Company should **report** allegations of corrupt practices to the authorities, and to any applicable trade or professional association. Corruption can only be prosecuted if it is reported. No anti-corruption mechanism can fully succeed unless there is the real likelihood of prosecution for offenders.

#### Medium term actions

- f) The Company should **only contract with organisations which have implemented an internal anti-corruption code of conduct and management programme**. Some organisations may not yet have implemented this action, or may be in the process of implementation. In this instance, the Company could allow a specified time for implementation.
- g) The Company should support the introduction of an **international externally audited ethical standard** which organisations can only attain and keep if they implement an effective internal anti-corruption code of conduct and management programme. Once this standard has been introduced, Companies should only be eligible to tender for public sector projects, and to receive public financing or guarantees, if they have achieved this standard.
- h) The Company should support the appointment of an **independent assessor** who monitors the pre-qualification, tender and execution of a project to ensure as far as possible that it is operated in an environment free from corruption. The assessor can be appointed under an integrity pact, or under alternative appointment arrangements.
- i) The Company should support the use of a project **integrity pact** during both tender and project execution phases. Each party undertakes to the other parties that it will act with absolute integrity in relation to the project. Compliance with the pact is monitored by an independent assessor. The pact contains enforceable sanctions and arbitration mechanisms.

- j) The Company should support the development of fair, proportionate and transparent **blacklisting** procedures. Under these procedures, a Company which is found to have been involved in corruption would not be eligible to tender for public sector projects, or to receive public financing or guarantees, for a specified period of time after the offence.
9. This report concentrates on actions which can be taken by Companies. However, corruption cannot be eliminated by Companies alone. Urgent action also needs to be taken to ensure that other participants in projects undertake necessary anti-corruption measures. TI has therefore issued equivalent reports which recommend actions for project owners and funders (“Preventing Corruption on Construction Projects”- [www.transparency.org](http://www.transparency.org)).
10. The risks and proposed preventative actions are examined in further detail below.

## **ANALYSIS**

### **BRIBERY AND FRAUD**

#### **Bribery**

11. Bribery will in most jurisdictions constitute a criminal offence. It can also constitute breaches of accounting and stock market regulations.
12. As a result of the OECD Convention on Combating Bribery which came into force in 1999, all OECD countries have made it a crime in the relevant OECD country for one of their companies or individuals to pay a bribe in another country.
13. A representative of one party may pay a bribe to a representative of another party. The bribe may be a cash payment, or it may be a non-cash advantage (such as the promise of a future contract, or a holiday). The bribe may be paid directly or indirectly (e.g. through an agent, joint venture partner or a subsidiary). The bribe may be received directly or indirectly (e.g. by a friend or spouse). The bribe may be paid or received with the full approval of the organisation (institutional bribery). On the other hand, the bribe may be paid or received by a representative of an organisation without the approval of the organisation (personal bribery). It is normally, but not always, the case that the payment of a bribe in relation to a construction project is an institutional act, and the receipt of the bribe is a personal act. For example, when a contractor pays a bribe to a representative of the owner, the contractor will normally be paying the bribe with the knowledge of its board or senior management for the sole purpose of winning the project. No individual of the contractor will normally be directly benefiting. The contractor will gain the benefit as an organisation as it will have won the project. However, the recipient of the bribe will normally be receiving the bribe for his personal benefit. The owner whom he represents will not normally benefit, as the contract price will normally be higher to reflect the bribe.

#### **Fraud**

14. Most jurisdictions criminalise fraudulent practices. These practices can also constitute breaches of accounting and stock market regulations.
15. Fraud normally involves a representative of one party trying to deceive a representative of another party, or trying to make an unlawful gain. The party using the deception will normally be attempting

wrongfully to extract additional payment or advantage from the other party, or to deny the other party a due payment or advantage. For example, contractors may secretly collude during bidding so as to increase the contract price, or an owner may wrongly accuse the contractor of project delays or defects in order to withhold the final payment due to the contractor. These practices can be included under the heading “fraud”, but can also be referred to by various different names, such as deception, anti-competitive practices or claims inflation.

### **The relationship between bribery and fraud**

16. Bribery normally inevitably involves a degree of fraud. A bribe paid to win a project will normally be concealed with the aim that the project appears from the outside to have been won on a genuine arms-length basis.
17. Fraud (such as collusion during bids and false claims) does not necessarily involve bribery. However, many of these acts of deception may need an act of bribery in order to complete the deception. For example, submission of a false claim by a Company (which is fraud) may go to arbitration, and the Company may then be compelled to bribe a witness or expert to give false evidence in order to obtain a satisfactory judgement.
18. Although bribery normally receives a higher public profile, the financial wastage in a project due to fraudulent practices such as claims inflation is often higher than that attributable to bribery.

