

OVERCOMING FCPA COMPLIANCE CHALLENGES IN INDIA

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1. Corruption in India– an Overview

1.1 Nature of Corruption

Corruption in developed countries generally exists only at the highest level; it is not encountered by the general public in their day-to-day dealings. In developing economies however, corruption is often prevalent at all levels and has to be dealt with on a day-to-day basis by the common person as well as the sophisticated business person. A study by TRACE International, Inc of bribery demands in India over a 16 month period reveals that more than half of the reported bribe demands were for US\$100 or less, and approximately 84% of the reported demands were for US\$ 5000 or less. See BribeLine, *India Report, 2009* (10 January 2009).

The general mind set in India is that the bribe-giver is the victim, rather than the perpetrator of the offense, particularly in the case of petty corruption. This is borne out by the anecdotal and other evidence available. The vast majority of bribery reports in India are of extortionate demands for the purpose of avoiding some harm or disadvantage rather than for gaining an advantage, as borne out by the above referenced study from BribeLine. Accordingly, the anti-corruption laws in India tend to focus on the bribe-taker (demand side), and treat the bribe-giver (supply side) as only secondarily liable as an accomplice or one who aids and abets the commission of an offence.

1.2 Causes of Corruption

The first post-independence government committee on the prevention of corruption (Santhanam Committee), while outlining the preventive measures that should be taken to significantly reduce corruption, identified four major causes of corruption: (1) administrative delays; (2) government taking upon themselves more than what they can manage by way of regulatory functions; (3) scope for personal discretion in the exercise of powers vested in different categories of government servants; and (4) cumbersome procedures of dealing with various matters which are of importance to citizens in their day to day affairs. The Sanatham Committee issued its report in 1964; its recommendations led to amendment of the Prevention of Corruption Act, 1947.

The literature on corruption in India generally lists the following as the causes of corruption:

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- *Political patronage.* Corruption in the political leadership at the helm of affairs in the country is the “fountainhead of corruption” from which flow various streams of corrupt practices which plague the political, economic and social activities in the country.
- *Administrative labyrinth.* Cumbersome and dilatory administrative procedures and practices are another major cause of corruption in India.
- *Lack of punishment.* A contributory factor to the growth of corruption in India is that the cases leading to corruption are often handled in a casual and clumsy manner.
- *Social environment.* In present day India, corruption has found an acceptance in the social psyche and behaviour. Social evils like bribery, nepotism and favouritism have come to be accepted in the society.

See S. Sondhi, *Combating Corruption in India – The Role of Civil Society*, University of Delhi, July 2000.

In June 2008, the ABA Section of International Law organized a series of concurrent global round table discussions on “Dealing with Extortionist Government Functionaries”. As the ABA jurisdictional member, Koura & Co., Advocates and Barristers, hosted the New Delhi session. The session was attended by senior executives and lawyers from business undertakings, both private and public sector, government officials and retired members of the judiciary. Given below are the findings of the group in brief.

Key Reasons of Corruption:

- Lack of transparency in the system;
- Degeneration of moral values in society, due to which people are not hesitant to give or accept bribes;
- Low salaries which prompt government employees to take bribes;
- Ambiguous laws, making prosecution of such officials very difficult;
- Lack of awareness amongst public about rules and regulations;
- Overly broad discretionary power of the government officials;
- Weak enforcement of anti-corruption laws; and
- Slow and unpredictable legal process.

ABA Section of International Law (Koura & Co.), *Report of New Delhi India Session on Dealing with Extortionist Government Officials*, 26 June 2008.

2. Anti-Corruption Laws

2.1 Prevention of Corruption Act, 1988

The Prevention of Corruption Act, 1988 deals primarily with curbing corruption within government agencies and authorities. The 1988 Act is a reenactment of the Prevention of

Corruption Act, 1947 and, amongst other changes, consolidates into it the offences by or relating to public servants previously contained in the Indian Penal Code, 1860.

The 1988 Act prohibits the taking of a bribe or any other gratification by a public servant. One of the objects of the 1988 Act was to make the existing anti-corruption laws more effective by extending the scope of the definition of “public servant” and to bring within its sweep each and every person who holds an office by virtue of which he is required to perform any public duty. In addition, the Prevention of Corruption Act, 1988 takes into its ambit not only public servants but also any one who acts as a tout or intermediary in the offence of corruption.

To prosecute a public servant, it is necessary to obtain prior approval of the Central Government or State Government in the case of Central and State Government employees (as applicable) and, in the case of any other person, the authority competent to remove the accused from office. Section 19(1), Prevention of Corruption Act, 1988.

To file charges, it is necessary for the prosecution to make out a *prima facie* case that the following elements exist:

- a. that a public servant (or a person expecting to be one) accepted or obtained or agreed to so do for himself or for any other person any gratification other than legal remuneration; and
- b. that the said acceptance or obtaining of the gratification was a motive or reward for:
 - i. doing or forbearing to do any official act; or
 - ii. showing or forbearing to show, in the discharge of his official functions any favour or disfavour to any person; or
 - iii. rendering or attempting to render any service or disservice to any person with the Central Government or any State Government or Parliament or the legislature of any State or with any local authority, corporation or government company adverted to in clause(c) of section 2 of the Act, or with any public servant, whether named or otherwise.

