

TRANSPARENCY INTERNATIONAL (UK)



CONSULTATION ON CHANGES TO ECGD'S ANTI-BRIBERY AND CORRUPTION PROCEDURES INTRODUCED IN DECEMBER 2004

TI(UK)'S SUPPLEMENTARY SUBMISSION

November 2005

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TI(UK)'S SUMMARY RESPONSE

1. In March 2005, ECGD commenced its "Consultation on Changes to ECGD's Anti-Bribery and Corruption Procedures Introduced in December 2004". The primary question asked by ECGD in the Consultation was:

“Do the changes made to ECGD's anti-bribery and corruption procedures in December 2004 have the effect of ensuring that, so far as practicable, 1) taxpayers' money is not used to support transactions tainted with bribery and/or corruption; and 2) an undue burden is not placed on exporters and/or banks?

If you consider that the changes do not possess this balance, please indicate what changes you think would do so.”
2. In June 2005, TI(UK) made a detailed submission ("TI(UK)'s June 05 Submission") to ECGD as part of the Consultation. TI(UK)'s June 05 Submission contained detailed reasoning in relation to the aspects of ECGD's anti-corruption procedures which TI(UK) believed should be improved, and attached versions of ECGD's Buyer Credit Application Form and Schedule in which TI(UK) proposed specific amendments. The procedures being compared in TI(UK)'s June 05 Submission were the “May 04 Procedures” issued by ECGD in May 2004, and the significantly weakened “December 04 Procedures” introduced by ECGD in December 2004.
3. In October 2005, ECGD issued "ECGD's October 05 Interim Response to ECGD's Consultation on Changes to ECGD's Anti-Bribery and Corruption Procedures Introduced in December 2004". ECGD called for comments on ECGD's October 05 Interim Response by 18th November 2005.
4. This Supplementary Submission by TI(UK) is in response to ECGD's October 05 Interim Response.
5. Some industry bodies, in their submissions to ECGD as part of the consultation, emphasise the alleged practical difficulties of undertaking certain aspects of due diligence on their business partners, and the alleged need for confidentiality in relation to agents. TI(UK) believes that these difficulties, and the need for confidentiality, are being greatly exaggerated. The world has moved on during the last few years as a result of an increased ethical awareness, and the numerous anti-corruption treaties and resultant changes in the law in OECD countries. Greater due diligence on business partners is now a commercial pre-requisite for an organisation, and greater transparency is essential if these treaties are to achieve their purpose. Non-disclosure and confidentiality allow corruption to continue to flourish.
6. Some industry bodies in their submissions also claim that it is unfair that they or their members may have to be responsible for the corrupt acts of their business partners. However, it is far more unfair, and is legally wrong, that the British taxpayer should be liable instead.
7. ECGD's October 05 Interim Response deals satisfactorily with some of the points raised in TI(UK)'s June 05 Submission. As such, the amended export credit documentation proposed in ECGD's October 05 Interim Response constitutes an improvement over the documentation introduced by ECGD in December 2004. TI(UK) welcomes these improvements.

8. However, most of the recommendations made in TI(UK)'s June 05 Submission have not been adopted by ECGD. Nor has ECGD given reasons as to why many of these recommendations have not been adopted. The recommendations which have not been adopted are summarised below. TI(UK) does not believe that the result of any of these recommendations is to place *"an undue burden ... on exporters and/or banks"*. The recommendations were serious, and were fully developed in TI(UK)'s June 05 Submission. TI(UK) can discern no logical reason for their being rejected, and ECGD's final response should deal with them, or offer equally well developed reasons if any of them are to be rejected, otherwise the purpose and process of the consultation is flawed.
9. Unless ECGD satisfactorily adopts the following recommendations, TI(UK)'s view remains that *"the changes made to ECGD's anti-bribery and corruption procedures" do not "have the effect of ensuring that, so far as practicable taxpayers' money is not used to support transactions tainted with bribery and/or corruption."* As a result, an unnecessarily high risk would remain that:
- bribery will occur in relation to projects covered by an ECGD guarantee;
 - ECGD (and the UK taxpayer) will suffer unnecessary loss;
 - ECGD managers may be at risk of prosecution for aiding and abetting bribery.
10. In paragraph 22 of ECGD's October 05 Interim Response, ECGD states:
- "In summary, whilst ECGD is not an investigatory body, and this imposes restrictions on what it can do, it should do all it reasonably can to avoid taxpayer's money being used to support transactions tainted with bribery and corruption, and to support wider efforts to deter these practices."*
- The recommendations made by TI(UK) are reasonable, and should be adopted by ECGD in accordance with its stated objective under paragraph 22. It is difficult to comprehend why ECGD is apparently having such difficulty in imposing reasonable and credible warranties, and effective due diligence and audit requirements, on Applicants for tax-payer supported export credits.

