Managing bribery and corruption risks in the construction and infrastructure industry
“Any competitive advantage gained through corruption is a mirage.”

Robert S. Khuzami, Director of Enforcement, US Securities and Exchange Commission
Contents

Introduction 3
Regional and country profiles: 4
  Europe 4
  The Middle East 6
  India 8
  Africa 10
What should companies be doing? 12
Eight steps to an effective compliance program 14
How Ernst & Young can help 16
Global reach and experience 18
Contacts 20
Introduction

The construction and infrastructure sector has featured significantly in bribery prosecutions, with 11% of all enforcement activity, since the US Foreign Corrupt Practices Act (FCPA) was introduced, relating to the sector.\(^1\) Recent headline-grabbing cases demonstrate that organizations in these industries continue to face significant bribery and corruption risks.

Why is bribery and corruption such a challenge in the sector?

In addition to the bribery and corruption risks prevalent in all industries, companies in the sector face a number of specific risks due to the following factors:

- Obtaining planning permission and licenses is a lengthy process and can be open to abuse.
- Funding by government, public or private partnerships or by donor agencies in developing economies requires many interactions with government officials.
- The use of subcontractors and consultants or agents is prevalent, increasing the risk of third parties making or soliciting bribes. In our recent 12th Global Fraud Survey, respondents from the construction and infrastructure sector were more likely than average to see bribery as common practice in their sector.\(^2\)
- Joint ventures are commonly used; indeed, in some jurisdictions it is necessary to have a local partner either as a result of legal requirements or from a commercial perspective.
- Negotiations concerning additions to specifications and cost overruns are critical to determining the profitability of a contract. These negotiations offer opportunities for consultants or clients to attempt to leverage payments or other benefits.
- Many contracts are large, and decision-making power can sometimes be concentrated in the hands of a small number of politically exposed persons (PEPs).
- Organized crime networks exploit labor-intensive sectors such as construction and infrastructure.

This paper offers a perspective on the bribery landscape across Europe, the Middle East, India and Africa (EMEIA), including enforcement trends, risks for businesses to be aware of and mitigating steps companies may want to consider.

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\(^1\) Trace International Global Enforcement Report 2011.
\(^2\) 12th Global Fraud Survey, Ernst & Young, 2012.
Europe

Europe is generally seen as a less corrupt region — but variations exist

Most European countries rank in the upper quartile in Transparency International’s 2012 Corruption Perceptions Index (CPI). Indeed, Scandinavian countries are rated among the least corrupt in the world (Denmark ranked one, Sweden ranked four. But other European countries such as Russia (133), Ukraine (144), Greece (94), Romania (66) and Turkey (54) rank significantly lower.

Anti-bribery or anti-corruption (ABAC) legislation differs significantly between states

Although 24 European countries have ratified the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the OECD Anti-Bribery Convention), there are significant differences in domestic ABAC legislation across Europe.

Over recent years, many countries have updated their legislation: the UK introduced the Bribery Act (effective from July 2011); Spain and France have made amendments to their legislation; Russia has introduced new laws increasing penalties for non-compliance and has ratified the OECD Anti-Bribery Convention. But nearly half of European countries have not yet codified the Convention in domestic law and have underdeveloped ABAC legislation.

Enforcement likely to rise

For much of the last decade, discussion of ABAC issues in Europe has been framed by the extra-territorial reach and enforcement of the FCPA. Europe still lags behind the US in terms of enforcement (as of last year, US actions outnumbered the rest of the world by three to one). Updated legislation in many European countries, however, has given prosecutors the power to investigate conduct overseas and to impose significant civil and criminal penalties.

“Corruption threatens the integrity of markets, undermines fair competition, distorts resource allocation, destroys public trust and undermines the rule of law.”

G20 Anti-Corruption Action Plan
Our experience of bribery and corruption in Europe

Mitigating the risk of bribery and corruption remains a significant challenge for corporate boards across the region. We have observed the following challenges as being common to many companies in the sector:

Use of intermediaries — many Europe-based construction companies use intermediaries to accelerate the process of obtaining required permits, authorizations and customs clearance. However, there is a risk that fees paid can be inflated to mask the payment of a bribe by the intermediary to a decision-maker.