See section 7, Prevention of Corruption Act, 1988.

Offences under section 7 above are punishable with imprisonment for a term of not less than six months and up to five years, and the imposition of monetary fines. Repeat and habitual offenders are subject to longer terms of imprisonment.

2.2 State Lokayukta Acts and Rules

The State *Lokayukta* Acts are anti-corruption laws enacted by individual States. These acts typically provide for the appointment and functions of a *lokayukta* (ombudsman) for the investigation of administrative actions taken by or on behalf of the State Governments in certain cases.

The *lokayukta* is appointed by the Governor of the State to investigate allegations that a public servant:

- (i) has abused his position to obtain any gain or favour to himself or to any other person, or to cause undue harm or hardship to any other person;
- (ii) was actuated in the discharge of his functions by improper or corrupt motive and thereby caused loss to the State or any member or section of the public; or
- (iii) is guilty of corruption, or lack of integrity in his capacity as such public servant.

See section 2(b), Andhra Pradesh Lokayukta And Upa-Lokayukta Act, 1983.

3. FCPA Proceedings Involving India

As on date, there are ten FCPA proceedings involving bribery in India, by the following US companies or individuals.

- Mario Convino
- Washington House Air Brake Technologies Corp. (2 proceedings)
- Textron Inc (2 proceedings)
- York International (2 proceedings)
- A.T. Kearney India, a subsidiary of Electronic Data Systems Corp.
- Dow Chemical Company
- Baker Hughes Inc.

Short particulars of the above cited cases are set forth in Appendix A.

4. Efforts to Curb Corruption

4.1 Public Interest Disclosure and Protection of Informer (Whistleblower Resolution)

The Government of India has notified a “whistle-blower” policy in respect of corruption or misuse of office by public officials. See Central Vigilance Commission, *Government of India Resolution on Public Interest Disclosure and Protection of Informer*, Office Order No. 33/5/2004, dated 17 May 2004. Salient feature of the policy are set forth below:

- The whistleblower policy applies only to Central Government actors, not State Governments.
- Applies to employees of the Central Government or any corporation established by or under any Central Act, government companies (Central Government owns not less than 51% equity), societies or local authorities owned or controlled by the Central Government.
- The Central Vigilance Commission (CVC) is the designated agency to receive complaints for disclosure on any allegation of corruption or misuse of office and is empowered to recommend appropriate action. Anonymous complaints will not be acted upon by the CVC.

- The CVC has adopted the relevant Bureau of Indian Standards (BIS) standard for its complaint handling policy. The objective of the complaint handling policy of the CVC, as specified in the BIS Manual, is to ensure timely and satisfactory redress of every complaint. In accordance with these standards, the complaint handling process is to be audited each year by an auditor nominated by the CVC. In addition, the standards require that the auditor’s observations be taken into consideration by the management review committee for necessary corrective action. See CVC, *Complaint Handling Policy*, available at www.cvc.nic.in.
- CVC will protect the complainant. If any person is aggrieved by any action on the ground that he is being victimized due to the fact that he had filed a complaint or disclosure, he may file an application before the CVC seeking redress in the matter, wherein the CVC may give suitable directions to the concerned person or the authority after inquiry into the matter. See CVC, *Complaint Handling Policy–FAQs*, available at www.cvc.nic.in.

4.2 E-Governance Initiatives

In May 2006, the Government of India approved the National e-Governance Plan (“NeGP”) for the country. The NeGP’s vision is to “make all Government services accessible to the common man in his locality, through common service delivery outlets and ensure efficiency, transparency and reliability of such services at affordable costs to realize the basic needs of the common man.” See generally website of the Ministry of Communication & Information Technology at www.mit.gov.in.

The NeGP is comprised of eighteen Mission Mode Projects at the Central and State level. The projects in more bribery-prone areas are listed below. The project dealing with e-Procurement is more fully described in Section 6.2 (*E-Procurement*) hereof.

- Central Excise and Customs
- Income Tax
- Corporate Filings (MCA 21)
- Passport, Immigration & Visa
- Commercial (State and Local) Taxes
- Land Records
- Property Registration
- Road Transport
- e-Procurement
- Police

4.3 Right to Information Act, 2005

With the aim to bring about greater transparency and accountability in the functioning of all government organizations, the Right to Information Act was enacted in 2005 (“RTI Act”). The RTI Act provides citizens of India access to information which is under the control of public authorities. It stems from the reasoning that for proper functioning of a government it is

important that citizens have access to information available with the government agencies which in turn can control corruption and bring about accountability of those holding public positions.

“[W]ith the passage of this Bill, we see the dawn of a new era in governance processes-- an era of performance and efficiency, an era which will ensure that benefits of growth flow to all sections of society, an era which will eliminate the scourge of corruption...”. [underlining added]. Statement by Prime Minister Dr. Manmohan Singh addressing the Lok Sabha (Lower House) on the Right to Information Bill, 2005 (10 May 2005).

