

International Chamber of Commerce
Policy and Business Practices

ICC ANTI-CORRUPTION THIRD PARTY DUE DILIGENCE: A GUIDE FOR SMALL AND MEDIUM SIZE ENTERPRISES

POLICY DOCUMENT

Prepared by the ICC Commission on
Corporate Responsibility and Anti-corruption

Introduction

Why SMEs need this Guide

SMEs are often on the receiving end of burdensome due diligence procedures of large multi-national companies. These requirements can be overwhelming and often companies feel they do not have sufficient resources to meet them. This Guide aims to address these concerns and inspire Small and Medium size Enterprises (SMEs) to engage in due diligence by creating achievable and manageable due diligence goals.

Following the Guide a company can:

- Know and have confidence in their counterparties;
- Through such knowledge and confidence meet the conditions for responsible investment;
- Avoid prosecution/reputational/financial damage from being implicated in an anti-corruption issue;
- Develop an ethical brand;
- Provide assurance to business partners, in particular larger organisations that they are an ethical company.

SMEs must also develop robust anti-corruption ethics and compliance procedures to ensure they minimise the risk of corruption and adhere to international anti-corruption standards. Understandably, many SMEs are overwhelmed by the extensive international anti-corruption legislation and the complex ethics and compliance procedures in place in larger, multi-national companies. However, ethics and compliance does not necessarily need to be on a grand scale and supported by a dedicated legal department. There are manageable ways in which smaller companies can protect themselves by better managing corruption risks. A key element to a simple but effective ethics and compliance programme is due diligence.

This is the focus of this Guide which sets out what due diligence is, why it is necessary, when it is necessary and how it can be implemented to protect a company from the risk of corruption as much as possible.

It provides practical advice on how SMEs can cost-effectively conduct due diligence on third parties they engage to perform services on their behalf. It focuses on corruption risks associated with engaging third party suppliers, contractors and consultants in an international and domestic setting and how those risks can be managed.

This tool will also assist SMEs create an effective due diligence procedure that fits into an overall ethics and compliance programme. For SMEs that do not have any ethics and compliance procedures in place, it can be considered a good starting point. The Guide can be used by any SME, of any size (even very small companies) or industry and it can be adapted so that the due diligence programme is tailored to the specific needs and industry in which the company operates.

Adoption of this Guide by SMEs will provide reassurance to prospective customers and can be used as evidence of an overall compliance commitment; the commercial benefits of which should not be underestimated.

Why SMEs should do Due Diligence on Third Parties

Corruption is “the abuse of entrusted power for private gain” and is “the single greatest obstacle to economic and social development around the world”.¹ Within business and government, corruption is used to induce a party to act improperly in return for any advantage. It can take the form of extortion, bribes, bribe solicitation², kickbacks, lavish gifts and hospitality, political and charitable donations. It is universally condemned and illegal in the majority of jurisdictions and the extent of international and national anti-corruption legislation and enforcement is increasing.

Corruption costs economies trillions each year and stifles economic growth. Corruption is insidious and erodes not only national economies but also the profitability of individual businesses.

Both companies that operate internationally or that are considering expanding their business into foreign jurisdictions and those that operate in a domestic setting often require third parties to provide services. It is this engagement of third parties that presents significant risks of corruption because the company has little control over the third party’s actions but crucially, can be held liable for bribes paid by them. It is therefore imperative that all companies ensure they know the background to the third parties they contract with in order to minimize the risk of engaging with a corrupt third party.

Due diligence is key to managing corruption risks associated with engaging third parties. It is a process of investigating their background. This will be particularly necessary when one considers retaining the services of an agent or other intermediary, who could be tempted to pay bribes in order to obtain business and thereby garner more easily a commission.

Many large international companies have anti-corruption and ethics and compliance procedures in place which include due diligence; indeed, it is smaller companies that are often required to respond to these requirements but many SMEs) do not have their own internal anti-corruption compliance procedures and do not conduct due diligence on the third parties they contract.

Companies that actively engage in due diligence, anti-corruption procedures and ethics and compliance more generally, benefit from the commercial advantages it brings. Principally, companies that have anti-corruption procedures reduce the cost of doing business, as corruption is a drain not only on national economies but also on the micro economies of businesses.

Companies can expect to see other commercial benefits from positive engagement in anti-corruption practices such as:

1. Assurance or otherwise that the third party:
 - a) Has the necessary skills and experience to provide the services for which they will be contracted;
 - b) Is a reputable and reliable business partner with a good track-record;

¹ Clean Business is Good Business, joint publication by the International Chamber of Commerce, Transparency International, the United Nations Global Compact and World Economic Forum Partnering Against Corruption Initiative

² “The act of asking or enticing another to commit bribery” <http://www.iccwbo.org/advocacy-codes-and-rules/areas-of-work/corporate-responsibility-and-anti-corruption/corruption-explained/>

- c) Is *bone fide* and will be less likely to defraud;
- d) Is charging a fair market price for their services (a company paying bribes may often charge more for its services in order to create a slush fund to pay bribes).

2. Not being associated with disreputable suppliers;
3. Being more readily and efficiently able to deal with the due diligence requirements of larger companies and being more attractive as a prospective counterparty;
4. Competitive advantage over competitors who are not engaged in ethics and compliance and become therefore the preferred choice for customers.

In general terms, SMEs have not yet been a focus for prosecutors and so have not had an urgent need to implement anti-corruption and compliance procedures. This is changing; law enforcement agencies are now not only investigating and prosecuting large multi-national companies but SMEs with an international presence are increasingly also the focus of prosecutors.

Notably, the US prosecuting agencies, the Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) have ever more resources to conduct company investigations.

Following a recent prosecution, the US Securities and Exchange Commission (the SEC) issued this warning “This is a wake-up call for small and medium-size businesses that want to enter into high-risk markets and expand their international sales. When a company makes the strategic decision to sell its products overseas, it must ensure that the right internal controls are in place and operating.”