### **Voluntary or Coerced?**

19. In some cases, the corrupt practice may be a voluntary act undertaken by the relevant party with the deliberate intention of gaining a competitive advantage or obtaining additional unjustified compensation.
20. However, in other cases, the practice may be undertaken so as to “level the playing field”. For example, a Company may feel compelled to offer a bribe during tendering if it believes that its competitors will all be offering a bribe. A Company may feel that it is necessary to inflate a claim artificially if it believes that the opponent will automatically and unjustifiably reduce the Company’s claim, or raise artificial counter-claims against the Company.
21. In some circumstances, a bribe may be extorted from the payer. A Company may be informed that if it does not pay a bribe, it will not receive a payment or certificate to which it is entitled, or will not be able to clear its equipment through customs.

### **THE PARTIES WHICH CAN CAUSE CORRUPTION RISK**

22. A Company could face corruption risks as a result of actions taken by the following categories of organisation or individual, each of which imposes differing degrees of risk, and may require different preventative or responsive actions:
  - a) employees;
  - b) subsidiary and associated companies;
  - c) agents;
  - d) joint venture and consortium partners;
  - e) sub-contractors, consultants and suppliers;
  - f) competitors;
  - g) project owners;
  - h) government officials.

23. The types of actions which could be undertaken by the above categories of organisation or individual are analysed in paragraphs 24 to 37 below.

### **Employees**

24. A Company could face corruption risks as a result of actions taken by one of its employees against the Company. In this instance, the employee will be acting against the interests of the Company for his own private gain. For example:
- a) The Company's procurement manager may receive a bribe from a sub-contractor to award a contract to the sub-contractor.
  - b) The Company's project manager may take a secret shareholding in a supplier, and ensure that the supplier receives unduly favourable treatment.
  - c) The Company's site manager may accept a bribe from a sub-contractor in return for certifying defective equipment as acceptable, or approving payment for equipment or services which were not actually supplied.
25. A Company could also face corruption risks as a result of actions taken by one of its employees on behalf of the Company. In this instance, the employee will be acting in a manner which he believes is in the interests of the Company. He may not be intending any private gain for himself. He may only be seeking a gain on behalf of the Company. For example:
- a) The Company's sales director may pay a bribe to a representative of the owner so that the Company wins business.
  - b) The Company's contract manager may artificially inflate a contract claim against the owner so as to improve the Company's profitability.

### **Subsidiary and associated companies**

26. A subsidiary company is normally one over which another company exercises control, through owning more than 50% of the shares, or controlling more than 50% of the votes. An associated company is normally one in which the other company owns less than 50% of the shares, or controls less than 50% of the votes. A Company could face corruption risks as a result of similar actions to those referred to in paragraphs 24 and 25 above being taken by employees of the subsidiary and associated companies.

### **Agents**

27. An agent may undertake corrupt practices against the Company. For example, the agent may fraudulently overcharge for services provided by the agent.
28. An agent may undertake corrupt practices on behalf of the Company. For example, the agent may pay a bribe to a representative of the owner or to a government official so that the Company wins business.

### **Joint venture and consortium partners**

29. A joint venture or consortium partner may undertake corrupt practices against the Company. For example, the joint venture partner may claim that the Company has delayed the project and caused resultant damage to the joint venture partner. The reasons on which the joint venture partner bases its claim may be false, or the costs which the joint venture partner claims may be fraudulently inflated.

30. A joint venture or consortium partner may undertake corrupt practices on behalf of the Company. For example:
- a) The joint venture partner may pay a bribe to a representative of the owner or to a government official so that the joint venture (in which the Company is a participant) wins business.
  - b) The joint venture partner may install below specification materials on the joint venture project, or submit an inflated claim against the owner, with the aim of increasing the joint venture's (and therefore the Company's) profitability.

### **Sub-contractors, suppliers and consultants**

31. A sub-contractor, supplier or consultant may undertake corrupt practices against the Company. For example:
- a) A sub-contractor of the Company may artificially inflate timesheets so as to enhance the sub-contractor's payment from the Company.
  - b) A sub-contractor may make a payment to the Company's quantity surveyor in return for the quantity surveyor approving the sub-contractor's false or inflated claims.
  - c) A supplier may deliberately supply below specification materials;
  - d) A consultant may invoice the Company for more days' work than the consultant actually carried out.
32. A sub-contractor, supplier or consultant may undertake corrupt practices on behalf of the Company. For example, a sub-contractor may pay a bribe to a representative of the owner or to a government official so that the Company wins business. The sub-contractor will as a result win a sub-contract from the Company.