The RTI Act gives to all citizens the right to access (barring certain exceptions) information held by or under the control of any public authority. With regard to the type of information that may be accessed, the RTI Act puts the ordinary citizen on to the same footing as the legislature. It provides that the information which cannot be denied to the Parliament or a State Legislature, shall not be denied to any person. See proviso to section 8(1), RTI Act. Moreover, the public authority holding the information may allow access to the information if the public interest in disclosure outweighs the harm to any protected interest.

The key terms in the RTI Act are to be interpreted as set forth below.

“public authority” includes entities established, owned or substantially financed by the Central Government, the State Government including *panchayats* (village and local governing bodies), municipalities and other local bodies.

“information” means any material in any form, including records, documents, memos, e-mails, opinions, advices, press releases, circulars, orders, logbooks, contracts, reports, papers, samples, models, data material held in any electronic form and information relating to any private body which can be accessed by a public authority under any other law for the time being in force. It also includes third party information as per provisions of section 11 of the RTI Act.

“right to information” means the right to information accessible under the RTI Act which is held by or under the control of any public authority and includes the right to-

- (i) inspection of work, documents, records;
- (ii) taking notes, extracts, or certified copies of documents or records;
- (iii) taking certified samples of material;
- (iv) obtaining information in the form of diskettes, floppies, tapes, video cassettes or in any other electronic mode or through printouts where such information is stored in a computer or in any other device.

Information exempted from disclosure includes *inter alia* the following:

- (i) information, the disclosure of which would cause a breach of privilege of Parliament or the State Legislature;
- (ii) information including commercial confidence, trade secrets or intellectual property, the disclosure of which would harm the competitive position of a third party, unless the competent authority is satisfied that larger public interest warrants the disclosure of such information;
- (iii) information received in confidence from foreign governments;

- (iv) cabinet papers including records of deliberations of the Council of Ministers, Secretaries and other officers; provided that the decisions of Council of Ministers, the reasons thereof, and the material on the basis of which the decisions were taken shall be made public after the decision has been taken, and the matter is complete, or over.

See section 8(1), Right to Information Act, 2005.

5. Investigation Agencies Dealing with Corruption

5.1. Central Vigilance Commission (CVC)

The CVC was established in 1964 by an administrative order of the Government pursuant to the recommendation of the Santhanam Committee on the prevention of corruption. The CVC was accorded statutory status in accordance with directions given by the Supreme Court of India in the landmark case of *Vineet Narain v. Union of India*, initially by an ordinance (executive order) in 1998 followed by enactment of the Central Vigilance Commission Act, 2003.

The CVC was established for the purpose of inquiring into and investigating offenses under the Prevention of Corruption Act, 1988 by certain categories of public servants of the Central Government, corporations established by or under any Central Act, government companies, societies and local authorities owned or controlled by the Central Government.

The CVC is comprised of a Central Vigilance Commissioner and not more than two Vigilance Commissioners. Their appointment is intended to be apolitical and bi-partisan. Accordingly, the Commissioners are appointed by the President of India upon the recommendation of a committee comprised of the Prime Minister, the Minister of Home Affairs and the leader of the opposition in the Lok Sabha (Lower House).

5.2 Chief Vigilance Officer

At the organizational level, the vigilance function is discharged by the Chief Vigilance Officer (“CVO”) in that organization. The primary responsibility for maintenance of ethical purity, integrity and efficiency in the organization vests, as the case may be, with the secretary of the concerned ministry, or the head of the department, or the chief executive of the public sector enterprise. Such person however is, in the discharge of vigilance functions, assisted by the Chief Vigilance Officer (CVO). The CVO acts as a special assistant or advisor to the chief executive, and reports directly to him in all matters relating to vigilance. He heads the vigilance division of the organization concerned and provides a link between his organization and the Central Vigilance Commission and the Central Bureau of Investigation.

The Chief Vigilance Officers in all government departments and organizations are appointed after prior consultation with the Central Vigilance Commission, and no person whose appointment in that capacity is objected to by the Commission may be so appointed.

The vigilance functions to be performed by the CVO are of wide sweep and include collecting intelligence about the corrupt practices committed, or likely to be committed by the employees of his organization; investigating or causing an investigation to be made into

verifiable allegations reported to him; processing investigation reports for further consideration by the disciplinary authority concerned; referring vigilance related matters to the Central Vigilance Commission for advice wherever necessary, taking steps to prevent commission of improper practices and misconduct. Thus, the CVO's functions can broadly be divided into three parts: (i) preventive vigilance; (ii) punitive vigilance; and (iii) surveillance and detection. See generally, Central Vigilance Commission, *Vigilance Manual*, Volume I (2005).

5.3 Central Bureau of Investigation

The Central Bureau of Investigation ("CBI") was established in 1963. The CBI is the successor organization to the Delhi Special Police Establishment ("DSPE"); but with an enlarged charter of functions. The DSPE was made one of the divisions of the CBI, namely the Investigation and Anti-Corruption Division.

