

## **BUSA ANTI-CORRUPTION WORKING GROUP (BACWG)**

### **Anti-corruption implications when dealing with Agents**

The South African law against anti-corruption imposes a positive duty prohibiting bribery in the private and public arenas. What is forgotten or ignored is that a principal is liable for the actions of the agent even in the anti-corruption sphere. Hence even if a company or individual knows that it or s/he cannot bribe someone, a person acting on behalf of the company or individual is similarly bound by law. Companies are required to ensure adequate due diligence on agents, intermediaries, consultants and contractors (“agents”) that they know what is permissible under local law, that their actions (even outside of SA) may be ascribed to the principal and therefore must comply with the law. A principal cannot under the current law turn a blind-eye, claim ignorance of the conduct of the agent or deny knowledge of the actions of the agent in the hope of escaping liability. Prior to contracting with an agent for services the principal, in order to protect itself, must conduct a “know your agent” review as part of its due diligence process. Any red flags arising out of the due diligence should act as a warning that the agent may breach the law and therefore the principal must desist from using such agent in order to mitigate its risks.

The due diligence on the agent should include:

- Copy of agent’s CV and verification of credentials and references;
- Speak to colleagues/friends/contacts in industry about using the particular agent;
- Credit check;
- Legal check with police;
- Verify history of agent’s performance in your industry, reputation;
- Search engine (example Google) check of agent’s name and if it appears in association with any negative reports;
- Copy of audited financial statements of agent’s business;
- If agent is in another country you may need to check with local SA embassy what are the risks of using local agents and if agent’s name is on their radar;
- Copy of business card of agent, verify address, email, phone numbers;
- If possible visit agent’s offices, meet employees and satisfy yourself that everything is legitimate;
- Enter into contract with agent, spelling out what scope of work is, specify obligation to comply with local laws and not engage in any action which would breach anti-bribery laws, duty on agent to maintain accurate accounting records/invoicing, cancellation clause for material breach including any actual or suspected anti-corruption breach;
- Ensure agent’s fees are a) permissible under local laws, b) commensurate with norms of that industry sector, c) not excessive (excessive fees give leeway for misuse), d) will be used for agent’s benefit and not others associated with scope of work, e) proper record keeping/invoicing and accounting is maintained (no off the book accounting);
- Resist paying up front lump sum agents fees and try to stagger payments based on achievement of milestones;
- Bonus payments should not be so exorbitant that it will act as an incentive to the agent to do something unethical or illegal – should be based on actual performance, results, ethical behavior, protection of client/principal’s interests;
- Deposit fees/payments into legitimate bank account (no cash hand-overs) held by agent in local country of where services are rendered;
- Beware agents being foisted on you by other party to the contract negotiation or government officials;
- Beware agents who have close family relations in government or are generally too close to government officials if the scope of the contract involves securing government permits, etc.
- Know your agent – how s/he operates, what s/he will be doing for you, etc. Do not turn a blind eye to any suspicious conduct.