Regular Article

Bribery: Am I a Criminal? Implications of the US Foreign Corrupt Practices Act and the UK Bribery Act in the Outsourced FM Environment

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ABSTRACT

This paper discusses the de facto international anti-bribery/anti-corruption (ABAC) standard and how facility managers can unwittingly fall afoul of it. Its conclusions will help FM practitioners in the outsourced multinational environment set up robust ethics trainings and control mechanisms for their teams in emerging markets. While bribery is found in all countries, it is especially problematic in emerging markets, which are increasingly included in FM outsourcing contracts. Three real-world situations are analyzed where misunderstandings of policy intent or implementation, lack of diligence in following standards, or other overriding considerations led to ABAC infractions. The analysis shows that the international FM outsourcing environment is susceptible to ethical difficulties caused by cutting corners during the account transition process. This is due to financial pressures during transition and a tendency to assume that the client knows best. This conclusion is not likely to be intuitive to practicing FM account managers. The paper will not touch on country standards of ethics or ABAC laws in the developing world. Such laws and standards are not always sufficiently enforced, which contributes to the persistence of bribery and corruption. This weakness in local enforcement is one factor that has led to the development of the international standard, which is framed by US and UK law.

Keywords: Bribery Act 2010; ethics; Foreign Corrupt Practices Act; international FM; outsourced FM

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INTRODUCTION AND BACKGROUND

A US company is being charged in a UK court of law for bribery in Indonesia. The company has a manufacturing plant in Indonesia. The plant's purchasing manager (an Indonesian) was found to be accepting money from a small Indonesian supplier for awarding the company a 5-year contract without proper bidding. How can such a situation end up with criminal charges in a country that was not involved? The key to understanding this hypothetical scenario lies in the fact that the US company has a subsidiary in the UK.

Large multinational companies are an important part of the client base for the FM outsourcing industry. Such client companies' international portfolios promise economies of scale in sourcing and opportunities for increased efficiency through process standardization. Furthermore, as these client companies expand their businesses into emerging markets, growth opportunities arise for the FM outsourcing industry on top of the already large outsourced base in the US, Canada, and Western Europe.

Expansion of outsourced FM operations into developing countries also represents risks, as local customs in these countries can implicitly tolerate or even explicitly accept practices that are considered unethical in the developed world. A common example of this is the expectation of officials in some developing countries that they will receive personal benefit for granting a business license to a company that wants to operate in their jurisdiction, even though the company has met all requirements to receive the license and is paying the formal license fee.

In addition to the unethical expectations of local officials, the FM outsourcing providers sometimes need to deal with expectations of bribes in their supplier base, which normally consists of locally operated companies. These local suppliers will generally have other local companies as their main client base, so dealing with imposed ethical practices from the developed world with a multinational client will represent a departure from the norm for them.

The multinational client who has outsourced FM in these developing countries can end up shielded from these practices that they consider unethical, because their FM partner now deals with them on a day-to-day basis. When an ethical issue then arises, the client can be surprised by negative publicity and fines or other penalties. Because of the damage this causes to the client company, the client-outsourcer relationship can be threatened.

Unethical acts are committed every year by well-known companies. Over the last decade (from 2006 through the first quarter of 2016) the SEC has fined 158 companies and individuals for acts related to overseas bribery with penalties reaching $795 million in one case. Among those prosecuted were prominent companies such as Novartis,

SAP, Hitachi, HP, Philips, Oracle, Pfizer, Siemens, Johnson & Johnson, IBM, Shell, GE, DaimlerChrysler, Fiat, Volvo, Chevron, Dow, and many others (US SEC, 2016). Some of these companies are clients of the FM outsourcing industry.