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Section 1 – Back to Basics

The Law

It is not necessary for the purposes of this Guide to detail the plethora of national and international anti-corruption legislation³. It will suffice to note the following key points:

- In many jurisdictions bribery and corruption is criminalised within domestic legislation and generally speaking it will prohibit bribery of individuals in public office. Commercial bribery (i.e. not involving an individual who is in public office) is also a criminal offence in the majority of jurisdictions.
- Bribery and corruption of individuals in public office and who are in positions of influence is the most common and damaging form of corruption. For example, bribery is very common within public procurement. This is primarily the focus of international legislation and specifically the bribery of “foreign public officials”.

The OECD defines “foreign public official” as follows:

“Foreign public official” means any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; any person exercising a public function for a foreign country, including for a public agency or public enterprise; and any official or agent of a public international organization”

- International anti-corruption legislation has extra-territorial reach meaning that companies operating in jurisdictions other than their own can potentially be prosecuted under domestic law.
- For example, this means that a company that operates primarily in Europe and is involved in corrupt activity in Europe, but also trades on the US Stock Exchange, can be prosecuted in the US under US law⁴ for the corrupt activity.

³ For example, The United Nations Convention Against Corruption (UNCAC) 2003, the Organization for Economic Cooperation and Development (OECD) Anti-Bribery Convention 1999, the United States’ Foreign Corrupt Practices Act 1977 (FCPA), the United Kingdom’s Bribery Act 2010 (UKBA), The Inter-American Convention Against Corruption (IACAC) adopted by members of the Organization of American States 1996 and the Council of Europe Criminal and Civil Conventions 1999.

⁴ Foreign Corrupt Practices Act 1977

What is Due Diligence?

Due diligence is a term used to describe background investigation conducted on a third party which a company is considering contracting with. It is a process of examining the background of a potential business partner in an effort to assess and mitigate risks of corruption⁵. The aim is to ensure that corruption risks are identified, but (as described) it also provides an associated commercial benefit. By conducting due diligence, a company can gain an understanding of whether there are any corruption risks associated with the potential business partner, mitigate any risks identified (see section 3) and then make an informed decision about whether to enter into the contract or not. In the context of due diligence, risks are termed as “red flags” across industries and this term will be used throughout this Guide.

Due diligence is not a tick box exercise; it is a comparative and thoughtful process. Any red flags identified need to be considered in the context of the industry and jurisdiction in which the third party is operating in. The SME should not consider red flags as necessarily being preventative of contracting with potential partners. Straight-forward and cost-effective mitigation to address red flags can often be identified which allow the progression of the engagement and simultaneously protects the company. Any red flags identified need to be considered by those within the company who have experience of the industry and jurisdiction to enable them to make a careful judgement.

Due diligence can be conducted in a variety of ways and in varying degrees of depth and detail; this Guide will set out various approaches. For any company the most effective means of conducting background research on a third party will be to approach them directly and ask a series of carefully framed questions. This can be done in person; indeed in some circumstances it will be prudent to do so, or it can be conducted virtually depending on available resources. A standard questionnaire can be used to structure the interview (see Annex B). If a face-to-face or virtual interview is not possible, the questionnaire can be sent to the third party and an assessment can be made of the written responses which can be followed up with the third party. Not only will the responses to the questions provide the information the company is seeking, they will also provide an insight into the third party's attitude towards corruption and their understanding of applicable international anti-corruption legislation. Annex B of this Guide is a suggested questionnaire which is intended to be universal so that it can be sent to any third party a company is seeking to engage with (or indeed to third parties already engaged).

Due diligence is not conducted in isolation but is part of an overarching ethics and compliance programme. The following are the other common components of a typical ethics and compliance programme:

⁵ Due Diligence is also an assessment of other business risks such as conflicts of interest, credit risk, fraud, trademark, and copyright infringement and others. This behaviour can often be dishonest and may also indicate a risk of potential corruption. This Guide is focused on anti-corruption and so does not discuss these risks.

- A Code of Conduct, including proportionate anti-corruption policies
- Top-level commitment or tone from the top
- Training of staff
- Assessment of potential corruption risks
- A Whistleblower programme
- Internal monitoring and review
- Installing an ethics and compliance function, with a full-time or part-time employee

Whilst this Guide will not advise upon all of the above aspects of ethics and compliance, it is worth noting that many of these can be easily achieved and implemented by any company. For example an internal anti-corruption policy does not need to be extensive or burdensome. Those individuals working within the company who are contracting with third parties do not need to be trained comprehensively on the law; they simply need to know what the company requires of them.

Why is Due Diligence necessary?

Perhaps the most fundamental reason for a company to conduct due diligence is to ensure that it does not unwittingly conduct business with those who are involved in corrupt activity. This extends down the supply chain and so if a third party sub-contracts services to be provided under the contract, the company needs to ensure, either by contractual provision or by using its influence, that proportionate due diligence is conducted by the third party on the sub-contractor.

The reason why companies can be liable for the actions of third parties is because international laws seek to prevent them from paying bribes indirectly through intermediaries. This form of conduct was envisaged by legislators and therefore international legislation seeks to ensure that a company does not avoid prosecution by indirectly engaging in corrupt activity via a third party. Taking the US Foreign Corrupt Practices Act 1977 as an example, it imposes liability not only on companies with “actual knowledge of wrongdoing”, but also on those who deliberately avoid actual knowledge by “deliberate ignorance” or “unwarranted obliviousness” where a company should have been alerted to the probability of corrupt activity on the part of the third party⁶. In these circumstances and in many jurisdictions, it will not be a defence for a company to claim that it had no knowledge of the third party’s actions.

Competent due diligence will be critical in helping a company to assess whether there are any risks of corruption associated with the third party prior to engagement.

⁶ FCPA: A Resource Guide to the U.S. Foreign Corrupt Practices Act (2012), pg. 22

Due Diligence will achieve the following:

1. Confirmation that there are no identifiable risks of corruption associated with the third party; or,
2. Provide actual knowledge of corruption risks, or red flags, associated with the third party and the opportunity to assess and mitigate those risks at the outset (for further information see sections 2 and 3 below) which will reduce the risk of prosecution for corruption; and,
3. Lower the risk of corporate or individual prosecution for corruption.

When does Due Diligence need to be conducted?

