

Red Flags in Public Procurement: Navigating Multi-Jurisdictional Intermediary Risk Under the FCPA, POCA, and PMLA.

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Abstract

When multinational corporations enter India's public procurement market, they never pay bribes directly to the public servant instead, they hired local expeditors, customs brokers, and liaison consultants to navigate bureaucratic channels. This paper focuses on analyzing the jurisdictional friction that creates when third-party corruption touches both global and domestic anti-bribery laws. Under the U.S. Foreign Corrupt Practices Act¹, parent companies face vicarious liability for the acts of local intermediaries under a standard of willful blindness. In India, while Section 8 of the Prevention of Corruption Act¹ criminalizes commercial bribegiving through third parties, Section 17A creates a procedural barrier by requiring prior government sanction before investigating public servants. however, the Enforcement Directorate can freeze project assets under the Prevention of Money Laundering Act² as proceeds of crime, completely unbothered by Section 17A delays. This paper analysis recent enforcement case law, evaluates the Supreme Court's split verdict on Section 17A, and details what actual, on-the-ground compliance is required to establish an "adequate procedures" defense under Section 9 of POCA.

Keywords: Public Procurement, Third-Party Risk, FCPA, Section 17A POCA, Section 8 POCA, PMLA, Proceeds of Crime, Adequate Procedures.

I. INTRODUCTION

Every year, billions of rupees flow through public procurement tenders across India, from highway construction and power grid expansions to municipal zoning permits and defense equipment. For foreign multinationals and large Indian companies, winning a tender is only half the battle. The harder part is executing it. Getting a power line laid or a corporate facility built requires securing dozens of municipal clearances, environmental sign-offs, electricity grid connections, and tax clearances across different tiers of government. This is where thirdparty intermediaries enter the picture. corporate executives never walk into a local municipal office to deliver cash, because it is too risky, and violates basic internal accounting protocols. Companies tend to do what has become standard market practice: they hire local "government liaison consultants," clearing agents, or general contractors who promise to handle bureaucratic friction and secure permits "within project timelines." When a local liaison agent pays off a municipal engineer to release a permit, the law reacts in two completely different ways depending on where you look. In Washington, the U.S. Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) view the parent company as strictly accountable under the Foreign Corrupt Practices Act (FCPA). In India the local police or State AntiCorruption Bureau faces Section 17A of the Prevention of Corruption Act, 1988 (POCA), which bars investigations into public officials without prior executive sanction.

¹ *Prevention of Corruption Act, No. 49 of 1988, §§ 7, 8, 9, 17A, India Code (1988) (as amended by Act 16 of 2018).*

² *Prevention of Money Laundering Act, No. 15 of 2003, §§ 2(1)(u), 3, 5, Sch. Pt. A, India Code (2002).*

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Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78dd-1 et seq.

II. STATUTORY FRAMEWORK AND THE WILLFUL BLINDNESS STANDARD

Understanding third-party exposure requires looking closely at how two key statutes, the FCPA in the United States and POCA in India, treat corporate responsibility for third-party acts. The FCPA extends to any company listed on U.S. stock exchanges, U.S. domestic concerns, and foreign entities that use any instrumentality of U.S. interstate commerce. That includes clearing a transaction in U.S. Dollars through a correspondent bank or sending an email stored on a server located in the United States. In practice, over eighty percent of all FCPA enforcement actions brought by the DOJ and SEC stem directly from bribes paid by third party intermediaries. Corporate boards often assume that contracting with an independent consultant creates a legal shield. The FCPA destroys that assumption through its definition of statutory knowledge under 15 U.S.C. § 78dd-1(f)(2)(A). Knowledge does not require explicit C-suite authorization. It includes "willful blindness" or "conscious avoidance." If local management notices suspicious invoices or inflated success fees and chooses not to ask questions, federal prosecutors treat that deliberate ignorance as statutory knowledge.

In India, the Prevention of Corruption (Amendment) Act, 2018 completely overhauled corporate bribery rules. Before 2018, POCA primarily targeted the public servant taking the bribe, treating the commercial bribe-giver as a mere abettor. The 2018 amendment changed that completely. Section 8 now directly criminalizes giving an undue advantage to a public servant, explicitly adding the words "whether directly or through a third party." Section 9 creates direct corporate criminal liability whenever an associated person, whether an employee, agent, or contractor bribes an official to secure or retain business. Under Section 9, a company's only affirmative defense is proving it had "adequate procedures" in place to prevent such conduct.

III. LEGAL ISSUE

When a third-party intermediary pays a bribe in a public procurement project, corporate counsel must address four overlapping issues: identifying the operational red flags that trigger FCPA liability, understanding how Section 17A restricts domestic police inquiries, navigating the interim status of these investigations pending the Supreme Court's split verdict, and managing parallel asset-freezing threats under the PMLA.