Typically, multinational FM accounts will be organized with a regional account director who is responsible for account teams in each country. The country team leaders (e.g., senior facility managers) will normally be local country nationals who have grown up with local business practices. The regional managers, some of whom are expatriates from the developed world, will not have this same hands-on experience in each country, but will generally be conversant in international ethics standards. At a minimum, their working knowledge of business ethics will come from the regular trainings their employers give them on the topic (US DOJ & US SEC, 2012; UK MOJ, 2011a; Sheikh, 2011). The interface between the regional manager and the local country managers is where ethical expectations can misalign if they are not explicitly stated and overtly monitored.

The International Standard against Bribery and Corruption

The de facto ethical standard for businesses dealing with foreign public officials is set by the US Foreign Corrupt Practices Act of 1977 (FCPA, amended in 1988 and 1998), and the UK Bribery Act 2010 ("Bribery Act") (Breslin, 2010; Norton Rose Fulbright, 2011). These two laws in combination can be seen pragmatically by outsourced FM practitioners as the international standard to follow because both laws potentially apply extra-territorially to companies with operations in the USA and the UK, respectively (Aaronberg, 2010; Breslin, 2010). This covers essentially all large multinational companies that have outsourced their FM operations to one of the FM industry outsourcing companies.

In other words, if Company XYZ operates in the US or UK, then its operations in all other countries should comply, respectively, with the FCPA or the Bribery Act regardless of local law. Since many large FM outsourcing clients operate in both the US and UK, both laws will often apply. This includes the FCPA applying to corrupt acts in the UK and the Bribery Act applying in the US (Travers Smith, 2011). While the UK government has said that a company would need to have a "demonstrable business presence" in the UK for the Bribery Act to apply, it would be a case-by-case court decision whether it does (UK MOJ, 2011a; Alderman, 2011). In the US, the mere listing of a company can be enough make a company liable under the FCPA (Breslin, 2010; Travers Smith, 2011). In any case, FM outsourcing companies would be wise to err on the side of caution as they provide FM services to their clients' sites around the world.

For years, the US FCPA was the benchmark used internationally against corruption involving foreign officials, but the newer UK Bribery Act is even broader in scope and can therefore be considered more critical than the older US law upon which it was based (Breslin, 2010; Norton Rose Fulbright, 2011). US multinationals that have ties to the UK (e.g., they have a subsidiary in the UK) will sometimes need to strengthen their ABAC policies that were based on the FCPA in order to comply with the Bribery Act (Breslin, 2010; Gauci, 2011; Norton Rose Fulbright, 2011).

Since most major client companies of the main FM outsourcing providers operate in both the US and the UK, both laws will apply everywhere these companies operate, including an act of corruption (e.g., a bribe) occurring outside the US and UK (Travers Smith, 2011). As there are a few differences between the two laws (one may be stricter in an area than the other) companies that operate in the US and UK need to ensure they follow the stricter of the two laws on the point in question.

An example of this is that facilitating payments are allowed in some cases by the FCPA, but never by the Bribery Act (US DOJ, 2012; UK MOJ, 2011a; Aaronberg, 2010; Breslin, 2010; Gauci, 2011; Norton Rose Fulbright, 2011). A facilitating payment is a payment intended to influence an official beyond what local law allows, even if the official will not be acting improperly (Breslin, 2010; Gauci, 2011). An example would be a payment to perform a standard service (one that the customer is entitled to receive) more quickly. A facilitating payment is not an attempt to influence the outcome of a decision. Attempting to improperly influence a decision is a bribe. Because of this distinction between the FCPA and the Bribery Act, companies that operate in the UK should follow the stricter UK law with regard to facilitating payments in all cases, even if they are a US multinational and the situation in question is taking place in the US.

Another difference is that bribery between private persons in a commercial context is not covered by the FCPA, but is by the Bribery Act (Breslin, 2010; Gauci, 2011; Norton Rose Fulbright, 2011). The FCPA also only deals with giving bribes, whereas the Bribery Act prohibits receiving bribes as well (Breslin, 2010; Gauci, 2011; Norton Rose Fulbright, 2011; Sheikh, 2011).

