EN

GIACC

Global Infrastructure Anti-Corruption Centre

EN

EN

Contract Terms

EN

This section provides guidance in relation to the inclusion by an organisation of a prohibition of corruption into contracts with business associates.

Measure 14 of the Anti-Corruption Programme for Organisations (https://giaccentre.org/programme-organisations/) requires that an organisation should implement procedures which ensure that, in relation to all business associates which pose a more than low corruption risk:.

- As far as is reasonable, the organisation should require that all contracts between the organisation and the business associate should contain a prohibition of corruption.
- Where it is not reasonable for the organisation to require the contract to contain such prohibition, then the absence of the prohibition should be a negative factor taken into account in undertaking the relevant risk assessment.

This section examines this requirement in two stages:

- Firstly, when it is reasonable for the organisation to require such provisions in a contract.
- Secondly, the types of anti-corruption commitments which can be included in the contract.

Sample Anti-Corruption Commitments (https://giaccentre.org/chess_info/uploads/2019/10/GIACC.WEBSITE.CONTRACTTERMS.SAMPLE.docx) are annexed which can be used and adapted by an organisation.

The requirement to include a prohibition of corruption in the contract.

The requirement in Measure 14 to include a prohibition of corruption in the contract applies only in relation to contracts with business associates which pose a more than low corruption risk to the organisation. (See Business Associate Corruption Risk Assessment (https://giaccentre.org/risk-assessment-business-associate/) for suggested categorisation of business associate by risk, and for suggested thresholds for low risk.)

The organisation would not be required to insert a prohibition of corruption into its contracts with low risk business associates. The administrative requirement to do so is likely to be unreasonable and disproportionate to the low risk.

In the case of business associates which pose a more than low corruption risk, the organisation should where reasonable include a prohibition of corruption in its contracts with those business associates.

1. It will normally be reasonable for the organisation to require a prohibition of corruption when the organisation has influence over the business associate, and therefore can insist either on the business associate using the organisation's own contract wording, or on amendments being made to the contract to include this prohibition. The organisation is likely to be able to require a prohibition, for example, where the organisation is appointing:
    - suppliers to work on the organisation's standard purchase conditions
    - a sub-contractor with a large scope of work
    - an agent to act on its behalf in a transaction.
2. In some cases, the organisation may not have sufficient influence over a business associate to be able to require a prohibition of corruption to be included in the contract with that business associate. For example, in contracts with major customers or clients, or where the organisation is buying components

from a major supplier on the supplier's standard terms. In such cases, it would not be reasonable for the organisation to insist on the prohibition being included in the contract. In these cases, the absence of such prohibition does not mean that the contract should not go ahead, but the absence of such prohibition should be regarded as a negative factor in the relevant risk assessment. In these cases, therefore, in undertaking the risk assessment, the organisation should consider, taking into account all relevant factors, including the lack of a corruption prohibition in the contract, whether the risk of corruption in relation to the transaction is sufficiently low for it to be a reasonable business decision to continue. In some cases, the lack of a corruption prohibition may be a major concern (e.g. if the business associate is refusing to agree to insert a corruption prohibition in relation to a high corruption risk transaction). In other cases, it may be regarded as a minor concern. For example, a particular type of business associate may be deemed by the organisation's corruption risk assessment to be in the medium risk category because the transaction is of high value, but a risk assessment of the particular transaction may show that the transaction is taking place in a low risk location, and poses a low risk to the organisation, with the result that the lack of a corruption prohibition in the contract is likely to have minimal impact and it would be a reasonable decision to continue with the contract.

What anti-corruption commitments can be included in the contract?

Simple anti-corruption prohibition

The above requirement is a minimum requirement (i.e. that, as far as is reasonable, all contracts between the organisation and the business associate should contain a prohibition of corruption). The organisation could choose to meet this requirement by inserting a very simple clause in the contract which requires the business associate to agree not to participate in any corrupt conduct.

More comprehensive anti-corruption provisions

However, the organisation may choose, particularly in the case of more complex or higher risk transactions and higher risk business associates, to include more comprehensive anti-corruption provisions. These could include, for example, the following:

1. A definition of corruption to include bribery, extortion, fraud, cartels, abuse of power, embezzlement, money laundering, and any similar criminal activity.
2. Agreement by the business associate that:
    - it will not participate in any corrupt practices in relation to the contract or project
    - it will ensure that its personnel, and subsidiary and related companies, do not participate in any corrupt practices
    - it will take reasonable steps to ensure that its agents, joint venture and consortium partners, sub-contractors, suppliers and consultants do not participate in any corrupt practices.
3. Confirmation by the business associate that it, and its owners, directors and relevant managers, have not been investigated, convicted or debarred for corruption.
4. Agreement by the business associate to ensure that its relevant personnel receive anti-corruption training.
5. Provisions allowing the organisation to audit the business associate in relation to the relevant transaction.
6. Provisions allowing the organisation to undertake an investigation in the event of suspected corruption involving the business associate.
7. Provisions allowing the organisation to terminate the contract with immediate effect in the event of any breach by the business associate of the anti-corruption provisions.

