

Contractor Antibribery Compliance Programs

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During the past month, there have been numerous reports of construction company officials being charged with commercial bribery. On December 21, 2010 the U.S. Department of Justice (DOJ) announced that a former construction company official, Wendel Torres plead guilty to providing an illegal gratuity to the former chief of the construction division of the Fort Carson Directorate of Construction in Colorado Springs, Colorado. Mr. Torres faces a maximum sentence of two years in jail and a \$250,000 fine. The fine could be increased to twice the gain derived from the crime or twice the loss suffered by the victims of the crime.

On November 19, 2010, the DOJ announced that James Woodason, a former department manager of purchasing of Consolidated Edison of New York had plead guilty to a four count felony indictment charging that he accepted approximately \$807,000 in bribes from two ConEdison pipe suppliers. Mr. Woodason faces a possible prison sentence of up to ten years and fines of twice the amount of the bribes that he accepted.

The Antitrust Division of the DOJ has announced that it is conducting an ongoing federal antitrust investigation of bid rigging, bribery, fraud and tax related offenses in the power generation industry. The investigation is being conducted by the Antitrust Division's New York field office with the assistance of the Federal Bureau of Investigation and the Internal Revenue Service.

Earlier in 2010, the United Kingdom enacted the UK Bribery Act of 2010. This is a comprehensive law addressing all types of illegal payments including entertaining and gift giving. In commenting on the new law, Richard Alderman, Director of the UK Serious Fraud Office indicated that the UK intended to follow the example of U.S. enforcement officials and prosecute the top corporate officers of companies engaged in commercial bribery.

All contractors should have an Antibribery Policy as part of their Corporate Governance policies. The policy should clearly define what constitutes commercial bribery under the various laws that cover the company's activities. This includes municipal regulations, state statutes, federal statutes and in many cases, statutes in foreign countries in which you are doing business.

As an example, every contractor is aware of the fact that giving the contacting officer a cash payment of \$25,000 in order to get a bid is a criminal offense. In the same manner, treating the contracting officer and his family to an all expense paid week in the Bahamas is also clearly illegal. But where do you draw the line? Can you bring a dozen donuts for the contracting officer's staff when you visit his offices? Can you take a contracting officer out for a business lunch? If lunch is okay, how about dinner? Dinner with spouses? Dinner and the theatre with spouses? What about a business trip to our plant? What about a business meeting at a resort? What are the rules?

Contractors should have a company manual spelling out exactly what corporate employees can do and what they can't do. The company should have a procedure to enable employees to ask questions when there is some doubt. Company employees must recognize that any form of bribery is prohibited and those who violate the company policy will be fired.

This type of a policy must be established by top level management. The corporate CEO and President must endorse the policy and make it clear to all that the policy will be strictly enforced even if it means that you will not get certain contracts. The risks of violating the law including large fines, jail sentences and debarment from future bidding must be fully explained.

A system should be put in place for monitoring compliance and recognizing "Red Flags." If you are told that the only way to do business without problems in Country X is to pay off certain officials and your company is doing business in country X with no problems, you should see that Red Flag waving. If a problem is found, your procedures should include the steps to take to investigate the problem, develop a course of action to deal with the issues involved and manage the risk in the most efficient manner.

This is an issue that affects both large and small companies. If you are the President of a smaller construction company, don't assume that this can't affect you. If one of your key employees has paid off a contracting officer without your knowledge and is discovered, the problem is your problem. When that employee is asked whether you as President of the company knew of the payoff or whether he did it without your knowledge, he will try to push the responsibility to you and say that you knew what was happening. If you don't have a compliance policy in place, you will have a tough job defending yourself.

We are living in an era where corporations are being held to a higher ethical standard. Construction companies must include antibribery policies as part of their corporate governance programs.

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