The CBI is now comprised of the following divisions:

- (i) Anti-Corruption Division [also referred to as CBI/DSPE]
- (ii) Special Crime Division
- (iii) Economic Offenses Division
- (iv) Directorate of Prosecution (Legal Division)
- (v) Policy and Coordination Division
- (vi) Administration and Training Division
- (vii) Central Forensic Science Laboratory

Set forth below are the thrust areas of the Anti Corruption Division, which the CBI seeks to pursue with vigour:

- (i) To hit hard at high-level corruption in all government departments and public sector undertakings by registering quality cases of disproportionate assets, traps and abuse of official position.
- (ii) To invigorate, sharpen and strengthen intelligence-gathering all over the country in order to detect quality cases against corrupt officials.
- (iii) To speed up "secret verifications" prior to registration of cases and to improve the quality of pre-registration work so that no real accused escapes and no innocent suffers.
- (iv) To speed up investigations and the decision-making process so that the cases are charge-sheeted and decided at the earliest, and a tangible impact is made on checking corruption.
- (v) To improve the quality of investigation, evaluation of evidence and decision-making so that the real accused are brought to justice and innocent are unharmed.

- (vi) To expedite the prosecution of cases, ensure close monitoring of *pairvi* work and improve the quality of prosecution.
- (vii) To improve the intelligence, investigation and prosecution skills of its officers and officials through continuous in-service and on-the-job training.
- (viii) To spread awareness about the evil of corruption so that a strong movement is created and sustained to fight corruption in public life, and to strengthen the preventive vigilance measures being taken by various departments and organizations. See generally, Central Bureau of Investigation, *CBI (Crime) Manual* (2005).

Superintendence of the CBI/DSPE vests with the Central Vigilance Commission in so far as it relates to the investigation of offenses alleged to have been committed under the Prevention of Corruption Act, 1988. See section 4 of the DSPE Act and section 8 of the CVC Act, in relation to investigations under the Prevention of Corruption Act, 1988. The CVC may give directions to the CBI/DSPE for purposes of discharging the responsibilities provided in section 4(1) of the DSPE Act. However, the CVC shall not require the DSPE to investigate or dispose of any case in any particular manner. The CVC may review the progress of investigations conducted by the CBI/DSPE into offenses alleged to have been committed under the Prevention of Corruption Act, and it may review the applications pending with the competent authorities for sanction of prosecution under the said Act. See Central Bureau of Investigation, *CBI (Crime) Manual*, Chapter 2 (2005).

5.4 Directorate of Enforcement

The Directorate of Enforcement is responsible for enforcement of the Foreign Exchange Management Act, 1999 and the Prevention of Money Laundering Act, 2002. It is under the administrative control of the Department of Revenue in the Ministry of Finance.

Adjudication and appeal officers of and above the rank of Director of Enforcement are empowered to adjudicate cases involving contravention of the above cited Acts. These proceedings are quasi-judicial in nature. Appeal from orders of the adjudicating authority lie with the Appellate Tribunal or Special Director (Appeal), Foreign Exchange. Further appeal of the order of the Appellate Tribunal can be made to the High Court only on a question or point of law.

The Directorate of Enforcement is primarily concerned with enforcement of the provisions of the Foreign Exchange Management Act, 1999 to prevent leakage (loss) of foreign exchange, which generally occurs through the following malpractices:

- Remittances of Indians abroad otherwise than through normal banking channels, i.e. through compensatory payments.
- Acquisition of foreign currency illegally by persons in India.

- Non-repatriation of the proceeds of exported goods.
- Unauthorized maintenance of accounts in foreign countries.
- Under-invoicing of exports and over-invoicing of imports and any other type of invoice manipulation.
- Siphoning off of foreign exchange against fictitious and bogus imports by land.
- Illegal acquisition of foreign exchange through *hawala* (illegal money changers).
- Secreting of commission abroad.

The Directorate of Enforcement is not directly responsible for the enforcement of anti-corruption laws; that is the domain of the Central Vigilance Commission. The Directorate however becomes indirectly involved in anti-corruption prosecution efforts because the payment and receipt of bribery funds often involves violations of the foreign exchange and anti-money laundering regulations. These violations are often easier to prove than offences under the Prevention of Corruption Act, 1988.

6. Transparency Efforts in Public Procurement Transactions

6.1 Integrity Pact

Integrity Pact Generally

The Integrity Pact (IP) is a tool developed during the 1990's by Transparency International (TI) to help governments, businesses and civil society to fight corruption in the field of public contracting and procurement. It consists of a process of signing an agreement between a government or government department and all bidders for a public sector contract. It contains rights and obligation to the effect that neither side will pay, offer, demand or accept bribes, or collude with competitors to obtain the contract or while carrying it out. Also that bidders will disclose all commissions and similar expenses paid by them to anybody in connection with the contract, and that sanctions will apply when violations occur. These sanctions range from loss or denial of contracts, forfeiture of the bid or performance bond and liability for damages, blacklisting for future contracts on the side of the bidders, and criminal or disciplinary action against employees of the government. IP also introduces a monitoring system that provides for independent oversight and accountability.

Features of Integrity Pact

- A pact (contract) is entered into by the principal (a government office inviting public tenders for a supply, consultancy, construction and/or any other service) and the counter-party (bidders, contractors or the suppliers).

