

TRANSPARENCY INTERNATIONAL



ANTI-CORRUPTION TRAINING MANUAL

(INFRASTRUCTURE, CONSTRUCTION
AND ENGINEERING SECTORS)

INTERNATIONAL VERSION

APRIL 2007

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SECTION 1

GENERAL ANTI-CORRUPTION TRAINING

The use of this Manual

- 1.1 This Anti-Corruption Training Manual aims to help users achieve a better understanding of corruption and how to avoid it. It can be used by individuals, and also by companies as part of their corporate training.
- (1) Section 1 provides an overview of what constitutes corruption, who may be liable for corruption, and how it may be avoided.
 - (2) Section 2 provides 47 detailed examples of corruption throughout the project cycle.
 - (3) Section 3 provides some simple anti-corruption rules which individuals should follow (and which companies could impose on their employees) to try to ensure that no corruption offence is committed.
 - (4) Section 4 provides practical advice as to what individuals and companies should do when faced with a potentially corrupt situation.
- 1.2 This Manual can be used by companies and individuals wherever they are located or working, as the general principles and examples would have worldwide applicability. However, specific legal advice should be taken in the relevant jurisdiction so as to ascertain the exact position.

The purpose of anti-corruption training

- 1.3 Corruption is widespread in the infrastructure, construction and engineering sectors. It may take place in both developed and developing countries. It may take place at any phase of a public or private sector project, and may be committed by any of the many corporate or individual participants in a project.
- 1.4 Some corruption offences are committed knowingly and deliberately for personal or corporate gain. Some offences are committed reluctantly in the belief that it is necessary to undertake these practices in order to remain competitive, or in order to retaliate against the corrupt practices of others. Some offences are committed in the erroneous belief that these practices are normal business acts and do not constitute criminal offences.
- 1.5 Many individuals in the infrastructure, construction and engineering sectors fail to recognise corrupt situations or, if they do recognise them, fail to appreciate the risks of becoming involved in corruption.
- 1.6 It is important to stress that whatever the apparent commercial or other justification for activities involving corruption, they nevertheless constitute *criminal offences* for which a number of persons may be liable including the individual employee who committed the act, his employer, and company directors.
- 1.7 The consequences of an individual or company being involved in corruption, whether directly or indirectly, are potentially extremely serious. An individual may face imprisonment. A company may face damage to reputation, financial loss and/or debarment. There is also now far greater pressure for corruption to be detected and prosecuted. Consequently, unlike in past years, there is now a far greater likelihood that wrongdoing will be punished.
- 1.8 The damage caused by corruption in terms of loss and injury, particularly in the developing world, is also becoming more widely understood, with the resultant realisation that all efforts must be made to eliminate corruption.
- 1.9 It is essential, therefore, that individuals and companies in the infrastructure, construction and engineering sectors acquire a better understanding of:
- (1) how corruption occurs on a project;
 - (2) the personal and corporate risks of criminal and civil liability of involvement in corruption;
 - (3) the damage caused by corruption;
 - (4) what to do when confronted with corruption.

What is corruption?

- 1.10 There is no international legal definition of corruption.
- 1.11 For the purposes of this Manual, “corruption” includes bribery, extortion, fraud, deception, collusion and money-laundering. These will normally constitute criminal offences in most jurisdictions although the precise definition of the offence may differ.

Bribery

- 1.12 **Bribery is a criminal offence** in most jurisdictions.
- 1.13 **In general terms**, bribery is committed where a person (A) offers or gives some benefit to another person (B) as an inducement for that person (B) or another person (C) to act dishonestly in relation to his principal's or employer's business. In such a case, all those persons (A, B and C), as well as other persons who were complicit in the offence, may be guilty of bribery.
- 1.14 **Nature of a bribe.** A 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).
- 1.15 **The dishonest activity.** The dishonest activity includes any dishonest act or omission which would not be done but for the payment of the bribe. It would be an act or omission done by someone in relation to his employer's or principal's business. For example, a government officer acting on behalf of a government department may, if offered a bribe, dishonestly award a contract.
- 1.16 **Institutional bribery** refers to a situation where a bribe may be paid or received with the full approval of the organisation which is the employer of the individual paying or receiving the bribe. This may occur, for example, where a contracting company authorises its commercial director to pay a bribe to win a tender.
- 1.17 **Personal bribery** refers to a situation where a bribe may be paid or received by a representative of an organisation without the approval of that organisation. This may occur, for example, where a government officer receives a bribe to award a contract, where the government department in question would not approve the bribe.
- 1.18 **Supply-side bribery** refers to those persons or companies who are responsible for offering or paying bribes.
- 1.19 **Demand-side bribery** refers to those persons or companies who are responsible for demanding or receiving bribes.
- 1.20 A “**facilitation payment**” is the term often used in relation to relatively minor payments made to officials so as to obtain or expedite services to which the payer is entitled (for example, the obtaining of import or work permits, or installation of telephone lines). The amounts which are paid are often quite small, yet the consequences of not paying can be serious. (For example, a delay in issuing an import permit could delay a project, which could increase the contractor's costs and cause the contractor to have to pay liquidated damages to the project owner for delay.) A distinction is sometimes made between bribes and facilitation payments. A bribe is regarded as being a payment made to someone to act in a way in which he should not (for example, by awarding a contract to the bribing party, or releasing a party from a legal obligation) whereas a facilitation payment is regarded as being a payment made to a person to do something which he should already be doing (for example, issuing a visa or customs clearance) or for undertaking this task more quickly. However, the distinction is on most occasions academic, as most countries criminalise the payment and receipt of both bribes and facilitation payments.
- 1.21 **Examples of bribery.** Bribery in relation to an infrastructure, construction or engineering project can occur in numerous ways. For example:

- (1) A project owner may bribe a government official in order to obtain planning permission for a project.
- (2) A bidder may bribe the project owner's designer to design a project in a manner which improperly favours that bidder over other bidders.
- (3) A bidder may pay a bribe to the project owner's representative to win the contract.
- (4) A contractor may pay a bribe to the project owner's representative to have defective or non-existent work approved.
- (5) The project owner may pay a bribe to the project engineer in return for the engineer refraining from issuing a payment certificate or an extension of time to a contractor.
- (6) If the parties are in dispute in relation to the construction of the project, one party may bribe a witness, expert, arbitrator or judge in order to give false evidence, or to give a favourable opinion or verdict.

1.22 Detailed examples of bribery are given in Section 2 of this Manual.

1.23 **The bribe mechanism.** The payment of a bribe may be made direct by the payer to the ultimate recipient who is to carry out the dishonest act. However, it is common for a bribe to be paid through intermediaries. This is done so as to make it more difficult to detect that a bribe has been paid. The following are some common methods of concealing a bribe by the use of intermediaries:

- (1) **Agents.** The most common form of intermediary is the agent. A contractor who wishes to hide the payment of a bribe may appoint an agent who has contacts with a representative of the project owner or with the government of the country concerned. The contractor will enter into an agency agreement with the agent which purports to be an agreement for legitimate services. However, the scope of those services will often be false or exaggerated and the size of the payment due under the agreement will be significantly in excess of the value of the legitimate services specified in the agreement. The payment may sometimes be expressed as a percentage of the contract price. The agent will normally receive the payment when the contractor is awarded the contract. The agent will then pass the whole or part of the payment to the representative of the project owner or government who has dishonestly ensured that the contractor would win the contract. The payment is usually made in foreign currency into an offshore bank account.
- (2) **Joint ventures.** An international joint venture, comprising joint venture partners from several countries, may arrange for an agency agreement (which conceals a bribe arrangement as described in (1) above) to be entered into by the joint venture partner who is resident in the country which is least likely to discover or punish the bribery.
- (3) **Subsidiaries or other group companies.** Where a contractor is part of a multinational group, arrangements may be made by the group for a corrupt agency agreement to be entered into, or for a corrupt payment to be made, by a subsidiary or other group company which is located in a country where the bribe is less likely to be detected or punished. The subsidiary or other group company will then be repaid by the contractor through inter-company charges for false services or services of inflated value.
- (4) **Sub-contractors.** A contractor may channel a bribe through a corrupt sub-contract arrangement. For example, a sub-contract may falsely state that certain services are to be provided to the contractor in return for a certain payment. In reality, the sub-contractor will not provide these services or will provide services of a much lower value than the price agreed. The balance of the payment will then be passed on by the sub-contractor to the relevant party as a bribe.

(5) **In each of the above cases**, the bribe may have been deliberately paid with full knowledge of all relevant parties. Alternatively, a bribe may be paid in situations where a related party is unaware of the bribe. For example:

- (a) a contractor may be unaware that an agent intends to use part of his agency fee to pay a bribe;
- (b) a joint venture partner may be unaware that a fellow joint venture partner has paid a bribe in order for the joint venture to win the contract;
- (c) a contractor may be unaware that a subsidiary in another country is paying bribes to win contracts;
- (d) a contractor may be unaware that a sub-contractor paid a bribe to a representative of the project owner to ensure that the contractor won the tender.

In such situations, a contractor may be genuinely unaware that these practices are occurring. However, in many cases, the contractor may have been wilfully blind to the circumstances. In other words, the contractor may have suspected that there was a likelihood of corruption but refrained from making enquiries or taking preventive action. Such wilful blindness would be treated as culpable in most jurisdictions.

Extortion

- 1.24 **Extortion is a criminal offence** in most jurisdictions.
- 1.25 Extortion is a form of blackmail where one party makes threats against another party of adverse consequences unless demands, usually for payment, are met by the other party. Such blackmail may constitute, for example, refusal to provide customs clearance for equipment or materials, or refusal to make payments or issue certificates that are due. Sometimes such threats may involve threats of physical harm.
- 1.26 If the party who is the victim of the extortion provides the payment or other benefit, it will normally become liable for the offence of bribery. However, the party making the extorted payment may have a defence to bribery if the threat was of imminent death or personal injury.
- 1.27 Detailed examples of extortion are given in Section 2 of this Manual.

