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THE BRIBERY ACT 2010

The Bribery Act 2010 ('the Act'), which received Royal Assent on 8th April 2010, comes into force on 1 July 2011.

1. THE MAIN PROVISIONS OF THE ACT ARE AS FOLLOWS:

1) Active Bribery

The Act prohibits offering, promising or giving a financial or other advantage to a person with the intention of influencing a person to perform their duty improperly. It does not matter whether the bribe is direct or indirect.

2) Passive Bribery

The Act prohibits a person from requesting, agreeing to receive or accepting a financial or other advantage for a function or activity to be performed improperly. Again, it does not matter whether the bribe is direct or indirect.

3) Bribery of a foreign public official

The Act prohibits bribery of a foreign public official with the intention of influencing them in their official capacity and obtaining or retaining business or an advantage in the conduct of business.

4) Corporate Offence

The Act introduces a new strict liability offence under which corporate bodies will be guilty of bribery if they fail to prevent an act of bribery occurring in connection with their organisation. Where a senior officer of the organisation has consented to the offence he/she could also be individually liable.

5) Associated Persons

In relation to the new corporate offence, a commercial organisation is responsible for the actions of not only its own employees but also for the actions of persons associated with its organisation. This could include agents, sub-contractors and those worked with in joint-venture arrangements.

6) Adequate Procedures

The only defence to the new corporate offence of failure to prevent bribery is to show that the organisation had adequate procedures in place to prevent employees or agents committing bribery. The government has issued guidance on what constitutes adequate procedures but this is general guidance only. The requirements will be different depending on the nature and size of each organisation.

7) Facilitation Payments

Unlike the US Foreign Corrupt Practices Act, the Act does not make any allowances for facilitation payments; these are unlawful under the Act.

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8) Penalties

The maximum penalty for a corporate entity is an unlimited fine. Individuals found guilty of bribery can also be subject to an unlimited fine and up to 10 years in imprisonment.

9) Procurement and being debarred

Corporate bodies convicted of bribery may be prohibited from tendering for public contracts as a result of the EU Public Procurement Directive, although this is not a provision of the Act. The Government has decided that a conviction of a commercial organisation under section 7 of the Act in respect of a failure to prevent bribery will attract discretionary rather than mandatory exclusion from public procurement under the UK's implementation of the EU Procurement Directive (Directive 2004/18). The relevant regulations will be amended to reflect this.

10) Jurisdiction

The Act is far reaching in terms of jurisdiction as a result of its extra territorial application. An offence under the Act does not need to take place within the UK and non UK companies are covered by the Act if they have a UK office, operate in the UK or employ a UK resident. Simply having a UK presence will create jurisdiction.

2. CRIMINAL OFFENCES UNDER THE ACT

One of the most significant provisions of the Act is the introduction of a strict liability corporate offence of failing to prevent bribery being undertaken on its behalf (Section 7).

In addition to the Section 7 offence, the Act defines a further three new criminal offences:-

- * Offering, promising or giving a financial or other advantage (Section 1)
- * Requesting, agreeing to receive or accepting a financial or other advantage (Section 2)
- * Bribing a foreign public official. (Section 6)

Sections 1 and 2 describe the offences in terms of six cases that relate to the improper performance of a relevant 'function or activity' and Section 3 defines those functions or activities as being:-

- Any function of a public nature
- Any activity connected with a business
- Any activity performed in the course of a person's employment
- Any activity performed by or on behalf of a body of persons (whether corporate or unincorporated).

The new strict liability offence under Section 7 will make it easier to prosecute commercial organisations in cases where a person performing services on the commercial organisation's behalf (e.g. an employee or associate) bribes another person, intending to obtain or retain business for the commercial organisation, or to obtain or retain an advantage in the conduct of the commercial organisation's business.

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A commercial organisation cannot escape liability for this offence unless it can show that it had in place ‘adequate procedures’ to prevent those performing services on its behalf from committing bribery.