A risk-based assessment

It will not be proportionate to conduct due diligence on every third party a company is considering contracting with; this is because the extent of the corruption risks will vary. Therefore, an assessment of the corruption risks should be made in order to focus due diligence on counterparties which pose the greatest risk. This will allow the most efficient use of limited resources.

The corruption risk of a third party will be determined on the basis of key factors (see below) and is a comparative process that requires judgement. There is no one formula that will be appropriate for every industry and company and so the company needs to bring its knowledge and experience to the process. This section will provide the company with an understanding of the factors to be considered in a risk-based assessment and how that knowledge can be used to determine whether a third party represents a high or low corruption risk. The outcome of this assessment will then inform the company about the extent of due diligence required (to be discussed in section 2).

It is possible to create a simple risk-assessment tool based on the factors most relevant to the company and industry it operates in, which will allow for third parties and contracts typical to the company to be easily determined as high or low risk. At the end of this section is a simple example of how this can be achieved.

A risk assessment must include the following factors:

1. Is the third party a public official (including entities that are owned or controlled by a government/government official) or will the third party be interacting with public officials in order to perform the contract?
2. The country the counterparty is based in and the country where the services are being performed;

3. Industry;
4. The value of the contract; and
5. The nature of the work/services to be performed.

1. Is the third party a public official or will the third party be interacting with public officials in order to perform the contract?

Third parties that present the biggest risk of corruption or perception of corruption are those that are public officials, connected to public officials or third parties that are likely to interact with public officials in the course of the performance of the contract. This is because a public official is in a position of influence and could use this influence in relation to the contract or the contract could affect decision making in their official role. The public official and third party could be working in concert, with corrupt payments being made to the public official. Even if there is no evidence of corrupt activity, the mere association of a public official could create the perception of a corrupt relationship. As noted above, international legislation generally, expressly prohibits the bribery of foreign public officials.

Accordingly, contracts with third parties who are public officials, connected to or likely to interact with public officials are high risk and due diligence should always be conducted.

A (foreign) public official can include but is not limited to the following:

- An official or employee of any government, or any agency, ministry or department of the government (of any level).
- Any individual acting in an official capacity for a government regardless of rank or position.
- Official or employee of a company wholly or partially state-owned.
- A political party or official of a political party.
- A candidate for political office.
- Officer or employee of any public international organisation, such as the United Nations or the World Bank.
- Family member of any of the above.

Third Parties connected to public officials or third parties that are likely to interact with public officials can include, but are not limited to the following:

- Processing agents: freight forwarders, customs agents, couriers, visa processors or persons providing similar services.
- Commercial agents: consultants, business agents, or other persons, including joint ventures or joint venture partners, who assist in obtaining government contracts, concessions, permits or other Government-issued rights.
- Professional agents: attorneys, accountants, lobbyists or other persons engaged on a professional basis to represent a company in government business (including delivery of documents to government bodies) or to lobby for a change in law.

A state-owned company poses additional risk because all employees will be government officials. A company will be state-owned if it is wholly (100%) or partially (50% or more) owned or controlled directly or indirectly by a government.⁷

2. The country the counterparty is based in and the country where the services are being performed;

The most indicative factor is the country where the counterparty is based and if different, where it is actually providing the service. Transparency International publishes annually its Corruption Perceptions Index (CPI) which ranks countries in the world from being “highly corrupt” to “very clean”. A common approach is to separate the results of the index into high and low risk and use this as the basis of the risk assessment.

When a determination of high or low has been reached, the company needs to go on to consider the remaining factors and make an overall comparative judgment about whether due diligence needs to be conducted and if so, to what extent.

3. Industry, value of the contract and nature of the contract

The value of the contract will be an important consideration; the more valuable the contract, the more potential risks will be associated with it and the more serious the potential implications will be should any corrupt activity take place.

The industry the third party operates in will also be an important indicator of the risk associated with a third party because some industries will require more interaction with public officials than others.

⁷ The company can be owned or controlled via shareholding, right to vote or appointment of directors.

Industries which are considered high risk are as follows⁸:

- Public works/construction
- Utilities
- Real estate, property, legal and business services
- Oil and gas
- Mining
- Power generation and transmission
- Pharmaceuticals and health care
- Heavy manufacturing
- Fisheries
- Arms, defence and military
- Transportation and storage
- Telecommunications
- Consumer services
- Forestry
- Banking/finance
- Information Technology
- Civilian aerospace
- Light manufacturing
- Agriculture

The nature of the contract can also be a useful tool in determining corruption risks. For example, contracts with sales agents who sell to public officials and/or governmental agencies will be high risk (for reasons explained above). Whereas a contract is for rudimentary maintenance services, where work being performed by the third party leaves less room for corrupt activity to take place, will be low risk.

Whilst the focus may be on new contracts with entities that the company has not contracted previously, there is also a possible corruption risk from existing engagements and third parties. If due diligence was not conducted at the outset, there may be issues with a counterparty that are unknown; there is a risk that the company may be unwittingly complicit in corrupt behaviour without having made the initial assessment of their business partner.

Therefore as part of the implementation process of a system to determine risk, an inventory of all existing contracts should be conducted. This will allow the company to determine and consider the activities that are already being performed by third parties, the type of third parties currently engaged and the exposure that those third parties may represent. This information will assist in refining which third parties and contracts present the highest risk to the company.

⁸ Transparency International Bribes Payers Index Report 2011 which ranks 19 economic sectors from the most bribery-prone to the least bribery-prone.

Examples of risk assessment:

- A contract with a third party that is based in a low risk country but involves the engagement of an agent that will interact with a public official will be a high risk contract regardless of the value of the contract.
- A contract in a high risk jurisdiction and a high risk industry but where the value of the contract is low will still be high risk. Where the jurisdiction is low risk, the contract may still be high risk depending on whether there is interaction with public officials and the risk associated with the industry.
- A contract in a high risk country and high risk industry in certain circumstances might be low risk, for example if the nature of the services to be performed means that the risk of corruption is very unlikely combined with the fact the value of the contract is low.

