Eradicating corruption in infrastructure delivery

According to the Co-founder and Director of the South African Chapter of the Global Infrastructure Anti-Corruption Centre (GIACC-SA), Anton Krause, the private sector must lead the way in eradicating corruption in infrastructure delivery; this opinion piece, provided by the GIACC-SA looks at legislation and frameworks addressing corruption facing South Africa.

The legal framework governing bribery and corruption in South Africa consists of the following legislation and regulations:

- Prevention and Combating of Corrupt Activities Act (2004), known as PRECCA
- Prevention of Organised Crime Act (1998)
- Protected Disclosures Act (2000)
- Financial Intelligence Act (2001)
- Protection of Constitutional Democracy Against Terrorist and Related Activities Act (2004)
- Competition Act (1998)
- The South African Companies Act (71 Of 2008) / Section 43(a)

PRECCA is South Africa's primary legislation against bribery and corruption, establishing a comprehensive offense of corruption. It broadly encompasses the acceptance or offering of any gratification from another person, with the intention of influencing that person to engage in illegal, dishonest, unauthorised, incomplete, biased, or information-misusing actions. This legislation applies to both public officials and private individuals.

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Section 34(1) of PRECCA mandates a reporting responsibility, requiring individuals in authoritative positions, as defined in Section 34(3) of the Act, to report corruption offenses such as theft, fraud, extortion, bribery, or uttering a forged document involving an amount exceeding R100,000.

It is crucial to clarify that this section solely imposes a reporting duty and doesn't necessitate an obligation to investigate.

Prepare for SAPS Investigation

The framework of Section 34 designates the responsibility of investigating to the relevant authority with the constitutional mandate for crime investigation in South Africa, namely the South African Police Service (SAPS). Nevertheless, it is generally advisable to carry out an internal investigation to comprehend the circumstances of the offense and to prepare for the formal investigation by the SAPS.

However, there is a legislative change on the horizon. Emanating from the State Capture Commission Report, the Zondo Commission has proposed a significant measure by recommending the incorporation of a "failure to prevent corrupt activities offence".

This recommendation is on the brink of materialising, given that the National Council of Provinces approved the Judicial Matters Amendment Bill on 6 December 2023. The bill is currently awaiting presidential assent and aims to amend the PRECCA. It introduces a new provision, Clause 34A, which establishes an offence for failing to prevent corrupt activities.

The language of this newly proposed offence mirrors the version advocated in the State Capture Report and takes inspiration from the failure to prevent bribery offences outlined in section 7 of the United Kingdom Bribery Act, 2010.

As per the suggested Section 34A, an individual associated with a *"member of the private sector or incorporated state-owned entity"* would be deemed culpable if they offer or agree to offer any form of gratification to another person with the aim of securing or maintaining business or an advantage for that member. This mirrors the existing prohibition outlined in Chapter 2 of PRECCA.

What does 'association' include?

The term "association" in relation to this offence is broadly outlined, encompassing individuals providing services for the member, regardless of their position. This inclusive definition includes employees, independent contractors, and other third parties delivering services to the entity.