Section 7 (5) defines ‘relevant commercial organisation’ as:-

- A body incorporated under the law of any part of the UK that carries on a business (anywhere);
- Any other body corporate (wherever incorporated) that carries on a business, or part of a business, in any part of the UK;
- A partnership formed under the law of any part of the UK that carries on a business (anywhere); or
- Any other partnership (wherever formed) that carries on a business, or part of a business, in any part of the UK.

The subsection concludes ‘for the purposes of this section, a trade or profession is a business.’

Only a ‘relevant commercial organisation’ can commit an offence under section 7 of the Bribery Act. A ‘relevant commercial organisation’ is defined at section 7(5) as a body or partnership incorporated or formed in the UK irrespective of where it carries on a business, or an incorporated body or partnership that carries on a business or part of a business in the UK, irrespective of the place of incorporation or formation. The courts will be the final arbiter as to whether an organisation ‘carries on a business’ in the UK, taking into account the particular facts in individual cases.

Although there is no specific guidance as to whether public authorities will be deemed ‘commercial organisations’, it seems generally accepted that they will, on the basis that it is unlikely that a private company that ‘carries on business in the UK’ could be liable for the offence, whilst a public authority, which procures and supplies goods and services in the UK, would not.

The basis for this argument is that as long as the organisation in question is incorporated (by whatever means), or is a partnership, it does not matter if it pursues primarily charitable or educational aims or purely public functions. It will be caught if it engages in commercial activities, irrespective of the purpose for which profits are made.

The safest course is to assume that public authorities could be liable under the Act for failing to prevent bribery by implementing adequate procedures and therefore it is important that the Force ensures that it has ‘adequate procedures’ in place to prevent persons associated with it from carrying out bribery.

3. GOVERNMENT PUBLICATION OF GUIDANCE ON PROCEDURES TO PREVENT BRIBERY

Section 9 of the Act requires the Secretary of State to publish guidance on procedures that can be put in place to prevent bribery. Although there is no legal requirement to comply with the guidance per se, in the event that an offence has been committed, the guidance will be taken into account by the courts in determining whether or not the organisation did have adequate procedures in place to prevent bribery.

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The six principles contained in the guidance make clear that ‘adequate procedures’ must go beyond an anti bribery and corruption policy and follow the ‘six principles approach’ as follows:-

1 Proportionate Procedures

A commercial organisation’s procedures to prevent bribery by persons associated with it are proportionate to the bribery risks it faces and to the nature, scale and complexity of the commercial organisation’s activities. They are also clear, practical, accessible, effectively implemented and enforced.

2 Top Level Commitment

The top level management of a commercial organisation (be it a board of directors, the owners or any other equivalent body or person) is committed to preventing bribery by persons associated with it. They establish a culture within the organisation in which bribery is never acceptable.

3 Risk Assessment

The commercial organisation assesses the nature and extent of its exposure to potential external and internal risks of bribery on its behalf by persons associated with it. The assessment is periodic, informed and documented.

4 Due Diligence

The commercial organisation applies due diligence procedures, taking a proportionate and risk based approach, in respect of persons who perform, or will perform, services for or on behalf of the organisation, in order to mitigate identified bribery risks.

5 Communication (including training)

The commercial organisation seeks to ensure that its bribery prevention policies and procedures are embedded and understood throughout the organisation through internal and external communication, including training, which is proportionate to the risks it faces.

6 Monitoring and Review

The commercial organisation monitors and reviews procedures designed to prevent bribery by persons associated with it and makes improvements where necessary.

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NOT PROTECTIVELY MARKED**4. PROCEEDINGS IN SCOTLAND AND SELF-REPORTING**

The Lord Advocate has instructed that the police are to report all Bribery Act cases, to the Crown Office's Serious and Organised Crime Division (SOCD). This should include any cases that come to their attention of bribery and corruption that took place under the law before 1 July 2011. All decisions about criminal proceeding in such cases will be taken by Crown Counsel, who represent the Lord Advocate and give instructions in the most serious cases.