Additionally, while the FCPA considers the intent of the improper payment to a foreign official, the Bribery Act does not (US DOJ, 2012; Breslin, 2010; Gauci, 2011; Norton Rose Fulbright, 2011). An unwitting person can bribe a foreign official according to the Bribery Act regardless of whether there was corrupt intent. This is an important distinction in some developing countries where outsourced FM is practiced. Local employees of multinational companies in such countries might not be aware that certain payments meant to influence local officials would be considered bribery by the Bribery Act. Such payments can be seen as a nuisance rather than an impropriety. They are often just a part of getting business done in that country, and the payers might not have a sense of being involved in corruption as it is defined in the developed world. In other words, the distinction between a facilitating payment and a bribe might not be appreciated in developing countries. For clarity, in a private context the Bribery Act does require intent to improperly induce an

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activity or reward its performance for there to be an infraction (Breslin, 2010; Gauci, 2011; Norton Rose Fulbright, 2011).

Due to the heavy penalties involved in infractions of these two laws, as well as the reputational damage violators suffer, FM outsourcing client companies can be sensitive even to perceived infractions by their FM provider staff (US SEC, 2016; Breslin, 2010, Norton Rose Fulbright, 2011).

LITERATURE REVIEW

The US and UK governments have adopted, respectively, the Foreign Corrupt Practices Act (FCPA) and the Bribery Act 2010 ("Bribery Act"). The FCPA covers bribery of foreign officials (but not national officials, which is covered by other law) and accounting. The Bribery Act only covers bribery, not fraud, theft, offenses related to financial books, money laundering, or business competition. The Bribery Act covers three bribery offenses: general bribery (including receiving bribes, which is not covered by the FCPA), bribery of foreign public officials, and failure of a commercial organization to prevent bribery (US DOJ, 1977; Crown, 2010). It is notable that "general bribery" in the Bribery Act includes bribery between individuals. Table 1 gives a summary of the two laws.

While the UK law is more accessible than the US law to readers without a legal background, both laws have been supplemented with guidance documents to aid the average reader. The UK has additionally published a quick start guide to accompany its Bribery Act 2010 guidance (UK MOJ, 2011b). These documents help organizations understand the laws and their definitions, and through case studies and hypothetical examples give insight into how the governments intend to enforce them (US DOJ & US SEC, 2012; UK MOJ, 2011a). In addition to the formal guidance provided by the two governments, a number of legal specialists (both professional and academic) have provided summaries and explanations of these two laws (Aaronberg, 2010; Breslin, 2010; Travers Smith, 2011; Sheikh, 2011). Since the UK law was passed well after the establishment of the US law (some 30 years), much of the discussion in the technical press has focused on how the UK law compares to the US law, thus providing summaries and explanations of both laws (Gauci, 2011; Norton Rose Fulbright, 2011).

There is broad agreement in these summaries on the impact of these laws on businesses. This agreement is not surprising in view of the thorough guidance on the laws given by the US and UK governments. The UK guidance in particular reflects the concern expressed by the business community that the new UK law, which in a sense builds on the standard set by the US law, could reduce competitiveness overseas (UK MOJ, 2011a; Aaronberg, 2010).

The points in the summaries which are most relevant to the outsourced FM industry are as follows. First, both laws build on the concept of "extra-territoriality". A company headquartered in Country A that has operations in Country B can be prosecuted in Country B for an offense that occurred in Country C. Second, corrupt intent in offering money to a foreign official is not necessary to be guilty of bribery under UK law. Third, private/commercial bribery is illegal under UK law, not just bribery of foreign officials. Fourth, and finally, companies are legally required to prevent bribery and should put systems in place to ensure bribery does not occur; existing systems need to be expanded to include the stricter provisions of the UK law if they are only based on the older US law.