Example of simple risk assessment tool:

| | High risk country | Low risk country |
|---|-------------------|------------------|
| High risk industry | High | High |
| Low risk industry | High/Low | Low |
| High value contract | High | High/Low |
| Low value contract | High/Low | Low |
| Any contract involving public officials (or connected – for definition of public official see section 1) | High | High |
| RESULTS | | |
| High = due diligence is required | | |
| Low = due diligence is not required | | |
| Mix of High and Low = due diligence is required and the extent is to be determined by the company (see section 2) | | |

Section 2 – Conducting Due Diligence

How to conduct Due Diligence?

Due diligence can be conducted cost-effectively and it is not necessary to instruct external agents. There are six essential pillars of due diligence that should be covered. This is not as burdensome a process as it may seem at first. A great deal of background information can be gathered from the third party itself and an assessment can be made on the basis of not only the information provided but also the tone and the way in which it was communicated. Again, it is not a tick box exercise but a considered process.

The Six Pillars

The six broad topics or pillars of due diligence upon which background information should be sought are as follows:

1. Beneficial ownership
2. Financial background and Payment of Contract
3. Competency of third party
4. Public Records Resources: History of Corruption and Adverse News
5. Reputation: Consulting Commercial References
6. Approach to Ethics and Compliance

1. Beneficial ownership

Beneficial ownership refers to the individual or legal entity that ultimately owns and has control of, or entitlement to a company. It is crucial that the ownership of a potential third party is established because ownership that is unidentified presents corruption risks. It also presents money laundering and terrorist financing risks but these are outside of the scope of this Guide.

A company needs to know who they are contracting with and how that party conducts business. This cannot be known unless all principal shareholders (those with more than 5% shareholding – see below) are identified. If ultimate beneficial ownership is not established it will not be known who has control of the company. Hidden individuals present a risk of corruption because they may be involved in corrupt activity and such activity could be the very reason why the individual is seemingly hidden.

Beneficial ownership can be determined by asking the counterparty for the company registration documentation relevant to that jurisdiction. Documentation provided by the prospective third party purporting to evidence beneficial ownership needs to be independently verified. This is why official company registration documentation is the most effective means of determining ownership. The registration documents will confirm that the entity exists and who owns it.

Documentation that is produced by the third party itself which has not been officially verified as accurate will not prove beneficial ownership. Often companies will provide the list of board members or directors and suggest that this is proof of ownership. There is no way of knowing whether such information is accurate and if this occurs, repeated requests for the company registration documentation should be made.

In identifying ownership of an entity it is important that all individuals who have significant shareholdings in the company are identified as they will have control over the business. Typically, across industries, all shareholders with 5% - 10% shareholdings or more should be identified. Any shareholders with shareholdings less than 5% will have limited input or influence into the operations of the entity and as such do not pose a significant corruption risk.

If a third party seems reluctant to provide this information then this may be a red flag in itself. Caution should be taken with regard to third parties where ownership is registered in a 'low disclosure jurisdiction'. Whilst there will be many legal and ethically sound companies operating in these jurisdictions, caution is advised as those with criminal intent can use the low disclosure requirements of these jurisdictions to their advantage.

There may also be other means of determining beneficial ownership through open sources depending on the jurisdiction. For example, there may be information available from the relevant government agency that governs company registration and this may be available online, by post or in person. The website of the third party may also provide some useful information in respect of ultimate ownership, although this will not be information that is independently verified and so not authoritative.

If difficulties are experienced in determining ultimate beneficial ownership and the third party is reluctant to provide this information or, gives reasons why it cannot provide this information or, provides documentation purporting that it is evidence of ultimate ownership, whereas, upon analysis, is not, these will all be red flags and caution is recommended. Consideration could be given to instructing external investigators to determine beneficial ownership at this point.

2. Financial background and Payment of Contract

The financial background of a third party can be useful in determining whether there are corruption (and money laundering) risks. The simplest approach is to ask the counterparty to provide their latest financial reports/statements.

The prospective third party's financial statement will provide a formal record of its financial activities. It should be ensured that the statement has been produced by a reputable accountant and is sufficiently detailed. A basic assessment can be made about whether the third party's financial statements are consistent and commensurate with its purported size, the services it performs, the industry it operates in and how it markets itself.

It is not necessary to conduct a detailed review or to approach the financial statements as if conducting audit but to simply look for any discrepancies and payments which may seem unusual or inconsistent.

Below are some examples:

- Are there any payments that are not transparent where it is not clear who the payment is being paid to or why? E.g. are there vague or non-specific payments such as “consulting expenses”?
- Is there anything unusual about the frequency of payments?
- Is there anything unusual in the value of payments?
- Consideration should also be given to expenses— particularly if they are excessive. This could be an indication of bribes.
- Have the third party’s fees been commensurate with the services provided?

The third party’s financial report may also provide details of beneficial ownership and this can be verified against the company registration documentation (see above section, Beneficial Ownership).

The internet can also be a useful tool in determining whether there has been any adverse news relating to the financial activities of the company. This information will also allow for an assessment of the financial viability of the entity which depending on the contract may be an important consideration albeit not necessarily related to corruption (see History of Corruption below). Searches of online trade magazines can also prove useful for determining the financial status of a third party. More generally an assessment can be made as to whether the extent of the third party’s internet presence is commensurate with the size of the third party and the services offered.

Remuneration is also a key consideration in due diligence and in particular, success fees will carry corruption risks. This is because they can motivate an entity/individual to engage in bribery in order to ensure that they meet the targets required to trigger the success fee. Most crucially, extreme caution should be exercised if the third party proposes success fees because this could be an indication of an intention to pay bribes or create a slush fund from which to pay them.

Similarly, the location of the bank account the third party nominates for payment will also be a key consideration. Entities and individuals that engage in corrupt activity often funnel corrupt money to bank accounts in jurisdictions outside the country the company is based in or the country of operation in an effort to hide the funds and avoid detection. Again, extreme caution should be exercised if a third party suggests a bank account in another jurisdiction and further investigation into the third party will be necessary.

