

FIFA, the World Cup Selection and the FCPA

One of the interesting facts of life that I have learned being married to an English woman is that what I thought of as 'Football' is really 'American Football'. The true game of 'Football' is played by the rest of the world. (She also decries the term 'World Series' but that's another post). She had also assured me that when the UK won its bid to host the 2018 World Cup we would go to the home of 'Football' and watch a match or two, alas it was not meant to be. Who knows maybe we can catch a match in Russia about that time.

FIFA and Bribery Allegations against Executive Committee Members

However, the thought that the Motherland of Football would host a World Cup gave me more than a passing interest in the recent selection process of countries to host the 2018 and 2022 World Cup. I was very interested in the allegations of bribery and corruption leveled at FIFA during the selection process, known, these days, as the "world's richest and most influential single-sport ruling body". As has been reported extensively throughout the world, two members of FIFA's 24 member executive committee were suspended for allegedly offering their votes to determine which countries would host the 2018 and 2022 World Cups. Both men were caught on videotape by the UK Sunday Times asking for specific sums of money, apparently in exchange for their votes. The New York Times, in an October 20, 2010 article, reported that Reynald Temarii, the Tahitian President of FIFA's Oceanic regional confederation, reportedly said that he wanted "about \$2.3 million to finance a sports academy" in New Zealand. Amos Adamu, the Nigerian representative, was alleged to have requested approximately \$790,000 to fund the construction of soccer fields in Nigeria. Mr. Adamu reportedly asked for "cash to be paid into his personal account". FIFA President Seth Blatter was quoted as saying that the two men's actions had "created a very negative impact on FIFA and on the bidding process". On November 17, 2010, the FIFA Executive Committee did take action as both men were suspended by FIFA for their actions; subsequently both men have recently had the appeals of their suspensions denied by the FIFA appeal committee. Rueter's has reported that Adamu will appeal his upheld suspension by FIFA to the Court of Arbitration for Sport in Lausanne.

In yet another interesting development, the UK Telegraph reported that the countries of Spain and Qatar had colluded to trade their votes for their respective 2018 and 2022 bids. These allegations of collusion between the two bids were initially reported in September, 2010 but they were denied by both countries. A subsequent investigation by FIFA's ethics committee said that there was insufficient evidence to take any action. On Monday, February 7, FIFA President Seth Blatter told the BBC that the two bids had colluded, though he insisted it had made no difference to the final outcome, which saw Russia and Qatar win the 2018 and 2022 tournaments respectively. "I'll be honest, there was a bundle of votes between Spain and Qatar," Blatter said. "But it was a nonsense. It was there but it didn't work, not for one and not for the other side."

The Wall Street Journal on Qatar's Bid

I was also interested in the bid awarded to Qatar to host the 2022 World Cup. In a January 13, 2011 article in the Wall Street Journal, entitled "*Qatar's World Cup Spending Spree*", reporter Matthew Futterman detailed the "spending spree" of a reported one year amount of \$43.3 million by Qatar, which led to its winning World Cup bid. Futterman's article focused on information derived from the internal documents of Qatar's bidding committee. Futterman reported that there was no evidence that Qatar violated the rules and regulations of FIFA to secure its winning bid. Rather he reported on how Qatar "worked within FIFA's broad guidelines" to secure its winning bid.

From the internal bid documents, obtained by the WSJ, Futterman reported that some of the tactics used by Qatar included:

1. Charitable Donations. Commitments were made to establish, build or continue to fund soccer academies, in the home countries in which FIFA executives who would vote on the 2022 site selection, through a Qatar football training academy, Aspire Academy for Sports Excellence, controlled by the Qatar Royal Family. The WSJ article cited examples in Thailand and Nigeria. In Thailand, Futterman reported that Aspire would "build a football academy" and in Nigeria, it would "expand grass-roots training". These internal documents also revealed that the Aspire Academy also continued to work with three African countries which were home to FIFA executive committee members, who all had a vote on the 2022 site selection.

2. Use of Marketing Agents. The Qatar bid included the hiring of certain well known celebrities to assist in the effort. In order to "talk up" the Qatar bid to host the 2022 World Cup, the WSJ reported that it hired several international personalities as "Bid Ambassadors" to endorse the Qatar bid. These endorsements were important because they assisted Qatar to "establish its legitimacy within FIFA and connections to executive committee members." The only Bid Ambassador named in the WSJ article was the former French star Zidane. It was reported that Zidane received \$3 million for his endorsements of the Qatar bid.

Review under the FCPA and Bribery Act

FIFA is generally recognized as a, non-US, Non-Governmental Organization (NGO) and therefore the US Foreign Corrupt Practices Act (FCPA) does not apply to it. But we thought that it might be of use to review some of the tactics, as reported in the WSJ, that Qatar used to secure the 2022 World Cup bid, in the context of what might be allowed under the FCPA. It should be noted that, although still waiting to be implemented, the UK Bribery Act would apply to UK companies and citizens involved in the matter because there is no public/private distinction under the Bribery Act and unlike the FCPA, the Bribery Act does not have require that a bribe be offer or paid to a *foreign governmental official*, only that a bribe or offer to bribe be made.

A. Charitable Donations-the Football Academies

Charitable donations are not banned by the FCPA. However any such donations must be made following the requirements of the Act. The FCPA Blog reported that when asked about the guidelines regarding requests for charitable giving, the FCPA then Deputy Chief of the Criminal Division's Fraud Section at the DOJ Mark Mendelsohn, said that any such request must be evaluated on its own merits. He advocated a "common sense" approach in identifying and clearing **Red Flags**. This would include determining if a governmental decision maker held a position of authority at the charity to which the donation would be made; whether the donation was consistent with a company's overall pattern of charitable giving; who made the request for the donation; and how was it made.