TABLE 1.—Comparison of ABAC Law Scope

Scope	FCPA (US)	Bribery Act (UK)
Bribery	Yes	Yes
Foreign officials	Yes	Yes
National officials	No	Yes
Individuals (non-gov't)	No	Yes
Giving bribes	Yes	Yes
Receiving bribes	No	Yes
Failure of company to prevent bribery	No	Yes
Records and accounting	Yes	No

The Cases

The three situations described below involved well-known Western-based multinational client companies, as well as international FM providers. All names, both company and individual, are fictitious. The cases took place in Southeast Asia.

CASE 1: SUPPLIER-EMPLOYEE FRAUD

Middleton, Inc. has operations throughout the Philippines, including a 2500-employee service center in Manila. Middleton first outsourced its FM in the Philippines as a local initiative to Sampson Services, who managed Middleton's buildings for a couple of years, and then lost the contract to a competitor called Paradigm Services. Paradigm's remit was to manage all of Middleton's sites across Asia as part of a globally coordinated outsourcing effort.

The new Middleton-Paradigm FM contract was a lump sum (i.e., fixed price) contract, with some consumables treated as pass-through items. Paradigm was to manage these consumables as part of their scope and invoice Middleton for them separately on a cost-plus basis (true cost with a defined markup). The previous Middleton-Sampson contract was also lump sum.

One of the FM processes at Middleton's service center was that copier paper was ordered by an employee named Ann, from a supplier called ACME Paper. Ann was a Sampson employee and had been in that role at the Middleton service center since Sampson was awarded the outsourcing contract. Ann was seen as a solid contributor by the relevant Middleton managers, and ACME was a well-established supplier to Middleton. Copier paper was a pass-through item and was therefore not included in the lump sum invoice.

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The paper management process was as follows: Paper was ordered by Ann, delivered by ACME to the building's receiving dock, verified (physical quantity vs. delivery slip) by Middleton's security guards, and moved by a cleaning company employee to a storeroom. The paper was distributed from the storeroom to the printers by cleaning company employees as needed. This process had been followed as long as Sampson was the FM provider, and was substantially taken over by Sampson from Middleton.

A year after Paradigm took over FM operations from Sampson, the Middleton General Manager of the service center got a text message from one of the security guards that someone should look into what Ann was doing. This senior manager spoke to the Paradigm facility manager, who undertook an audit.

It was quickly determined that Ann had been ordering the same amount of paper every month (5500 reams), but that only 500 reams were being delivered to the site each month with a delivery slip that matched the 500 reams. However, the invoice payment was matched against a second delivery slip that listed 5500 reams. Once Ann realized her boss (the facility manager) was curious about paper ordering, she left the site and never returned to work. In her desk were found the two sets of delivery slips (one set matching the physical deliveries and one set matching the invoices) as well as a receipt for a pre-paid ticket to Bangkok charged to a credit card in the name of the owner of ACME. It is assumed that Ann received a portion of the value of the under-delivered paper from the owner of ACME. The amount of money involved was significant for an employee at Ann's pay grade in the Philippines. A large amount was overbilled each month and it went on for a long time.

Lessons Learned by Paradigm

At face value, this fraud should have quickly been discovered by the normal control processes that are common to the FM outsourcing companies. During the "post-mortem" investigation performed by Paradigm, four issues were identified that together led to complacency in the local FM team and Paradigm's local head office. This complacency allowed the situation to remain undetected during the Sampson-Paradigm handover, and then continue for a year under Paradigm. Had it not been for the guard's tip, it could have potentially continued for quite some time.