3. Competency of the third party

A significant corruption risk will exist where third parties offer a service which they are not competent to provide, especially where they will be interacting with government officials. This is because the government official and the third party could be working in concert, and corrupt payments being made to the official. Companies should also be aware of the perception of corruption where foreign officials are associated to an engagement. In order to mitigate the risk of actual corrupt activity and the perception of corrupt activity, it is crucial that there is a clear business justification for engaging with a third party. The Business Anti-corruption Portal can be referred to in this regard.⁹

The company should consider the following:

Does/has the third party:

1. Have experience of the industry and country where the services will be provided?
2. Have the qualifications and experience to provide the services required under the contract?
3. Provided a competitive estimate for the work?
4. Have a business presence in the country where the services are to be provided?
5. Been recommended by a public official?
6. Requested urgent payments or unusually high commissions?
7. Requested payments to be made in cash, to a third party, or to different country?
8. Suggested they know all the 'right people' to secure the contract?¹⁰
9. Been selected in a transparent way?

Finally, are there sufficient business reasons for awarding the contract to this third party? In particular, are the services necessary?

The above steps will minimise the risk of engaging with a third party for the wrong reasons and also, in the event of queries being raised about the legitimacy of the engagement, the business justification for the selection will be clear.

4. Public Record Resources: History of Corruption and Adverse News

A fundamental step in the due diligence process is to find out whether there is any adverse news associated with the third party and in particular, whether there is any history of unethical business practices, corruption or other criminal activity or investigations into or allegations of the same.

⁹ The Business Anti-corruption Portal is a website that contains comprehensive information on corruption and tools on how to avoid it, free of charge. Website: <http://www.ganintegrity.com/the-business-anti-corruption-portal/>

¹⁰ This could be an indication that the services they are offering are not based on their professional expertise.

Research should be conducted to find out if there is any information in the public domain to suggest a history of such activity. This research can be performed with simple internet searches.

Internet searches can be conducted of publicly available information, as follows:

- General internet searches of the media, including national and local news
- FCPA Blog¹¹
- Trade magazines
- Court listings

Suggested search terms:

“Name of the third party AND”:

- “corruption”
- “bribery”
- “conviction”
- “investigation”
- “allegations”
- “indictment”
- “crime”/ “criminal”
- “kickbacks”
- “customer review”

For more in-depth research, for higher risk counterparties, there are a number of more specific, publically available resources that could be searched:

¹¹ www.fcpablog.com/

- Department of Justice website (USA)¹²
- US Securities and Exchange Commission website (USA)¹³
- System for Award Management (SAM)¹⁴
- Office of Foreign Assets Control (OFAC) Specially Designated National and Blocked Persons Lists (SDN)
- U.S. Department of Commerce, Bureau of Industry and Security, List of Parties of Concern¹⁵
- The Serious Fraud Office (UK)¹⁶
- The World Bank Listing of Ineligible Firms¹⁷
- European Bank List of Ineligible Entities¹⁸
- European Union External Action, Consolidated list of persons, groups and entities subject to EU financial sanctions¹⁹
- Interpol – red notices²⁰
- Debarment and sanctions lists – relevant governments will have information available online

A useful resource in finding out about the history of the third party can be to conduct a face-to-face interview (if practical) or similar (e.g. a phone call) and ask the company directly about their history. This interview could be conducted at the outset of the due diligence but it may be advantageous to find out if there are any identifiable red flags first in relation to unethical, corrupt or other criminal activity.

If red flags are identified that relate to improper activity, this will not necessarily mean that the third party cannot be engaged; it will often be possible to take steps that will mitigate the risk. Mitigation can often simply involve finding out further information to better understand and quantify the risk; in many circumstances this can be obtained directly from the company itself. For example, it may be that the third party or an employee of the third party was convicted of corruption a number of years

¹² www.justice.gov/

¹³ www.sec.gov/

¹⁴ <https://www.sam.gov/>

¹⁵ <http://www.bis.doc.gov/complianceand enforcement/liststocheck.htm>

¹⁶ www.sfo.gov.uk/

¹⁷ <http://web.worldbank.org/external/default/main?theSitePK=84266&contentMDK=64069844&menuPK=116730&pagePK=64148989&piPK=64148984>

¹⁸ <http://www.ebrd.com/ineligible-entities.html>

¹⁹ http://eeas.europa.eu/cfsp/sanctions/consol-list/index_en.htm

²⁰ <http://www.interpol.int/INTERPOL-expertise/Notices>

ago and, since then the third party has dismissed the individual, implemented an anti-corruption compliance programme and there is evidence of a strong “tone from the top” and a good ethics and compliance culture. In this instance the red flag can be considered mitigated. Mitigation is dealt with in more detail below at section 3.

5. Reputation: Consulting Commercial References

The reputation of a third party is clearly connected to the history of the company and the question of whether there is any adverse news, but reputation should also be considered more generally. The most straight forward means of assessing a third party’s reputation is to seek references from those who have worked with them previously. The third party can be approached directly for the contact details of those who will be able to provide the references which can be verbal or written. If they are verbal, a contemporaneous record should be made of the conversation.

The company should ensure that those providing references are asked the following key questions:

1. How long have you known the third party?
2. In what capacity do you know the third party?
3. Have you experienced any problems with the third party?
4. Have you ever had any concerns of corruption in respect of the third party?
5. Are you aware of any allegations of criminal activity against the third party or any of its employees?
6. Do you consider the third party to be honest in its business dealings?
7. Do you know if the third party has any connections with government officials or government agencies?
8. Do you know if any of the third party’s employees or family members of the employees have any connections with government officials or government agencies?

For third parties that are new entities and may not have existing relationships it may not be possible to obtain references. In these instances background research on the owners of the entity and general searches for adverse news can be relied upon.

6. Approach to Ethics and Compliance

Throughout the ethics and compliance process an assessment should be made of the third party’s approach to due diligence and the questions asked. It will be possible to assess an entity’s general

attitude towards due diligence and more generally to ethical business. There are a number of key indicators to a positive culture in this regard which should be noted throughout the process.