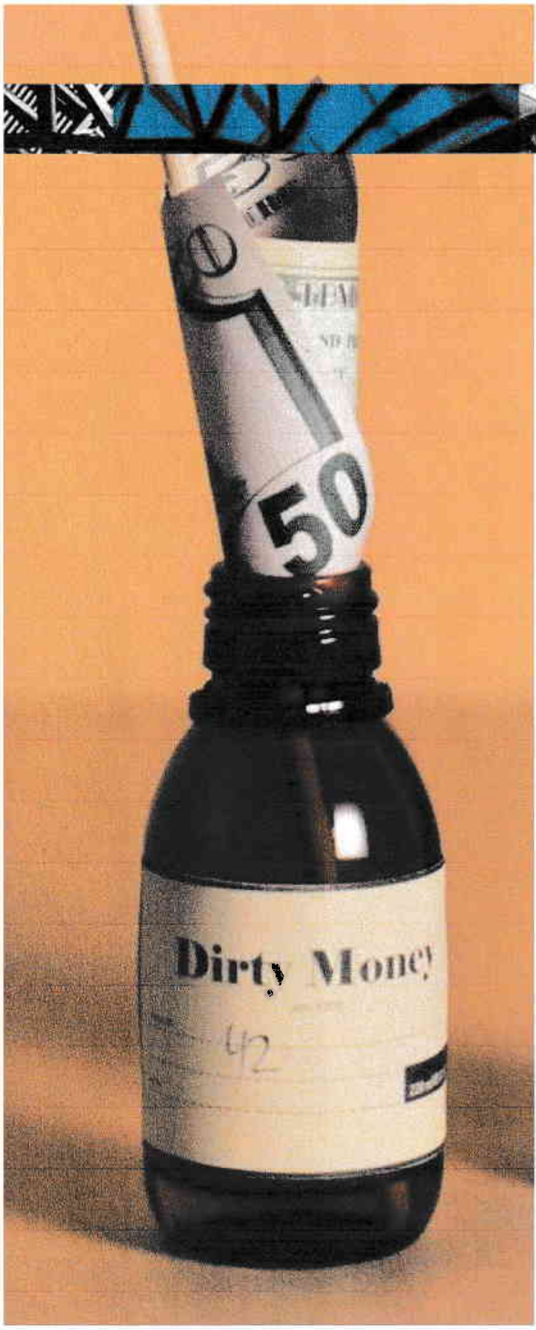
Consequently, comprehensive anti-corruption risk mitigation controls must encompass these diverse third-party entities. It is crucial to emphasise that engaging in corrupt activities in South Africa can result in civil consequences.

Civil damages claims arising from corruption or bribery are prevalent and the extent of these claims is determined by the harm inflicted, and any awards are meant to be compensatory rather than to be punitive.

Criminal Consequences of Corruption

In relation to the criminal consequences of corruption in South Africa, a court may impose a sanction of imprisonment and/or a mandatory fine. Any contraventions of PRECCA may include:

- **a fine of unlimited value;**
- **a prison sentence (the maximum sentence being life imprisonment);**
- **an additional fine equal to five (5) times the value of the gratification involved in the offence; or**
- **an endorsement of the convicted person or enterprise on the Register for Tender Defaulters (a "Black Listing"), which means that the individual/s and entities are placed on a list which the government and public sector is prohibited to trade with.**



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The proposed amendments to the PRECCA aligns with the Construction Industry Development Board's Board Notice 152 of 7 August 2015. This government gazette notice provides for the CIDB Best Practice Contractor Recognition Scheme/Best Practice: Specification for a Fraud and Corruption Management System.
It states -

"In terms of sections 5(2) of the Construction Industry Development Board Act, 2000 (Act No. 38 of 2000) ('the Act'), the Construction Industry Development Board is empowered to promote best practice Standards. In terms of the cidb Best Practice Contractor Recognition Scheme, the Construction Industry Development Board has identified certification to BS 10500 Specification for an Anti-Bribery Management System (ABMS), but extended to fraud and corruption, as a best practice for Grade 9 enterprises."

One can deduce that these CIDB, and the future PRECCA requirements, are going to have significant cascading ramifications for registered Grade 9 construction and civil contractors and their supply chain associates.

Support Mechanisms

To assist South African infrastructure organisations to meet this new proposed legislation head-on, the GIACC-SA (a GIACC Affiliate and registered NPC) offers the GIACC Organisational Anti-Corruption System (GIACC OACS) and the GIACC Project Anti-Corruption System (GIACC PACS).

These are designed to be applicable to a broad spectrum of organisations, encompassing construction, civil contractors and built environment professional practices engaged in infrastructure projects.

The GIACC OACS is inclusive, catering to organisations of varying sizes across the private sector. Construction and civil contracting organisations, and built environment professional practices often confront significant risks, including criminal and civil liabilities, financial losses, and damage to reputation due to corruption involving their personnel and business associates.

Minimise Risks

To minimise such risks, these organisations are encouraged to mainstream a comprehensive anti-corruption management system aimed at preventing, detecting, and addressing corruption within their own structures and projects and in their interactions with business associates.

While the adoption of an anti-corruption system cannot guarantee the complete eradication of corruption, it can substantially contribute to its prevention and detection. Furthermore, in the event of potential legal action against the organisation or its personnel, such a system can serve as crucial evidence that the organisation took reasonable measures to prevent corruption, potentially mitigating criminal liability.