### **Competitors**

33. A competitor of the Company may undertake corrupt practices which adversely affect the Company's interests. For example, a competitor may bribe a representative of the owner or a government official with the result that:
- a) the competitor gains access to confidential tender information;
  - b) the Company is not included on the list of pre-qualified bidders; or
  - c) the competitor, and not the Company, wins the project.

### **Project owners**

34. The owner, or one of its representatives, may undertake corrupt practices which adversely affect the Company's interests.
35. Some corrupt actions may be taken by the owner's representative without the knowledge and approval of the owner. For example:
- a) A representative of the owner may accept a bribe from the Company's competitor which results in the competitor, and not the Company, winning the project.
  - b) The project architect/engineer appointed by the owner to manage a project may refuse to issue an extension of time or variation to which the Company is entitled, because it fears that this would expose it to a claim from the owner for negligence (if the reason for the delay or variation was the fault of the architect/engineer).
  - c) A representative of the owner may refuse to pay the Company, or to issue a certificate, unless he receives a bribe.

36. Some corrupt actions may be taken deliberately by the owner. For example:
- a) The owner may claim liquidated damages for delay from the Company when the reason for the delay was the fault of the owner.
  - b) The owner may create artificial claims for defects against the Company, and use these claims as a pretext to refuse to pay the Company its retention, or to draw down on the Company's performance bond
  - c) The owner may make a payment to the architect/engineer in return for the architect/engineer refusing the Company's extension of time.

### **Government officials**

37. A government official may undertake corrupt practices which adversely affect the Company's interests. For example:
- a) A senior government official may notify the Company that it will not be awarded a contract, or will not receive a payment or certificate, unless the Company pays the official a bribe.
  - b) A junior government official may refuse to issue a visa or customs clearance to which the Company is entitled unless he receives a relatively minor "facilitation" payment.

### **LOSSES WHICH RESULT FROM CORRUPT ACTIONS AGAINST THE COMPANY**

38. The Company can incur considerable loss as a result of corrupt acts undertaken by employees, agents, joint venture and consortium partners, sub-contractors, suppliers and owners against the Company. False claims increase costs, and defective work and materials expose the Company to additional expense and to claims from other parties.
39. Corrupt actions by competitors, owners and government officials may result in the Company losing work. Refusal by the owner to release payment or a certificate unless a bribe is paid may result in additional costs and cash flow difficulties.
40. The refusal of junior government officials to issue visa, customs clearance and other necessary permits and services unless a facilitation payment is made can result in additional costs and expensive delays.

### **LIABILITY FOR CORRUPT PRACTICES**

41. This section examines some aspects of the liability which a Company can incur as a result of corrupt practices of the type referred to in paragraphs 24 to 37 above. The relevant civil and criminal law will depend on the governing law of the relevant contract, and on the local laws where the acts are carried out. There will inevitably be differences in law between jurisdictions, and local legal advice should always be sought. However, this section attempts to highlight some relatively common legal principles which may impact on the Company.

### **Termination of the project contract in the event of bribery**

42. Many jurisdictions have the legal concept that a contract which has been procured through an illegal act (which would normally include a bribe) is either void from commencement, or can be terminated by the aggrieved party, who would then be entitled to claim damages. Many contracts also contain an express clause entitling termination in the event of a bribe.

43. Therefore, if an owner places a contract with a Company and a bribe is paid in connection with the contract award, the owner would probably be entitled to terminate the contract and claim damages. Even if the bribe was paid to a representative of the owner, the representative, by committing a criminal act, would probably be acting outside the scope of his authority from the owner. The consequences of his criminal act would probably not be binding on the owner.

#### **Liability of the Company for the cost consequences of the contract being terminated**

44. Whether a Company which has directly or indirectly paid a bribe can be liable for the cost consequences of the contract being terminated would depend on the governing law and on the contract. However, it is likely that most legal jurisdictions and most contracts would require a party which has undertaken an illegal act to compensate the affected parties for their resultant loss. This loss could be extensive, and could include the losses to the owner, joint venture and consortium partners, sub-contractors, banks and investors.

#### **Liability of the Company for a bribe paid by the Company's employee**

45. A Company will normally be liable for the actions of an employee undertaken on its behalf, even if the Company had not authorised these actions.