The Lord Advocate has also approved an initiative for businesses to 'self-report' bribery offences. The Crown will accept reports from businesses that wish to report the discovery by them of conduct within their organisation which may amount to an offence under the Bribery Act, or under the law before 1 July. The Crown will give consideration to refraining from prosecuting the business and instead referring the case to the Civil Recovery Unit for civil settlement, through the recovery of assets.

The initiative will run for 12 months. In order to participate, businesses will have to submit a report, via a solicitor, to SOCD before June 30, 2012. The initiative will be reviewed at the end of the 12-month period. While consideration will be given at that point to extending the initiative for a further period, businesses should not assume that there will be an extension.

5. IMPLICATIONS FOR PROCUREMENT THAT IS SUBJECT TO THE PUBLIC CONTRACTS (SCOTLAND) REGULATIONS 2006

The Public Contracts (Scotland) Regulations 2006 already provide, under Regulation 23 (1), that a contracting authority must not select an economic operator if the authority has actual knowledge that the economic operator or its directors or any other person who has powers of representation, decision or control of the economic operator has been convicted of certain offences.

The relevant offences are listed in Regulation 23 (1) and include, at b), 'corruption within the meaning of section 1 of the Public Bodies Corrupt Practices Act 1889 or section 1 of the Prevention of Corruption Act 1906'.

Both pieces of legislation will be repealed by the Act and, in respect of the offence at 23 (1) (c) 'bribery or corruption within the meaning of sections 68 and 69 of the Criminal Justice (Scotland) Act 2003', sections 68 and 69 are repealed by the Act.

In a consultation document issued in December 2010, the Scottish Procurement Directorate proposed that the 2006 Regulations should be amended to require public bodies and utilities to exclude potential tenderers from the procurement process if the public body has actual knowledge that the business or its directors or any other person with powers of representation, decision or control has been convicted of an offence under sections 1, 2 or 6 of the Bribery Act 2010. All of those offences require conduct amounting to bribery to have occurred.

The Directorate has also suggested that, so far as the section 7 offence of failing to prevent bribery is concerned, public bodies and utilities should not be required to exclude a potential tenderer that has been convicted of a section 7 offence, although public bodies and utilities would have discretion to do so under regulation 23 (4) (d) of the

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Public Contracts (Scotland) Regulations 2006 or regulation 26 (5) (d) of the Utilities Contracts (Scotland) Regulations 2006, respectively.

The rationale given for this distinction is that the potential scope of a section 7 offence is very broad, as it ‘does not require conduct amounting to bribery by the business, its directors or any other person who has powers of representation, decision or control over it to have occurred.’

In each case, when exercising its discretion whether or not to exclude an economic operator convicted of a section 7 offence, a contracting authority will have to consider the connection between the bribery resulting in the section 7 conviction and the economic operator concerned.

It has been suggested that this might include factors such as the seniority of the individual or individuals involved in the bribery; whether they were still employed by the economic operator and the closeness of the relationship between the economic operator and a supplier or affiliate implicated in the bribery.

6. IMPLICATIONS FOR STRATHCLYDE JOINT POLICE BOARD

6.1 So far as the relevant Joint Board Standing Order is concerned, Standing Order 9.2 provides;

‘Prevention of Collusion, Corruption or Illegal Practices

9.2.1 Every contract shall include a clause entitling the Board to:-

9.2.1.1 terminate the contract if the supplier or its representative (whether with or without the supplier's knowledge) shall have:-

- (1) practised collusion in tendering for the contract or any other contract with the Board; or
- (2) employed any corrupt or illegal practices in obtaining or performing the contract or any other contract with the Board; and

9.2.1.2 recover from the supplier the amount of any loss resulting from such termination.’