- The principal and the counter-party commit and are obliged to follow that they will not demand or accept any bribe or gift. The principal commits that its officials will not do so, with appropriate disciplinary or criminal sanction in case of violation. Similarly, the bidder commits and is obliged to follow that it has not paid and will not pay, any bribe, in order to obtain and retain this contract.
- Appointment of independent external monitor (IEM), a person of impeccable integrity who has knowledge of tendering/contracting processes, to be appointed by the principal and Transparency International India (TII), to oversee implementation and effectiveness. The panel of IEMs would be approved by the Central Vigilance Commission (CVC).
- Use of arbitration as conflict resolution mechanism.
- A pre-announced set of sanctions for any violation by a bidder of its commitments or undertakings, including (some or all) denial or loss of contract forfeiture of the bid security and performance bond, liability for damages to the principal and the competing bidders, and debarment of the violator by the principal for an appropriate period of time.

Violations and Consequences

- If a vendor its commits a violation of its commitments and obligations under the IP program, it may lose its bid security and performance bond. In addition, the principal may terminate its current contract and business relationship with that vendor.
- Banning and exclusion of vendors from future dealings until the concerned IEM is satisfied that the vendors will not commit violations in future.
- To initiate criminal proceedings against the violating vendor.
- The vendor will be liable to pay damages, as determined by the IEM.

Implementation of Integrity Pact

The Integrity Pact has been implemented by many of the larger public sector undertakings and government companies in India, as noted below.

<u>PSU/Governemnt Company</u>	<u>Date</u>
○ Oil & Natural Gas Corporation	17 April 2006
○ Rashtriya Ispat Nigam Ltd.	29 March 2007
○ Hindustan Petroleum Corporation Ltd.	13 July 2007
○ Gas Authority India Ltd.	23 July 2007
○ Coal India Ltd.	25 August 2007
○ Hindustan Steelworks Construction Ltd.	24 September 2007
○ MECON	24 September 2007
○ MSTC Ltd.	24 September 2007

<u>PSU/Governemnt Company</u>	<u>Date</u>
○ National Mineral Development Corporation	24 September 2007
○ Ferro Scrap Nigam Ltd.	24 September 2007
○ Steel Authority of India Ltd.	24 September 2007
○ Kudremukh Iron Ore Company Ltd.	24 September 2007
○ Bharat Refectories Ltd.	24 September 2007
○ Manganese Ore (India) Ltd.	24 September 2007
○ Oil India Ltd.	29 November 2007
○ Container Corp. of India (CONCOR)	20 December 2007
○ Neyveli Lignite Corporation Ltd.	29 December 2007
○ Bharat Petroleum Corporation Ltd.	10 January 2008
○ Indian Oil Corporation Ltd.	18 January 2008
○ Airports Authority of India	15 February 2008
○ Mahanagar Telephone Nigam Ltd.	5 March 2008
○ Northern Coalfields Ltd.	14 March 2008
○ South Eastern Coalfields Ltd.	26 March 2008
○ Mahanadi Coalfields Ltd.	7 April 2008

6.2 E-Procurement

E-Procurement is one of the Mission Mode Projects (MMP) under the National e-Governance Plan (described in Section 4.2 (*E-Governance Initiatives*) hereof). This project is being implemented to ensure that government procurement becomes simplified, transparent and result-oriented. It is being implemented through and in the Directorate General of Supplies & Disposals (DGS&D), a central purchasing organization under the Ministry of Commerce and Industry, having core competency in procurement of goods and services and involves computerization of DGS&D operations.

The objectives of the E-Procurement project are:

- To establish a one stop-shop providing all services related to government procurement;
- To reduce cycle time and cost of procurement;
- To enhance transparency in government procurement;
- To enhance efficiency of procurement; and
- To bring about procurement reform across the government.

In DGS&D, out of 350 items, 200 items are currently covered by the e-procurement system. It has also implemented a system for a single check to be issued to the bank along with information on the suppliers' accounts, which is then used by the bank to automatically credit the suppliers with their dues. It is envisaged that all procurements made by DGS&D will be made electronic.

The Central Vigilance Commission has mandated that all government departments publish their tenders on the internet after 1 April 2006. Accordingly, the project envisages

covering all aspect of procurement from indent of tender up to tender preparation, bidding, bid evaluation and award of contract. It will use extensive security features for encryption and decryption of bids, use digital signatures and payment gateways.

6.3 CVC Guidelines

The Central Vigilance Commission has issued to the Chief Vigilance Officers at each public sector undertaking guidelines titled Preventive Vigilance in Public Procurement. These require *inter alia* that the check points set forth below be complied with during the various stages of procurement

Check points for tender stage –

- Open tenders are called as far as possible.
- The panel of contractors/vendors are prepared and updated periodically in a transparent way.
- Prequalification criteria is notified and applied as per notified criteria.
- In case of relaxation in prequalification criteria, tenders are recalled. Credentials are verified at least in case of L1 (lowest bidder)
- Commission’s circular regarding negotiations with L1 are to be complied with.
- Conditions of tenders are not relaxed after price bids are received.

Check points for execution stage –

- Agreement is signed and sealed properly.
- Bank guarantees are verified.
- Conditions regarding insurance policies, performance guarantee, labour license etc. complied with.
- Major deviations not done.
- Recoveries are made as per contract.
- Proper record of hindrance maintained.
- Mandatory tests are carried out.