#### **Liability of the Company for a bribe paid by the Company's subsidiary or associated company**

46. In some cases, the Company's subsidiary or associated company may pay a bribe with the full knowledge and approval of the Company. This may be the case where the subsidiary or associated company is resident in a jurisdiction in which a bribe is less likely to be identified and prosecuted. In other cases, the subsidiary or associated company may pay a bribe against the wishes of the Company.
47. **Civil liability:** A contract is often either void, or can be terminated, in the event that a bribe has been paid in relation to the contract award. Therefore, if a subsidiary or associated company pays a bribe, the owner may terminate the contract as a result of the bribe, and/or claim damages. If the Company had no involvement with the contract, the losses of the Company would probably be limited to a reduction in the value of its shareholding in the subsidiary or associated company. If the Company had an involvement with the contract (for example, if the Company was the main contractor, and its subsidiary was acting as a sub-contractor), then the Company would probably be liable if the owner as a result of the bribe terminated the main contract. This would be the case even if the Company had no knowledge of the bribe.
48. **Criminal liability:** If the Company's subsidiary or associated company paid a bribe to a representative of the owner or government in return for the subsidiary or associated company winning a project, the subsidiary or associated company could be prosecuted. If the Company had no management control over the subsidiary or associated company, and had taken reasonable steps to ensure that its subsidiary or associated company had adopted a proper anti-corruption programme, and it knew nothing about the bribe, and had not been put on notice, then the Company would be unlikely to be criminally liable for the actions of its subsidiary or associated company. However, if the Company had not taken reasonable steps to prevent bribery, or if it exercised management control over the subsidiary or associated company, or had approved the bribe, or had been wilfully blind to the circumstances in which the bribe was paid, then the Company could be criminally liable.

### **Liability of the Company for a bribe paid by the Company's agent**

49. It is quite common, particularly on large international construction projects, for a Company to appoint a local agent. The agent will normally be paid a commission if the Company is awarded the project. The whole or part of the commission is sometimes used by the agent to bribe an influential person working for the owner or the government of the owner's country, so as to secure the award of the project to the Company. The payment of the bribe by the agent will normally be a criminal offence, for which the agent will be liable. Whether the Company will be liable for the agent's action in paying the bribe will depend on the circumstances.
50. In most cases, the Company would appoint an agent with the genuine intention that the agent only carry out legitimate services. However, the agent may still pay a bribe in connection with the Company's scope of work, but without the Company's knowledge, and against the Company's wishes.
51. In some cases, the agent is appointed by the Company primarily to pay a bribe, or the company may be aware that it is highly likely that the agent will pay a bribe. In these circumstances, the agent may be paid a sum of money which is significantly disproportionate to the legitimate scope of work which the agent is contracted to carry out. Often this money is paid in foreign currency into an off-shore bank account. While the Company may not actually know for certain that the payment will be used as a bribe, it is likely to be aware from the circumstances of the appointment, and from the amount of the commission relative to the legitimate services to be provided by the agent, that there is unlikely to be an alternative explanation. In this case, the contractor could be said to be "wilfully blind" to the circumstances.
52. **Civil liability:** A contract is often either void, or can be terminated, in the event that a bribe has been paid in relation to the contract award. Therefore, if an agent pays a bribe, and the owner terminates the contract as a result of the bribe, and/or claims damages, then the Company may be liable to the owner and other affected parties for the consequences, even if it had no knowledge of the bribe.
53. **Criminal liability:**
- a) The Company could be criminally liable if it knew that a bribe was to be paid by the agent, or that it probably would be paid. Even if the agent had never expressly told the Company that it was to pay a bribe, and even if the Company had not expressly authorised the payment of a bribe, a court may infer that the Company must have known that a bribe would probably be paid. This inference may arise where the circumstances of the agent's appointment (such as those referred to in paragraph 51 above) would be likely to put the Company on notice. It will not be sufficient for the Company to rely on a formal agency agreement as a defence. The court is likely to look at the substance of the agreement, not at its form.
  - b) It would be unlikely for the Company to be criminally liable if it had taken reasonable steps to ensure that no bribes would be paid.

### **Liability of the Company for a bribe paid by the Company's joint venture or consortium partner**

54. In situations where individual companies do not have the expertise or financial strength to construct the entire project, companies may form a consortium or joint venture to construct the project. In this case, one of the consortium or joint venture partners may pay a bribe to a representative of the owner on behalf of all the partners. This decision may be taken with the consent of all the partners, and the cost of the bribe may be concealed in one partner's scope of work, or may be reimbursed to the paying partner by the other partners by means of a leadership or other fee. In other cases, the decision to bribe may be

made by one partner without the knowledge of the other partners, and against the wishes of the other partners.

55. **Civil liability:** The partners in a joint venture or consortium are normally jointly and severally liable under the contract to the owner. A contract is often either void, or can be terminated, in the event that a bribe has been paid in relation to the contract award. Therefore, if a joint venture or consortium partner pays a bribe, and the owner terminates the contract as a result of the bribe, and/or claims damages, then all the joint venture or consortium partners may be liable to the owner and other affected parties for the consequences, even if they had no knowledge of the bribe.
56. **Criminal liability:** The joint venture or consortium partner who did not pay the bribe could be liable if it knew that the bribe was to be paid, or that it probably would be paid. It would be unlikely for the non-paying partner to be criminally liable if it had taken reasonable steps to ensure that no bribes would be paid.