IV. THIRD-PARTY RED FLAGS AND CASE STUDY ANALYSIS

Compliance officers regularly look for clear red flags, like consultant fees that far exceed market norms, vague invoices requesting lump sums for "liaison charges" or "administrative facilitation" without timesheets or work record, instructions to transfer commission payments to offshore bank accounts, consultants operating out of residential apartments with no technical staff or relevant industry background, and undisclosed personal or family relationships between the consultant and government tender officials.

Two landmark U.S. SEC enforcement actions involving Indian operations demonstrate how easily these red flags pull foreign parent entities into criminal liability.

In *SEC v. Cognizant Technology Solutions Corp.* (2019)³, Cognizant's Indian subsidiary was constructing a massive 2.7 million square foot corporate facility in Chennai. Securing statutory planning permissions and environmental clearances dragged on, threatening project timelines.

Local management engaged a prominent third-party general contractor to handle the municipal approvals. Senior executives at the Indian subsidiary authorized the contractor to pay roughly \$2 million in bribes to senior municipal officials. The contractor paid the bribes and then recovered the cash by submitting inflated construction reimbursement requests, which Cognizant mischaracterized on its books as capital expenditures. When the SEC investigated, Cognizant argued that the contractor made the payments independently. The SEC rejected this argument entirely. The regulator proved that subsidiary executives had actively approved the arrangement and overridden internal accounting controls. Cognizant ultimately paid over \$25 million in disgorgement, interest, and civil penalties. The case delivered a clear message to corporate legal teams: using a general contractor as a financial conduit does not break the chain of FCPA liability.

In the *Matter of Oracle Corporation* (2022)⁴, Oracle's Indian subsidiary used third-party sales distributors to sell software licenses to state-owned enterprises. Subsidiary employees instructed distributors to apply steep, off-grid discounts on public sector deals. But instead of passing those savings to the government buyer, the distributors siphoned the discount margins into off-the-books "slush funds" held by third-party vendor accounts. These slush funds were then used to pay bribes to government procurement officials and fund lavish international travel for key decision-makers. Oracle's defense crumbled because its internal accounting controls failed to audit distributor margins. The company simply assumed that distributors operated at arm's length. The SEC held Oracle accountable for failing to maintain internal accounting controls over vendor discounts, resulting in a \$23 million settlement.

V. SECTION 17A POCA AND THE PROCEDURAL CONUNDRUM

While foreign regulators move aggressively against corporate bribe-givers, domestic enforcement in India encounters a major procedural hurdle under Section 17A of POCA. Section 17A bars police officers and investigative agencies (such as the CBI or State AntiCorruption Bureaus) from conducting any enquiry or investigation into an offense committed by a public servant relating to any recommendation or decision made in official duty, without prior approval from the competent government authority. This creates an undeniable operational paradox in procurement cases. When a local consultant pays a bribe to win a tender, the corporate entity faces immediate global scrutiny under the FCPA and direct corporate charges under Section 8 POCA. Yet the police inquiry into the government official who took the bribe gets stuck at the threshold waiting for government permission.

The constitutional validity of Section 17A was challenged in *CPIL v. Union of India* (2026)⁵, where a two-judge Bench of the Supreme Court delivered an equal 1:1 split verdict. Justice B.V. Nagarathna struck down Section 17A as unconstitutional under Article 14. She reasoned

³ *In re Cognizant Tech. Sols. Corp., Admin. Proc. File No. 3-19001, Securities Exchange Act Release No. 85149 (Feb. 15, 2019).*

⁴ *In re Oracle Corp., Admin. Proc. File No. 3-21158, Securities Exchange Act Release No. 95931 (Sept. 27, 2022).*

⁵ *Centre for Public Interest Litigation v. Union of India, MANU/SC/0024/2026*

that requiring prior executive sanction before a police officer can even conduct a preliminary enquiry revives the struck-down 'Single Directive' (Vineet Narain⁶ and Subramanian Swamy⁷ precedents) and gives the executive branch absolute power to block corruption investigations into its own officers. Justice K.V. Viswanathan took the opposite view. He upheld Section 17A as a necessary shield against administrative policy paralysis, observing that honest bureaucrats cannot function if every complex tender decision exposes them to frivolous police harassment. To cure executive bias, Justice Viswanathan read down the provision to mandate that approval

requests must be screened by independent statutory bodies, specifically the Lokpal at the Central level or Lokayuktas at the State level. rather than executive superiors. The issue has been referred to the Chief Justice of India to constitute a larger three-judge Bench. In the interim, Section 17A remains fully active on the statute book as valid law. Investigating agencies must continue seeking prior government approval before opening formal enquiries against public servants, unless an individual High Court stays the requirement in a specific writ petition or the facts show a direct, overt demand for illegal gratification outside official duties, as clarified in *Anil Daima v. State of Rajasthan*⁸

VI. PARALLEL PMLA PROCEEDINGS AND FINANCIAL ASSET ATTACHMENT

While Section 17A creates administrative delays for public servants, corporate entities face a far more dangerous domestic threat from parallel financial crime proceedings under the Prevention of Money Laundering Act, 2002.