Increased competition and challenging market conditions — new players entering the sector increase competition for contracts; a belief that others will be more aggressive can pressure staff to push boundaries and take risks that might not accord with their company’s corporate culture. Also, current market conditions are placing increased stress on executives to deliver growth.

Corporate entertainment — companies commonly use entertainment to improve relationships with clients and ultimately to influence decision-makers. In many cases, this is legitimate, but it can be difficult for companies to determine appropriate limits.

Germany was classed as an “active” enforcer of foreign bribery by Transparency International’s 2012 Progress Report on the OECD Anti-Bribery Convention, on the basis of 176 settled cases of foreign bribery and 43 investigations in progress. This has made Germany the most active enforcer within Europe.
It is generally perceived that the risk of bribery and corruption in the Middle East is high.

Many Middle Eastern countries fall in the lower half of the CPI (the Gulf Cooperation Council countries and Jordan are notable exceptions).

Several high-profile corruption investigations in Western countries have related to activities in the region.

Many countries have adopted the United Nations Convention against Corruption (UNCAC).

UNCAC has been ratified by most Middle Eastern countries. Oman has not signed; Saudi Arabia and Syria are signatories but have not yet ratified. However, the implementation of the specific policies continues to pose a challenge.

Enforcement is expected to increase.

The effects of the recent global financial crisis on the region (particularly for the real estate market), and the more recent political unrest in some countries, is increasing pressure on governments and leaders to strengthen their ABAC laws and practices. For example, Saudi Arabia last year initiated a crackdown on corruption through the newly created National Authority for Combating Corruption.

The Authority’s chairman stated that their anti-corruption drive would be targeting “big heads.” In Qatar, a new anti-corruption committee has been created, monitoring enforcement of the ABAC provisions in the criminal procedures law, and in Bahrain, the Prime Minister called for new measures to combat economic crime and the establishment of an anti-corruption agency. Despite these developments, however, progress in tackling corruption is likely to remain slow.

Our experience of bribery and corruption in the Middle East

We have seen increasing ABAC measures in many countries in the Middle East, but bribery and corruption is still prevalent, as shown by the numerous FCPA cases involving conduct in the region.

Our recent experience suggests that companies should be particularly aware of the following challenges in the region:

- Lack of clear guidance or process – companies often fail to provide clear guidance to employees regarding acceptable and unacceptable business practices specific to the region, or the procedures to manage situations when they arise.
Gifts and “kickbacks” — in the context of business dealings, the provision of gifts and kickbacks is common and often viewed as normal business practice in the market.

Conflicts of interest — it is common for conflicts of interest to be overlooked. For example, sales commissions may be paid to companies in which management has an interest; similarly, improper sales discounts may be provided to parties connected to the sales team.

Lack of proper tender or contract award process — control deficiencies are common, leading to contracts being awarded by board members and senior management without effective due diligence or “not at arm’s length.”

Requests for facilitation payments — these can be common in areas such as obtaining visas for employees and obtaining licenses and planning permission for new sites. Local operators can view them as essential to getting business done. But they are illegal under the UK Bribery Act and are under intense scrutiny by external third parties such as the OECD Anti-Bribery Working Group.

There have been high-profile corruption cases throughout the region. This has resulted in a greater focus by governments on the issue of corruption and the need for greater transparency and accountability.
Recent prosecutions have brought bribery and corruption to the fore.

Bribery and corruption remain a major challenge in India. The 2012 Transparency International Corruption Perceptions and Bribe Payers Indices rank India 94 (out of 176) and 19 (out of 28) respectively, indicating the severity of the issue. Twenty-eight percent of India respondents to our 12th Global Fraud Survey were willing to make cash payments to win or retain business, compared with 15% of respondents globally.¹ Hardening public attitudes and the need for businesses to secure foreign direct investment have led to strengthened ABAC efforts.

Government introducing new anti-corruption legislation

Indian policy-makers are taking robust steps to increase the confidence of investors – corporate and public. In recent Parliamentary sessions, a number of important bills were introduced, including the Prevention of Bribery of Foreign Public Officials Bill, the Anti-Corruption, Grievance Redressal and Whistleblower Protection Bill and the Companies Bill 2011. In addition to this, ratification of UNCAC by the Government in 2011 has helped India demonstrate its commitment to improved governance. In another significant development, the Government has submitted the Lokpal Bill, which aims to create stricter regulations and has given more credibility to its fight against bribery and corruption.