#### **Liability of the Company for a bribe paid by the Company's sub-contractor, supplier or consultant**

57. It is unlikely in most situations that a Company's sub-contractor, supplier or consultant would pay a bribe to a representative of the owner in relation to the award by the owner of a contract to the Company. However, this would be possible in the case of a major sub-contract, as the sub-contractor obtaining the work from the Company depends on the owner awarding the contract to the Company. It is also possible where, in some countries, local procedures require local sub-contractors to undertake a major part of the work. In some cases, the Company and sub-contractor may agree that the bribe will be paid by the sub-contractor, and would be included in the sub-contract price. The intention may be that the bribe would be better concealed in the books of the sub-contractor than in the books of the Company. In other cases, the sub-contractor may pay the bribe without the knowledge of the Company, and against the wishes of the Company.
58. **Civil liability:** The Company is normally liable under the contract to the owner for the acts of its sub-contractors, suppliers and consultants. A contract is often either void, or can be terminated, in the event that a bribe has been paid in relation to the contract award. Therefore, if a Company's sub-contractor pays a bribe in relation to the contract award, and the owner terminates the contract as a result of the bribe, and/or claims damages, then the Company may be liable to the owner and other affected parties for the consequences, even if it had no knowledge of the bribe.
59. **Criminal liability:** The Company could be liable if it knew that the bribe was to be paid, or that it probably would be paid. It would be unlikely for the Company to be criminally liable if it had taken reasonable steps to ensure that no bribes would be paid.

#### **Fraudulent contract claims**

60. Fraudulent contract claims are quite common in the construction industry. A Company may inflate claims for variations, or for delay and disruption, in order to increase the project's profitability for the Company, or to reduce its loss. A Company may also create false reasons for an extension of time claim in an attempt to avoid liquidated damages. An owner may create false or exaggerated claims (for example for delay or defects) in order to set off against the Company's claims, or to avoid having to pay the Company the retention. On some occasions, false claims are submitted in anticipation of the opponent submitting false claims, or negotiating down genuine claims. The assumption is often that you need "fat" in the claim in order to end up, after negotiation, with the correct position.

61. However these actions are likely to constitute criminal offences. If the owner makes a statement to the Company that the owner has lost a specified amount of money for a specific reason attributable to the Company, and the amount of money is exaggerated or the reason false, the owner is deceiving the Company with a view to making a wrongful gain. Even if the party attempting to make the wrongful gain is unsuccessful, the offence of attempt, conspiracy, false accounting or equivalent offence may have been committed.

### **Facilitation payments**

62. “Facilitation payments” is the term often used in relation to relatively minor payments made to junior officials so as to expedite services to which the payer is entitled (e.g. the obtaining of import or work permits, or installation of telephone lines). The amounts which have to be paid are often quite small, yet the consequences of not paying can be large (e.g. a delay in issuing an import permit could delay a project, which could increase the Company’s costs, and cause the Company to have to pay liquidated damages to the owner for delay). However, even though facilitation payments are usually small, their payment and receipt is normally a crime both in the country in which the payment is made and in the home country of the Company or individual making the payment.

### **Personal liability of the employee for a bribe paid on behalf of the employer**

63. A Company would not be permitted by its memorandum of association or governing statutes to commit a criminal offence. A bribe is a criminal offence. The Company has no legal power therefore, to pay a bribe. A director or manager of a Company would have no authority to undertake a criminal act on the Company’s behalf. Therefore, a director or manager of a Company who authorises or undertakes the payment of a bribe on behalf of the Company would be acting outside his authority, and would be undertaking an act which the Company has no power to undertake. The Company could probably therefore request repayment of the bribe from the recipient of the bribe. If the recipient of the bribe did not repay it, the responsible director or manager may be personally liable to the Company for the repayment of the bribe.

### **Corporate and personal liability**

64. The Company would normally be liable for any criminal offence carried out by it, or on its behalf.
65. In addition, the individuals involved in the offence (the directors, employees and consultants of the Company) could be liable for the offence, or for aiding and abetting the offence. Such parties could be personally criminally liable:
- a) if the offence is intentionally committed by them, or, in some cases, if they are wilfully blind or reckless as to its commission;
  - b) even if they are only indirectly involved (as they can be treated as aiders and abettors, or conspirators with others, in the corrupt action);
  - c) even if they do not personally benefit from the corrupt behaviour (e.g. if only their employer benefits).
66. Ignorance that the action in question was a criminal offence is not normally a defence.