The key indicators are as follows:

- Does the third party have its own anti-corruption ethics and compliance programme in place? If so, this will provide reassurance that the third party takes the issue seriously. If there is no ethics and compliance programme, enquiries should be made directly about how the third party intends to manage corruption risks. In particular, they might be asked how they manage gifts and hospitality or engagements that involve government intermediaries.
- Does the third party have its own due diligence procedure in place? If it uses subcontractors, how will it assess and address the risks which they may pose? It will be imperative that the company ensures that due diligence is conducted on subcontractors who perform work on the contract for which the third party has been engaged (see Standard Safeguards below for further details).
- Connected to an existing ethics and compliance procedure is whether there is “tone from the top” – this means whether there is support for anti-corruption compliance from the senior leadership of the organisation. This will give an indication as to how much of a priority ethics and compliance is for the third party.
- Similarly, if there is reluctance from the third party to engage with the due diligence programme, provide information or if there is a lack of transparency about any stage, this can be an indication of a corruption risk and a lack of understanding.
- The third party can be asked to provide any anti-corruption policies it has in place and about the anti-corruption training requirements of its employees. This is a good indicator of “tone from the top” and culture.
- The company can share its own anti-corruption policies and ensure the contract includes a clause requiring the third party to comply with the requirements contained in the policies. The third party’s response to this and comments on the policies will also provide a useful insight into their culture.
- In the event there are red flags about the attitude or understanding of anti-corruption requirements but which are not so significant that the engagement cannot progress, the company might suggest providing anti-corruption training to the third party. This can prove to be useful mitigation of the red flags identified.

Section 3 – What to do with the outcome

The next stage of due diligence is to deal with the outcome of the investigations undertaken; this can be done in one of two ways;

1. Red flags have been identified that must be resolved or mitigated;
- Or,
2. No red flags have been identified during the due diligence process and so the engagement can proceed.

If no red flags have been identified at any stage of the due diligence investigations then the company can proceed with the engagement, in the confidence that reasonable steps have been taken to check the corruption risk of the third party. Ideally, the decision to proceed should be made by an individual within the company who is not directly involved in the contract and can make an unbiased decision. When making the judgement, all stages should be considered and carefully compared with attention given to the overall culture the third party has demonstrated during the process.

If red flags have been identified then it is critical that further work is undertaken prior to entering into any contract. The red flags will need to be resolved or mitigated. In many circumstances the most straight forward means of resolving a red flag will be to contact the third party directly and ask it to provide further information to clarify the issue highlighted by the due diligence. In particular, the third party should be asked what measures it has taken to prevent the same activity happening again.

If red flags cannot be resolved then actions to mitigate the risks will need to be taken. Often risks can be mitigated with simple common sense actions; some examples of which are below.

Previous allegation or conviction for corruption:

- If a red flag relates to a previous allegation or corporate conviction for corruption this does not necessarily mean that progression of the engagement is not possible. Indeed, many companies significantly improve their anti-corruption compliance procedures following settlement with law enforcement authorities for violations of anti-bribery laws; in some cases such improvement will be a condition of settlement.
- If the corrupt activity is historic (a number of years old) and ethics and compliance procedures were put in place to deal with the circumstances that led to the corruption, such as the dismissal of the relevant employees then the red flag could be deemed to be no longer relevant.
- If there is concern that although the previous historic issue was dealt with adequately, there remains a lack of understanding of anti-corruption laws and ethics and compliance within the third party (although no corrupt intention), then the company can request anti-corruption training be provided to the relevant employees of the third party as a condition of the engagement.
- Similarly, the company could impose as a condition of engagement that the third party adopts an anti-corruption policy approved by a recognised Non-Governmental Organisation.

Investigations into corrupt activity

- If the red flags relate to an historic investigation in corrupt activity where no convictions resulted, then the red flag can be considered mitigated, although it will be prudent to seek further information about the circumstances and background to the investigation. A company might also consider imposing conditions to reduce any perceived risk such as training or anti-corruption policies; this should be reinforced by contractual provisions.
- Similarly, if an investigation is on-going this does not necessarily prevent an engagement progressing but caution should be exercised and careful consideration given to the third party's response to the investigation: does the investigation and allegations relate to the services which the company seeks to receive and in the country/ies where they will be performed? Other relevant considerations will be: are they being open and transparent, are they engaging with the investigation and are they seeking to take remedial steps to identified issues?

- It may be that the red flag is unsubstantiated rumours which have not been formally investigated by the authorities or law enforcement agencies or proven in a court, tribunal or equivalent. In these circumstances it may be possible to proceed with the contract. It is advisable to monitor to see if the situation changes.

Red flag relating to the conduct of a specific employee

- A red flag that relates to a specific employee could also be a case of mistaken identity and so this should always be borne in mind. Particular regard should be given to names of individuals which may be common in the relevant jurisdictions. Where this may be the case the red flag can often be mitigated by seeking verification of the employee's identity and checking this against the information provided in the identified publication*

The other steps in the due diligence process and in particular the questionnaire may provide sufficient comfort to mitigate a red flag and allow progression of the engagement without having to raise the matter with the prospective third party. Where this is not possible or where the allegations are more serious it will be necessary to seek the counterparty's comments.

Companies are encouraged to rely on the existing experience and knowledge of the business and industry which their senior managers will possess. An in-depth understanding of the industry will assist in assessing the risks identified and deciphering whether any mitigation needs to be taken; it will also assist in devising common sense but robust solutions. Ideally, it should be a senior manager who is not directly involved in the award of the contract who considers the mitigation.

****Prior to contacting a prospective third party in respect of any red flag, please consider the note of caution in the box below.***

Caution when approaching a prospective third party with adverse news

In circumstances where it is deemed necessary to directly seek the third party's comments, such an approach should be done with caution and diplomacy because there is a potential risk of defamation. If this approach is going to be taken, the red flag needs to be put to the counterparty in a non-accusatory manner and in a way that makes it clear that the company does not hold the opinions of the publication, has in no way formed any formal view and is simply drawing the third party's attention to the adverse news so that it has the opportunity to comment.

The most prudent approach will be to meet face-to-face and provide a copy of the relevant publication so that the third party can read it. If it is not practical or economical to conduct a face-to-face meeting, the company could provide details of where the adverse news was found, such as the website, the author and date of publication. By doing this, the third party can find the publication and then comments could be sought via email or telephone. It is recommended that advice is sought from a defamation legal advisor if there are concerns about this step. This above information is not legal advice on defamation but simply a recommendation.