TI(UK)'S DETAILED RESPONSE

11. TI(UK) will relate its detailed response to the 12 Issues it raised in TI(UK)'s June 05 Submission. The June Submission gave detailed argument on the reasons for TI(UK)'s recommendations, and supported these recommendations with examples of international best practice. The following paragraphs cross refer to the relevant parts of TI(UK)'s June 05 Submission so as to avoid repetition.

APPLICATION FOR AN ECGD BUYER CREDIT GUARANTEE

12. The following comments apply to the "Application for an ECGD Buyer Credit Guarantee" and its Schedule.

Issue 1: ECGD's December 04 Procedures do not require disclosure of agents' commissions if they are 5% or less of the contract price and are not subject to the export credit

[See paragraphs 8 to 27 of TI(UK)'s June 05 Submission.]

13. Under Paragraph 7 of the Schedule to the Application in ECGD's December 04 Procedures, the Applicant was no longer required to provide any details of an agent where the agent's commission was 5% or less of the contract price and where it was not to be covered in any way by ECGD support.

14. TI(UK)'s June 05 Submission recommended an amendment to Section 7.1 of the Schedule to the Application to require disclosure in relation to all agents without a percentage limit, and whether or not the commission is covered by ECGD support.
15. In paragraph 58 of ECGD's October 05 Interim Response, and in the relevant parts of the Schedule to the Application, ECGD has removed this exception. Disclosure now applies in relation to the Applicant's agents without a percentage limit, and whether or not the commission is covered by ECGD support. TI(UK) welcomes this amendment.

Issue 2: ECGD's December 04 Procedures allow the Applicant not to disclose the name and address of the agent

[See paragraphs 28 to 38 of TI(UK)'s June 05 Submission.]

16. Under Paragraph 7.3 of the Schedule to the Application in ECGD's December 04 Procedures, ECGD required the Applicant to provide details of the name and address of the agent. This is critical information, as it may highlight a possibly suspicious circumstance (for example a connection between the agent and a representative of the project owner or government of the country in which the project will be located, or the fact that the agent is located in a “haven” jurisdiction). However, ECGD expressly provided in this paragraph that *“If you are unable to provide this information, please give your reason(s) for not being able to do so.”* It appeared that if the Applicant stated that the identity of the agent was “commercially confidential”, this may permit the Applicant to avoid disclosing this information to ECGD.
17. TI(UK)'s June 05 Submission recommended an amendment to Section 7.2 of the Schedule to the Application so as to delete the provision allowing the Applicant to avoid disclosing the name and address of the agent.
18. In paragraphs 65 and 66 of ECGD's October 05 Interim Response, and in the relevant parts of the Schedule to the Application, ECGD has suggested two variants.
 - a) The first variant (paragraph 65) would require the Applicant to notify ECGD of the name and address of the agent before ECGD can process the application. This is without question the correct variant, and is the one which ECGD should adopt.
 - b) The second variant (paragraph 66) allows the Applicant to avoid disclosing the name of the agent if the Applicant enters into a contractual commitment with ECGD to repay any monies which ECGD should be obliged to pay in relation to that deal if the agent concerned, with or without the knowledge, consent or acquiescence of the Applicant, has committed a Corrupt Act. **This variant is manifestly unacceptable for the following reasons:**
 - i) As argued in paragraphs 28 to 38 of TI(UK)'s June 05 Submission, it is a fundamental part of good anti-corruption practice that the identity of the agent should always be disclosed to ECGD. ECGD deals satisfactorily in paragraph 62 of ECGD's October 05 Interim Response with any concerns which the Applicant may have in relation to the confidentiality of this information.
 - ii) The commercial logic of this second variant is fundamentally flawed. ECGD states that, as a quid pro quo for non-disclosure of the identity of the agent, the Applicant would become liable for any corrupt acts of the Agent. This suggests that, if the Applicant does disclose the identity of the Agent, ECGD would assume responsibility for the corrupt acts of the

Applicant's agent. This is of course incorrect. The Applicant should always be responsible for the corrupt acts of its agent, regardless of disclosure. It is ECGD's function to take reasonable steps to prevent corruption. It is not ECGD's role, in return for disclosure of the Applicant's identity, to provide the Applicant with insurance against the corrupt acts of the Applicant's agent.