The GIACC and GIACC-SA offers a detailed organisational and project anti-corruption system, including measures, guidance, and templates, tailored for the infrastructure sector. Aligned with international best practices (such as the Commonwealth Anti-Corruption Benchmarks published in 2021) and consistent with the SANS 1734 (BS

10500) and ISO 37001 Anti-bribery Management System, these systems comprise of policies and procedures that organisations can integrate into their existing management systems to reduce the risk of corruption.

The primary objective of these systems is to minimise the risk of corruption:

- within the organisation and project delivery, by its personnel or others acting on its behalf
- against the organisation, its personnel, or others acting on its behalf
- whether occurring directly or indirectly
- both within the organisation's home country and in other countries of operation
- irrespective of the monetary value involved.

Mainstreaming these anti-corruption systems should be treated with the same diligence and attention as any other corporate management process, such as health and safety, environmental or quality assurance.

Tailor Systems to Your Requirements

Organisations are encouraged to tailor the systems to their specific requirements, considering the applicable laws, organisational size, transaction value and nature, project locations, and perceived corruption risks. The level of preventive action may vary based on the value and risk associated with contracts or projects, and organisations are reminded that while commercial risk may differ, the criminal risk remains constant. The available systems are a flexible framework, allowing organisations to exercise judgment in modifying them based on their unique circumstances.

As a minimum, a construction, civil and built environment professional organisation is advised to mainstream the following infrastructure anti-corruption measures:

Anti-corruption Policy: Adopt an anti-corruption policy, demonstrating the organisation's commitment to prohibiting corruption. The policy should include measures to prevent corruption and address instances that occur.

Anti-corruption Programme: Mainstream an anti-corruption programme to operationalise the anti-corruption policy. The system should incorporate appropriate policies, procedures, and controls, considering the nature and extent of corruption risks.

Board and Management Responsibility: The board should assume overall responsibility for mainstreaming the anti-corruption policy and system.

Communication of Policy and Programme: The chief executive officer should issue a written statement confirming the board's commitment to the anti-corruption policy and programme.

Compliance Manager: Appoint a senior manager as the full/part time compliance manager responsible for ensuring the adequacy and effective mainstreaming of the anti-corruption system.

Resources: Provide the necessary resources for the effective mainstreaming of the anti-corruption programme.

Employment Controls: Implement procedures related to personnel, including vetting before employment, conditions of appointment, informing personnel of the anti-corruption policy, declaring conflicts of interest, ensuring necessary competence, and disciplinary procedures.

Training: Provide regular anti-corruption training to relevant personnel, covering potential corruption types, associated risks, the organisation's policy, programme, and reporting mechanisms.

Gifts, Hospitality, Entertainment, Donations & Other Benefits: Adopt a policy prohibiting improper gifts, hospitality, entertainment, donations, or other benefits and implement procedures to minimise the risk of policy breaches.

Facilitation Payments: Prohibit facilitation payments, except in cases where the safety and liberty of personnel are perceived to be at risk. Implement procedures to minimise the risk of breaches.

Risk Assessment and Due Diligence: Regularly assess corruption risks in existing and proposed activities, conducting due diligence when risks are identified as more than low.

Review and Improvement: Regularly review and enhance the anti-corruption programme to effectively manage corruption risks.

Decision-making Process: Establish a procedure aligning the decision-making process and the seniority of decision-makers with the value of transactions and perceived corruption risks.

Contract Terms: Ensure that contracts with business associates posing more than low corruption risks contain a prohibition of corruption.

Commercial Controls: Implement commercial controls, including those related to sales, procurement, supply chain management, operational activities, project management, and other commercial aspects, to minimise corruption risks.

Records: Maintain detailed records of the anti-corruption policy and programme, including any compliance issues.

Investigating and Dealing with Corruption: Establish procedures requiring appropriate investigation and action in response to reported, detected, or reasonably suspected corruption or breaches of the anti-corruption policy or programme.