## **ACTIONS FOR COMPANIES**

67. The following are recommended actions which could be taken by a Company to reduce the risk of bribery and fraud. The actions are divided into immediate actions, and medium term actions.
- a) Immediate actions are those which are largely within the Company's control, and which the Company should immediately take steps to implement. If the Company has already implemented actions of this nature, the Company should review the adequacy of its procedures in this regard.
  - b) Medium term actions are those which it is desirable for the Company to implement, but which are to a great extent outside the Company's control, and which may take more time to develop and implement. The Company can therefore support the development of these actions, and implement them as soon as possible.
68. Anti-corruption actions should be modified according to the extent of the risk. Small or low risk contracts or projects would require a lower level of preventive action than large or high risk contracts or projects.

## **IMMEDIATE ACTIONS**

### **Internal anti-corruption code of conduct and management programme**

69. The Company should implement an internal anti-corruption code of conduct and management programme which commits the Company to a strict anti-corruption policy. TI has developed the "Business Principles for Countering Bribery" and accompanying guidelines and implementation plan to assist this purpose ([www.transparency.org](http://www.transparency.org)).
70. The code of conduct should:
- a) Prohibit all officers and employees of the Company from engaging in any form of corrupt conduct.
  - b) Specify the Company's policy on political and charitable contributions, gifts, hospitality and expenses to ensure that they could not be used as a subterfuge for bribery.
  - c) Specify the Company's policy on facilitation payments.
  - d) Commit the Company to take all reasonable steps to prevent corruption by the Company's subsidiary and associated companies, agents, joint venture and consortium partners, sub-contractors and suppliers.
71. The purpose of the Company's anti-corruption management programme is to ensure that the code is complied with. As such, the programme should:
- a) Require a senior officer of the Company to have responsibility for management of the programme.
  - b) Ensure that all employees receive adequate training in implementation of the programme.
  - c) Ensure that the code is applied in relation to all dealings by the Company with parties with which it has business relationships.
  - d) Put into effect proper whistle-blowing procedures.
  - e) Be subject to adequate internal controls and audit.
  - f) Be periodically monitored and reviewed.
72. An effective anti-corruption code and management programme will not guarantee that no corrupt behaviour will take place. However, they could materially assist in the prevention of corrupt behaviour. In the event that corrupt behaviour is identified, the existence of the code and programme may be a factor in the defence of the Company in a criminal prosecution, or in mitigating any criminal penalty, and may also be a mitigating factor if the Company is threatened with blacklisting. If the

code and programme are to provide this protection, they must have been genuinely and properly introduced and managed. They cannot be an artificial defence. The tribunal will normally want to see evidence of proper implementation and enforcement.

### **Contractual safeguards**

73. The Company should ensure that contractual documentation in relation to the project includes the following safeguards:
- a) The contract should contain adequate anti-corruption warranties given by the other contracting party to the Company. Under these warranties, the other party should undertake to the Company:
    - i) that it will not participate in any corrupt practices in relation to the project;
    - ii) that it will ensure that its officers and employees, and subsidiary and associated companies, do not participate in any corrupt practices;
    - iii) that it will take reasonable steps to ensure that its agents, joint venture and consortium partners, sub-contractors, suppliers and consultants do not participate in any corrupt practices.
  - b) The contract should pass on to the other contracting party any anti-corruption obligations assumed by the Company in its contracts with other companies.
  - c) The contract should entitle the Company to terminate and/or obtain compensation in the event of a corrupt act by the other contracting party.
  - d) The contract should contain a claims management code which requires integrity in the event of contract claims. The code would oblige claimants to take reasonable steps to ensure that all claims submitted by it are genuine and accurate. The recipient would be obliged to take reasonable steps to review the claim diligently, objectively and in good faith. TI has prepared a “Claims Management Code” which could be used for this purpose (“Preventing Corruption on Construction Projects”- [www.transparency.org](http://www.transparency.org)).
  - e) The Company should be willing to give equivalent commitments to those contained in paragraphs a) to d) above to the other contracting party.

### **Due diligence**

74. The Contractor should undertake adequate due diligence with a view to minimising corruption risk. Examples of areas of risk in this regard which due diligence would try to prevent are the following:
- a) Major construction projects can cost a significant amount of money and bribes can be hidden in the project costs. The Company’s staff and representatives that have responsibility for sub-contract and supply tenders, project management, and the certification and payment of sub-contractors and suppliers, are all vulnerable to bribery. The Company needs to take adequate steps to ensure the integrity of these personnel.
  - b) The possible payment of bribes by the Company’s agents to representatives of the owner or to government officials is a high risk area. Adequate due diligence needs to be undertaken in relation to the appointment of agents by the Company so as to be reasonably sure that the agents will not pay bribes.