Fraud

- 1.28 **Fraud is a criminal offence** in most jurisdictions. It is sometimes referred to as “deception”.
- 1.29 Fraud usually involves one person (or group of persons) deceiving another person in order to gain some financial or other advantage.
- 1.30 In the context of a construction project, fraud offences may include:
- (1) manipulation of pre-qualification or tender requirements so as to favour a particular bidder,
 - (2) concealment of defects,
 - (3) dishonestly levying liquidated damages,
 - (4) dishonestly withholding payment,
 - (5) dishonestly providing false grounds in support of claims for payment, variations or extensions of time,
 - (6) dishonestly exaggerating the quantum of a claim,
 - (7) fabricating or falsifying evidence to support claims.
- 1.31 Parties may be liable for the offence of fraud where they deliberately undertake the fraudulent action with full knowledge of the circumstances. Alternatively, it is possible for a party to be liable for fraud if it

was reckless as to the circumstances. For example, a contractor may be liable for fraud if it submits a claim for additional payment which it suspects is inflated but fails to take reasonable steps to determine that the claim is accurate.

1.32 Detailed examples of fraud are given in Section 2 of this Manual.

Collusion

1.33 **Collusion is a criminal offence** in most jurisdictions.

1.34 It occurs where two or more parties co-operate to defraud or deceive another party. This is a type of fraud and is often described as a “cartel”, “anti-trust” or “anti-competitive” offence.

1.35 An example of collusion is where bidders collude in order fraudulently to arrange which bidder will win a contract and at what price. This form of collusion is often referred to as “bid-rigging”.

1.36 Detailed examples of collusion are given in Section 2 of this Manual.

Money-laundering

1.37 **Money-laundering is a criminal offence** in most jurisdictions. It occurs where a party moves cash or assets obtained by criminal activity from one location to another. For example, a contractor submits a fraudulent claim to a project owner for work which it did not carry out. The project owner pays the fraudulently obtained sum into the contractor’s bank account with Bank A. If the contractor then moves the payment to Bank B, this would constitute the offence of money-laundering. Money-laundering is often used to conceal the criminal source of funds.

The relationship between bribery and fraud

1.38 Bribery normally involves a degree of fraud. A bribe paid to win a project will normally be concealed by some fraudulent act with the aim that the project appears from the outside to have been won on a genuine arms-length basis.

1.39 Fraud (such as collusion during bids and submission of false claims) does not necessarily involve bribery. However, many acts of fraud may need an act of bribery in order to complete the fraud. For example, a contractor may submit a false claim to a project owner (which is fraud) and may then bribe the certifier to approve the claim (which is bribery). Alternatively, a project owner may wish fraudulently to withhold payment from a contractor and may bribe the certifier to certify falsely that liquidated damages or costs for rectification of defects are payable by the contractor.

1.40 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 corruption?

1.41 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.

1.42 However, in other cases, the practice may be undertaken so as to “level the playing field”. For example, a contractor may feel compelled to offer a bribe during tendering if it believes that its competitors will be offering a bribe. A contractor may feel that it is necessary to inflate a claim artificially if it believes that the project owner will automatically and unjustifiably reduce the contractor’s claim or raise artificial counter-claims against the contractor.

- 1.43 In some circumstances, a bribe may be extorted from the payer. For example, a contractor may be informed that if it does not pay a bribe, it will not receive a payment to which it is entitled.
- 1.44 Some offences are committed in the mistaken belief that practices, such as the inflation of claims, or the wrongful withholding of payment, are normal business acts and do not constitute criminal offences.

Other related offences

- 1.45 Corruption offences may also constitute breaches of **tax and accounting laws and stock market regulations**. For example, a bribe wrongly shown in the accounts as an agency commission for legitimate services would constitute a false accounting entry which would be in breach of accounting laws and stock market regulations and may also constitute other types of criminal offence. Deduction of a bribe against tax may also constitute a breach of tax law. Prosecutors may find it easier to prosecute under accounting or tax laws than bribery laws as the standard of proof may be lower, and proof may be obtained by the mere fact of the erroneous entry.
- 1.46 Thus, a wide range of people may be caught in both the initial offence (such as bribery or submission of fraudulent claims), which may involve site and commercial staff, and in subsequent offences, which may involve accounting and legal staff.

Who may be liable for corruption offences?

- 1.47 Both companies and individuals can be liable for a criminal offence. The exact extent of criminal liability will depend on the law of a particular country. However, the principles stated below will apply in a number of jurisdictions.
- 1.48 **Individual liability.** An individual may incur liability for corruption as follows:
- (1) **Those directly involved:** Any individual who is directly involved in committing a corruption offence may be liable for the offence.
 - (2) **Those indirectly involved:** An individual may be liable for a corruption offence where he is indirectly involved in committing the offence. For example, an individual may be liable where he has used another person to act on his behalf.
 - (3) **Those in authority:** A person in authority, such as a chief executive, director, financial manager or commercial manager, may be liable for a corruption offence even where he was not directly involved in committing the offence, but either he expressly authorised the offence or that type of offence, or knew of the offence and either consented to it or turned a blind eye to it. Such liability may arise where, for example, a chief executive suspects that the company's employees may be paying bribes on a project, but takes no action to prevent them doing so.
 - (4) **Aiding and abetting:** An individual may also be liable for the offence of aiding and abetting where he has somehow facilitated the committing of the offence.
- 1.49 An individual may incur criminal liability even where:
- (1) He was not aware that the activity constituted a crime.
 - (2) He did not or would not make any personal gain from the activity.
 - (3) He did not pay or receive the bribe personally, and instead the bribe was paid or received through or by another person, such as an agent, subsidiary company, joint venture partner, friend, spouse or other third party.

- (4) He did not commit a fraud personally, and instead the fraud was committed by or through another person.
- (5) He was following the instructions of a superior in the organisation.
- (6) He believed that his actions were in the interests of his employer.
- (7) There were threats of adverse consequences made to him in order to make him commit the offence (unless he feared imminent physical harm).
- (8) The bribe or fraudulent activity did not involve money, but instead involved the provision of a non-cash advantage, for example, a future contract, a holiday, jewellery or other gift.
- (9) The person who had been offered or who had received the bribe did not act in the way intended when the bribe was agreed.
- (10) The bribe was offered, but was never actually paid.
- (11) The amount of the bribe was less than the financial damage which could result from failure to pay the bribe.
- (12) The conduct constituting the offence was widely practised and considered to be normal business practice.
- (13) The conduct constituting the offence was believed to be necessary for a party to remain competitive.
- (14) The offence did not succeed (as the person could be liable for an attempt to commit the offence).

1.50 **Corporate liability.** In many jurisdictions, companies can be liable for criminal offences. This liability may arise in a number of ways including:

- (1) **Through the acts of its employees.** A company may incur criminal liability through the corrupt act of an employee (whatever his position) if the employee was acting within the course of his employment. Thus, if a junior employee responsible for preparing work records submits a false work record to another company in support of a claim, then the company (as well as the junior employee) could be liable for fraud. Or, if a company director decides to pay a bribe in connection with the company's business, then the company (as well as the director) could be liable for bribery.
- (2) **Through the acts of its agents.** A company may incur criminal liability through the corrupt act of an individual or company who has been appointed to act on its behalf and where the corrupt act is committed in the course of that appointment.
- (3) **Through the acts of its related companies or business partners.** A company could be liable for a corrupt act committed by a subsidiary or associated company, joint venture or consortium partner, sub-contractor or supplier, where that corrupt act could benefit the company's business. Such liability could arise where the company authorised, approved, condoned or turned a blind eye to the corruption.
- (4) **"Turning a blind eye"** (or wilful blindness) occurs where a party in authority (such as an officer or manager of a company) suspects corruption in relation to a business transaction in which the company is involved, but deliberately refrains from making further inquiries and taking preventive steps. In such situations, even if the officer or manager has not been expressly told that a business partner is paying a bribe which may benefit the company, a court may infer that the company must have known that a bribe would probably be paid. This inference may arise where the circumstances would be likely to put the officer or manager on notice. Such circumstances would include, for example, where an agency commission is significantly

disproportionate to the legitimate scope of services which the agent is to undertake, or where the agent has no capability for undertaking those services, or where the agency commission is to be paid, without good reason, in foreign currency into an off-shore bank account. The existence of a formal agency agreement will not prevent an inference of corruption. The courts would look at the circumstances surrounding the agreement and at its true effect, not merely at its form. It is, therefore, extremely important for company officers and managers to make proper inquiries, should they suspect corruption in relation to the company's affairs, and to take steps to prevent or stop the corruption. Otherwise their inaction may make the company liable (in addition to causing them to incur personal liability).

1.51 **Range of persons (both individuals and companies) who may be liable.** A wide range of persons could be liable for a corruption offence. For example, a bribe is agreed to be paid by a contractor to a government employee and, in order to conceal the bribe, it is paid by the contractor through a sub-contractor who in turn appoints an individual agent to pay the bribe. In such circumstances, the following may incur liability where they are aware of or are wilfully blind to the corrupt circumstances:

- (1) those directors and managers of the contractor and sub-contractor who authorise payment of the bribe, or who authorise the general policy of payment of bribes, whether tacitly or expressly;
- (2) those directors and managers of the contractor and sub-contractor who are involved in the decision to conceal the bribe by payment through the sub-contractor and agent;
- (3) the director or manager of the sub-contractor who directly negotiates the payment of the bribe with the agent;
- (4) those directors and managers of the contractor and sub-contractor who suspect that there may be corruption but do not make proper enquiries and take preventive steps;
- (5) the accounting employee of the sub-contractor who implements payment of the bribe to the agent and charges the contractor with the cost of the bribe;
- (6) the accounting employee of the contractor who implements reimbursement of the cost of the bribe to the sub-contractor;
- (7) the lawyer who drafts the agency or other agreement which was used as a cover for the bribe mechanism;
- (8) the agent who acts as intermediary for payment of the bribe;
- (9) the government employee who receives the bribe.
- (10) the contractor and sub-contractor (where they are companies), their liability being incurred through the knowledge and actions of their directors and managers.

1.52 **Overseas bribery:** As a result of the OECD Convention on Combating Bribery which came into force in 1999, all countries which have ratified the Convention have made it a crime for their companies or individuals to bribe a foreign public official abroad.

Why should corruption be avoided?

1.53 Corruption should be avoided because of:

- (a) the risk of criminal prosecution;
- (b) the risk of financial loss;
- (c) the moral argument.

The order of priority of the above will depend on the personal values of an individual.