Issue 3: ECGD's December 04 Procedures do not require disclosure of agents' commissions if they are paid by or through other group companies (other than Controlled Companies) or by joint venture and other business partners

[See paragraphs 39 to 50 of TI(UK)'s June 05 Submission.]

19. Under Paragraph 7 of the Schedule to the Application in ECGD's May 04 Procedures, ECGD required the Applicant to disclose specified details in relation to any agent appointed by its Affiliates in relation to the Supply Contract. An "Affiliate" included "*in relation to [the Applicant], any company which is a member of the same group of companies or any other party to any joint venture or consortium or other similar arrangement with [the Applicant] in connection with the Supply Contract*" (paragraph 4.1 of the Application). This was the correct approach for ECGD to take.
20. Under Paragraph 7 of the Schedule to the Application in ECGD's December 04 Procedures, ECGD considerably weakened the procedures with the result that the Applicant was no longer required to provide any details of an agent appointed by a group company (other than a Controlled Company) or by a joint venture or consortium partner. The Applicant's obligation was limited to providing specified details of agents "*engaged by [the Applicant] or any Controlled Company*". A Controlled Company is one which the Applicant controls by virtue of any contractual arrangements or through owning a majority of the voting rights (paragraphs 4.4 and 4.5 of the Application). It would be unusual for the Applicant to control its joint venture or consortium partners.
21. TI(UK)'s June 05 Submission recommended an amendment to Section 7.1 of the Schedule to the Application so as to reinstate the obligation under ECGD's May 04 Procedures to disclose details of agents appointed by a member of the same group of companies, or by joint venture, consortium or similar parties.
22. **ECGD's October 05 Interim Response does not incorporate this recommendation. This remains a serious deficiency in ECGD's procedures.**

Issue 4: ECGD's December 04 Procedures do not require the Applicant to carry out due diligence on, or provide warranties in respect of, its non-controlled group companies, or its joint venture or other business partners

[See paragraphs 51 to 60 of TI(UK)'s June 05 Submission.]

23. In ECGD's May 04 Procedures, the definition of "Affiliate" in paragraph 4.1 included *any company which is a member of the same group of companies or any other party to any joint venture or consortium or other similar arrangement with [the Applicant] in connection with the Supply Contract*". Paragraph 8.2.1 of ECGD's May 04 Procedures made it a condition of the guarantee that the Applicant certified that "*neither we nor to the best of our knowledge and belief any of our Affiliates nor anyone (including any of our or their employees) acting on our or their behalf with due authority or with our or their prior consent or subsequent acquiescence has engaged or will engage in any Corrupt Activity in connection with the Supply Contract or any related agreement, undertaking, consent, authorization or*

arrangement of any kind.” Consequently, as a result of these provisions, the Applicant would need to undertake due diligence on its Affiliates so as to be reasonably sure that they would not engage in corrupt activities.

24. In paragraph 9.2 of ECGD's December 04 Procedures, ECGD considerably weakened its procedures by removing most of the Applicant's obligations in relation to its non-controlled group companies, or its joint venture, consortium and similar partners. It did this in the following ways:
- a) The anti-bribery undertaking in paragraph 9.2.1 now only applies to the Applicant and a Controlled Company (any company which the Applicant controls by virtue of any contractual arrangements or through owning a majority of the voting rights (paragraphs 4.4 and 4.5 of the Application). The obligation under ECGD's May 04 Procedures to give this undertaking in relation to any non-controlled group company or to any joint venture, consortium or other partner has therefore been removed.
 - b) A significantly reduced obligation in relation to joint venture and other partners has been substituted for the previous more extended obligation. The new definition of “Associate” has been introduced which means “*a party to any joint venture, consortium or other similar arrangement*” (paragraph 4.1). Paragraph 9.2.2 provides that the Applicant is obliged to notify ECGD in relation to a Corrupt Activity by an Associate if the Applicant “*becomes aware*” of such activity. In other words, the Applicant has no obligation to take any active steps to ascertain whether such activity is being carried out, or to try to prevent it.
 - c) No obligation remains in relation to non-controlled group companies.
25. TI(UK)'s June 05 Submission recommended that the obligation on the Applicant to provide warranties in relation to its non-controlled group companies, and its joint venture and other partners should be restored. TI(UK) made the following specific recommendations in the text of TI(UK)'s June 05 Submission and/or in the amended Application and Schedule attached to TI(UK)'s June 05 Submission:
- a) TI(UK) recommended that the Application impose a warranty given by the Applicant that to the best of its knowledge and belief, no Associate or Agent, nor anyone acting on that Associate's or Agent's behalf shall engage in any Corrupt Activity in connection with the Supply Contract or any Related Agreement. TI(UK)'s definition of Associate included a non-controlled group company and a joint venture or consortium partner. TI(UK) suggested a revised and reasonable definition of “*to the best of our knowledge and belief*”. ECGD's October 05 Interim Response adopts a new definition of “Consortium Partners” (joint venture, consortium or similar partner) and acceptably incorporates wording similar to that recommended by TI(UK) in relation to Consortium Partners.