7. **Defence Procurement Policy**

The Defense Procurement Policy 2008 (“DPP-2008”) establishes a formalized set of guidelines for capital acquisition processes to be followed by the Ministry of Defence.

7.1 Integrity Pact

The DPP-2008 requires *inter alia* the execution of an integrity pact for all procurement schemes above Rs. 100 crore (roughly US\$ 20 million). As explained in Section 6.1 (*Integrity Pact*) hereof, the Integrity Pact is a binding agreement between the agency and bidders for specific contracts in which the agency promises that it will not accept bribes during the procurement process and bidders promise that they will not offer bribes. Under the Integrity Pact, the bidders for specific services or contracts agree with the procurement agency or office to

carry out the procurement in a specified manner. The essential elements of the Integrity Pact required under DPP-2008 are as follows:-

- a. A pact (contract) between the Government of India (Ministry of Defence) (the authority or the “principal”) and those companies submitting a tender for this specific activity (the “bidders”);
- b. An undertaking by the principal that its officials will not demand or accept any bribes, gifts, etc., with appropriate disciplinary or criminal sanctions in case of violation;
- c. A statement by each bidder that it has not paid, and will not pay, any bribes;
- d. An undertaking by each bidder to disclose all payments made in connection with the contract in question to anybody (including agents and other middlemen as well as family members, etc., of officials); the disclosure would be made either at the time of tender submission or upon demand of the principal, especially when a suspicion of a violation by that bidder emerges;
- e. The explicit acceptance by each bidder that the no-bribery commitment and the disclosure obligation as well as the attendant sanctions remain in force for the winning bidder until the contract has been fully executed;
- f. Undertakings on behalf of a bidding company will be made “in the name and on behalf of the company’s chief executive officer”;
- g. The following set of sanctions shall be enforced for any violation by a bidder of its commitments or undertakings:-
 - (i) Denial or loss of contract;
 - (ii) Forfeiture of the bid security and performance bond;
 - (iii) Liability for damages to the principal and the competing bidders, and
 - (iv) Debarment of the violator by the principal for an appropriate period of time.
- h. Bidders are also advised to have a company code of conduct (clearly rejecting the use of bribes and other unethical behaviour) and a compliance program for the implementation of the code of conduct throughout the company.
- i. The vendors are required to sign a Pre-Contract Integrity Pact and submit it separately along with the technical and commercial offers.

7.2 Penalty for use of Undue Influence

In addition to the integrity pact, the procurement contract requires an undertaking that the seller has not used any undue influence in relation to the obtaining or execution of the contract. See Clause 16 of the Standard Clauses in Contract given in Appendix H of DPP-2008, reproduced below.

The seller undertakes that he has not given, offered or promised to give, directly or indirectly any gift, consideration, reward, commission, fees brokerage or inducement to any person in service of the buyer or otherwise in procuring the Contracts or forbearing to do or for having done or forborne to do any act in relation to the obtaining or execution of the Contract or any other Contract with the Government for showing or forbearing to show favour or disfavour to any person in relation to the Contract or any other Contract with the Government. Any breach of the aforesaid undertaking by the seller or any one employed by him or acting on his behalf (whether with or without the knowledge of the seller) or the commission of any offers by the seller or anyone employed by him or acting on his behalf, as defined in Chapter IX of the Indian Penal Code, 1860 or the Prevention of Corruption Act, 1947 or any other Act enacted for the prevention of corruption shall entitle the buyer to cancel the contract and all or any other contracts with the seller and recover from the seller the amount of any loss arising from such cancellation. A decision of the buyer or his nominee to the effect that a breach of the undertaking had been committed shall be final and binding on the seller.

7.3 Bar on Representative and Broker

The DPP-2008 requires that all dealings with the supplier be on a principal to principal basis. It requires in the procurement contract that the seller provide an undertaking that no agents Indian or foreign have been engaged by the supplier. A violation of the undertaking results in cancellation of the Contract without compensation, and debarment of the supplier from contracting with the government for a period of not less than five years. See provisions reproduced below.

AGENTS/ AGENCY COMMISSION

The seller confirms and declares to the buyer that the seller is the original manufacturer of the stores referred to in this contract and has not engaged any individual or firm, whether Indian or foreign whatsoever, to intercede, facilitate or in any way to recommend to the Government of India or any of its functionaries, whether officially or unofficially, to the award of the contract to the seller; nor has any amount been paid, promised or intended to be paid to any such individual or firm in respect of any such intercession, facilitation or recommendation. The seller agrees that, if it is established at any time to the satisfaction of the buyer that the present declaration is in any way incorrect or if at a later stage it is discovered by the buyer that the seller has engaged any such individual/firm, and paid or intended to pay any amount, gift, reward, fees, commission or consideration to such person, party, firm or institution, whether before or after the signing of this contract, the seller will be liable to refund that amount to the buyer. The seller will also be debarred from entering into any supply Contract with the Government of India for a minimum period of five years. The buyer will also have a right to consider cancellation of the Contract either wholly or in part, without any entitlement or compensation to the seller who shall in such event be liable to refund all payments made by the buyer in terms of the Contract along with interest at the rate of 2% per annum above LIBOR rate. The buyer will also have the right to recover any such amount from any contracts concluded earlier with the Government of India.