Risk of criminal prosecution

- 1.54 **A real risk.** Until relatively recently, there has been little risk of prosecution for corruption in relation to the infrastructure, construction and engineering sectors. However, due to a number of factors, individuals and companies are facing an increasing risk of prosecution. These factors are as follows:
- (1) **Increased awareness.** There is growing awareness of the scale of corruption and of both the social and commercial damage that this is causing.
 - (2) **Increased pressure.** There is as a result increased pressure to take steps to eliminate this corruption. Civil society, aid organisations, multi-lateral development banks, governments and the industry itself are all responsible for this increased pressure.
 - (3) **Better laws and an increased risk of prosecution.** Such pressure has resulted in the passing and ratification of a number of anti-corruption conventions (in particular the United Nations Convention against Corruption and the OECD Convention on Combating Bribery). Countries which have ratified such conventions are required to enact the necessary laws to criminalise domestic and overseas bribery of public officials and also to ensure that those laws are enforced.
 - (4) **Increased risk of detection.** Far greater attention is now being paid to methods of detecting corruption in infrastructure, construction and engineering projects. There is also increased protection for and encouragement of whistle-blowing. Thus, there is now a far greater risk that corruption will be uncovered.
 - (5) **Increased willingness to prosecute and punish white-collar crime.** There is increasing pressure to ensure that white-collar crime (which includes corruption offences) is punished as severely as blue-collar crime. This means that there is a growing likelihood that where an individual is convicted of corruption, more severe penalties may be imposed than previously.
- 1.55 **Serious penalties.** The penalties for corruption offences can be severe. In most jurisdictions, such penalties for individuals may include several years' imprisonment and heavy fines. For companies, the criminal penalty will normally be a substantial fine.
- 1.56 **Company directors and employees.** Corruption now presents a real risk of harsh punishment for both senior and junior employees.

Risk of financial loss

- 1.57 **Serious financial loss.** As it becomes more acknowledged that corruption must be prevented and penalised, so governments, funders, project owners, competitors, and employers will become less tolerant of corruption. There is, therefore, an increasing tendency for these parties to adopt stronger measures against corruption. Such measures may include:
- (1) **Debarment of companies because of corruption involvement.** Multi-lateral development banks have adopted formal debarment policies whereby a company which has been found to have been involved in corruption will be debarred permanently or for a number of years from participating in any of their projects. Whilst aid organisations and other lenders may not yet have official debarment policies, it is becoming increasingly unlikely that they would allow companies which have been convicted of corruption or debarred by multi-lateral development banks, to participate in projects which they are funding. Some public sector project owners are now required by law to debar convicted companies from participating in their projects. For example, the European Union Procurement Directives require compulsory exclusion of a company from all EU public sector contracts if the company, or any of its senior managers, have been convicted of a corruption offence.
 - (2) **Exclusion of companies from projects because of unsuitability.** Funders and project owners are increasingly carrying out better due diligence in order to determine the risk of

corruption in including certain companies in projects, even if they have had no conviction for corruption. Thus, for example, companies which have not adopted adequate anti-corruption measures may be considered unsuitable to tender.

- (3) **Termination of corrupt contracts.** A contract which has been obtained through corruption is often either void, or can be terminated, and this can have significant financial consequences. For example, if a party pays a bribe to win a contract, or submits fraudulent data with its tender, and if the project owner discovers the corruption, it is possible that the project owner will terminate the contract (if it has already been awarded to the corrupt party).
- (4) **Reputational damage for companies.** The increasing attention given to corruption issues and the growing desire for ethical investment means that companies which are associated with corruption (even where there has been no conviction) may suffer in terms of share value and may also find that they are increasingly considered to be undesirable business partners. It may also mean that the company may find it more difficult to win work, raise financing, and employ good staff.
- (5) **Reputational damage for individuals.** Involvement by an individual in corruption may irreparably damage an individual's reputation. Companies are paying increasing attention to their own reputation and consequently to corporate social responsibility and are therefore increasingly unlikely to employ an individual who has been involved in corruption.
- (6) **Dismissal of individuals from employment.** The growing trend of anti-corruption requirements by governments, funders and project owners has the effect that employers must now be seen to be imposing stricter disciplinary measures against employees who have been involved in corruption. It is becoming more common for an officer or employee of a company to be dismissed from employment because of involvement in corruption. A company may prefer to lose an employee rather than damage its business.
- (7) **Disciplinary action against individual members by professional associations.** Professional associations are becoming more conscious of their duty to deter corruption by their members, and may impose fines on, or suspend or disqualify from practice, members who have engaged in corruption.
- (8) **Litigation against individuals and companies for losses caused by corruption.** Significant financial loss can be caused to a company which is the victim of corruption. For example:
 - (a) a tenderer which loses a tender because of bribery by a competitor may lose both the cost of submitting its tender and the potential profits from the contract;
 - (b) a contractor against whom a project owner submits a fraudulent claim (which is then approved by a corrupt certifier) may lose its own claim and have to pay the project owner's fraudulent claim.

It is becoming increasingly likely for such companies to take legal proceedings to recover their losses. Such proceedings may be taken against both the corrupt company and the individuals involved in the corruption. These proceedings can be costly in terms of lawyers' and consultants' fees, lost management time and emotional stress.

The moral argument

1.58 **Corruption in the public sector** usually involves bribery or fraud being perpetrated against a government body. It is, therefore, the taxpayer that ultimately pays for this corruption. This can occur in a number of ways:

- (1) **Needless, uneconomic or over-designed projects.** The most blatant type of corruption occurs where a project is commissioned which is not necessary or which is unviable or over-designed, and whose sole purpose is to act as a vehicle for corruptly channelling government

funds into the private accounts of corrupt government officers and their associates. In such cases, the initial corruption in conceiving or over-designing the project may rest with the responsible government official and the consultant designer. However, where a contractor takes on such a project while aware or suspicious that the project is corrupt from inception, it too may become implicated in the corruption.

- (2) **Bribes included in the contract price.** The cost of bribes paid by contractors to corrupt government officials is usually recouped by including the amount of the bribe in the contract price which is paid by public funds.
- (3) **Contract prices fraudulently inflated.** Where a contract is corruptly awarded, it is often the case that the contract price is significantly inflated, not just to cover the cost of the bribe, but also to maximise profit for the contractor. Where the contractor is assured of success in winning the contract, it will have considerable freedom to demand a high contract price.
- (4) **Fraudulent claims approved and paid.** Contractors may submit fraudulent claims which are either unmerited or inflated. Bribery of the certifier, or other person responsible for approving the claims, will ensure that the claims are approved. Bribery of the relevant government official will ensure that he does not challenge the approvals and that the claims are paid.
- (5) **Contracts awarded and claims approved in the hope of future or indirect gain.** In developed countries, the corrupt awarding of contracts and corrupt approval of fraudulent claims may take a more insidious form. Large bribes may not necessarily change hands directly. Favours may consist of a discreet assurance of future employment once a government official leaves office. Such favours may be promised in exchange for preferential award of planning permissions or contracts, or for ensuring that inflated contract prices or claims are left unchallenged.
- (6) **Defective or dangerous works provided.** Contractors may use bribery to persuade a certifier to approve defective works or materials. This can result in projects being provided which are seriously defective and which deteriorate very quickly requiring repair or replacement far earlier than should be the case. Alternatively or in addition, defective work may result in dangerous structures which may cause injury or death. It is the taxpayer who will have to fund any repair or replacement of the defective products and compensate those harmed by them.

1.59 In simple terms, corruption in the public sector is stealing from the taxpayer. Money is stolen which could be spent on hospitals, schools, roads, and other vitally important infrastructure. This loss will be felt most severely in poorer countries. It will nevertheless also be felt in developed countries where large sums may be lost through more subtle forms of corruption.

1.60 **Corruption in the private sector** takes the same form as corruption in the public sector but the cost of corruption is not directly borne by public funds. It nevertheless can have widespread and serious consequences. Corruption may have an immediate adverse effect on the cost and quality of the private sector works. It may result in an increase in the financing, capital, operating and maintenance costs of projects. This in turn may result in increased property or utility prices, or increased charges that are required for use of certain facilities such as toll roads or bridges. It may also result in dangerously defective works. All these factors will affect the ordinary population. In the longer term, the effects may include less investment (due to the growing concern to ensure ethical investment) and withdrawal of ethical contractors from the market. This will leave the market even further open to corruption which will then inevitably infect other sectors. It is unlikely that there will be significant corruption in the private sector without such corruption spreading to the public sector.

How individuals may avoid liability for corruption

- 1.61 In order to avoid liability for corruption, an individual should take all possible steps to ensure that he is not involved, whether directly or indirectly, in any corrupt activity. This would include the following:
- (1) He must not be involved in offering, paying, requesting or receiving bribes.
 - (2) He must not be involved in any fraudulent or dishonest activity.
 - (3) He must not authorise, expressly or impliedly, any corrupt activity.
 - (4) He must not participate in any activity which could facilitate corruption. Such activity may include authorising payment of bribes, drafting illegal agreements, drafting fraudulent claims, falsifying evidence, and giving false evidence in legal proceedings.
 - (5) He must not assist in the concealment of any corrupt activity. This does not necessarily mean that a party must report corrupt activity (although in some countries failure to report may be an offence itself). It means that he must not take any positive steps to conceal the corruption.
 - (6) He must not commit corrupt activity because he has been requested to do so by his company or by any senior manager.
 - (7) Where he is in a position of authority, he must not turn a blind eye to corrupt activity. If he suspects that corruption has occurred, is occurring, or is likely to occur, he must make proper enquiries to establish what has happened or may happen, and take steps to prevent or stop it.
- 1.62 However, in all circumstances, the employee should not take any step which is likely to endanger his safety, or that of another person.
- 1.63 A simple set of anti-corruption rules to help an individual avoid corruption is contained in Section 3. Specific advice on what to do when confronted with corruption is contained in Section 4.

SECTION 2

EXAMPLES OF CORRUPTION

INTRODUCTION

This section of the Anti-Corruption Training Manual provides examples of activities in the infrastructure, construction and engineering industry which may constitute the criminal offence of bribery, fraud, deception or similar offence.

These examples are indicative only and are not a complete list of all possible types of corrupt behaviour which could take place. The examples are deliberately simplistic and are designed to be informative of the type of acts which could constitute a criminal offence.

The examples in this section frequently use the project owner/architect/contractor contractual structure. However, they would apply on a similar basis to alternative structures, for example project owner/consultant, or contractor/sub-contractor.

As with all criminal offences, the commission of the offence will depend on the precise circumstances, including the degree of involvement of the individual in the particular situation and his intentions. Reliance should not be placed on these examples in determining the criminality of a particular action. Separate legal advice should always be obtained.

In many examples, there may be both corporate and individual liability. A company can incur criminal liability through the actions of individuals and companies acting on its behalf. Similarly, employees and independent consultants may incur personal criminal liability when acting on behalf of their employer or client. Therefore, in many cases, both the company and the individual will be guilty of the same offence. It is not practical, in the examples below, to list all categories of individual who may be criminally liable in each offence. Consequently, the global phrase 'individuals involved' has been used instead.