However, the warranty is deficient in that:

 - i) **it does not extend to non-controlled group companies;**
 - ii) **it does not extend to agents;**
 - iii) **it relates only to past acts, not to future acts.**
 - b) TI(UK) recommended that the obligation on the Applicant to report to ECGD any Corrupt Activity of which it becomes aware should apply to a Corrupt Activity undertaken by anyone in connection with the Supply Contract or a Related Agreement. This would include, for example, Corrupt Acts undertaken by the Applicant's employees, and Controlled Companies, Associates (which included group companies and joint venture partners) and Agents. Under ECGD's December 04 Procedures, the obligation applied only to a Corrupt Activity undertaken by an Associate, which was unnecessarily restricted. ECGD's October 05 Interim Response (paragraph 11.2 of the Application) does not accept TI(UK)'s recommendation. The requirement to report now applies

only to acts undertaken by a Consortium partner, and the Consortium partners' employees. **The wording therefore remains deficient.**

- c) TI(UK) recommended that the warranties should apply not only in relation to the *"Supply Contract"* but also in relation to *"Related Agreement"*. ECGD's October 05 Interim Response accepts this recommendation.
- d) TI(UK) recommended that the obligation on the Applicant under paragraph 9.2.3 of the Application to require compliance with anti-corruption requirements, to monitor compliance, and to take appropriate action in the event of breach, should apply not only to companies acting on the Applicant's behalf, but also to Controlled Companies, Associates (which included group companies and joint venture partners) and Agents. ECGD's October 05 Interim Response (paragraph 11.3 of the Application) does not accept this recommendation. The obligation as defined by ECGD's October 05 Interim Response only applies to *"anyone (including any of our employees) acting on our behalf with due authority"* which is unnecessarily restrictive. **The wording therefore remains deficient.**

Issue 5: ECGD's December 04 Procedures do not require the Applicant to give any effective anti-corruption warranty in relation to its controlled companies

[See paragraphs 61 to 77 of TI(UK)'s June 05 Submission.]

26. In ECGD's May 04 Procedures, the definition of "Affiliate" in paragraph 4.1 included, inter alia, *"a member of the same group of companies"*. Paragraph 8.2.1 of ECGD's May 04 Procedures made it a condition of the guarantee that the Applicant certified that *"neither we nor to the best of our knowledge and belief any of our Affiliates nor anyone (including any of our or their employees) acting on our or their behalf with due authority or with our or their prior consent or subsequent acquiescence has engaged or will engage in any Corrupt Activity in connection with the Supply Contract or any related agreement, undertaking, consent, authorization or arrangement of any kind."* Consequently, as a result of these provisions, the Applicant would need to undertake due diligence on its controlled companies so as to be reasonably sure that they would not engage in corrupt activities.
27. However, in paragraph 9.2 of ECGD's December 04 Procedures, ECGD materially diminished the Applicant's obligations in relation to its controlled companies. Under paragraph 9.2.1, the Applicant is required to declare as follows:

"That neither we nor, to the best of our knowledge and belief, any Controlled Company or anyone (including any employees) acting on our, or that Controlled Company's, behalf with due authority, or with our, or that Controlled Company's, prior consent or subsequent acquiescence, shall have engaged, or shall engage, in any Corrupt Activity in connection with the Supply Contract."

This declaration is expressly qualified by the wording *"to the best of our knowledge and belief"*. The declaration has been materially weakened by the addition in the Appendix to ECGD's December 04 Procedures of a new definition of *"to the best of our knowledge and belief"*.

28. TI(UK)'s June 05 Submission recommended the deletion of the *"to the best of our knowledge and belief"* qualification from the warranty given by the Applicant that neither it nor its Controlled Companies nor anyone acting on its or their behalf shall engage in any Corrupt Activity in connection with the Supply Contract or any Related Agreement. ECGD has satisfactorily dealt with this point.