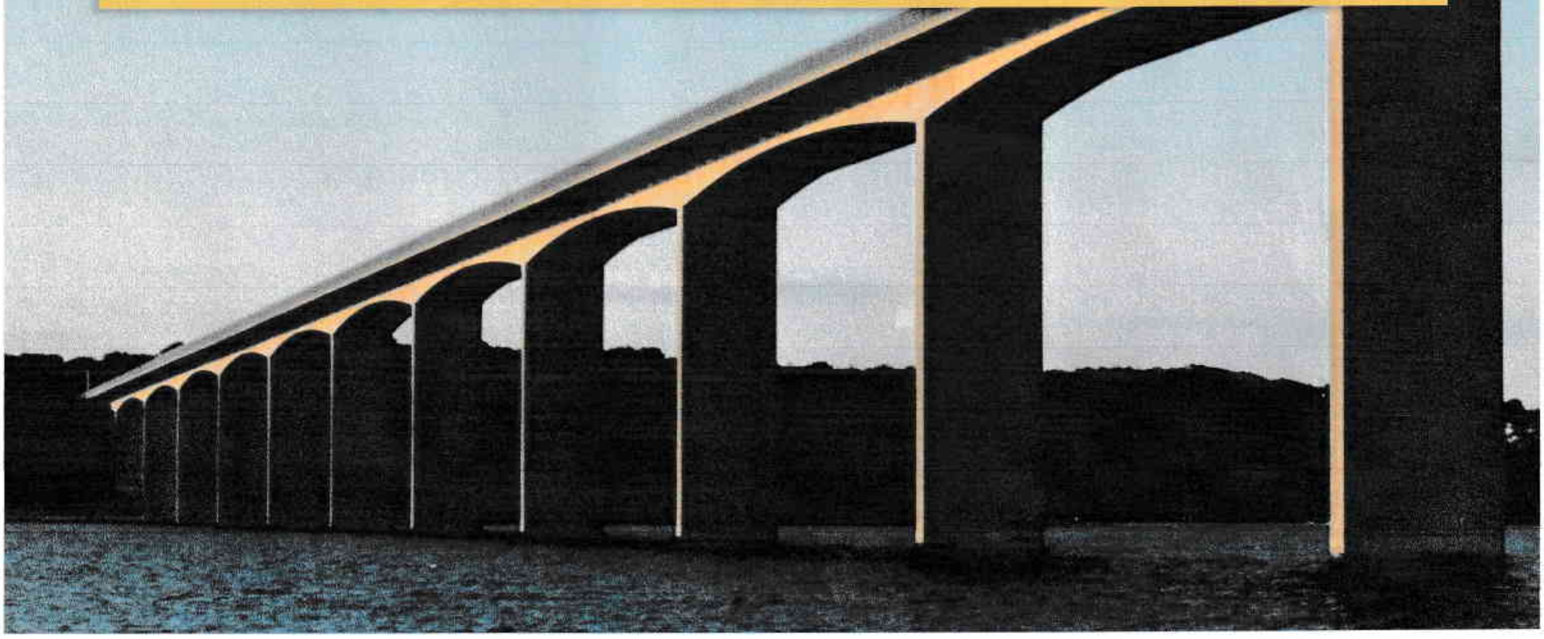
Financial Controls: Implement financial controls minimising corruption risks for, against, or on behalf of the organisation.

Mainstreaming by Controlled Organisations and Business Associates: Ensure that organisations (agents, subsidiaries and sub-contractors) under the organisation's control mainstream reasonable and proportionate anti-corruption procedures.

Reporting: Implement procedures enabling personnel to report suspected or actual corruption or breaches of the anti-corruption policy or programme confidentially.

Independent Assessment and Certification: While not essential, obtaining independent verification and validation or certification, such as SANS 1734 (BSI 10500) or ISO 37001, can provide assurance that the anti-corruption programme aligns with good practice.

Cooperating with Other Stakeholders: While not mandatory, collaboration with other stakeholders in the public and private sectors is beneficial for reducing corruption in the infrastructure sector. Open cooperation helps organisations learn from others' experiences and best practices.



In conclusion, the incorporation of the proposed "failure to prevent corrupt activities offence" signals a substantial transformation in South Africa's anti-corruption legal framework, presenting a considerable compliance hurdle for those falling under its purview.

Considering these advancements, South African infrastructure organisations need to mainstream resilient anti-corruption compliance programs within their organisations and project management delivery methodologies.

For further information, please visit the GIACC-SA website at www.giaccsa.org.za and www.giaccentre.org or alternatively contact Anton Krause via: anton@giaccsa.org.za

NOTE: Organisations are permitted to freely adopt and mainstream the GIACC organisational anti-corruption systems, but they are strictly prohibited from selling the entire system or any part of it. GIACC and the GIACC-SA offers this anti-corruption system at no cost, emphasising that it does not guarantee the complete eradication of corruption or absolve organisations from potential criminal liability. GIACC and GIACC-SA holds no liability to organisations or individuals utilising the system.