Even where the particular facts of the examples below would not inevitably lead to criminal liability, it is submitted that they would be sufficient to support a finding that the person concerned had not acted with integrity for the purposes of the person's professional or employment code of conduct.

EXAMPLES

Pre-qualification and tender

Example 1: Loser's fee

It is a condition (express or implied) of a tender that each unsuccessful tendering contractor will bear its own tender costs. Prior to tender submission, the competing contractors secretly agree that they will each include in their tender price an agreed additional sum of money representing the total estimated tender costs of all the competing contractors. Whichever contractor is awarded the contract will then divide this sum of money between all the unsuccessful contractors who will thereby recover their tender costs. This is known as a 'loser's fee'. This arrangement is not disclosed to the project owner. The project owner believes that the losing contractors are bearing their own tender costs. The project owner is therefore unknowingly paying more than it would have done had the unsuccessful contractors borne their own tender costs.

Possible offenders: Contractors and individuals involved.

Example 2: Price fixing

A group of contractors who routinely compete in the same market secretly agree to share the market between them. They will each apparently compete on all major tenders, but will in advance secretly agree which of them should win each tender. The contractor who is chosen by the other contractors to win a tender will then notify the others prior to tender submission as to its tender price. The other contractors will then tender at a higher price so as to ensure that the pre-selected contractor wins the tender. The winning contractor would therefore be able to achieve a higher price than if there had been genuine competition for the project. If sufficient projects are awarded, each contractor would have an opportunity to be awarded a project at a higher price. This arrangement is kept confidential from the project owners on respective projects who believe that the tenders are taking place in genuine open competition, and that they are achieving the best available price. The project owners therefore pay more for their projects than they would have done had there been genuine competition.

Possible offenders: Contractors and individuals involved.

Example 3: Manipulation of pre-qualification

A project owner appoints an engineer to manage a pre-qualification for a project so as to obtain a short-list of five suitable contractors who can then bid for the contract. A contractor who wishes to be short-listed pays a cash bribe to the engineer to ensure that key competitors of the contractor are eliminated from the short-list on artificial grounds. The engineer produces a short-list which does not contain several key competitors. The engineer falsely informs the project owner that it has selected the best five competitors. The project owner relies on the engineer's advice. The contractor who bribed the engineer wins the project.

Possible offenders: Contractor, engineer, and individuals involved.

Example 4: Bribery to obtain main contract award

A contractor who is tendering for a project is approached by an agent who claims that he will be able to assist the contractor to be awarded the project. They agree that, if the contractor is awarded the project, the contractor will pay the agent a commission of 5% of the contract price. The agent is appointed under a formal agency agreement which states that the agent will carry out specified services. However, the fee being paid to the agent is grossly in excess of the market value of the legitimate services which the agent is committed to provide. The

agent intends to pay part of the commission to a representative of the project owner to ensure that the contractor is awarded the contract. Although the contractor does not actually know that the agent will use the commission for that purpose, the contractor thinks it likely that this will be the case due to the significant disparity between the value of the legitimate services to be carried out by the agent and the amount of the fee. The contractor is awarded the contract. The contractor pays the agent the commission. The agent pays the representative of the project owner a bribe out of the agent's commission. The cost of the commission (and therefore of the bribe) is included in the contract price. The project owner therefore pays more than it would have done had there not been a bribe. The project owner is unaware that one of its representatives has been bribed.

Possible offenders: Contractor, agent, and individuals involved.

Example 5: Bribery during sub-contract procurement

A procurement manager of a contractor is managing a competitive tender between sub-contractors. One of the sub-contractors offers a free holiday to the procurement manager if the procurement manager awards the contract to the sub-contractor. The procurement manager does so.

Possible offenders: Procurement manager, sub-contractor, individuals involved.

Example 6: Corruptly negotiated contract

A senior government official who is in charge of the construction of new infrastructure projects wishes to enrich himself. He therefore decides to initiate a project which could conceal a major bribe for himself. In order to maximise the bribe potential, he ensures that the design will result in a project which is unnecessarily large and complex. He then informs a major contractor that he will ensure that the contractor is awarded the project on a non-competitive basis if the contractor includes in the contract price a payment for him personally of an amount equal to 30% of the contract price. The contractor agrees. The contract is awarded and the contractor pays the official.

Possible offenders: Government official, contractor, and individuals involved.

Example 7: Manipulation of design

A project owner appoints an architect to design a project. One of the competing contractors who is tendering for the project bribes the architect to provide a design with which only that contractor can fully comply. The bribe is the promise by the contractor of significant future work for the architect. The architect provides an appropriate design. The contractor submits a price that is higher than it would have been had there been a genuine competitive tender, and higher than several of the other tenders. The architect recommends to the project owner that the relevant design was in the project owner's best interests and that the compliant contractor should be appointed, even though its tender is not the cheapest, as only it fully complies with the tender design. In fact, to the knowledge of the architect, one of the cheaper tenderers bidding to an alternative design would have adequately suited the project owner's needs. The project owner follows the architect's advice and awards the contract to the compliant contractor.

Possible offenders: Contractor, architect, and individuals involved.

Example 8: Specification of overly sophisticated design

A project owner and a contractor are negotiating a design and build contract. There is no competitive tender and the project owner is, to the knowledge of the contractor, relying on the contractor to put forward a reasonable proposal. In its written proposal to the project owner, the contractor deliberately specifies an overly sophisticated

design. The contractor is aware that an alternative cheaper design would be adequate for the project owner's purposes but does not inform the project owner of this possibility. The contractor's intention is that the project owner will accept the sophisticated design as it will result in a higher overhead recovery and profit for the contractor. The project owner places the contract with the contractor.

Possible offenders: Contractor, and individuals involved.

Example 9: Inflation of resources and time requirements

A project owner and a contractor are negotiating a contract. There is no competitive tender and the project owner is, to the knowledge of the contractor, relying on the contractor to put forward a reasonable proposal. In its written proposal to the project owner, the contractor deliberately exaggerates the manpower, equipment and time required to complete the project. These exaggerated elements are not a contingency against possible risk. They are deliberate overstatements of the time and resources required in order to support a higher price. The project owner accepts the contractor's proposal. The works are carried out and the project owner pays the excessive contract price.

Possible offenders: Contractor and individuals involved.

Example 10: Obtaining a quotation only for the purpose of price comparison

A project owner intends to place a contract with a contractor which it frequently uses. It wishes to ensure that the price obtained from the contractor is a market price. It therefore requests quotations from two other contractors. It leads these contractors to believe that they have a chance of winning the project. However, the project owner always intends to award the contract to its favoured contractor. The price of one of the other bidding contractors is the lowest. The project owner discloses this lowest price to its favoured contractor and requires it to match the price. The favoured contractor does so and is awarded the contract. The other contractors therefore waste their tender costs.

Possible offenders: Project owner and individuals involved.

Example 11: Concealment of financial status

A project owner places a contract with a contractor. At the time of placing the contract, the project owner is in serious financial difficulty. It believes that it is quite likely that it will go into receivership prior to completion of the contract and will therefore be unable to pay the contractor in full for work done. The project owner does not disclose its financial status to the contractor at the time of placing the contract. The project owner is aware that if it does disclose its financial difficulties, the contractor is unlikely to commence work.

Possible offenders: Project owner and individuals involved.

Example 12: Intention to withhold payment

A project owner places a contract with a contractor. At the time of placing the contract, the project owner intends, in order to increase the profitability of the project for the project owner, to refuse to pay the contractor the retention of 10% upon completion of the project and to concoct artificial counterclaims to set-off against the retention.

Possible offenders: Project owner and individuals involved.

Example 13: Submission of false quotation

A procurement manager of a contractor is required to organise the hire of cranes for one of the contractor's projects. Crane hire companies are at that time giving discounts of approximately 25% off their published hire prices for long-term hires. The procurement manager and two friends set up a company ('Craneco') which is registered in the names of the two friends. Half the shares in Craneco are secretly held as nominee for the procurement manager. Craneco obtains a quote including discount from a crane hire company. The procurement manager obtains the published rate sheets (excluding discounts) from two other crane companies. Craneco supplies a written quote to the contractor to supply the cranes at a rate slightly lower than the published rates of the two other crane companies, but at a higher rate than the rate quoted to Craneco. The procurement manager uses the two rate sheets and the quote from Craneco as three competitive quotes, and awards the contract for the supply of cranes to Craneco. These documents are placed on the procurement file, creating the false impression that there has been genuine competitive pricing, and that the hire contract has been awarded to the cheapest supplier. Craneco makes a profit. The procurement manager does not disclose to the contractor his interest in Craneco. The contractor pays more for the hire than it would have done if the contract had been awarded, including discount, to one of the other crane hire companies.

Possible offenders: Procurement manager and friends.

Example 14: Falsely obtaining export credit insurance

A contractor tenders for a project using a buyer credit. Under this arrangement, a commercial bank offers the project owner a loan for part of the project cost. The bank will directly pay the contractor for the work as it progresses. The project owner will then pay back the loan and interest to the bank over an agreed period of time. The bank is insured against default by the project owner in repaying the loan by means of an export credit guarantee. The contractor pays the export credit guarantee organisation a premium in return for it offering the guarantee. Under the application for the export credit guarantee, the contractor is required to warrant to the export credit guarantee organisation that it will not pay a bribe in relation to the project award. The contractor pays a bribe to a representative of the project owner in order to win the contract. (This example looks only at the offence committed in relation to obtaining the export credit guarantee deceptively.)

Possible offenders: Contractor and individuals involved.

Project Execution

Example 15: False invoicing: supply of inferior materials

A concrete supplier is obliged to supply concrete to a particular specification. The concrete supplier deliberately supplies concrete of a cheaper and inferior specification, but invoices the contractor for the required specification.

Possible offenders: Concrete supplier and individuals involved.

Example 16: False invoicing: supply of less equipment

A scaffolding sub-contractor contracts to provide a specified quantity of scaffolding to a project for a fixed price and for a fixed duration. Before the contract period for supply has expired, the scaffolding sub-contractor, without the knowledge of the contractor, removes part of the scaffolding. The scaffolding sub-contractor does

not inform the contractor that some scaffolding has been removed nor does it make any deduction for the scaffolding removed. It invoices the contractor for the full fixed price. The contractor pays in full.

Possible offenders: Sub-contractor and individuals involved.