In circumstances where the red flags are so serious that they cannot be mitigated by the actions above or there is on-going concern, and where the company has the financial resources available it may be necessary to instruct an external provider to conduct due diligence. There are also subscription databases available which again if the company has available resources, can be used to identify red flags such as the third party appearing on sanctions lists, being state owned, and criminal activity/investigations²¹.

Section 4 – Standard safeguards

Following due diligence, if a decision has been made to proceed with the engagement, then some further safeguarding actions should be taken prior to finalisation of the decision to engage to ensure that the company is sufficiently protected.

Independent oversight

The company should ensure that there is independent oversight of the due diligence process. There needs to be independent accountability and so a suitably senior employee who is not directly involved in the engagement should have oversight of the process. The employee who has proposed the engagement may not be able to objectively assess the information gathered in due diligence and make an unbiased assessment. Dependent on the resources within the company it may be appropriate to appoint an individual in an ethics and compliance function to conduct this role.

Contract – Anti-Corruption Clauses

The company should ensure that the contract contains anti-corruption clauses which require the third party to abide by the applicable anti-corruption laws; doing so can provide some protection. For further guidance, refer to the ICC Anti-Corruption Clause.²²

²¹ For example, World Check, World Compliance and Dow Jones Risk and Compliance.

²² <http://www.iccwbo.org/Advocacy-Codes-and-Rules/Document-centre/2012/ICC-Anti-corruption-Clause/>

Supply Chain due diligence

The risks associated with contracting a third party to perform services on the company's behalf remain further down the supply chain. This means that a company can be held liable for the actions of a subcontractor a third party has contracted, who is found to have been involved in corrupt activity. If a third party is going to subcontract services to be provided under the contract, due diligence needs to be conducted on the subcontractor. The extent of due diligence will depend on the size of both the third party and subcontractor.

The company should ensure that there is a clause within the written agreement which obliges the third party to request consent to subcontract. If services are subcontracted, proportionate due diligence should be conducted on the subcontractor. Depending on the size of the third party, the company may assist with conducting the due diligence on the subcontractor in order to protect itself. This will be a consideration for the company and a judgement based on the risks associated with the subcontractor and resources available. Depending on the nature of services to be provided and the extent of the contract, the subcontractor may have a limited role and so due diligence may be straight forward and require minimal resources. In the event that a large portion of the contract is being subcontracted, this may be a red flag in itself and require investigation on the part of the company.

Monitoring

Once a third party has been engaged to provide services, due diligence is not complete. Ongoing supervision should be given to the conduct and activities of the third party. The company should continue to monitor the third party.

One simple, yet effective, way of doing so will be to maintain a continuous dialogue with the third party in which anti-corruption issues are raised. In practice, this may be an agenda item as part of routine and regular commercial contract management meetings. Another cost effective method will be to request clear documentation from the third party for services rendered prior to payment being made or at least have the contractual right to do so. The invoices should be reviewed and approved by a suitably qualified employee. Consideration should be given to whether there is anything unusual about the request for payment and whether the amount is commensurate with the services provided and in line with the original contract. If any red flags are identified, payment should be put on hold until the red flags are mitigated or resolved.

In circumstances where a contract is for prolonged periods, depending on the extent of risk (as will have been identified during the original due diligence procedure) it may be necessary to update the due diligence procedure. It will be up to the company to determine the frequency of due diligence. Due diligence should be more frequent for contracts that are higher risk, depending on the circumstances and resources available.

Record Management and Retention

It is vital that each step of the due diligence process is clearly documented so that there is clear evidence of the steps the company has taken to mitigate the risks associated with contracting third parties. Should any issues arise in the future, such as a third party being accused of corrupt activity connected with the fulfilment of its work for the company, it will be able to show that all reasonable

steps have been taken by the company to avoid involvement in such activity. Whether this would provide a defence in the event the third party is prosecuted is dependent on the law governing the particular jurisdiction and the particular circumstance. Even if it is not an express defence, it is likely to be a powerful mitigating factor.

The records of due diligence, as with most records, can be stored electronically but need to be stored by the company for a sufficiently long period. Investigations into corruption can take years from start to conclusion; in addition many do not commence until years after the activity occurred. A timeframe of 10 years is recommended but the timeframe is to be determined by the individual company and may be dependent on the company's resources and local privacy laws. Indeed, in some circumstances it might be necessary to obtain legal advice in relation to local privacy laws.

The following principles should be remembered:

- The company needs to maintain written records evidencing that due diligence has taken place and that any risks identified have been carefully considered and mitigated as practicably as possible.
- Records should be retained for a significant period of time; this may depend upon local law, company policies and resources.
- If there are no records of due diligence there is no way to prove it took place.

Annex A

This document is a tool to be used internally by those within the company who are responsible for conducting due diligence to ensure that each stage of the due diligence process has been completed; it is a checklist to be used each time due diligence is conducted. It will also serve as a summary document confirming the findings of the due diligence.

Annex B

This document is the questionnaire described throughout this Guide which is to be sent to the third party as part of the due diligence process. If interviews are to be conducted with the third party (whether virtually or face-to-face) it can also be used as a basis for the interview structure.

Due Diligence: A Guide for Small and Medium size entities

Annex A

Internal due diligence questionnaire

Details of third party

1. Name of prospective third party
2. Contact at prospective third party
3. Company activity
4. Size of prospective third party (i.e. approx. how many employees are there?)

Risk

1. What country is the third party based in?
2. What country will the contract be performed in?
3. What is the value of the contract?

Government officials

1. Is the third party state-owned or partly state-owned? If so, please provide details and consider the employees to be public officials.
2. Are any of the owners, directors, officers or any employees of the third party current or former public officials? If so, please provide details.
3. Does any of the owners, directors, officers or any employees of the third party have personal, familial or any associations with public officials? If so, please provide details:

Beneficial ownership

Obtain from the entity company registration documentation and respond to the following:

1. Has ultimate beneficial ownership of the entity been verified with the documentation provided? If not, revert to the entity and seek further confirmation.
2. Does the documentation provided independently verify the ownership? Please note that documentation produced by the entity itself should not be relied on as this is not independent.
3. Have all shareholders who hold significant shareholdings (typically of 5% or more) been identified, with their percentage ownership confirmed? Please insert details below.