ACCESS TO THE BOOKS OF ACCOUNTS

In case it is found to the satisfaction of the buyer that the seller has engaged an Agent or paid commission or influenced any person to obtain the contract as described in clauses relating to Agents/ Agency Commission and penalty for use of undue influence, the seller, on a specific

request of the buyer shall provide necessary information/ inspection of the relevant financial documents/ information.

8. Dealing with Extortionist Government Functionaries

8.1. Positive Deviance Approach

The Positive Deviation Initiative (PDI) is a global collaborative, funded by the Rockefeller Foundation, working to amplify the use of the Positive Deviance (PD) approach to enable communities to solve seemingly “intractable” problems requiring social and behavioral change, including the problem of corruption. Positive Deviance is a development approach that is based on the premise that solutions to community problems, including corruption, already exist within the community. The goal then is to “discover” these solutions and then implement them more broadly. See generally www.positivedeviance.org.

Given below are some of the strategies that have been developed using the Positive Deviance approach. These are intended to help the lawyer deter public extortion. See B. Horowitz, *Bridge Ogres, Little Fishes and Positive Deviants* (February 2006); available at the PDI website.

- Serving the client is NOT everything;
- Strengthening yourself (to successfully and ethically negotiate around an extortion demand);
- Never pay a bribe on behalf of a client;
- Have a reputation of never submitting to extortion;
- Treat public servants as human beings;
- Know where the procedural bottlenecks are;
- Understand the signals that a bribe is being solicited, and understand the myriad forms that a bribe can take.

Attempts are underway to apply the Positive Deviance approach to develop (discover) solutions that could be used by businesses in dealing with extortionate government demands. The hope is to come up with ways in which a company can continue to do business in a corrupt environment without compromising its legal and ethical obligations. One such initiative is described below.

In the context of dealing with corruption in India, the ABA Section of International Law organized a series of concurrent global round table discussions on “Dealing with Extortionist Government Functionaries”. The session was attended by senior executives and lawyers from business undertakings, both private and public sector, government officials and retired members of the judiciary. Taking a cue from Positive Deviance, the exercise at the session was for members of the group to share their experience on what works in dealing with an extortionate demand in India. The findings of the group for India are noted below.

Strategies to Deal with Corruption

Pursuant to the discussion, the following suggestions emerged, which have or may work in dealing with extortionist government functionaries:

- Courage to say “no” and determination to stand by that decision;
- Companies to have written policy to not pay bribes for getting work done from government authorities. Example of a leading company (Tata Sons) was given, which does not resort to bribing as part of its internal code of conduct. The said company has been able to withstand bribe demands without relenting and has also been able to get its work accomplished;
- Companies should to begin with comply with legal and regulatory requirements to ensure no scope for a demand of bribery exists;
- If despite complying with all legal and regulatory requirements government functionaries still raise demands for bribe, affected party must take representation to higher authorities regarding his/her grievance;
- E-governance has drastically reduced the scope of bribe in various government sectors as there is no direct interaction with government employees. Therefore, e-governance should be encouraged and implemented by government authorities;
- Honest people within the state machinery should be awarded. There should be civic groups which should act as watch dogs.

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FCPA CASES INVOLVING BRIBERY IN INDIA

No	Company/Offender	Date	Violation	Total Fine(s)/ Penalties (US \$)	Comment
1.	Mario Covino (filed by Department of Justice fraud section)	January 2009	Covino admitted that from March 2003, through August 2007, he caused employees and agents of the Orange County, California based valve Company to pay approximately \$1 million in bribes to numerous foreign government officials for securing business for the Orange County valve company from state-owned enterprises in several countries including India's Maharashtra state electricity board; also admitted to providing false and misleading responses to internal auditors during a 2004 internal audit of the company's commission payments and deleting emails that referred to corrupt payments, for the purpose of obstructing the said audit.	Sentencing scheduled for July 20, 2009; faces a maximum of five years in prison.	As part of his plea agreement, Covino has agreed to co-operate with the department in its ongoing investigation.
2.	Westinghouse Air Brake Technologies Corporation ("Wabtec") (filed by DOJ fraud section)	February 2008	In the agreement with the Department of Justice regarding improper payments to government officials in India, Wabtec has acknowledged responsibility for the actions of its Indian subsidiary Pioneer Frictions Limited and its employees and agents who made various payments to the Indian Railway Board for obtaining and retaining business with the Indian Railways.	Payment of \$300,000 penalty and further remedial steps, including the adoption of rigorous internal controls.	Upon discovering these payments, Wabtec conducted an investigation through outside counsel, voluntarily disclosed its findings to the department, cooperated fully with the department, and instituted remedial compliance measures. As a result of these mitigating factors, the department has agreed not to prosecute Wabtec or Pioneer for making improper payments, provided Wabtec satisfies its obligations under the agreement for