Example 17: False work certificates

An earth-moving sub-contractor signs a contract with the contractor to remove unsuitable material from site and to replace it with suitable material. The earth-moving sub-contractor will be paid by the load. The contractor appoints a quantity surveyor to count on site the number of loads removed and replaced by the earth-moving sub-contractor. Each load will have a written load certificate which will be signed by the earth-moving sub-contractor and counter-signed by the quantity surveyor. The manager of the earth-moving sub-contractor agrees with the quantity surveyor that the quantity surveyor will falsely certify more loads than the earth-moving sub-contractor actually undertakes. In return, the earthmoving sub-contractor will pay the quantity surveyor 30% of the payment received by the earth-moving sub-contractor for each false load. The quantity surveyor certifies 20 false removals and 20 false replacements. The earth-moving sub-contractor submits both its genuine and its false certificates to the contractor for payment. The contractor pays in full, resulting in an illicit profit to the earth-moving sub-contractor. The earthmoving sub-contractor pays the quantity surveyor his share.

Possible offenders: Sub-contractor, quantity surveyor, and individuals involved.

Example 18: Excessive repair work

A plumbing sub-contractor is requested by the contractor to repair a toilet. After inspecting the toilet, the plumbing sub-contractor ascertains that the repair could be completed by the supply of a replacement washer. The plumbing sub-contractor, with the intention of securing a higher price, falsely informs the contractor that several new parts are necessary. The contractor agrees. The plumbing sub-contractor replaces the parts and invoices the contractor for the work carried out. The invoice is higher than it would have been had only the washer been replaced. The contractor pays the invoiced amount.

Possible offenders: Plumbing sub-contractor and individuals involved.

Example 19: Overstating man-day requirements

A sub-contractor is appointed by a contractor on a day-works basis to undertake work which the sub-contractor knows will take approximately 100 man-days to complete. The sub-contractor informs the contractor that the work will require 150 man-days. The sub-contractor deliberately over-states the man-day requirement in order to achieve a higher price from the contractor. The contractor accepts the sub-contractor's estimate of 150 days. The sub-contractor completes the work using 100 man-days. The sub-contractor invoices the contractor for 150 man-days of work and attaches time-sheets for the work. 100 man-days of time-sheets are correct. 50 man-days of time-sheets are falsified so as to support the amount invoiced. The contractor pays the invoiced amount.

Possible offenders: Sub-contractor and individuals involved.

Example 20: Inflated claim for variation (1)

A contractor is instructed by the architect appointed by the project owner to carry out a variation to the works. The contract entitles the contractor to an extension of time and additional payment in this circumstance. The contractor submits a written claim in respect of the variation to the architect which deliberately exaggerates the manpower, materials, equipment and time required to carry out the variation.

Possible offenders: Contractor and individuals involved.

Example 21: Inflated claim for variation (2)

The facts are as in Example 20 except that, when the architect indicates to the contractor that he is inclined to reduce the contractor's claim, the contractor offers the architect a bribe if he will approve the full claim. The architect does so.

Possible offenders: Contractor, architect, and individuals involved.

Example 22: False variation claim

A contractor carries out work which is not in compliance with the contract specification. Under the contract, the architect is responsible for issuing variations. The contractor offers the architect a bribe if he confirms in writing that the work was carried out pursuant to a variation issued by the architect, and is therefore acceptable. The architect does so.

Possible offenders: Contractor, architect, and individuals involved.

Example 23: Issue of false delay certificate

A contract entitles the contractor to an extension of time and payment of loss and expense in the event of specified delays caused by the project owner. The contract also provides that the contractor should pay liquidated damages to the project owner in the event of specified delays caused by the contractor. Under the contract, the engineer appointed by the project owner determines questions of delay and loss and expense. The works are delayed by the project owner. The contractor applies to the engineer for an extension of time and ascertainment of loss and expense. The project owner and engineer are aware that the contractor is entitled to both. The project owner agrees with the engineer that the engineer should refuse the contractor's claim and should instead issue a certificate requiring the contractor to pay the project owner liquidated damages for delay. The engineer does so.

Possible offenders: Project owner, engineer, and individuals involved.

Example 24: False extension of time application

A contractor has been delayed in completing the project. Two reasons could account for the delay. The first is the delayed delivery of materials by one of the contractor's suppliers for which delay the contractor is responsible under the contract and for which he would be liable to pay liquidated damages to the project owner. The second is a change to the specification for which delay the project owner is responsible under the contract and for which the contractor would be entitled to receive an extension of time and additional cost. The contractor is aware that the whole or part of the actual cause of the delay is the supplier delay. However, the contractor submits a written claim to the architect appointed by the project owner which alleges that the whole delay was attributable to the change in specification. The architect accepts the contractor's claim, and awards the contractor an extension of time and additional payment. The project owner pays the additional payment.

Possible offenders: Contractor and individuals involved.

Example 25: False assurance that payment will be made

During a project, a project owner runs into financial difficulties and realises that it will be unable to complete payment to the contractor. The project owner nevertheless induces the contractor to finish the works by falsely assuring the contractor that it will be paid.

Possible offenders: Project owner and individuals involved.

Example 26: Delayed issue of payment certificates

The project owner offers the architect a future appointment on another project if the architect delays the issue of payment certificates which are due to the contractor. The architect agrees.

Possible offenders: Project owner, architect, and individuals involved.

Example 27: Concealing defects (1)

A contractor accidentally omits some structural steel from the foundation works. The contractor discovers the omission after the foundations have been completed. Neither the architect nor the project owner realises the omission. The contractor decides not to disclose the omission to the architect or project owner. The contractor invoices the project owner in full for the foundation works (including the omitted structural steel). The project owner pays the contractor in full.

Possible offenders: Contractor and individuals involved.

Example 28: Concealing defects (2)

A roofing sub-contractor installs a waterproof roof membrane. The membrane is accidentally perforated during installation which means that it could leak. The membrane needs to be approved by the contractor's supervisor before it is covered over. The membrane should be rejected and replaced owing to the perforations. The sub-contractor offers to make a payment to the supervisor if he certifies that the sub-contractor's defective membrane is water-tight. The supervisor accepts. The payment is made by the sub-contractor to the supervisor and the supervisor issues the certificate. The sub-contractor submits the certificate to the contractor, and obtains full payment for the defective membrane. Neither the sub-contractor nor supervisor discloses to the contractor that the membrane is defective.

Possible offenders: Sub-contractor, supervisor, and individuals involved.

Example 29: Set-off of false rectification costs

A contractor has completed the works and applies for final payment. Under the contract, the architect appointed by the project owner is required to specify outstanding defects. The project owner persuades the architect to include, in the schedule of defects, additional purported defects which in fact are not outstanding. The project owner then sets off the alleged cost of rectification of these defects against the balance due to the contractor. The contractor disputes the deduction. The project owner informs the contractor that, if the contractor does not accept the reduced sum, then he will have to litigate or arbitrate to get the remainder from the project owner. The contractor cannot afford litigation, so he accepts the reduced amount.

Possible offenders: Project owner, architect, and individuals involved.

Example 30: Refusal to issue final certificate

A contractor has properly completed the works and is entitled to receive a final certificate. The engineer appointed by the project owner refuses to issue the final certificate to the contractor unless the contractor pays him 5% of the final certificate value. The contractor refuses to pay.

Possible offenders: Engineer and individuals involved.

Example 31: Requirement to accept lower payment than is due

A project owner owes a contractor payment of the contract price. The contractor has completed the contract works to the correct specification and within the allotted time. There is no dispute between the project owner and the contractor. The project owner informs the contractor that it will pay the contractor 80% of the contract sum immediately in full and final settlement. The project owner further states that, if the contractor does not accept this proposal and wants to recover the full amount, the contractor will have to sue the project owner for payment and the project owner will make the litigation as long and as costly as possible. The project owner is a large company which could bear the cost of protracted litigation. The project owner knows that the contractor would be unable to do so. The contractor agrees to accept the reduced payment.

Possible offenders: Project owner and individuals involved.

Example 32: Extortion by project owner's representative

A contractor is due the final payment on a project. The project owner's representative informs the contractor that he will not authorise the release of the final payment unless the contractor makes an extra payment to the project owner's representative personally. The contractor makes the payment. The project owner's representative authorises the release of the final payment.

Possible offenders: Project owner's representative, contractor, and individuals involved.

Example 33: Facilitation payment

A customs official demands a payment from a contractor in return for the customs official speeding up the issue of an import permit to which the contractor is entitled. The contractor makes the payment.

Possible offenders: Customs official, contractor, and individuals involved.

Example 34: Overstating of profits

In the project accounts, a project manager deliberately overstates the profitability of the project he is overseeing in order to enhance his performance bonus.

Possible offenders: Project manager.

Example 35: False job application

In order to obtain employment, an applicant for the post of contract manager states in his job application that he has worked as a contract manager. He has not held such a position. He is appointed to the post.

Possible offenders: Applicant.

Dispute resolution

Example 36: Submission of incorrect or misleading contract claims, pleadings or particulars

In a contract claim, or during dispute resolution proceedings (such as mediation, adjudication, arbitration or litigation), the claimant submits claims, pleadings or particulars which he knows to be false, or does not believe to be true, or of which he is reckless as to their accuracy. These include:

- A claim for an extension of time (in circumstances where the contract permits an extension of time based on actual delay) where the extension claimed is greater than the actual delay caused, or where the stated cause of delay is not the true cause of delay;
- A loss and expense claim where the extension of time claim on which the loss and expense claim is based is incorrect or the amount of loss and expense claimed is overstated;
- A claim for payment for the supply of work, equipment or materials where the work, equipment or materials are defective, or are not in accordance with the specification, or are not supplied.
- A claim containing false or misleading statements as to the parties' understanding at the time the contract was made;
- A claim containing false or misleading statements regarding representations made concerning scope of work, quality, timing, or limitations of liability.

Possible offenders: Claimant and individuals involved.

Example 37: Concealment of documents

In a contract claim, or dispute resolution proceedings, a claimant deliberately does not disclose to his opponent, or to the dispute resolution tribunal, documents which are, or may be, damaging to the claimant's case. Such documents include:

- Timesheets which would undermine the claimant's case that labour and equipment were working on a particular item of work;
- Work records which would show that the claimant's claim document overstates or incorrectly describes equipment or material;
- Work records which would show, contrary to the claimant's case, that the works were not completed by a particular date, or were defective, or were not in accordance with the specification;
- Programmes which would establish that the delay claimed by the claimant was in fact due to a different reason from that claimed, or was not as long as that claimed;
- Cost records which would show that claimed costs have been incorrectly stated;
- Photographs which would show an activity occurring at a different time or in different circumstances to that alleged by the claimant;
- Correspondence and other records which would undermine the claimant's case.