Standing Order 9.2.1.1 (1) refers only to ‘corrupt or illegal practices’; it does not specify any particular piece of legislation and therefore, as the words remain appropriate and relevant to offences under the Act, there will be no requirement to make any amendment to Standing Orders.

6.2.1 In the selection of tenderers, information is sought, either in a pre-qualification questionnaire or within an invitation to tender, as in the following example from a Corporate Procurement tender. Additions to the questionnaire to take account of the Act are shown in italics.

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QUESTIONNAIRE For completion by Tenderers as part of Tenders	
<p>As part of their Tenders in response to this ITT, Tenderers must complete this Questionnaire and also provide appropriate documentary evidence where necessary. For the purposes of this Questionnaire, a Tenderer is hereinafter referred to as “the Economic Operator”. “Economic Operator” has the same meaning as ascribed to it in Regulation 4 of the Public Contracts (Scotland) Regulations 2006 (“the Regulations”). The questions below relate to Regulation 23 of the Regulations <i>and to the relevant sections of the Bribery Act 2010.</i></p>	
	<p>Has the Economic Operator or any of its Directors or any other person who has powers of representation, decision or control of the Economic Operator been convicted of any of the following offences? If so convicted, the Economic Operator must provide full details:</p> <ul style="list-style-type: none"> (a) conspiracy where that conspiracy relates to participation in a criminal organisation as defined in Article 2(1) of Council Joint Action 98/733/JHA; (b) corruption within the meaning of section 1 of the Public Bodies Corrupt Practices Act 1889 or section 1 of the Prevention of Corruption Act 1906; (c) bribery or corruption within the meaning of section 68 and 69 of the Criminal Justice (Scotland) Act 2003; (d) <i>bribery within the meaning of sections 1, 2 and 6 of the Bribery Act 2010;</i> (e) incitement to commit a crime; (f) fraud, where the offence relates to fraud affecting the financial interests of the European Communities as defined by Article 1 of the Convention relating to the protection of the financial interests of the European Union, within the meaning of <ul style="list-style-type: none"> (i) the offence of cheating the Revenue; (ii) the offence of fraud; (iii) the offence of theft or fraud; (iv) fraudulent trading within the meaning of section 458 of the Companies Act 1985; (v) defrauding the Customs within the meaning of the Customs and Excise Management Act 1979 and the Value Added Tax Act 1994;

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	<p>(vi) an offence in connection with taxation in the European Community within the meaning of section 71 of the Criminal Justice Act 1993; or</p> <p>(vii) the offence of uttering;</p> <p>(viii) the criminal offence of attempting to pervert the course of justice.</p> <p>(g) money laundering within the meaning of the Money Laundering Regulations 2006;</p> <p>(h) any other offence within the meaning of Article 45(1) of the Public Sector Directive as defined by the national law of any relevant state.</p>
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6.2.2 All contracts entered into by the Joint Board include the following condition. The additional Bribery Act wording is shown in bold type.

‘The Joint Board shall be entitled to cancel the contract and to recover from the Contractor the amount of any loss resulting from such cancellation if the Contractor shall have offered or given or agreed to give to any person any gift or consideration of any kind as an inducement or reward for doing or forbearing to do or for having forborne to do any action in relation to the obtaining or execution of the contract or any other contract with the Joint Board or for showing or forbearing to show favour or disfavour to any person in relation to the contract or any other contract with the Joint Board or if the like acts shall have been done by any person employed by it or acting on its behalf (whether with or without the knowledge of the contractor) or if in relation to any contract with the Joint Board the Contractor or any person employed by it or acting on its behalf has committed an offence under the Prevention of Corruption Acts 1889 to 1916, or shall have given any fee or reward the receipt of which is an offence under Sub-Section (3) of Section 68 of the Local Government (Scotland) Act 1973 **or has committed an offence under Sections 1, 2 and 6 of the Bribery Act 2010.**’

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