29. TI(UK)'s June 05 Submission recommended deleting the qualification to paragraph 9.2.1 of the Application which excluded from the scope of the warranty Corrupt Activities carried out by anyone acting on behalf of the Applicant or a Controlled Company, unless they were carried out “*with due authority, or with our or that Controlled Company’s prior consent or subsequent acquiescence*”. This is unnecessarily restrictive. It is not sufficient that the Applicant states that it will not give authority to anyone acting on its or its Controlled Company’s behalf to bribe, or will not consent to or acquiesce in a bribe. The Applicant must actually take steps to ensure that these parties do not bribe. **ECGD's October 05 Interim Response does not incorporate this recommendation. This remains a serious deficiency in ECGD's procedures.**
30. ECGD's October 05 Interim Response has further weakened the warranty in paragraph 9.1 by removing its application to future acts. It now relates only to past acts. **The link with future acts must be restored.**

Issue 6: ECGD's December 04 Procedures do not require the Applicant to make any effective enquiry as to whether it, or any companies it controls, or its parent or other group companies, or any of its joint venture or other business partners, have been debarred or convicted for corruption

[See paragraphs 78 to 89 of TI(UK)'s June 05 Submission.]

31. In ECGD's May 04 Procedures, the Applicant is required to declare as follows:

“We declare that to the best of our knowledge and belief neither we, or any of our Affiliates nor any of our or their directors or employees:

5.1 appears on any list of contractors or individuals debarred from tendering for or participating in any project funded by the World Bank or any other multilateral or bilateral aid agency, and

5.2 has at any time freely admitted or been found by a court to have engaged in any Corrupt Activity.”

32. However, ECGD's December 04 Procedures materially weakened this obligation. In paragraph 5 of ECGD's December 04 Procedures, the Applicant is required to declare as follows:

“We declare that, to the best of our knowledge and belief:

5.1 we or any Controlled Company or any board director of ours or of any Controlled Company:

5.1.1 neither appears on any list of contractors or individuals debarred from tendering for or participating in any project funded by the World Bank or any other multilateral or bilateral aid agency, nor

5.1.2 has at any time during the last five years, other than under duress, admitted having engaged, or been found by a court in any competent jurisdiction to have engaged, in any Corrupt Activity that has not previously been notified to ECGD;”

33. TI(UK)'s June 05 Submission identified three main weaknesses in ECGD's December 04 Procedures, and made recommendations for their improvement.

- a) The declaration no longer covered employees, but only board directors. TI(UK) acknowledged that the obligation in ECGD's May 04 Procedures to make a declaration in relation to all employees was too onerous, but suggested that the revised obligation in ECGD's December 04 Procedures which is limited to board directors is too restrictive, as senior managers who are not board directors can often undertake corrupt acts which are binding on the company. TI(UK) recommended that the declaration should extend to "Senior Executives" (which included directors and those with senior management responsibility over the supply contract). ECGD has satisfactorily dealt with this point in ECGD's October 05 Interim Response by including directors and a new category of "Senior Manager".
- b) There was no longer any obligation on the Applicant to disclose to ECGD whether any of its non-controlled group companies, or its joint venture or other partners, has been debarred or convicted for corruption. There was also no requirement to give disclosure in this regard in relation to Agents. TI(UK) recommended that the declaration extend not only to the Applicant and Controlled Companies (as per ECGD's December 04 Procedures) but also to non-controlled group companies and joint venture partners (as per ECGD's May 04 Procedures), and to agents, and to their senior executives. In ECGD's October 05 Interim Response, ECGD has extended the declaration to the directors of Consortium Partners, but not to the Consortium Partners themselves, nor to non-controlled group companies, nor to agents, nor to the directors and senior managers of these parties. **This remains a serious deficiency in ECGD's procedures.**
- c) The remaining obligation of the Applicant under ECGD's December 04 Procedures to make a declaration in respect of itself and its Controlled Companies is expressly subject to the same very weak definition of "*to the best of our knowledge and belief*". TI(UK)'s June 05 Submission recommended as follows:
- i) The deletion of this qualification in relation to the Applicant and its Controlled Companies and their directors and senior managers. ECGD's October 05 Interim Response has dealt satisfactorily with this point.
 - ii) The inclusion of a more reasonably defined "*to the best of our knowledge and belief*" qualification in relation to non-controlled group companies, joint venture partners, agents, and their directors and senior managers. ECGD's October 05 Interim Response has dealt satisfactorily with this point in relation to the directors of Consortium Partners, but as stated in paragraph b) above, has not included any declaration in relation to the Consortium Partners themselves, nor to non-controlled group companies, nor to agents, nor to the directors and senior managers of these parties

Issue 7: The entire Schedule to ECGD's December 04 Procedures is expressly qualified by a new definition of "to the best of our knowledge and belief" that is so weak that it materially diminishes the effect of the disclosures in the Schedule

[See paragraphs 90 to 94 of TI(UK)'s June 05 Submission.]