Possible offenders: Claimant and individuals involved.

Example 38: Submission of false supporting documents

In a contract claim, or dispute resolution proceedings, a claimant submits the following supporting documents as genuine and accurate when he knows that they are false, or does not believe them to be true, or is reckless as to their accuracy:

- Timesheets which are not genuine and which have been created to show falsely that labour and equipment was used for a particular item of work when in fact it was not;
- Work records which are not genuine and which have been created to overstate or incorrectly describe equipment and materials supplied;
- Programmes which purport correctly to state dates and events, but which do not and which have been deliberately amended to attribute delay falsely to a stated cause;
- Cost records which incorrectly state the cost of items, or include items or work which were not provided;
- Photographs which have been created to show falsely that an activity occurred at a certain time or location, when in fact it did not.

Possible offenders: Claimant and individuals involved.

Example 39: Supply of false witness evidence

In dispute resolution proceedings, a witness as to fact gives evidence on behalf of the claimant (whether by way of affidavit, witness statement or orally) that he knows to be false, or does not believe to be true. Such evidence by the witness includes the following:

- Confirming that supporting documents (such as those referred to in Example 38) are genuine and accurate, when he knows that they are false, or is not sure whether or not they are accurate;
- Stating that an event occurred, when he knows that it did not occur, or is not sure that it occurred;
- Stating that the opponent's action was the sole cause of delay to the works, when he knows that there were other causes of delay, or is not sure that it was the sole cause of delay;
- Stating that the claimant's loss was a certain figure, when he knows that the figure has been inflated above the true figure, or is not sure that the claimed figure is correct;
- Stating that a fact had been orally agreed between representatives of the claimant and the opponent, when he knows that this fact had not been agreed, or is not sure whether or not it had been agreed;
- Giving an incomplete account of events, knowing that, or being reckless as to whether, the incomplete account may be misleading.

Possible offenders: Claimant, witness, and individuals involved.

Example 40: Supply of false expert evidence

In dispute resolution proceedings, a claimant appoints an expert to provide an opinion on an aspect of the claimant's case. The expert's initial report, prepared confidentially for the claimant, is unsupportive of the claimant's case. The claimant makes it clear to the expert that his appointment will continue only if the expert amends his report to make it favourable to the claimant's case. The expert does so. He believes the amended view to be arguable, but presents it in the report as his most favoured view, and as the correct view, when this is not his belief. The report is then submitted as expert evidence in the proceedings and the expert witness gives oral evidence in accordance with it. Both the expert and the claimant are aware that the expert does not believe his evidence to be true. The success of the claim and counterclaim in the proceedings depends on the outcome of the expert evidence.

Possible offenders: Claimant, expert, and individuals involved.

Example 41: Bribery of witness

A claimant offers a witness a percentage of any future award by the arbitrator in the claimant's favour if the witness gives false evidence in support of the claimant in the arbitration. The witness accepts, and provides a false witness statement and false oral evidence both of which support the claim and undermine the counterclaim.

Possible offenders: Claimant, witness, and individuals involved.

Example 42: Blackmail of witness

The respondent in an arbitration owes money to the claimant. The respondent tells a witness that he will be dismissed as an employee of the respondent unless he gives false evidence in support of the respondent in the arbitration. The employee gives the false evidence and as a result the respondent wins the arbitration, and does not need to pay the claimant.

Possible offenders: Witness, respondent, and individuals involved.

Example 43: False information as to financial status

Under a settlement agreement, a project owner agrees to pay a contractor a certain amount. The project owner is late in paying and meets with the contractor to discuss payment. At the meeting, the project owner falsely informs the contractor that the project owner is in financial difficulty. The project owner offers the contractor a lower amount than the contractor is due and states that, if the contractor does not accept the lower amount, the project owner would have to be put into liquidation and the contractor may in that event get even less than the amount offered, or nothing at all. The contractor accepts the reduced payment.

Possible offenders: Project owner and individuals involved.

Example 44: False statement as to settlement sum

A contractor has reached a confidential settlement with the project owner. The settlement amount includes an amount for payment in full to all sub-contractors on the project. The contractor then meets with the sub-contractors, and falsely states that he received a smaller amount from the project owner under the settlement agreement than he actually received. The sub-contractors believe the contractor and, as a result of what they believe to be an underpayment under the settlement between the contractor and the project owner, they agree to accept a reduced payment of sums due under their sub-contracts.

Possible offenders: Contractor and individuals involved.

Example 45: Over-manning by law firm

A contractor appoints a law firm to act in an arbitration on its behalf. The partner in the law firm who is head of construction sees the arbitration as a major opportunity to make money and allocates four lawyers to the arbitration when he knows that two lawyers would be sufficient. The partner advises the contractor that this number of lawyers is necessary owing to the complexity of the case and the volume of the work. The contractor accepts this advice. The partner quotes the contractor an hourly rate for each of the lawyers. Monthly bills are submitted by the law firm to the contractor and these are paid by the contractor.

Possible offenders: Partner.

Example 46: Excessive billing by lawyer

A lawyer working on an arbitration for a project owner bills more hours to the project owner than the lawyer actually spent working on the case.

Possible offenders: Lawyer.

Example 47: Complicity by lawyer

In relation to Example 39, the lawyer involved in drafting the witness statement is aware that the witness does not believe his evidence. However, despite this knowledge, the lawyer continues to draft the witness statement on the basis that it is true, and allows the witness statement to be put forward in support of the claimant's case.

Possible offenders: Lawyer.

SECTION 3

ANTI-CORRUPTION RULES FOR INDIVIDUALS

Breach of these Rules may result in the following consequences for the individual:

- **criminal conviction, which may result in fines and/or imprisonment;**
- **civil claims for compensation;**
- **dismissal from employment or other disciplinary action.**

Personal safety: Do not comply with these Rules if you believe that, in doing so, you will endanger your personal safety or that of another person.

1. Act at all times honestly and without deception.
2. Do not knowingly, with wilful blindness or recklessly do any of the following, or participate in any activity which involves any of the following:
 - Offer, give, demand or accept any bribe or other improper advantage.
 - Participate in any dishonest or deceptive activity in relation to any pre-qualification, tender or nomination process.
 - Provide, conceal, or approve work, materials, equipment or services which are not of the quality and quantity required under contract.
 - Provide false, inaccurate or misleading information.
 - Dishonestly withhold information.
 - Make or submit false, inaccurate, misleading or exaggerated records, invoices, claims, applications for variations or extensions of time, or requests for payment.
 - Dishonestly refuse or fail to approve, or delay in approving, work, materials, equipment, services, invoices, claims, applications for variations or extensions of time, or requests for payment.
 - Dishonestly refuse or fail to pay, or delay in paying, sums due.
3. If you are a director or officer of, or have any management responsibility for, a company, you must act as follows:
 - You must make proper enquiries regarding any suspicion of corruption of which you become aware.
 - You must take reasonable preventive measures to stop corruption for which the company may be liable.
 - You must not instruct, authorise or condone, expressly or impliedly, any corrupt activity.

SECTION 4

WHAT TO DO WHEN CONFRONTED WITH CORRUPTION

- 4.1 This Section recommends actions which individuals and companies should take when confronted with corruption.
- 4.2 The risks of being involved in corruption may far outweigh the potential personal or corporate benefits that may flow from such corruption. If convicted of corruption, an individual may face a lengthy prison term and claims for compensation, and may find it difficult to obtain employment of any merit. Companies may suffer fines, criminal conviction, debarment, financial loss and reputational damage.
- 4.3 **Generally, individuals and companies:**
- (1) **should avoid involvement in any corrupt situation, or**
 - (2) **if they have unintentionally become involved in a corrupt situation, should withdraw from it as soon as they become aware that it is corrupt.**
- 4.4 The three tables in this Section are as follows:
- Table 1: Corrupt Situations – Preparatory steps: These are the suggested steps that a company and an individual should take prior to commencing work in a particular jurisdiction in order to ensure that the company and its officers and employees are suitably equipped to deal with corrupt situations.
- Table 2: Corrupt Situations – Possible actions for individuals: This table considers 9 situations in which individuals may be confronted with corruption and makes suggestions in relation to the individual's legal position, direct action that may be taken, recording the event, and reporting the event.
- Table 3: Corrupt Situations – Possible actions for companies: This table briefly lists the situations in which a company may encounter corruption and then discusses the categories of actions which a company should consider when dealing with corrupt situations.
- 4.5 The suggested actions in Tables 2 and 3 should be considered in the context of the following advice:
- (1) The actions in Table 2 are only those actions which an individual officer or employee might take. Any actions which may require a decision by the company are set out in Table 3.
 - (2) The actions suggested in Tables 2 and 3 are only *suggested* actions. The actions an individual or company actually take in a corrupt situation must be guided by the individual's or company's own assessment of the situation and how other persons involved may respond.
 - (3) The reports suggested in Tables 2 and 3 are only *suggested* reports. The decision by an individual or company as to whether to report a corrupt situation and, if so, to whom, must depend on the individual's or company's assessment as to how that report will be received and whether making such a report may have an adverse impact on the individual, any other person, or the company. For example, an individual will have to assess whether making a report to his company may lead to adverse discrimination against him by the company, or whether making a report to the authorities may place him in danger.
- 4.6 Note that this Section does not deal with anti-corruption measures such as corporate codes, due diligence or monitoring. It looks only at suggested actions for an individual or company when actually confronted with corruption.

TABLE 1
CORRUPT SITUATIONS
PREPARATORY STEPS

In order to be able to deal effectively with corrupt situations, companies must have reporting and advisory systems in place, and individuals and companies must be aware of the legal and corporate framework in which they are operating.

The steps in this Table should ideally be taken *prior* to commencement of work in a particular jurisdiction. If not taken prior to commencement, then they should be taken as soon as possible after commencement.

Preparatory steps by companies

(1) Corporate framework

- (a) Ensure that the company has a system in place:
 - (i) for officers and employees to report corruption, and
 - (ii) to advise and assist officers and employees who are confronted with a corrupt situation.
- (b) Ensure that this system enables officers and employees to make reports of corruption and receive advice confidentially and without fear of adverse discrimination.