Offenses under Sections 7, 8, and 9 of POCA are listed as Scheduled Offenses under Part A of the PMLA Schedule. Under Section 3 of PMLA, any property or financial revenue generated from a corrupt procurement tender is classified as "proceeds of crime."

Under Section 5 of PMLA, the Enforcement Directorate (ED) has broad powers to provisionally attach corporate bank accounts, real estate, and project assets. Corporate boards often assume that if police cannot investigate the public servant under Section 17A, the ED cannot freeze corporate assets either. That assumption is legally wrong. In *Vijay Madanlal Choudhary v. Union of India* (2022)⁹, the Supreme Court affirmed that PMLA attachment proceedings are independent civil-criminal actions. The ED needs only a registered FIR or complaint regarding a scheduled offense to open an Enforcement Case Information Report (ECIR) and attach assets. A procedural stall or delay in investigating the public servant under Section 17A does not stop the ED from declaring corporate tender revenues as proceeds of crime and freezing corporate bank accounts. A company can find its operations paralyzed and its accounts frozen overnight, even while the bureaucrat who took the bribe remains uninvestigated.

⁶ *Vineet Narain and Ors. v. Union of India (UOI) and Ors.* MANU/SC/0827/1998

⁷ *Subramanian Swamy v. Director, Central Bureau of Investigation and Anr.* MANU/SC/0413/2014

⁸ *Anil Daima v. State of Rajasthan & Ors.*, MANU/SC/0038/2026

⁹ *Vijay Madanlal Choudhary and Ors. v. Union of India (UOI) and Ors.* MANU/SC/0924/2022

VII. THE "ADEQUATE PROCEDURES" DEFENSE UNDER SECTION 9 POCA

To defend against domestic prosecution under Section 9 POCA and satisfy global FCPA standards, companies must understand what actually constitutes an "adequate procedures" defense. Section 9(1) proviso states that a commercial organization has a complete defense if it proves it had adequate procedures in place to prevent associated persons from committing bribery. In practice, many corporate legal departments rely on "paper compliance", a glossy compliance manual sitting on a shelf, generic annual employee sign-offs, and standard contract templates. Indian courts and international authorities like the U.S. DOJ and U.K. Ministry of Justice consistently reject paper compliance. To satisfy the legal threshold of adequacy, a compliance program must demonstrate real, operational implementation across six areas.

First, the company must maintain clear, proportional policies prohibiting all forms of illegal gratification, including grease payments and third-party kickbacks, tailored to specific public procurement risks. Second, there must be documented board-level commitment and an active culture of zero tolerance, ensuring compliance officers report directly to independent board

audit committees rather than sales heads. Third, the company must execute verifiable preresentment due diligence on all third-party intermediaries. That means checking ultimate beneficial ownership (UBO) to ensure no undisclosed ties exist with government officials, screening for politically exposed persons (PEPs), and physically verifying that the consultant has real offices and technical staff. Fourth, contracts must contain mandatory anti-corruption clauses, including explicit bans on subcontracting without prior written approval, unfettered financial audit rights over agent books, no-cash rules, and immediate termination power upon suspected non-compliance. Fifth, internal financial accounting controls must block milestone payments or success fees to consultants unless accompanied by detailed, itemized proof of legitimate work performed. Sixth, the company must conduct regular independent audits of high-risk third-party accounts and maintain an operational, confidential whistleblower mechanism protected from internal retaliation. Without these operational elements, a compliance policy is legally useless when a third-party scandal breaks out.

VIII. CONCLUSION

Managing third-party intermediary risk in Indian public procurement requires navigating complex, overlapping legal frameworks. The belief that hiring a local consultant creates a legal buffer between a corporation and corrupt acts is an illusion under both international and Indian law. While Section 17A POCA provides a procedural filter for public servants, it offers zero protection to commercial entities. Foreign regulators like the DOJ and SEC, along with domestic agencies like the Enforcement Directorate, act independently of local police sanctions under Section 17A.

For corporate legal teams, surviving this environment requires moving past surface-level compliance manuals. Establishing documented, audited "adequate procedures" under Section 9 POCA and maintaining strict operational oversight over third-party intermediaries remain the only reliable legal shields against multi-jurisdictional white-collar exposure.