34. The introduction to the Schedule to ECGD's December 04 Procedures states that "*All relevant questions in this Schedule must be answered fully and truthfully to the best of your knowledge and belief.*" ECGD's December 04 Procedures had re-defined "*to the best of your knowledge and belief*" to have such a weak meaning that the information in the Schedule (which contains vital underwriting details) became virtually meaningless.

35. TI(UK)'s June 05 Submission recommended a more reasonable definition of *"to the best of your knowledge and belief."*
36. ECGD's October 05 Interim Response deals satisfactorily with TI(UK)'s recommendations.

Issue 8: Improvements in the disclosure requirements in the Schedule to ECGD's December 04 Procedures

[See paragraphs 95 to 104 of TI(UK)'s June 05 Submission.]

37. Section 7 of the Schedule to the Application under ECGD's December 04 Procedures contains various questions designed to assist ECGD in ascertaining whether there is, on the face of it, any risk of an agent paying a bribe in relation to the Supply Contract. TI(UK) has already dealt under Issue 3 above with the point that disclosure should extend to agents appointed by non-controlled group companies and joint venture partners. Issue 8 deals with the scope of the questions.
38. TI(UK)'s June 05 Submission recommended that the scope of these questions be improved so as to increase the chances that ECGD may be alerted in advance to potential corrupt transactions, while not imposing an undue burden on either ECGD or the Applicant. TI(UK)'s June 05 Submission recommended some specific additional questions for inclusion in the Schedule.
39. ECGD's October 05 Interim Response deals only partially satisfactorily with the following questions for Applicants which were recommended in TI(UK)'s June 05 Submission.
- a) *"Does, to the Best of your Knowledge and Belief, any direct or indirect relationship exist between the Agent and the Buyer named in section 2 of this Schedule, or any Senior Executive of the Buyer? If yes, please supply details."* ECGD's October 05 Interim Response deals only partially satisfactorily with this point, in that it does not refer to *"direct or indirect relationship"* and does not extend to *"Senior Executive of the Buyer"*.
 - b) *"Please specify the amount (or, if in the form of payments in kind, the value) of the commission relating specifically to the Supply Contract or any Related Agreement that is payable to the Agent".* ECGD's October 05 Interim Response deals only partially satisfactorily with this point, in that it does not include within its scope agent's fees paid in connection with *"Related Agreements"*.
40. ECGD's October 05 Interim Response does not include the following questions for Applicants which were recommended in TI(UK)'s June 05 Submission.
- a) *"Does, to the Best of your Knowledge and Belief, any direct or indirect relationship exist between the Agent and any public official who may have influence in relation to the award or performance of the Supply Contract or any Related Agreement? If yes, please supply details."*
 - b) *"Please specify the currency in which the commission is payable."*
 - c) *"Is the commission to be paid into a numbered bank account, or to a third party? If yes, please supply details."*
 - d) *"To the Best of your Knowledge and Belief, are the services provided or to be provided by the Agent in compliance with both the laws of the country in which the Supply Contract is to be carried out, and with the Relevant Acts? If no, please supply details."*

- e) *"To the Best of your Knowledge and Belief, is the amount of the commission payable to the Agent a reasonable amount for the services in question? If no, please supply details."*
- f) *"What steps have you taken to ascertain the reasonableness of the commission?"*
- g) *"What steps have you taken, or will you take, to ascertain whether the Agent has previously been involved in any Corrupt Activity?"*
- h) *"What steps have you taken, or will you take, so as to be reasonably sure that the Agent will not undertake any Corrupt Activity in relation to the Supply Contract or any Related Agreement?"*

41. **TI(UK) strongly recommends that ECGD adopts the suggestions in paragraphs 39 and 40 above.**

Issue 9: The definition of “Corrupt Activity” and “Relevant Acts”

[See paragraphs 105 to 108 of TI(UK)'s June 05 Submission.]

- 42. The definition of “Corrupt Activity” in paragraph 4.6 of the Application under ECGD's December 04 Procedures relies on the definition of “Relevant Acts”. The definition of “Relevant Acts” makes no express reference to the Anti-Terrorism, Crime and Security Act 2001. TI(UK)'s June 05 Submission recommended an amendment to the Application so as to include reference to the Anti-Terrorism, Crime and Security Act 2001 in the definition of “Relevant Acts”. ECGD's October 05 Interim Response satisfactorily deals with this point.
- 43. Paragraph 4.6.4 of the Application and the sub-paragraph following paragraph 4.6.4 under ECGD's December 04 Procedures seek to exclude from the definition of “Corrupt Activity” any activity which is an offence *“by virtue of an amendment to the Relevant Acts having retrospective effect”*. TI(UK)'s June 05 Submission queried the intended effect of this exclusion, and recommended its removal. **ECGD's October 05 Interim Response does not deal with this point.**

PREMIUM AND RECOURSE AGREEMENT FOR THE BUYER CREDIT GUARANTEE

- 44. The following comments apply to the “Premium and Recourse Agreement” for the Buyer Credit Guarantee.