(2) Legal framework

Obtain legal advice as to the following:

- (a) Whether, under the relevant law:
 - (i) it is a defence to bribery if it can be proved that a person paid a bribe only because there were threats of imminent harm to him or another;
 - (ii) it is an offence to fail to report corruption;
 - (iii) there is protection from self-incrimination;
 - (iv) there is protection for whistle-blowers;
 - (v) reporting of corruption may provide immunity from prosecution or mitigate any potential liability or penalty for corruption.
- (b) How reports of corruption may be made to the criminal authorities.
- (c) How records and witness statements of corrupt incidents should be made so that they are valid under the relevant law.
- (d) How a report of corruption should be made so as to avoid any risk of liability for defamation for the person making the report.

(3) Informing officers and employees

- (a) Ensure that officers and employees of the company are made aware, in writing, of all information under (1) and (2) above.
- (b) Train officers and employees in accordance with this Training Manual.

Preparatory steps by individual officers and employee

Officers and employees who are about to commence work in a new jurisdiction should ensure that they have been informed and trained as stated in the previous box.

TABLE 2
CORRUPT SITUATIONS
POSSIBLE ACTIONS BY INDIVIDUALS

Note: How an individual deals with a particular situation will depend on the circumstances. Every situation is different. The suggestions in the following table are for guidance only and should not be taken as prescriptive. Common sense and discretion need to be used on every occasion.

Situation (1) : An express request for a bribe is made to you (but is not accompanied by threats).

Example: You are informed that, in order for your company to receive a contract payment due to it, you will need to pay 10% of the due amount to a manager of the paying company.

Legal position: If you pay a bribe in this situation, then it is likely that you and your employer will be liable for bribery.

Caution: Do not do or say anything which could put you or another person in danger.

Suggested direct action:

- Politely refuse to pay the bribe.
- If the demander persists with the request for a bribe, inform him that your employer prohibits payment of bribes and that, if you pay the bribe, you will have to report it to your employer who will then report it to the demander's employer and the criminal authorities.
- If the demand is made by a government official, and there are government procedures in place to report the official, then inform the official that these procedures would require you to report.
- If the situation is not resolved, ask to see a more senior official or manager.
- If this request is refused, or if the senior official or manager is unhelpful, say that your company will make a formal complaint to one or more of the relevant government department or company which is responsible for making the payment, the project owner, the funders, your embassy, and the criminal authorities.

Make a record of the event

- Make a detailed record of the event.
- If possible, obtain witness evidence of the event. Such evidence should, if possible, be in the form of written witness statements that are legally valid as evidence in the relevant jurisdiction.

Suggested reporting of the corruption

- If you believe that your employer has proper reporting procedures, then:
 - Report the incident to the relevant officer of your employer.
 - Request, if necessary, that your identity be kept confidential by your employer.
 - If appropriate, provide your employer with copies of your record and witness statements of the event. Ensure that you keep the originals of these documents unless you feel that it is safe to hand them to your employer. If you hand over the originals, keep copies.
- If you do not believe that your employer has proper reporting procedures and/or you are concerned that making a report may have an adverse impact on you, then consider the situation carefully before deciding whether or not to make a report to your employer.
- If you do not make a report to your employer or if, having made a report to your employer, you think that the employer is not taking adequate action, then consider reporting (anonymously or otherwise) to:
 - any independent assessor or monitor appointed in relation to the project;
 - your local embassy;
 - the criminal authorities.

Situation (2) : An express request for a bribe is made to you (and is accompanied by implicit or explicit threats to your safety or that of another).

Example: You are stopped by an armed policeman at a road-block. He acts in a menacing manner and demands payment in return for allowing you to continue. You anticipate that he may harm you and/or your passengers if you do not pay.

Legal position: In a number of jurisdictions, you would not be liable for bribery if you made a payment in this situation. However, this may not be the case in all jurisdictions. Even in those jurisdictions where you would not be liable, you may need, in order to avoid liability, to be able to prove that you reasonably feared for your or your passengers' safety.

Caution: Do not do or say anything which could put you or another person in danger.

Suggested direct action:

- If your personal safety or that of another person would be endangered by a refusal to pay, then pay the bribe.
- Even if the making of threats is not a defence to liability, it is better to pay the bribe than to endanger your or another person's safety.

Make a record of the event: As for Situation (1)

Suggested reporting of the corruption

- If it is a defence to a charge of bribery that you paid in circumstances where you reasonably feared for your safety, then make reports as in Situation (1).
- If it is not a defence to a charge of bribery that you paid under threat of personal harm, then you may be incriminating yourself by making a report. Take independent legal advice before taking any further action. Alternatively, or in addition, your employer may be able to provide you with confidential advice in this situation. You will also need to consider your position if reporting corruption is a legal obligation in the particular jurisdiction, and so, by failing to report the incident, you may be committing a further offence.

Situation (3) : A payment is demanded from you which you suspect may include a hidden bribe.

Example: An "expediting" fee is required by a government official to issue a permit in circumstances where the legitimacy of the fee is not clear, or a fee is demanded which the official claims is legitimate but which is higher than the published fee or appears to be disproportionately high given the action required.

Legal position: If you make the payment knowing or suspecting that it includes a bribe, and it does include a bribe, then it is likely that you and your employer will be liable for bribery.

Caution: Do not do or say anything which could put you or another person in danger.

Suggested direct action:

- Politely ask for documentary proof that the sum is payable, stating that you must account for all expenses to your employer, and that you will need an official receipt.
- If documentary proof and receipt are not provided, refuse to pay.
- If the demand is made by a government official, and there are government procedures in place to report the official, then inform the official that these procedures would require you to report.
- If the official refuses to issue the necessary permit or whatever is required, ask to see a senior official.
- If this request is refused, or if the senior official is unhelpful, say that your company will make a formal complaint to one or more of the relevant government department, the project owner, the funders, your embassy, and the criminal authorities.

Make a record of the event: As for Situation (1)

Suggested reporting of the corruption: As for Situation (1).

Situation (4) : A situation arises where it appears that a bribe is expected from you in order for a function to be carried out.

Example: Inordinate delay in obtaining a permit suggests that the official is expecting a bribe even though no express demand has been made.

Legal position: If you pay a bribe in this situation, then it is likely that you and your employer will be liable for bribery.

Caution: Do not do or say anything which could put you or another person in danger.

Suggested direct action:

- Politely ask the official for the reasons for the delay.
- If the reasons fall within any of Situations (1) to (3) above, then follow the advice in the appropriate section.
- If the reasons are inadequate, ask to see a senior official.
- If the request to see a senior official is refused, or if the senior official is unhelpful, say that your company will make a formal complaint to one or more of the relevant government department, the project owner, the funders, your embassy, and the criminal authorities.

Make a record of the event: As for Situation (1)

Suggested reporting of the corruption: If you believe that the inaction is due to corruption rather than incompetence or if you are unsure as to the cause, then report as for Situation (1).

Situation (5) : A senior manager requires you (as a more junior officer or employee) to participate in bribery or fraud.

Example: You are requested by a senior person in your company to participate in:

- Bribery, in order to help the company to make a profit or win a contract, or to obtain a certificate, permit or payment.
- Fraud, in order to help the company increase its profit or avoid loss or liability (for example, by submitting an inflated claim, or by concealing a defect so as to avoid the company incurring rectification costs).
- Bribery and fraud, where, for example, as company legal adviser, you are asked to draft an agency agreement which you suspect conceals a bribe arrangement.

Legal position: If you participate in the activity knowing or suspecting that bribery or fraud is involved, it is likely that you and your employer will be liable for bribery or fraud. It will not be a defence for you to say that you were requested to commit the offence by a senior person, or that you were not personally benefiting, or that you thought it was normal business practice. If you are caught, it is possible that the company's senior management will disassociate themselves from you so as to avoid incurring liability themselves.

Caution: Do not do or say anything which could put you or another person in danger.

Suggested direct action:

- Refuse to participate in the bribery or fraud – even if you are threatened with dismissal or demotion. It is not worth it to you personally. If you participate and are caught, you face personal criminal liability and possible imprisonment.

Make a record of the event: As for Situation (1)

Suggested reporting of the corruption: As for Situation (1).

Situation (6) : You discover bribery or fraud in your company or its business partners (and you are neither an officer nor senior manager).

Examples:

- You are involved in activity which you did not initially realise was corrupt, such as where you are preparing a claim on the basis of records that you discover have been falsified.
- You discover that someone working for your own company, or for one of your company's business partners, has taken corrupt action, such as paying a bribe or approving the delivery of defective materials.

Legal position: If as a junior employee, you were not involved in the activity, it is unlikely that you would be liable. If you were involved in the activity, but you did not know or suspect that there was any bribery or fraud involved then, it is unlikely that you would be liable for taking part in the activity. However, if you *continue* to take part in the activity once you have discovered or suspect that there is bribery or fraud, then it is likely that you will incur liability.

Caution: Do not do or say anything which could put you or another person in danger.

Suggested direct action: Play no part, or no further part, in the activity in question.

Make a record of the event: As for Situation (1)

Suggested reporting of the corruption: As for Situation (1).

Situation (7) : As an officer or senior manager, you discover that an individual or organisation for which you have management responsibility has paid a bribe or committed fraud.

Examples:

- A project manager discovers that a site manager over whom he has management responsibility has been taking bribes to approve short delivery of materials.
- A commercial director discovers that a claims manager over whom he has management responsibility has been submitting false claims.

Legal position: It is likely that you would not be liable for bribery or fraud while you did not know or suspect or turn a blind eye to the possibility that there was any bribery or fraud taking place. However, once you have discovered or suspect that there is corruption, then, as you are the person in authority, it is likely that you will incur liability if you do not make full enquiries and take all reasonable steps to put a stop to the corruption.

Caution: Do not do or say anything which could put you or another person in danger.

Suggested direct action:

- Make full enquiries to establish what has happened and whether any other company officers or employees are involved.
- If the corruption is continuing, then take all reasonable steps to put a stop to the corruption.
- Require all relevant documents and evidence to be collected together.
- For further follow up action to be taken by your employer, see Table 3.

Make a record of the event: As for Situation (1)

Suggested reporting of the corruption:

- If you are not a director, report the matter to the relevant responsible director.
- If you are a director, report the matter to the board.
- For further reporting by your employer, see Table 3.

Situation (8) : As an officer or senior manager, you discover that your company is involved in a cartel.

Example: Several companies agree that they will share the market. When they tender for a particular project they secretly agree in advance which of them will win the project and at what price. The other companies then bid at a higher price in order to ensure that the selected company is the successful bidder.