The impression of poor enforcement is changing

The perception that corruption is rarely prosecuted is changing as a result of recent investigations and high-profile prosecutions – for example, the arrest of former cabinet-level officials in the 2G telecoms license scandal. It is likely that bribery and corruption will continue to feature as a political hot topic, resulting in increased enforcement as political parties seek to demonstrate their willingness to act.

Our experience of bribery and corruption in India

Through our experience of investigating alleged bribery and corruption in India, we have observed many changes over the years and, unfortunately, some long-standing challenges:

³ 12th Global Fraud Survey, Ernst & Young, 2012.
Bribes to government officials remain a serious risk — India’s CPI score has got worse over the past year. In some cases, officials have expected bribes from project officials to release project funds, for example, where they hold funds of donor agencies.

Financial manipulation to obtain financing benefits — promoters or builders may manipulate financial statements and valuations to obtain financing on particularly beneficial terms. In our recent Global Fraud Survey, 16% of India respondents were prepared to misstate financial performance, significantly higher than average.4

Weak records management — poorly developed systems provide an opportunity for the manipulation of ownership documentation, including title to land rights.

Pressure from project officials — application of inappropriate pressure to select a certain agent or contractor might indicate a hidden financial interest.

Limited or unreliable information — in practice, it is often difficult for companies to conduct due diligence on contractors, subcontractors and agents due to poor information. The introduction of unique identifiers for businesses by the Government may improve this situation going forward. But obtaining complete and accurate historical information is likely to remain a challenge.

Corruption is perceived as being accepted in business dealings as a way of avoiding administrative bottlenecks. Low public sector wages increase the risk of bribery for quick favors or ignoring wrongdoing.

4 12th Global Fraud Survey, Ernst & Young, 2012.
Africa is perceived to have a high risk of bribery and corruption, but the situation is complex. Although the majority of African countries are in the bottom half of the CPI, the rankings of individual countries vary widely. For example, Botswana is ranked number 30, ahead of many European countries, whereas Somalia is ranked 174, considered the most corrupt country in the index.

Africa is attractive to many construction companies because it contains some of the fastest-growing economies in the world. Corruption and security issues, however, are significant barriers to investment, according to our recent survey.5

There is no common legislation governing bribery and corruption across Africa. The Convention on Preventing and Combating Corruption was agreed by the African Union in 2008. The Convention is a regional agreement setting the framework for the prevention of corruption, but this has not driven the development of a common legislative approach across the region. In some countries, inefficient and opaque political systems are preventing progress in introducing new legislation. However, many governments are strengthening ABAC laws and practices.

Enforcement is increasing. There has been a significant amount of FCPA enforcement related to business conduct in Africa across a number of industry sectors, including construction and infrastructure. Given the extent of this enforcement and the media attention associated with it, some countries are starting to act. Overall, however, the level of local enforcement remains low. Only 10% of the Africa respondents in our recent 12th Global Fraud Survey state that regulators in their country appear willing to prosecute cases of bribery or corruption and appear effective in securing convictions.6

Rwanda’s fight against corruption is paying off. This country’s ranking in Transparency International’s CPI has improved from 89 in 2009 to 50 in 2012.

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6 12th Global Fraud Survey, Ernst & Young, 2012.
Our experience of bribery and corruption in Africa

Many of the corruption risks in Africa are heightened due to the lack of sophisticated systems (paper records being an integral part of many business processes) and poor control environments. Our experience shows that the following are among the key challenges facing companies operating in the region:

Informal payments — improper payments by businesses in Africa can arise due to significant levels of “red tape,” particularly relating to business permits, licenses and the import of goods.

Use of intermediaries — agents, brokers and facilitators are used to “assist” with negotiations. Fees paid to these intermediaries are often non-distinct and might be used to disguise bribes.

Petty corruption — petty corruption can be found in areas such as identification books, marriage and birth certificates and driving licenses. Transparency International’s Global Corruption Barometer 2010/11 states that more than 50% of people in sub-Saharan Africa reported paying a bribe; more than anywhere else in the world.

