Fenwick Elliott
The construction & energy law specialists

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Welcome to the December edition of ***Insight***, Fenwick Elliott's newsletter which provides practical information on topical issues affecting the building, engineering and energy sectors.

In this issue we review the Bribery Act & New Act

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Christmas 2012 round-up: The Bribery Act & the changes to the Housing Grants Act

This Christmas issue of Insight reviews the two most anticipated pieces of legislation to affect the construction industry over the past 18 months: the Bribery Act 2011 and Part 8 of the Local Democracy, Economic Development Act 2009, and asks (i) where are we now and (ii) what might the future hold?

The Bribery Act: 1 July 2011 to present

The Bribery Act 2011 (the "Bribery Act") came into force on 1 July 2011,[1] and in April 2012 the Serious Fraud Office (the "SFO") (the Bribery Act's prosecuting body) was brought under the control of a new Director, David Green QC. Under Mr Green's leadership, on 9 October 2012, the SFO published revised policy statements in relation to (i) the self-reporting of any possible breaches of the Bribery Act (ii) facilitation payments and (iii) corporate hospitality. The new policy statements took immediate effect and superseded the original statements of policy or practice that were previously made by or on behalf of the SFO. The policy statements are therefore now instructive as to how, in practice, the SFO might proceed to prosecute any breaches of the Bribery Act that it might discover.

Self-reporting

The SFO's original guidance stated that by self-reporting at an early stage, organisations may be able to avoid prosecution by reaching a civil settlement with the SFO. Indeed, civil settlements have been reached on a number of occasions.

The SFO has now retreated from its previous position in that the new policy on self-reporting does not provide for dialogue between the SFO and those who self-report. This will make it much more difficult for civil settlements to be reached. The SFO confirms it "*will always listen to what a corporate body has to say about its past conduct*" but the new policy simply sets out the SFO's new powers to prosecute and the tests that it will apply when prosecuting. This is much less collaborative than was the case previously and represents a significant departure from the previous guidance which indicated that the SFO would be prepared to work with self-reporting organisations towards achieving a civil settlement. Instead, prosecution now appears to be the first port of call.

Self-reporting will now be just one of the factors that the SFO will take into account in any decision to prosecute. Under the new guidance, any self-reporting must be part of a "*genuinely proactive approach adopted by the corporate management team when the offending is brought to their notice*", and each case will turn on its own facts. Further, the SFO will provide *"no guarantee that prosecution will not follow"* where an organisation has self-reported and this will place organisations that discover corruption in a difficult position when making any decision as to whether to self-report.

Facilitation payments

The SFO's original guidance on facilitation payments (payments intended to influence government officials) comprised six criteria the SFO would consider in deciding whether to prosecute. These included whether the organisation had a clear policy on facilitation payments and whether it was taking practical steps to curtail any illegal payments. Whilst this guidance has not changed in the strict sense, the SFO has restated its position that all facilitation payments are illegal and if, on the evidence, there is a realistic prospect of conviction, the SFO will prosecute if it is in the public interest to do so.

However, the focus now seems to be on "*serious or complex*" facilitation payments where significant international elements are present and/or where involved legal or accountancy analysis might be required. Where an isolated payment is made in circumstances where the organisation had a clear, appropriate policy in place and properly followed through that policy by its actions, it is unlikely this would constitute a *"serious or complex"* payment and prosecution may be avoided.

Corporate hospitality

The SFO's previous guidance on corporate hospitality also took the form of a six-point list of circumstances where organisations' expenditure would be less likely to lead to prosecution.

The new policy simply restates the existing Bribery Act and associate guidance re-iterating that *"Bona fide hospitality or promotional or other legitimate business expenditure is recognised as an established and important part of doing business".* Above and beyond very obvious indicators of lavish expenditure and the correlation between that and the organisation's business activities, the new guidance does not provide any examples of the type of business expenditure that is likely to be regarded as reasonable and proportionate, and therefore not subject to scrutiny under the Bribery Act. That said, it confirms that if there is an element of "*improper performance*" by the recipient of hospitality where another person is alleged to have been bribed, or where the hospitality was intended to influence the foreign public official so as to obtain or retain business in order to gain an advantage in the conduct of business, then prosecution will be more likely.

1. Please see **http://www.fenwickelliott.com/files/insight_issue_1.pdf** for a summary of the Bribery Act shortly after its enactment.