No	Company/Offender	Date	Violation	Total Fine(s)/ Penalties (US \$)	Comment
3.	York International Corp.(filed by Department of Justice fraud section)	October 2007	According to the Deferred Prosecution Agreement and criminal information filed in the District Court for the District of Columbia, York has acknowledged responsibility for the actions of two of its subsidiaries whose employees and agents paid kickbacks to the Iraqi government officials. York's investigation of its illicit payments in Iraq also led the company to discover that from 1995 through 2005 the two subsidiaries made and authorized kickbacks to government customers and contractors of government customers in order to retain and obtain contracts on governmental projects in Bahrain, Turkey, Egypt, India and UAE.	\$10 million penalty	York entered into a Deferred Prosecution Agreement for three years and have its compliance programs and procedures reviewed by an independent monitor.
4.	Textron Inc.(filed by Department of Justice fraud section)	August 2007	Under agreement between the department and Textron, Textron divulged that between 2000 and 2003, three of Textron's David Brown (French) subsidiaries made improper payments to the Iraqi government to obtain contracts. On a thorough review of these payments, Textron also discovered improper payments made in other countries including India, Egypt and UAE.	\$1.15 million fines as part of the department's ongoing investigations into the UN Oil for Food program.	The department has agreed not to file criminal charges against the company or its subsidiaries in recognition of Textron's early discovery and reporting of improper payments.
5.	Westinghouse Air Brake Technologies Corporation ("Wabtec") (filed by SEC)	February 2008	For the years between 2001 through 2004, Wabtec through its Indian subsidiary, Pioneer Friction Limited, made improper payments of approximately \$ 85,000 in cash to employees of the Indian Railway Board to obtain business through bids and \$21,217	Wabtec paid \$288,351 in disgorgement of profits and prejudgment interest.	Wabtec to retain within 60 days an independent compliance consultant (ICC); ICC to issue a report within 60 days of being retained recommending policies and procedure to ensure compliance of

No	Company/Offender	Date	Violation	Total Fine(s)/ Penalties (US \$)	Comment
			<p>for the same purpose in 2005. Similarly from 2001 through 2004 improper payments of \$25,000 were made for obtaining additional business for certain products at the awarded price without going through a new tender process, in 2005 again \$ 6250 were paid for ordering payments; none of these payments were accurately reflected on the books and records and Wabtec failed to prevent or detect these payments.</p>		<p>FCPA and federal securities laws; ICC and staff engaged by ICC to be compensated by Wabtec for services rendered; Wabtec shall preserve FCPA and federal securities laws compliance records for 6 years and keep such records in an easily accessible place for the first two years.</p>
6.	York International Corp. (filed by S.E.C)	October 2007	<p>Amongst other offences, York's Indian subsidiary retained an agent to represent York in connection with orders for after installation service on equipment sold to the Indian Navy. From 2000 through 2006 York made a total payment of \$ 132,500 to secure 215 orders. The aforesaid amount was part of commission to the Indian agent.</p>	<p>Disgorge \$8,949,132 in profits, \$1,083,748 in pre-judgment interest, and pay civil penalty of \$2,000,000.</p>	<p>York to maintain an independent compliance monitor.</p>
7.	Chandramowli Srinivasan, President, A.T. Kearney India (ATKI), subsidiary of Electronic Data System Corp (EDS).	September, 2007	<p>Made approximately \$720,000 in illicit payments to senior employees of Indian state-owned enterprises to retain its business with those enterprises.</p>	<p>\$ 490,902 in disgorgement and pre-judgment interest; Srinivasan to pay \$70,000 as penalty.</p>	<p>In separate administrative proceeding, EDS agrees to cease-and-desist order.</p>
8.	Textron Inc. (filed by S.E.C)	August 2007	<p>Amongst other illicit payments, in 2002 Textron's subsidiary made illicit payments of \$51,870 to a non-government customer in India to secure business. Textron did not profit in this transaction.</p>	<p>Disgorge \$2,284,579 in profits, \$450,461.68 in pre-judgment interest, and civil penalty of \$800,000.</p>	<p>The Commission considered remedial acts promptly undertaken by Textron, and without admitting or denying the allegation in the Commission's complaint Textron consented to entry of a final judgment enjoining it from future violations under the provisions of the Securities and Exchange Act 1934.</p>

No	Company/Offender	Date	Violation	Total Fine(s)/ Penalties (US \$)	Comment
9.	Dow Chemical Company (filed by S.E.C)	February 2007	\$200,000 in improper payments made by a fifth-tier foreign subsidiary (DE-Nocil Crop Protection Ltd) of Dow to Indian government officials from 1996 through 2001.	\$325,000 civil penalty.	The Commission issued a settled cease and desist order against Dow, finding that Dow violated the books and records provisions and internal control provisions of the Exchange Act in connection with improper payments made by DE-Nocil. Without admitting or denying the Commissions findings, Dow consented to entry of the order.
10.	Baker Hughes Inc. (filed by SEC)	September 2001	Payments of \$15,000 made by senior managers of Baker Hughes to Baker Hughes' agents in India in 1998, for securing a shipping permit to enter Indian coastal waters. These payments were made without making an adequate inquiry as to whom the payment was made.	Settled; cease-and-desist order against violation of the books and records provisions and internal controls provision was issued and consented.	In a related criminal proceeding, the DOJ filed criminal charges resulting in a criminal fine of \$11 million.