- c) The Company needs to ascertain whether agents are being appointed by the Company's subsidiary or associated companies, consortium or joint venture partners, or major sub-contractors. The Company then needs to take reasonable steps to ensure that these agents cannot be used as conduits for the payment of bribes.
  - d) Some countries and project owners are more corrupt than others. Operating in high risk countries, or contracting with high risk owners, will inevitably require greater precautions. TI publishes a "Corruption Perceptions Index" which assesses the perceived corruption risk in most countries ([www.transparency.org](http://www.transparency.org)).
75. It will obviously not be possible to make certain that there will be no corruption in relation to a project. Only reasonable enquiries and preventive actions can be undertaken. However, as far as civil liability is concerned, the Company should try to ensure that no bribes are paid, as it may be liable for the consequences whether or not it had knowledge of the bribe, and whether or not it took preventive actions. As far as criminal liability is concerned, the Company should take sufficient steps to ensure that it cannot be accused of deliberately authorising the party to pay a bribe, or of being wilfully blind or reckless as to whether or not a bribe was paid.

### **Transparency**

76. The Company should support moves to make all pre-qualification, tendering and project management procedures more fair, reasonable, objective and transparent. Corruption is concealed. The greater the transparency, the more difficult it will be to conceal corruption.

### **Reporting**

77. The Company should report allegations of corrupt practices to the authorities, and to any applicable trade or professional association. Corruption can only be prosecuted if it is reported. No anti-corruption mechanisms can fully succeed unless there is the real likelihood of prosecution for offenders.

### **MEDIUM TERM ACTIONS**

#### **Only contract with organisations which have implemented an internal anti-corruption code of conduct and management programme**

78. Companies should only enter into contracts with organisations which have implemented an internal anti-corruption code of conduct and management programme of the type referred to in paragraphs 69 to 72 above.
79. Some organisations may not yet have implemented this action, or may be in the process of implementation. In this instance, the Company could notify these organisations that, after a specified date, the Company will only contract with organisations which have implemented an anti-corruption programme.
80. The extent of the programme will obviously depend on the size of the organisation. A very small organisation would not be expected to have as refined a programme as a large organisation.

### **International externally audited ethical standard**

81. While many Companies will properly implement an internal anti-corruption code of conduct and management programme of the kind referred to in paragraphs 69 to 72 above, some Companies will pretend to implement it, but in reality continue with corrupt practices. This kind of abuse can be reduced by the introduction of an international externally audited ethical standard (e.g. ISO or equivalent) which Companies can only attain and keep if they implement an effective internal anti-corruption code of conduct and management programme.
82. Once this standard has been introduced:
  - a) funders should only agree to provide finance, guarantees or insurance in relation to a project if the relevant participants have achieved this standard;
  - b) public sector project owners should only allow Companies which have achieved this standard to be included on their tender lists.

### **Independent Assessors**

83. The Company should support the appointment of an independent assessor who monitors the pre-qualification, tender and execution of a project to ensure as far as possible that it is operated in an environment free from corruption. The assessor can be appointed under an integrity pact (see paragraphs 91 to 93 below), or under alternative appointment arrangements. For a detailed analysis of independent assessment see “Preventing Corruption on Construction Projects – Independent Assessment”- [www.transparency.org](http://www.transparency.org).
84. The assessor will be appointed at pre-qualification stage, and will remain in place until completion of the project. The assessor should be a skilled individual, or an organisation of skilled individuals, who is independent from all parties involved with the project. He should have experience of the construction industry, and have a reasonable working knowledge of accounting and law. He should be a member of a recognised professional association which subjects its members to an enforceable ethical code.
85. The assessor could be appointed full time or part time according to the requirements of the parties and the size of the project. In some situations a panel of assessors (for example three) may be preferable to one assessor. This could be appropriate in the following situations:
  - a) where the level of work or diversity of skills required from the assessor is so high or so great that one person would not be sufficient;
  - b) where there is a danger of one assessor being unduly influenced by some of the parties;
  - c) where because of language or accounting differences between the parties, a panel of assessors from different countries needs to be selected to ensure that, between them, they have the necessary skills.
86. The fees of the assessor could be borne by the owner as a project cost, or be shared equally between the parties.
87. The assessor will have open access to the relevant books, records and staff of the parties. He will attend pre-qualification and tender selection meetings, tender opening, and important project progress and claims meetings. He will issue reports simultaneously to all relevant parties, including governments, the owner, the contractor, and the funders. Where the project involves public funds, his report should also be made public. Reports will be issued at critical junctures, for example at completion of pre-qualification, at completion of tender, and periodically during project execution. A party who suspects corruption can report his suspicion to the assessor who can then investigate. Where the assessor finds evidence of corruption, he will be obliged to report his suspicions to the appropriate authorities.