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Civil recovery orders

Each of the new policy statements confirm that, as an alternative to or in addition to any criminal prosecution, the SFO may consider the use of a civil recovery order under the powers that are open to it under the Proceeds of Crime Act 2002 ("Proceeds of Crime Act").

Under the Proceeds of Crime Act, the SFO can elect to bring civil proceedings if it considers there is insufficient evidence to warrant a prosecution, or if a prosecution would not be in the public interest. The aim of a civil recovery order is to strip the offending organisation of its criminal gains.

The publishing giant, Oxford University Press, became the most high-profile subject of such a civil recovery order this summer in relation to sums it received that were generated through the unlawful conduct of its subsidiaries in Tanzania and Kenya. The subsidiaries used illegal methods to win public tender contracts to sell educational publications between 2007 and 2010 and Oxford University Press was fined £1.9 million to reflect the dividend income received from these subsidiaries. The criteria for bringing a prosecution had not been met in that, amongst other reasons, key material obtained through the SFO investigation was not in an admissible format for use in criminal proceedings and a civil recovery order was therefore pursued.

If civil recovery is used more, organisations will need to be prepared to accept that far more information about any transgressions of the Bribery Act will enter the public domain than has been the case previously.

The Bribery Act: what does the future hold?

The three new policy statements[2] that were brought in by David Green QC were the result of his wish to focus the SFO's efforts on deterring misconduct through the prosecution of high-profile corruption, as opposed to encouraging compliance by opening lines of communication with organisations.

Whilst this is the case, the policy statements do not confirm this and they are actually quite blunt. Instead, they increase the severity of the sanctions for breach of the Bribery Act by reducing the focus on collaboration and providing for direct enforcement of the Bribery Act and its associated guidance. Organisations should therefore make sure they continue to maintain "*adequate procedures*" to prevent bribery and review their policies and procedures to ensure they do not relate to the previous guidance.

With regard to self-reporting, the landscape has become much starker and it is likely that the benefits of self-reporting may now be outweighed by the risks. However, until such time as the SFO brings a criminal prosecution for any failure to self-report, there are no cases to serve as a yardstick against which the benefits of self-reporting can be judged.

As far as facilitation payments and corporate hospitality are concerned, again, until there is judicial guidance as to the exact application of the Bribery Act in these two areas, an element of uncertainty will remain as to what might constitute a breach of the Bribery Act in these areas.

Changes to the Housing Grants Act[3]: 1 October 2011 to present

After around eight years of debate and months of delay, Part 8 of the Local Democracy, Economic Development and New Act 2009 (the "New Act") was implemented on 1 October 2011. Many in the construction industry (and, indeed, construction lawyers alike) thought it would change the landscape of the very familiar payment regime that had been in place for many years and that a flurry of case law would invariably follow.

But all this concern was unwarranted as, in practice at least, very little seems to have changed. This is so despite the fact that anecdotal evidence suggests that not everyone understands the new payment regime. The reality is that there have been a few (unreported) cases involving enforcements and the requirement to serve a payless notice, but the issues that were raised in those cases were not new.

The New Act: what does the future hold?

It might be that we will be in a position to say more about the New Act this time next year but, that said, many in the industry expected cases to start coming through the courts in the first half of this year. It is likely over time that some of the more perplexing issues that arise from the New Act (for example, what a payless notice should contain) will be clarified by the courts. For the time being, the construction industry appears to have reached its own understanding as to how the New Act should operate in practice. That seemingly being so, the number of adjudications and reported adjudication enforcement decisions are on the increase and therefore some contested disputes in relation to some of the more contentious aspects of the New Act are probably likely at some point during 2013.

Conclusion

Bribery Act

The revised Bribery Act policy statements represent not so much a change of approach as a change of tone, albeit that change in tone may lead to an increase in the number of prosecutions brought by the SFO. In practical terms though, ultimately, provided organisations adequately address the risk of bribery in their policies and their policies are mirrored by their actions, then no further action should be necessary since matters should not escalate to a possible prosecution.

The New Act

Suffice to say in relation to the New Act that there is nothing to report at present, but the New Act may well be the subject of some judicial scrutiny next year. So watch this space!

Should you wish to receive further information in relation to this briefing note or the source material referred to, then please contact Lisa Kingston.
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2. The revised policy statements can be found on the SFO's website (**http://www.sfo.gov.uk**).
3. See Issue 2 of Insight which summarises the New Act and the Revised Scheme that accompanied it: **http://www.fenwickelliott.com/files/insight_issue_2.pdf.**