Legal position: As for Situation (7). In addition, in a number of jurisdictions, immunity from prosecution may be given to the first company in a cartel to report the cartel to the authorities. Even if it is not the first to report the cartel, some mitigation of liability or penalty may be available if a company reports the cartel and/or co-operates with the authorities.

Caution: Do not do or say anything which could put you or another person in danger.

Suggested direct action: As for Situation (7).

Make a record of the event: As for Situation (1)

Suggested reporting of the corruption: As for Situation (7).

Situation (9) : You discover that a competitor of your employer has secured a contract through bribery.

Example: Your company is both the best technical and the lowest priced bidder. Despite this, one of your competitors wins the contract. You receive a tip-off that a bribe was paid by your competitor.

Legal position: It is unlikely that you, as an individual, would incur liability in this situation provided you have not been complicit in any way in the bribery.

Caution: Do not do or say anything which could put you or another person in danger.

Suggested direct action:

- Make full enquiries to establish what has happened.
- Require all relevant documents and evidence to be collected together.
- For further follow up action to be taken by your employer, see Table 3.

Make a record of the event: As for Situation (1).

Suggested reporting of the corruption: As for Situation (7).

TABLE 3
CORRUPT SITUATIONS
POSSIBLE ACTIONS BY COMPANIES

Note: How a company deals with a particular situation will depend on the circumstances. Every situation is different. The suggestions in the following table are for guidance only and should not be taken as prescriptive. Common sense and discretion need to be used on every occasion.

<u>Situations</u>
<p>A company may become involved in corruption or may need to report corruption where:</p> <ol style="list-style-type: none"> (1) An officer or employee of the company reports that someone has demanded a bribe from him which he has not paid. (2) An officer or employee of the company reports that he has paid a bribe under threat of personal harm. (3) An officer or employee of the company, in the course of his employment, commits bribery or fraud which has not been authorised by the company. (4) An officer or employee of the company, in the course of his employment, commits bribery or fraud which has been authorised by the company. (5) A related company or business partner of the company pays a bribe or commits fraud in relation to which the company could be implicated. (6) The company is involved in a cartel. (7) The company discovers that it has been the victim of bribery or fraud committed by another company.
<u>Possible Actions</u>
<p>(1) <u>Cautions</u> There are certain risks inherent in taking action in response to corruption. They include:</p> <ol style="list-style-type: none"> (a) Risk of personal harm to those reporting the corruption or seeking to remedy it. (b) Risk of discrimination against individuals and companies who speak out against the corruption. (c) Risk of incurring liability for defamation if accusations of corruption cannot be substantiated. (d) Risk of financial loss if reports of corruption are made against an organisation or individual which owes money to or has some other financial hold over the organisation reporting the corruption. (e) Risk of financial or commercial harm if reports are made against an influential organisation or individual. <p>It is necessary to keep these risks in mind when considering the possible actions listed below.</p>
<p>(2) <u>Safety</u> The safety of the individual is paramount. If an officer or employee is at personal risk as a result of reporting corruption or being involved in a corrupt situation, the company should take reasonable steps to protect the individual. This could include making the appropriate payment to avoid the individual being harmed, removing the individual from the dangerous situation, and/or requesting police protection.</p>
<p>(3) <u>Making proper enquiries and collecting evidence</u> The company should establish the facts and collect all necessary evidence by:</p> <ol style="list-style-type: none"> (a) Where possible and reasonable, requesting reports of corruption to be made in writing and signed by the individuals making them. (b) Making enquiries to establish the facts. (c) Collecting together all relevant documents and other evidence. (d) Obtaining legally valid witness statements. (e) Preserving all evidence for a period of at least 20 years. (This is because, in many jurisdictions, there is no limitation period for criminal prosecutions).

(4) Protecting whistle-blowers

If the company does not have in place a reporting system whereby reports can be made anonymously by employees, then it should ensure that officers or employees who have reported corruption are protected by:

- (a) Keeping their identity confidential.
- (b) Keeping details of the incident confidential, save for the need to make further reports, as suggested below.
- (c) Ensuring that they do not suffer adverse discrimination from other officers or employees within the company.

(5) Obtaining legal advice

The company should obtain legal advice as to its position under local law and under the law of its home country as to:

- (a) Which individuals and companies may have incurred liability for the corruption offences in question.
- (b) The penalties that might apply to each individual and company implicated.
- (c) Whether failure to report the corruption to the criminal authorities would be an offence.
- (d) Whether the law provides protection from self-incrimination.
- (e) In the case of corruption perpetrated by the company, whether the corruption can be remedied or other steps taken so as to mitigate or avoid liability.
- (f) In circumstances where the company is part of a cartel, whether the company would receive immunity from prosecution, or some mitigation of liability, if it reported the cartel.
- (g) The nature of evidence that would be legally valid in a court of law.
- (h) What civil action may be taken *against* the company (in situations where the company has perpetrated bribery or fraud).
- (i) What civil action may be taken *by* the company (in situations where the company may have been the victim of bribery or fraud).
- (j) What other steps should be taken to protect the interests of the company and its relevant officers and employees.

(6) Reporting corruption

- (a) Reporting corruption - where failure to report corruption is a criminal offence, but the company and its employees are not implicated in the corruption

In this situation, the company should make such reports as are necessary to comply with the law.

- (b) Reporting corruption - where failure to report corruption is a criminal offence, and the company and its employees are implicated in the corruption

In this situation, the company is obviously in a difficult position as, if it reports the corruption, it risks incriminating itself and/or its employee(s). Alternatively, if it does not report the corruption it will be committing a further criminal offence. It is not possible in this situation to provide advice as to the action that should be taken. However, in deciding whether or not to make a report, the company should consider, and take legal advice regarding, the following factors:

- (i) What are the risks of being prosecuted for failing to report the corruption and the likely penalties?
- (ii) What are the risks of being prosecuted for the corruption offence(s) in question and the likely penalties?
- (iii) Is there any protection against self-incrimination under the relevant law?
- (iv) Would reporting the corruption:
 - result in immunity from prosecution for the corruption in question?
 - mitigate any criminal penalty that may be imposed for the corruption in question?
 - mitigate any other penalty (such as debarment) that may be imposed for the corruption in question?

- (c) Reporting corruption – where failure to report corruption is not a criminal offence, and the company and its employees are not implicated in the corruption

In this situation, the company should consider the following factors in deciding whether or not to make a report:

- (i) Is the company under some other legal obligation to report the corruption (for example, if a company has signed an anti-corruption agreement which obliges reporting)?
- (ii) Would reporting the corruption mitigate:
 - any criminal penalty that may be imposed for any **other** corruption for which the company is or might be liable? and/or
 - any other penalty (such as debarment) that may be imposed for **other** corruption for which the company is or might be liable?
- (iii) Is the company generally committed to trying to eradicate corruption and would reporting corruption assist in doing this?
- (iv) What are the penalties for corruption under the relevant law? Are they extreme (such as execution), and would the company be comfortable reporting corruption in such circumstances?
- (v) Can the persons or companies responsible for the corruption be persuaded to undo the corruption without having to report the matter to the criminal authorities?
- (vi) Would the company or any of its employees be placed in any danger if the corruption was reported?

- (d) **Reporting corruption – where failure to report corruption is not a criminal offence, but the company and/or its employees are implicated in the corruption**

In this situation, the company would probably incriminate itself and/or its employees if it reported the corruption. In considering whether or not to make a report, it should inter alia consider whether reporting the corruption would:

- (i) result in immunity from prosecution for the corruption in question;
- (ii) mitigate any criminal penalty that may be imposed for the corruption in question;
- (iii) mitigate any other penalty (such as debarment) that may be imposed for the corruption in question;
- (iv) mitigate any criminal penalty that may be imposed for any **other** corruption for which the company is or might be liable;
- (v) mitigate any other penalty (such as debarment) that may be imposed for any **other** corruption for which the company is or might be liable.

(7) Undoing or remedying corruption

If the company discovers that an officer or employee of the company has perpetrated some corruption which has or may result in the company receiving some illicit benefit, then consider how to undo or remedy the situation. This may involve:

- (a) Taking legal advice as to how to remedy the corruption without self-incrimination.
- (b) Withdrawing from any procurement process, or resultant contract, where the company has been or may be awarded the contract because of corrupt activity.
- (c) Repaying any benefit obtained as a result of fraud.
- (d) Considering any other consequences of the initial corruption which may themselves constitute criminal offences. Such offences may include false accounting which may occur where a bribe is falsely described as an agency commission in the accounts, a tax offence where a bribe is wrongly deducted from income, or money-laundering where the proceeds of the crime are dealt with.

(8) Seeking a remedy for corruption

Where the company has been or may be a victim of corruption (for example, where it may lose or has lost a tender because of bribery by a competitor, or where it has paid out money on the basis of a fraudulent claim), the company should consider:

- (a) Requiring the corrupt party to take remedial action. (For example, to withdraw from the procurement process or repay the money obtained through the claims fraud.)
- (b) Requesting other parties who are in a position to do so to take remedial action. (For example, a project owner could be requested to disqualify the corrupt party from the procurement process or to terminate the contract which has been corruptly awarded to the party.)
- (c) Informing all other parties who may be affected by the bribery or fraud (such as other bidders) of the corruption.
- (d) Taking legal action against the corrupt company and any other party who participated in the bribery or fraud (for example, officers of the project owner in relation to the corrupt procurement process, or corrupt consultants who prepared the fraudulent claim).
- (e) Reporting the matter to the criminal authorities (as to which see (6) above).

(9) Disciplining officers or employees

Officers and employees who have engaged in corrupt activity during the course of their employment should be appropriately dealt with by the company. Disciplinary action would range from a warning for a minor offence to dismissal for a serious offence.

(10) Reviewing company policy and procedures

Both where the company has perpetrated corruption and where the company has been a victim of corruption, the company should:

- (a) Examine whether the situation arose because of some inadequacy in its procedures.
- (b) If so, it should take immediate steps to improve its procedures.

(11) Reviewing response and assistance provided by governments, funders, embassies and the criminal authorities

Where the company has sought the assistance or advice of government departments, funders, embassies or the criminal authorities, the company should:

- (a) Assess the quality and speed of the response and assistance, if any, provided by those bodies.
- (b) Make reports to those bodies as to their response and assistance, stating how such response should be improved (if necessary).
- (c) Make reports to other authoritative bodies where response and assistance has been inadequate and request them to take action to require the relevant bodies to improve their response.