Financial background

Obtain the latest financial reports from the prospective third party and answer the following:

1. Has the statement being produced by a reputable accountant?
2. Has the accountant identified any issues such as the following:
 - i. Repeated payments made to an unidentified third party, or an identified third party but for unclear reasons;
 - ii. A significant payment to an unidentified third party, or an identified third party but for unclear reasons;
3. Is the revenue and profits commensurate with the size of the entity?
4. Where is the location of the bank account?

Business justification for contract

1. What services are to be provided by the third party?
2. Why are these services required?

Competency of third party

1. What experience, qualifications and skills does the prospective third party have to fulfill this contract?
2. How was the prospective third party selected?

History of corruption and adverse news

1. Is there any evidence of a history of corruption (i.e. convictions), if yes please detail
2. Are there any allegations of corruption or investigations into corruption?
3. Is there any evidence of any other adverse news related to the third party?

Reputation

1. Obtain three satisfactory references from existing counterparties of the prospective third party?
2. Ask the following key questions:
 - a) How long have you known the third party?
 - b) In what capacity do you know the third party?
 - c) Have you experienced any problems with the third party?
 - d) Have you ever had any concerns of corruption in respect of the third party?
 - e) Are you aware of any allegations of criminal activity against the third party or any of its employees?
 - f) Do you consider the third party to be honest in its business dealings?
 - g) Do you know if the third party has any connections with public officials or government agencies?
 - h) Do you know if any of the third party's employees or family members of the employees have any connections with public officials or government agencies?
3. Ensure you ask those providing references whether they have had any concerns regarding corruption or lack of ethical behaviour.
4. Please summarise the three references.

Compliance Culture

1. How has the prospective third party responded to the due diligence process (positively or reluctantly?)
2. Has the third party been evasive at all?
3. Has there been any difficulty in obtaining the required information from the third party?

* * * *

Anti-Corruption Third Party Due Diligence: A Guide for Small and Medium Size Entities

Annex B

Anti-Corruption Questionnaire to send to Third Party

Company details

Individual/Entity name

Registered Business Address

Date of incorporation

City, Country, Post code, Telephone Number, Email, Company Website

Bank Account details including location

Any previous names or other trade names

Any affiliate companies (including subsidiaries)

Company activity/activities

Country where the contract will be performed

Country of incorporation/location of headquarters

Relationship with our Company

Please explain how this proposed contract has arisen? Do you have an existing relationship with our Company?

How has your company been selected for this contract?

Proposed contract

Nature of proposed contract i.e. contract for one off services, retainer contract, framework contract?

Services to be provided

How long have you/your company been providing the service you will provide under this contract?

Please describe your experience and qualifications for providing this service:

Previous contracts

Have you had a prior business relationship with our Company? If yes,

- a) Please describe the contract/s
- b) Provide the dates of the contract/s
- c) Who your key contacts were at this Company for the purposes of the previous contract/s

Please provide details of existing and/or previous customers:

Ownership

Please list all shareholders or owners who hold a financial interest in your business of 5% or more. (If an owner is a non-publicly-traded legal entity, please provide independently verified information to identify the ultimate beneficial owner/s)

| Owner | Role in company | Country where based | % ownership |
|-------|-----------------|---------------------|-------------|
|-------|-----------------|---------------------|-------------|

| Management and Key Employees including Managing Directors, Sales Directors, Contract Manager (not owners) List all individuals who have a leadership role within the company | | |
|--|-----------|------|
| Management/Key Employee Name | Job Title | Role |
| | | |

The below section relates to government officials – please refer to the below definition for guidance:

Definition of government officials (whether domestic or foreign public officials)

A government official can include, and is not limited to the following:

- *An official or employee of any government, or any agency, ministry or department of the government (of any level).*
- *Any individual acting in an official capacity for a government regardless of rank or position.*
- *Official or employee of a company wholly or partially state-owned.*
- *A political party or official of a political party.*
- *A candidate for political office.*
- *Officer or employee of a public international organization, such as the United Nations or the World Bank.*
- *Immediate family member of any of the above.*

The OECD defines "Foreign public official" as any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected; any person exercising a public function for a foreign country, including for a public agency or public enterprise; and any official or agent of a public international organization"

| Owners, Management, Employees who are Government Officials (including any representatives of the company) Are any owners, management or employees Government Officials? If yes, please detail: | | | | |
|--|-----------|---|-------------------|-----------------|
| Name | Job title | Role & influence on day to day business | Official position | Official duties |
| | | | | |

Company relationships with Governments and Government Officials

Do you perform any work for the government?

If the answer to the above is yes, could this conflict with your duties to our Company under this agreement?

Do you need to interact with public officials in order to perform this contract?

If the answer to the above is yes, please provide details and explain the extent of the relationship your company has with the government official/s:

Does your company make any donations to political parties? If yes, provide details explaining

Relatives who are government officials

Do any owners, management or employees relative/s who are Government Officials? If yes, please detail:

| Name of employee & Job title | Role & influence on day to day business | Relative's name and relationship | Official position of relative | Relative's official duties |
|------------------------------|---|----------------------------------|-------------------------------|----------------------------|
| | | | | |

Does the relative have any influence over or connection to your company's business? Please provide details:

Is there any risk of perception that the relative could influence the business of your company or this contract? Please provide details:

Anti-Corruption awareness

Can you explain what corruption is?

Transparency International's [2011] Corruption Perceptions Index ranks [insert country] as number [insert rank] out of 178 countries - Do you think this is fair? Please explain.

Are you aware of international anti-corruption laws?

Can you provide examples of international anti-corruption laws?

Are there any similar laws in your country?

Do you have any questions about our Company's policy on anti-corruption?

Compliance

Does your company have its own anti-corruption policies and ethics compliance programme? Please provide detail:

Have your employees being trained in anti-corruption practices? If yes, please detail (including frequency):

Does your company have any other communications about corruption?

Anti-corruption – investigations/allegations

Have there ever been investigations or allegations of corruption concerning your company, any employees or company representative? If yes, please provide details:

If the answer above is yes, please state what remedial action your company took:

Have any of your subcontractors ever been the subject of investigations or allegations into corruption? If yes, please provide details:

If the answer above is yes, please state what remedial action your company took:

* * * * *

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