Issue 10: ECGD has retained inadequate rights of recourse against the Applicant in the event of a Corrupt Activity

[See paragraphs 111 to 117 of TI(UK)'s June 05 Submission.]

- 45. Clause 5.11 of the Premium and Recourse Agreement under ECGD's December 04 Procedures obliges the Supplier (Applicant) to indemnify ECGD *“if the Supplier or any Controlled Company or anyone (including any employees) acting on the Supplier's, or that Controlled Company's, behalf with due authority, or with the Supplier's, or that Controlled Company's prior consent or subsequent acquiescence, has engaged, or engages, in any Corrupt Activity in connection with the Supply Contract ...”*

It therefore appears that the following actions are excluded from the scope of the above indemnity:

- a) A Corrupt Activity undertaken by an agent of the Supplier or Controlled Company without “*due authority*”. In practice, a company would be unlikely to give an agent express authority to bribe. Most bribes would be paid in situations where the Supplier is “wilfully blind” to the circumstances.
 - b) A Corrupt Activity undertaken by an employee of the Supplier or Controlled Company without “*due authority*”. For example, the project director may authorise a bribe without board authority, and contrary to the company’s anti-corruption code.
 - c) A Corrupt Activity undertaken by the Supplier’s parent company or non-controlled group company, or by any of its employees or agents.
 - d) A Corrupt Activity undertaken by the Supplier’s joint venture or consortium partner, or by any of its employees or agents.
 - e) A Corrupt Activity undertaken by the Supplier’s sub-contractor or supplier, or by any of its employees or agents.
46. TI(UK)'s June 05 Submission stated that the Premium and Recourse Agreement should be amended so that it expressly states that ECGD will have full right of recourse against the Supplier in the event of any Corrupt Activity in relation to the Supply Contract and any Related Agreement undertaken by the Supplier, its Controlled Companies, Associates, Agents, sub-contractors, suppliers and anyone acting on their behalf, whether or not the Supplier had consented to, or knew of these activities, and whether or not the Supplier had taken reasonable steps to prevent them. It cannot be correct that the taxpayer indemnifies the Supplier in any circumstance against Corrupt Activities by organisations which are within the Supplier’s control or contractual domain. This is a serious flaw in the allocation of risk. **ECGD's October 05 Interim Response does not incorporate this recommendation. This is a serious deficiency.**
47. TI(UK)'s June 05 Submission also stated that ECGD's practice of allowing recourse of less than 100% (referred to on ECGD's web-site and in paragraph 9.6 of the Premium and Recourse Agreement) should not apply in relation to any Corrupt Activity. Recourse should always be 100% in relation to any Corrupt Activity. **ECGD's October 05 Interim Response does not incorporate this recommendation. This is a serious deficiency.**
48. TI(UK)'s June 05 Submission also stated that it is unlikely that the existing recourse provisions in clause 7 of the Premium and Recourse Agreement will deal with the above criticisms, for the following reasons.
- a) The recourse provisions in clause 5.11 which relate specifically to Corrupt Activities, and which limit recourse only to specific circumstances, are likely to take priority over the general recourse provisions in clause 7. ECGD's October 05 Interim Response deals with this point by expressly stating (clause 9.7) that the recourse provisions under clause 9 (previously clause 7) are “*separate and independent from obligations under Clause 7.3*” (previously clause 5).
 - b) The Supplier could argue that “*default of the Supplier*” in clause 7 (now clause 9) does not include acts by Controlled Companies, Associates, Agents, sub-contractors, suppliers or anyone acting on their behalf. This is particularly the case as so much effort has been made to distinguish the actions to be taken by the Supplier in respect of these different parties in the Application and

in the Premium and Recourse Agreement. **ECGD's October 05 Interim Response does not take account of this point.**

Issue 11: The defects in the Application and its Schedule are perpetuated in the Premium and Recourse Agreement

[See paragraph 118 of TI(UK)'s June 05 Submission.]

49. TI(UK)'s June 05 Submission noted that many of the comments made in the Submission in relation to the weaknesses in the Application and its Schedule apply also to the Premium and Recourse Agreement, as the defects in the former documents are to a large extent perpetuated in the latter document. Equivalent amendments therefore need to be made to the Premium and Recourse Agreement to bring it into line with the amendments recommended above in relation to the Application and its Schedule. The same comment applies to ECGD's October 05 Interim Response.