The four issues and their lessons are as follows:

1. Based on Middleton's instructions, the copier paper volume was not included in the due diligence Paradigm performed prior to transition, hence paper was not part of the lump sum. Paradigm did not receive paper usage or cost information in the due diligence data pack they received from Middleton. This information was provided to Paradigm several months after transition so they could manage the paper ordering process as a pass-through cost. Paradigm therefore did not validate the Middleton information or create a budget for paper.
   Lesson:
   Paradigm should have insisted on receiving during due diligence all data for processes they were going to be managing (whether pass-through or not) and then done benchmarking on usage rates, physical delivery volumes, and unit costs. This would have helped their client detect illicit schemes that were being perpetrated in the past. In this case, even a simple sense check done by dividing the number of reams of paper ordered each month by the number of employees in the building would have shown an unreasonable amount of printing being done by each employee every month. Instead, Paradigm accepted Middleton's usage data without question. Even sense checking where such a large amount of paper (about 14 pallets) could be stored on site would have shown something to be amiss.
2. During due diligence, Ann was warmly recommended to Paradigm by the Middleton regional FM director, who was to be Paradigm's direct client. Due to this recommendation, Paradigm did not do any substantive interviewing or background checks before hiring Ann.
   Lesson:
   During the early phases of a client relationship, it is difficult to say no to a sincere recommendation from the new client. Paradigm should have asked the client beforehand not to provide staff recommendations, so that Paradigm could perform its own interviews and background checks without the influence of the client. This would have allowed Paradigm to be neutral and objective.
3. Ann's scheme with ACME was perpetrated across the cut-over from Sampson to Paradigm due to the continuity of the staff and vendor.
   Lesson:
   While staff and vendor continuity can be helpful during cut-over, job rotation should have been considered as soon as operations had been shown to be stable, and novated contracts should have been rebid as soon as reasonable.
4. The substance of the scheme was in the ordering process, which continued as it had in the past under Sampson. Paradigm should have reengineered the process as part of transition.
   Lesson:
   Several weak practices were part of the process which Paradigm does not allow elsewhere.
   - The POs for paper were not itemized, but just ordered as "one lot". This "lot" was defined with the supplier as 5500 reams (as well as certain other consumables such as toner cartridges). POs must always be itemized. This lack of itemization helped to conceal the extraordinarily large amount of paper being ordered.
   - Two delivery slips were used, one for the physical delivery and one for the subsequent invoice delivery. One delivery slip should be used unless there are exceptional circumstances. If multiple delivery slips must be used, they should be reconciled each month and their existence should be known to management.

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In this case, the goods receipt signature from the guard at the dock was on one slip, but was not on the other slip that had the payment authorization signature. An audit would have revealed the existence of the parallel receipts, as they each only contained one signature.

- Separation of duties was not observed. Ann controlled too many steps in the ordering and payment process herself. In this situation, staffing constraints had made it inconvenient to have complete separation of duties. However, compensating controls such as frequent random audits should have been in place, and the controls should have been signed off by Paradigm management.
- The copier paper POs were not approved by people who had sufficient knowledge of the site. This reduced the likelihood of an approver sense check. These POs were for large amounts and were sent directly to Paradigm's local head office for approval as they were above the account team leader's approval limit. The account team leader should have approved in the first instance, and then sent the POs to a higher management level in the head office.

Why did Paradigm need to learn these lessons?

These lessons should seem obvious to experienced FM practitioners. Why did the fraud still happen?

The Paradigm account team was under time pressure to get the account transitioned and running when they took over from Sampson. The transition phase for a new client generates costs but no revenue, so the account team was trying to shorten the due diligence and transition phases. As part of this, processes that were seen as minor did not get looked at carefully. The assumption was that processes that were to be operated under the pass-through model didn't need validation because the client would have already validated them.

In fact, the paper costs were the largest recurring cost element in the FM budget, yet Middleton did not think that this was odd. Middleton accused Paradigm of neglecting its duty of care as FM professionals. Middleton said they had decided to outsource FM in the first place because they weren't sure they were running things efficiently in-house, and expected their chosen FM provider to find things that were not running well and correct them.

Paradigm should have been doing post-transition audits of the largest budget cost items in situations where timing constraints limited the depth of due diligence and transition.