88. It will be expensive and impossible for the assessor to examine every possible aspect of a tender or a project, and to verify all payments made by the parties. His scope of work will depend to a large extent on the amount that the project participants are willing to pay him. However his very presence and the possibility that he may examine certain aspects of the project will act as a powerful deterrent.
89. Significant amounts of money can be lost on construction projects due to bribery and fraud. It is highly likely that the presence of the assessor will greatly reduce this financial wastage, and that the savings which result from the presence of the assessor will more than off-set the cost of the assessor. The duty of the assessor is owed to all parties.
90. The advantages to the Company of the appointment of an assessor on a project are as follows:
- a) His duty to assess the fairness of the pre-qualification and tender process will make it more likely that the awards will be made on merit, rather than as a result of bribery. The Company will as a result be more comfortable bidding for the project.
  - b) If the Company believe that the owner, government official or a competitor is acting in breach of its integrity obligations, the Company can complain to the assessor, who will have a duty to investigate and report his findings to all participants. This could occur, for example, in the following circumstances:
    - i) if, the Company believes that the pre-qualification or tender process is being, or has been, handled unfairly or corruptly;
    - ii) if, during project execution, a representative of the owner or a government official attempts to extort a bribe from the Company (for example in return for a payment, certificate or customs clearance);
    - iii) if the Company believes that the owner is fraudulently making false or exaggerated contract claims against the Company (for example for defects or delay).

As the assessor has open access to the records and staff of the parties, it will be easier for him to investigate these complaints. In addition, his right of access will make it less likely for parties to breach their integrity obligations.

### **Integrity Pacts**

91. The Company should support the use of a project integrity pact during both tender and project execution phases for all projects on which it is involved. A project integrity pact is an agreement between the participants in a specific project to act with integrity in relation to that project. A project integrity pact can have the following two components:
- a) The pre-qualification and tender integrity pact is between the owner, designer and all bidding contractors.
  - b) The project execution integrity pact is between the owner, designer, certifier and the appointed contractor.

Each party undertakes to the other parties that it will act with absolute integrity in relation to the project. The undertakings cover key integrity issues, such as commitments not to pay or receive bribes, objective assessments of pre-qualifications and tenders, and fair procedures for certification and claims management. The parties agree to appoint a suitably qualified and experienced independent assessor (see paragraphs 83 to 90 above) whose duty is to assess on an independent and objective basis the extent to which the parties comply with their obligations under the integrity pact. The pacts contain enforceable sanctions, including the right to terminate and/or claim damages. Disputes under the pact are referred to arbitration. In appropriate cases, relevant government departments and funders would also join in the pact. TI has produced an analysis of integrity pacts in public contracting, and details of their use in over 14 countries ([www.transparency.org](http://www.transparency.org)). TI has also produced, specifically for

construction projects, a report on construction integrity pacts, and model pre-qualification and tender, and project execution construction integrity pacts (“Preventing Corruption on Construction Projects”- [www.transparency.org](http://www.transparency.org)).

92. Companies which routinely compete against each other could also enter into a sector integrity pact, under which they all commit not to pay any bribes when they compete against each other in tendering for any construction project anywhere in the world. These sector agreements would also be monitored by an independent assessor.
93. One of the major drivers of corruption in relation to construction projects is that a Company may believe that if it does not pay a bribe, a competitor may pay a bribe, and as a result win the project. Corruption could be materially reduced if all competitors bidding for a project, or all Companies which routinely compete against each other in a sector, enter into integrity pacts.

### **Blacklisting**

94. Companies should support the development of fair, proportionate and transparent international blacklisting procedures. Under these procedures:
  - a) funders would, for a specified period of time after the offence, deny project finance, guarantees or insurance to a Company which is found to have been involved in corruption;
  - b) public sector project owners would, for a specified period of time after the offence, exclude from the tender list any Company which is found to have been involved in corruption.
95. While many Companies are understandably nervous of such procedures, it is in the long-term interests of Companies which do not wish to win business through bribery, that their competitors which continue to bribe are prevented from competing until they have adapted their practices.

### **DISCLAIMER**

96. The comments in this report on corruption and its consequences are neither comprehensive nor complete, and should not be relied on. They are intended merely to give indicators as to possible consequences. Independent legal advice should always be obtained. The proposed actions referred to in this report are suggestions only, and will need to be adapted to the specific circumstances of each case. Neither TI nor the author can accept responsibility for the consequences of any action claimed to be taken in reliance on the contents of this report.

### **COMMENTS**

97. This report is issued as a discussion document. TI welcomes comments which would lead to its improvement. These should be sent to [neill.stansbury@transparency.org.uk](mailto:neill.stansbury@transparency.org.uk)

### **FURTHER INFORMATION**

98. TI has published a series of reports and business tools under the title “**Preventing Corruption on Construction Projects**”. These reports and business tools can be freely downloaded from TI’s web-site at [www.transparency.org](http://www.transparency.org).

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