8. Agreement by the business associate to indemnify the organisation for any liability or loss suffered by the organisation due to a breach by the business associate of the anti-corruption provisions.
9. A provision passing on to the business associate any relevant anti-corruption obligations assumed by the organisation in its other contracts in relation to the same project or transaction. For example, if a contractor has given anti-corruption warranties to a project owner, then it should require similar warranties from all of its subsidiary and related companies, sub-contractors, suppliers, agents and consultants.
10. Where the contract may involve significant claims (e.g. for variations, extensions of time, liquidated damages, defects etc.), the organisation could include provisions requiring these claims to be handled in an honest and transparent manner. These provisions would oblige the claimant to take reasonable steps to ensure that all claims submitted by it are genuine and accurate. The recipient of claims would be obliged to take reasonable steps to review the claims diligently, objectively and in good faith. (See GIACC sample Claims Code (https://giaccentre.org/claims-code/) for suggested provisions in this regard).

The above provisions are mainly stated as commitments and obligations of the business associate, but it would be common and more fair in most contracts to make the provisions apply equally to both parties to the contract.

Other relevant contractual provisions

The above provisions are specifically applicable to anti-corruption. However, other clauses commonly included in contracts can also have an anti-corruption impact. These could include, for example, the following:

1. All essential terms of the contract should be set out in the contract in a complete and clear manner. Uncertainty and vagueness in contract provisions can leave room for subjective interpretation by managers, which results in a corruption risk (i.e. a manager of the organisation receiving a bribe from the business associate to interpret the contract in favour of the business associate).
2. All services to be provided by the parties under the contract should be legitimate and should be expressly stated and described in the contract. For the reasons stated in a), there should be no uncertainty or vagueness in relation to scope of work.
3. All fees or other compensation payable in respect of the contractual services should be expressly stated in the contract and should be proportionate to the services being provided. Fees or compensation which appear to be larger than is warranted by the services specified in the contract may indicate that the fees or compensation are being used to conceal a bribe.
4. Payment methods for fees or other compensation should be expressly stated in the contract and must be capable of legitimate justification. In particular, bank accounts for receiving payments should clearly belong to the relevant contracting party and should, unless there is good reason to the contrary, be located in the country of residence of the relevant contracting party. Any payment in a currency or into an account which cannot be properly justified (for example, payment into an off-shore bank account) may facilitate a corrupt transaction or, at the very least, may give rise to suspicion of a corrupt transaction.

Templates

See sample of Anti-Corruption Commitments (https://giaccentre.org/chess_info/uploads/2019/10/GIACC.WEBSITE.CONTRACTTERMS.SAMPLE.docx)

See sample of Claims Code (https://giaccentre.org/claims-code/)

Implementation checklist for Measure 14

EN

1. The organisation should identify from its Business Associate Corruption Risk Assessment (https://giaccentre.org/risk-assessment-business-associate/) which categories of business associate pose more than a low risk of corruption to the organisation.
2. The requirement to insert a prohibition of corruption into its contracts does not apply to low risk business associates.
3. In respect of business associates which are in a higher risk category than low risk, the organisation should take the following steps:
    - Identify any categories of business associate which will be required to work under the organisation's standard conditions of contract (e.g. suppliers and sub-contractors over which the organisation has bargaining power).
    - Identify any categories of business associate in respect of which it is likely that the organisation will need to work under the business associate's conditions of contract (e.g. clients, large suppliers with a greater bargaining power than the organisation). In relation to these business associates:
        - identify any categories of business associate in respect of which it is likely to be unreasonable to require the insertion of a prohibition of corruption into its contracts.
        - identify any categories of business associate in respect of which it is likely to be reasonable to require the insertion of a prohibition of corruption into its contracts.
4. The organisation should develop the actual anti-corruption contract wording which it will use. This could, for example, be a relatively simple provision for e.g. lower value suppliers working on a standard purchase order, but more comprehensive provisions for larger value and higher risk suppliers or sub-contractors. The organisation should update its standard contract documents to include these anti-corruption provisions.
5. The organisation should document these procedures.
6. The organisation should appoint a manager(s) responsible for implementation of these procedures. In particular:
    - to ensure that the organisation's standard wording is being used where appropriate;
    - to ensure where the organisation's standard anti-corruption wording is not being used, that:
        - where reasonable, an appropriate anti-corruption prohibition is included
        - where not reasonable, the lack of such a provision is a negative factor in the organisation's risk assessment on that business associate or transaction.
7. In relation to 6, different managers may be appointed to oversee different categories of business associate. For example, a procurement manager may manage the appointment of suppliers, a project manager may oversee the appointment of sub-contractors, and a sales manager may oversee the entering into a contract with a client.
8. On specified high risk transactions, the organisation may determine that the compliance manager or legal adviser should be required to assess and approve any transaction where there is no anti-corruption provision in the contract.

Updated on 10th April 2020

EN