Conclusion to Case 1

Even though this was a case of simple employee fraud and did not involve a public official, it would still fall under the Bribery Act. Since Middleton and Paradigm both have operations in the UK, the Bribery Act is binding upon them anywhere in the world. On the assumption that Ann received kickbacks for her part in the scheme, this situation was an infraction of the Bribery Act because it involved her receiving money in return for accepting false invoices submitted by the supplier. She was performing her duty improperly and with corrupt intent.

Ann was an individual accepting the bribe personally and her company did not know about it. Nevertheless, Paradigm was under obligation by the Bribery Act to put systems in place to prevent bribery. Even if Paradigm did have systems, they were not effective in this case due mainly to the time pressure on the account team. Since such pressure is not unusual, FM outsourcing companies should strengthen their controls during due diligence and transition.

CASE 2: TIPS TO TRASH COLLECTORS

AJC Ltd. has a large manufacturing complex in Bangkok, Thailand. The site consists of a country head office building next to an industrial facility. Carlton Partners provides full FM services to the office building and janitorial services to the industrial facility. The complex is located at the edge of a mainly residential neighborhood, with a number of small restaurants immediately adjacent to the site.

AJC pays the city a standard fee for trash collection. This fee pays for trash to be picked up from the street in front of the site. The trash needs to be moved to the site entrance from an internal trash collection point 100 meters away.

A number of years before Carlton took over FM operations at the site, AJC convinced the trash collectors, who are city employees, to come onto the site and pick up the trash from the internal collection point rather than off the street. The collectors are not supposed to do this, but agreed to if each collector received a monthly tip. The sum of these tips was greater than the fee being paid to the city, so the money involved was a material amount. The tips were paid in cash and no tax receipt was given by the collectors. Tax receipts can only be given by businesses or the government for official services in Thailand. AJC started this practice so that the trash did not sit on the street in front of the neighboring open air restaurants while waiting for pickup by the city.

During Carlton's due diligence of the site prior to taking over operations, the local AJC manager asked Carlton to continue the practice as it was beneficial to everyone involved. The Carlton facility manager did so to ensure operational stability, but was not comfortable with it because the tips were to be paid from petty cash and reimbursed by Carlton's local head office without formal receipts. Because of this concern, the Carlton facility manager started getting a "courtesy receipt" signed by the collectors each month along with copies of their identification cards. Additionally, she approached the city about changing the service to have the fee include pickup from the site interior, but the city was not interested in changing anything. The Carlton facility manager then got an offer from a private company to pick up the trash and take it to the dump instead of having the city do it, but AJC did not agree to change the process.

After a year, the local AJC manager resigned. On her last day in the office, she told the AJC regional FM director,

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who was her boss, about the process. He immediately asked for the tipping to be stopped and spoke to AJC's compliance group, who said it was serious enough to warrant an investigation. Carlton was formally reprimanded by AJC and told that they were at risk of losing the local contract and potentially even the regional contract, in spite of AJC's local management being the driver behind the trash removal process.

Lessons Learned by Carlton

Both AJC and Carlton made mistakes. Both companies are answerable to the FCPA and the Bribery Act because they operate in the US and the UK. Their responsibility is not mitigated by the authorities in Thailand condoning the tipping.

AJC operates in numerous developing countries around the world and had been found guilty of bribery under the FCPA in the past. The negative publicity and the fines levied had sensitized AJC's management to the need for strict adherence to the FCPA and Bribery Act, but this did not get passed on to Carlton during due diligence. It does not even appear that AJC sufficiently informed their regional or country managers about the need for strict local adherence to ABAC law. At a minimum, AJC was not monitoring local adherence sufficiently in this country. However, since this paper is looking at how FM providers can avoid mistakes, it will focus on Carlton's lessons below.