“The demand from people for the accountable use of power and an end to corruption is indeed one of the key social drivers of our time.”
Cobus de Swardt, Managing Director, Transparency International
What should companies be doing?

Dealing with bribery and corruption has always been a challenge for companies in the construction and infrastructure sector. The awarding of contracts and obtaining of planning permission or permits create particular bribery and corruption risks, with many of the enforcement cases in the public domain relating to these areas.

Key activities of a successful ABAC program for companies in the sector include:

- Setting the correct tone at the top. It is extremely important that ABAC is on the agenda of senior executives.
- Completing a comprehensive bribery and corruption risk assessment – considering the type and location of projects undertaken so that the specific risks faced are identified and understood.
- Once the risk assessment is complete, reviewing the overall bribery and corruption compliance program to determine if it is proportionate to the risks identified.
- Reviewing existing communication and training programs to help ensure that the desired corporate culture is achieved on the ground, especially in more remote and higher-risk locations. In our recent 12th Global Fraud Survey, only 55% of respondents were aware of anti-bribery training within their organization.
- Conducting due diligence on contractors, subcontractors and agents, with continued monitoring performed to make sure they comply with relevant ABAC laws.
- Ensuring that there are clear contracts with consultants and agents that refer to ABAC procedures and give the company audit rights over relevant contract records. Payments to consultants should be reviewed and approved at a senior level of the organization, including the payment of expenses.
- Proactively analyzing operational data on an ongoing basis, using forensic data analytics to detect transactions that indicate a heightened risk of bribery and corruption.
- Monitoring expenses such as corporate entertainment carefully, paying particular attention to the specific recipient, the context and the timing of the entertainment or gift.
- Undertaking vetting of key employees, contractors or partners, especially those unknown to the company, for example, in joint venture situations. In our recent Global Fraud Survey, only 59% of respondents report using an approved supplier database and almost half fail to check the ownership or backgrounds of third-party suppliers.8

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7 12th Global Fraud Survey, Ernst & Young, 2012.
8 12th Global Fraud Survey, Ernst & Young, 2012.
# Eight steps to an effective anti-corruption compliance program

Ernst & Young has developed an eight-step program to ensure you have a robust compliance framework in place:

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<th>Step</th>
<th>Description</th>
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<tr>
<td><strong>1.</strong> Conduct a risk assessment program</td>
<td>What risks are posed by the nature of the company’s operations; the degree of business with governmental entities; its use of agents and other intermediaries; the countries it works in; and the regulatory environment it works under? Identify the policies and controls in place that mitigate the corruption risk and evaluate their strengths and weaknesses.</td>
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<td><strong>2.</strong> Develop a corporate anti-corruption policy</td>
<td>There needs to be a clear and unambiguous statement of the company’s position that both governmental and commercial bribery on any scale will not be tolerated. The policy will provide operational guidance on such issues as bribing government officials; commercial bribery; misreporting and concealment in accounting records; facilitating payments, charitable and community gift giving; and policies covering travel, entertainment and gifts for government officials.</td>
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<td><strong>3.</strong> Implement anti-corruption policies and controls</td>
<td>We know that 90% of reported FCPA cases have involved outside agents and business consultants. Putting in contracting provisions and warranties that include compliance with legislation and company policy are important controls. It is also key to implement some form of certification to ensure there has been compliance. Make sure special payments and approvals are recorded. Do you undertake vendor anti-corruption audits? How does the company process and deal with employee travel, gifts and entertainment? Develop guidance that ensures charitable giving ends up in the right hands and gifts are bona fide.</td>
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<td><strong>4.</strong> Implement anti-corruption financial controls</td>
<td>Implement additional financial controls in high-risk countries and for high-risk operations. These may include controls around banks accounts and petty cash, executive travel, meals and entertainment. Transactions with consultants, agents and high-risk intermediaries will also need enhanced controls. Implement strict account posting requirements for high-risk transactions, including sufficient supporting documentation and adequately delegated authority to promote increased transparency and accountability.</td>
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<td>5</td>
<td>Conduct anti-corruption compliance training</td>
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<td>6</td>
<td>Monitor the program</td>
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<td>7</td>
<td>Anti-corruption procedures in mergers and acquisitions</td>
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<td>8</td>
<td>Re-assess risk and modify program</td>
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Global bribery and corruption risk assessment
We worked with senior client staff to conduct a bribery and corruption risk assessment for a major construction company. Our client had recently acquired a global construction services business and needed to ensure that the new business had a consistent approach to bribery and corruption risk mitigation. The review of the new business was piloted in countries in Asia and Africa.