Issue 12: ECGD has retained grossly inadequate post-contract audit and inspection powers

[See paragraphs 119 to 125 of TI(UK)'s June 05 Submission.]

50. ECGD's December 04 Procedures did not retain adequate powers to undertake effective post-contract audit and inspection to ensure that no corruption has taken place, or could take place. The purpose of wide ranging audit and inspection powers is not only to identify corrupt behaviour. The retention of these powers acts as a powerful deterrent, as the Supplier is always aware that ECGD may audit and inspect. TI(UK)'s June 05 Submission commented that the wording in ECGD's December 04 Procedures contained the following major deficiencies:
- a) ECGD can only exercise these powers if it has reasonable grounds for suspecting a Corrupt Activity. Corruption is concealed, and most successful bribes are never uncovered. The ability of ECGD to inspect is a powerful deterrent, and may also uncover bribes in relation to which ECGD had no prior suspicion. This power to inspect should not be limited only to the situation where ECGD has reasonable grounds for suspicion.
 - b) The independent third party needs to be acceptable to the Supplier. It is difficult to see why this approval is necessary.
 - c) The inspector can only visit the Supplier's UK premises. However, the issue concerns exports and overseas bribery. Records may be kept at the Supplier's overseas premises, and the right to inspect should extend to these premises also.
 - d) The inspector does not have access to the records of parent, associated and subsidiary companies, agents, joint venture and consortium partners, sub-contractors or suppliers, even though bribes may, with the knowledge or willful blindness of the Supplier, have been arranged through these companies.
 - e) Records can only be inspected if they relate to the period up to the date of award of the Supply Contract. However, most bribes will actually only be paid after award of the Supply Contract (for example out of the contract down-payment). An inspection of pre-award documents would be unlikely to reveal this. Inspection should not be limited to this period.

- f) Records can only be inspected for the sole purpose of verifying statements made and information given to ECGD by the Supplier in the Application. As stated in this Submission, the information requested in the Application is seriously inadequate. The inspection may therefore be equally inadequate.
 - g) Five business days' notice is required for inspection. This removes the very powerful weapon of spot checks, and would enable a corrupt Supplier to destroy or falsify documents.
51. TI(UK)'s June 05 Submission recommended that the Premium and Recourse Agreement (clause 5.9) should be amended with the result that:
- a) ECGD can exercise its powers of audit and inspection at any time before, during and after the signing and performing of the Supply Contract and Related Agreements. These powers should not be limited only to the situation where ECGD has reasonable grounds for suspicion.
 - b) The inspector or auditor need not be acceptable to the Supplier. The inspector or auditor should be suitably qualified, be subject to a duty of confidentiality, and be someone who could not be exposed to accusations of conflict of interest.
 - c) The inspector or auditor can at any time visit the premises of the Supplier, Controlled Companies, Associates, agents, sub-contractors and suppliers wherever located.
 - d) The inspector or auditor can at any time have access to the records and staff of the Supplier, Controlled Companies, Associates, agents, sub-contractors and suppliers. Such records and staff should be limited to those relevant to the Supply Contract and Related Agreements.
 - e) Records can be inspected and audited in relation to the period before, during and after the signing and performing of the Supply Contract and Related Agreements.
 - f) Records can be inspected not only for the purpose of verifying statements made and information given to ECGD by the Supplier in the Application, but also to ascertain whether there is any evidence of Corrupt Activity in relation to the Supply Contract and Related Agreements.
 - g) Records can be inspected on a spot-check basis (i.e. no requirement for notice).
 - h) Copies of all the above documents can be requested.
52. **ECGD's October 05 Interim Response does not incorporate these recommendations. This is a serious deficiency.**

THE VIEWS OF TI(UK)

53. In relation to paragraph 69.1 of ECGD's October 05 Interim Response:
- a) This submission has been made on behalf of Transparency International (UK). TI(UK) is the UK national chapter of Transparency International, which is the world's largest non-governmental anti-corruption organisation. TI(UK) works with governments, business and civil society with the aim of helping to bring about a reduction in both domestic and international corruption.
 - b) This submission has been approved by the Board of TI(UK).

DISCLAIMER

54. TI(UK) has provided this Submission to ECGD in good faith as part of the Consultation. Neither TI(UK) nor the authors can accept responsibility for the consequences of any action claimed to be taken by ECGD or any other party in reliance on the contents of this Submission.

Transparency International (UK)
18th November 2005