The issues and lessons from this case are:

1. Carlton was not aware of AJC's history of ABAC infractions, but should have been. Carlton could have easily learned about it during their preparation for taking on the account. Carlton's failure to do this showed AJC that Carlton did not take ABAC considerations seriously enough. This was a broader issue for AJC, as they were concerned that Carlton could make similar mistakes elsewhere. From AJC's point of view, Carlton should have explicitly asked AJC about the topic.
   Lesson:
   Carlton did not have a part in their due diligence process that focused on getting to know their new client's culture and history. Their focus was solely on getting to know the client's processes. Due diligence should include all factors that could affect the new relationship and broaching sensitive topics with the client can be a positive signal.
2. Carlton's local management assumed that AJC's involvement in paying the tips to the trash collectors meant there was no issue with the concept from AJC's point of view. This assumption was against Carlton's better judgment. The local Carlton facility manager was not comfortable with the AJC process she had inherited, to the point that she actually improved it by asking for courtesy receipts and approached the city about formalizing the tips. The Carlton local office was reimbursing regular payments made from petty cash without proper receipts, so even if Carlton's management felt AJC's acceptance of the process was grounds to continue it, Carlton's internal financial processes should have raised a warning flag.
   Lesson:
   It is unwise to blindly trust a client's processes. While clients can have many reasons for outsourcing FM, a common reason is that they want a professional to perform the services. The FM outsourcing partner is expected to do things better. FM providers should trust their own experience and should not assume they have the client's backing for continuing sub-standard processes. The client might be assuming their sub-standard processes have been improved by the FM outsourcing provider as a matter of course. Sometimes a client, especially a local client in a developing country, might not have the knowledge needed to know that a process is sub-standard. Additionally, even if a process that is in violation of ABAC law has been overtly agreed with a local client manager, it is risky (beyond being illegal) to continue the process because the local client manager might leave. In this case, the AJC local manager was condoning something that was illegal, against her company's policy, and being done without her manager's knowledge. It only became apparent to Carlton when she left that AJC did not approve of the practice. ABAC-relevant processes should always be based on solid principles.
3. The tips were seen as a minor matter by both the local client and the local FM provider, but were actually classified as a bribe, as they were meant to induce the collectors to perform a service that AJC was not entitled to receive: coming onto site to collect trash. In other words, the tips were given to cause the collectors to perform their duty improperly, to the benefit of AJC. Neither the local AJC manager nor the local Carlton head office saw trash collectors as government officials, but ABAC laws classify any government employee as such. The FCPA states that a foreign official is "any officer or employee of a foreign government or any department, agency, or instrumentality thereof", and in Section 6 of the Bribery Act, a foreign public official is described as an individual holding legislative, administrative or judicial posts or anyone carrying out a public function for a foreign country or the country's public agencies or an official or agent of a public international organization (U.S. DOJ, 1977; Crown 2010). The trash collectors were employees of a foreign government and carried out a public function, hence the tips given to them were illegal payments under US and UK ABAC law.
   Lesson:
   Outsourced FM practitioners need to be trained to understand the implications of the FCPA and the Bribery Act, and the terminology used in these acts must be clearly defined to them. In this case, it is easy to see how tips to trash collectors would not be seen as bribing a foreign official.

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CASE 3: HONORARIUM TO A FIRE MARSHAL

Startco, Inc. has a head office in Manila, Philippines. By law, office buildings must be inspected annually by a city fire marshal. This fire inspection is routinely combined with a fire safety training performed for the first aiders and other relevant staff in the company. This training is a free service provided by the city, but is not mandatory. Startco uses this service every year.

When 3P Management plc took over operations of this head office, several of the Startco FM staff transferred to 3P in the same roles. One of these employees was the Health & Safety manager, named Susan. Susan had many years of work experience and had been with Startco for several years before transferring to 3P. She was responsible for organizing the annual fire inspection and fire safety training. At the end of the first year of operation, Susan arranged for the fire marshal to come to site. He asked Susan about the honorarium he would receive for performing the training, with the intent of confirming that it would be paid as it had been in the past. As Susan was now a 3P employee, she asked her former boss, the local Startco manager, to approve the payment of this honorarium. Approval was received in an email. An honorarium is a small amount of money given for services that are normally performed free of charge, or for which it would seem improper to set a formal price.