The series of **Red Flags** raised and cleared by the US Company was the subject of Opinion Release 10-02. After initially listing the 3 levels of due diligence in which the company had engaged prior to finalizing its choice of local entity to receive the donation in question; the DOJ noted that the donation 'requested' of the US Company would be subject to the following controls:

- Payments of the donations would be staggered over a period of eight quarters rather than in one lump sum.
- Ongoing monitoring and auditing of the funds use for a period of five years. The donations would be specifically utilized for the building of infrastructure.
- The funds would not be paid to the parent of the organization receiving the grant and there was an absolute prohibition on compensating Board Members.
- The proposed grant agreement under which the funds would be donated had significant anti-corruption provisions which included a requirement that the local organization receiving the funds adopt an anti-corruption policy and that US company making the donation receive full access to the local organization's books and records.

In addition to the specific factors presented by the requesting US Company in Opinion Release 10-02, the DOJ also listed several of the due diligence and/or controls that it had previously set forth in prior Opinion Releases relating to charitable donations. These included:

- certifications by the recipient that it will comply with the requirements of the FCPA;
- due diligence to confirm that none of the recipient's officers or directors are affiliated with the foreign government at issue;
- a requirement that the recipient provide audited financial statements;
- a written agreement with the recipient restricting the use of funds to humanitarian or charitable purposes only;
- steps to ensure that the funds were transferred to a valid bank account;
- confirmation that contemplated activities had occurred before funds were disbursed; and
- ongoing auditing and monitoring of the efficacy of the program.

B. Use of Marketing Agents-the Bid Ambassadors

Much has been written on the use of agents under the FCPA. The UK Ministry of Justice Consultative Guidance on the Six Principals for an “*adequate procedures*” or *best practices* anti-bribery and anti-corruption program also discuss agents. Recently, Michael Volkov, noted FCPA attorney from the firm of Mayer Brown, spoke on the topic of due diligence on third parties. Volkov believes the key for any compliance based issues is to document the evidence. If you ask questions and get answers, document the process. If you ask questions and do not receive answers, document that process too. But the key is to Document, Document, and Document.

Volkov gave his thoughts on some of the basic pieces of information to cover when a company might begin the due diligence process. This would include:

1. Existence of relationships with foreign governmental officials.
2. Prior history of bribery or other crimes.
3. What is the nature of services provided?
4. What is the compensation and what will be the payment method?
5. Have a written contract in place with appropriate terms and condition’s including:
 - a) Reps and Warranties on compliance;
 - b) Right to inspect and audit books and records; and
 - c) Right to terminate if you believe that a violation has occurred.

Howard Sklar, writing in the Open Air Blog, added the following inquiries should also be made:

1. Are any of the leaders of the company (beneficial owners, or senior management) government officials, or related to government officials?
2. Is this company going to interact with or sell products to government officials on your behalf?
3. Is the third party publicly traded, or subject to regulatory oversight?
4. How did you first become aware of this third party?
5. Is the company what you’d expect—in terms of size, resources, office space, etc.—to allow the third party to provide the services they’re providing to you?
6. How is this company going to get paid? Unusual payment arrangements are a red flag.
7. How much is this company going to get paid? Is it amount in line with what the market value is?
8. Will the company provide business references?
9. Is anyone from senior management, or are the beneficial owners, on the Special Designated Nationals (SDN) or debarred parties list?
10. Has this company been in the news for something negative? Do a Google news search.
11. Has the third party said or done anything that makes your people nervous?
12. Was the procurement/onboarding process run according to normal channels or was it a rush job?

The point of both of these lists of questions is that in order to secure an agent under the FCPA or Bribery Act, a significant investigation, in the form of background due diligence, must be employed. When a company does business with higher-risk third parties, you need to understand not just the parties involved, but the transactions that follow. This means that a company must also proceed with transactional due diligence. The most important thing to know is, will there be money left on the table? You need to know where that money is going. Under the FCPA if the end user is a Government, you need transaction-level diligence if you want to be safe. However, the Bribery Act does not make this governmental/non-governmental distinction.

Remember the former French star Zidane and his \$3 million payment? The question is what was he, and the other Bid Ambassadors, paid to do? According to the WSJ, they “helped to establish Qatar its legitimacy within FIFA and *connections to executive committee members*”. such a purpose might well require audit rights to determine where the money paid to the agent went and whether it can be accounted for in a financial review. But there is one further analysis, which was alluded to by Howard Sklar in his list, that being the **amount** paid to the agent. A commission rate can be a percentage of a successful bid or it can be a flat rate, fixed fee payment. In this situation we do not know what the financial reward to Qatar will be for hosting the 2022 World Cup. Indeed, the reward may not be financial but rather the prestige of hosting the quadrennial championship of the world’s most popular sporting event. So there may be no such measure of the Zidane payment. But if the figures cited in the WSJ article are correct, Zidane received an amount of almost 10% of the Qatar one-year budget. That must have purchased some serious connections. Such a high figure, in an applicable situation, might well lead to significant FCPA and Bribery Act scrutiny.

Happily for the Qatar bid committee, it probably did not fall within the jurisdiction of the FCPA and thus there should be no FCPA implications for the bid committee. Since the Bribery Act is not yet implemented, there are no implications under this un-implemented law.

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