We developed a bribery and corruption risk assessment tool that enabled our client to focus on the ABAC compliance controls for subsidiary operations. The tool was used to identify higher-risk countries and projects in order to focus resources.

As a result of our work, the company made remedial changes to key business practices in high-risk countries.

Investigation into alleged bribes to government officials in Europe
Our client was subject to an FCPA investigation as a result of alleged bribes paid to government officials. We were engaged to collect and analyze all documentation relevant to the allegations. Our international team of e-disclosure specialists processed 15 million electronic documents over a three-week period.

We assisted our client and its legal counsel in designing and implementing robust and efficient disclosure strategies and helped them deal with various jurisdictional data privacy concerns. By using a combination of interviewing techniques and analysis of the electronic data, we helped our client in its submissions to the US Securities and Exchange Commission (SEC). Our technology tools and overall investigation approach allowed the client to provide timely responses to the SEC.

Investigation in Africa
We were retained by outside counsel to the audit committee of our client to investigate concerns raised by a new finance director.

We conducted interviews and reviewed customs clearance documents for multiple years to identify potential FCPA violations. Our findings were reported to the board of directors and the audit committee.

As a result of our work, the company made improvements in its local policies and internal controls, as well as its FCPA compliance program.

Whistle-blower investigation in Asia
We were engaged by an S&P 100 company to lead an investigation in multiple countries in Asia following whistle-blower allegations stemming from the company’s acquisition of a group of companies. We worked closely with two external law firms, and with the client’s general counsel and head of internal audit in each country.

We were asked to report regularly to the management committee, the external auditor and ultimately to the SEC.

Our work enabled our client to act swiftly, leading to voluntary disclosure of certain FCPA issues identified through the investigation. In addition, we assisted external counsel in identifying and formulating remedial measures.
Managing bribery and corruption risks in the construction and infrastructure industry
Global reach and experience

Countries or territories in which Ernst & Young professionals are located.
Our construction and infrastructure network

Our construction and infrastructure team is part of a 7,000-strong global Real Estate practice, serving more than 4,000 real estate clients worldwide. Our people have diverse backgrounds and a wealth of experience. Many of them have served in industry and government, while others have professional services experience and hold relevant certifications.

Our team comprises experienced professionals using sophisticated tools and proven methodologies to meet the most complex and demanding challenges and provide commercial and technical services on a global basis. The team includes forensic accountants, certified fraud examiners, forensic technology professionals, economists, regulators, quantity surveyors, architects, project managers and delay analysts. Our in-depth sector knowledge and experience allows us to advise clients and their legal advisors in an efficient manner.

Our global reach and experience

We operate globally, delivering high-quality service, using local knowledge where our clients operate. We have over 1,600 fraud investigation and dispute services professionals, based in 50 countries, with experience in business integrity, investigations, disputes and forensic technology.

We are the only major professional services organization to operate across Europe, the Middle East, India and Africa, under a single EMEIA structure. We therefore have a borderless approach to business in the emerging markets of the Commonwealth of Independent States (CIS), India, the Middle East and Africa as well as the established markets of Europe. This enables us to leverage our strengths more efficiently and move swiftly to bring together our teams to serve our clients, drawing on our industry experience across all of our services in 87 countries.

Our Fraud Investigation & Dispute Services practice

Dealing with complex issues of fraud, regulatory compliance and business disputes can detract from efforts to achieve your company’s potential. Better management of fraud risk and compliance exposure is a critical business priority – no matter the industry sector. We assemble the right multidisciplinary and culturally aligned team to work with you and your legal advisors. And we work to give you the benefit of our broad sector experience, our deep subject matter knowledge and the latest insights from our work worldwide.
# Contacts

For further help and information, please contact one of our specialist or local area representatives or log on to www.ey.com/fids

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