Susan arranged for the visit and paid the honorarium out of the 3P petty cash at the site. This was reimbursed by the local 3P office without tax receipt, as usual. Since the fire safety training is supposed to be free of charge, a fire marshal cannot give a tax receipt for an honorarium. The payment and reimbursement of this honorarium was not flagged by anyone at 3P. This type of payment is common in the Philippines.

Several months later Susan was in a 3P ethics training that is given every year by 3P's regional ethics officer, who is from another country. As part of the training, it was reiterated that no payments whatsoever are to be made to anyone that works for the government unless they are legally required payments and tax receipts are given in return. Susan spoke up and said that she had just made such a payment to the fire marshal. Her intent in making the comment was to point out that something seemed inconsistent. She wanted to know why honoraria to fire marshals were acceptable, when other payments were apparently not.

During the subsequent discussion with the ethics officer, it became clear that Susan already knew that payments such as the honorarium were not permitted, but also knew that they are not seen as improper and are regularly done. Susan said it was the discord caused by hearing a foreigner say that unofficial payments were never permitted, while knowing they were standard practice in her country, that caused her to raise the question.

The Startco regional FM director was informed of the payment. In spite of the clear knowledge and approval of the local Startco manager, the director was unhappy 3P had made the payment, and the Startco-3P relationship was seriously damaged.

Lessons Learned by 3P

The difference between this situation and the one described in Case 2 above is that the payment of tips to the trash collectors was an ad hoc solution to a specific need AJC had, whereas the honorarium payment by 3P was symptomatic of an entire culture in the country.

Issue and lesson:

The payment of an honorarium to a fire marshal, and other similar payments in the country, is so established that it could have been an affront to the fire marshal if Susan had declined to pay it based on a US or UK ABAC law. Such affronts are not culturally acceptable, and it likely would have led to fire permit issues, as the fire marshal has power to withhold the permit after the annual inspection.

There seems to be cognitive dissonance in some developing countries surrounding such payments to government officials. Both parties to the payment often do know that they are not strictly legal, however the practice is so broadly established and openly discussed that the payments are rationalized away. It is from a practical point of view difficult to do business in these cultures without such payments, so the payments are made.

When providing outsourced FM services in such countries, it is necessary to work through the various scenarios where honoraria and other payments will be expected by government officials with the local account FM team, and develop a set of standard responses to the normal requests for payment by government officials. For example, in this case it would have been possible for Susan to tell the fire marshal that because Startco is a foreign multinational, they are forbidden from paying honoraria by their home-country laws. If the fire marshal had objected on the grounds that Startco paid them in the past, Susan could have responded that during the outsourcing of FM services to 3P, it was determined that this was an incorrect practice and must be stopped. Issues with the fire marshal would then be referred to senior management.

Specifically scripted answers can help the local employee deal with a potentially disgruntled government employee in a gracious manner. In some developing countries, the concept of "saving face" is an important part of local culture, and carefully scripted answers allow the employee to come out of the confrontation with honor. In this case, the payment was classified as a facilitating payment, as it was made to influence a government official to perform a service that Startco was permitted to receive from the official free of charge. Facilitating payments are not permitted under the Bribery Act, but are permitted in some circumstances by the FCPA.

Final Conclusion

Ethics overseas is especially critical for FM outsourcing providers. Multinational companies often operate in areas

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of the world where ethics are weak. Many of these companies have outsourced their FM operations. The global and regional account managers on the outsourcer side are expected to ensure compliance in all countries under their remit to the same ethical standards that the client company espouses. There can be little tolerance by the client for local ethical practices that fall short of these standards. FM outsourcing providers should protect themselves by ensuring their staff fully understand ABAC laws and by carefully performing due diligence on new accounts, as well as regular audits on existing accounts, to ensure practices are in compliance with ABAC laws. FM outsourcing providers should, as experts, also ensure their clients are aware of the implications of existing client practices.

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