Submission by The Corner House to the ECGD Interim Response to the Public Consultation on the ECGD's anti-bribery and corruption procedures introduced in December 2004.

1. The Corner House welcomes the opportunity to comment further on the ECGD's proposed response to the consultation on the ECGD's anti-bribery and corruption procedures. In particular, the Corner House welcomes the fact that the ECGD has recognised the strong arguments for strengthening the December 2004 procedures.

2. However, the Corner House has some particular and serious concerns about some of the measures that the ECGD proposes to adopt as a result of the consultation. The Corner House believes that some of the proposed measures leave significant weaknesses in the ECGD's anti-bribery and corruption procedures and increase the risk that taxpayers' money may be used to underwrite contracts tainted by bribery.

Audit Provisions

3. The Corner House is deeply concerned that the ECGD has decided to keep the December 2004 procedures with regard to audit provisions, albeit with some minor changes. If the ECGD's anti-bribery and corruption procedures are to be effective in both deterring and preventing bribery on taxpayer-supported transactions, the ECGD must have adequate powers of inspection to enable it to verify anti-bribery warranties made by exporters and to assess whether bribery has taken place on a contract it has supported where appropriate. Such powers would act as a powerful deterrent to exporters. If exporters know that there is a significant risk that bribery may be detected by ECGD, they are far less likely to engage in bribery. Furthermore, anti-bribery warranties made by exporters and contained in the Premium and Recourse Agreement are legally binding. Breach of these warranties would represent a breach of contract. If the ECGD does not take appropriate powers to verify warranties made by exporters, it renders those warranties meaningless and would leave ECGD unable to assess whether breach of contract has occurred.
4. In coming to an preliminary decision about the powers of audit that the ECGD should adopt, the ECGD appears to have confused the fact that ECGD is not an investigatory body with its entitlement to assert contractual rights to inspection and audit. The ECGD is clearly not an investigatory body in the sense that it is not and does not act as a law enforcement body. However, as a government department, the ECGD does have a regulatory and oversight role to play in ensuring that bribery does not occur on projects it supports and that contracts it supports are compliant with UK law. Moreover, as a government body entering into contracts with private sector operators, it has the right to set whatever contractual terms of inspection and audit that it sees as necessary to fulfil its duties to combat bribery and protect the Exchequer interest, and to ensure that the contractual terms on anti-bribery and corruption are being complied with. The notion that applicants only cede certain powers of audit to the ECGD voluntarily is a misrepresentation of the contractual relationship between ECGD and applicants. Applicants voluntarily choose whether or not to take up ECGD's services and thereby whether to enter into a contract with

ECGD. It would be unusual and undesirable however if they were allowed to choose which terms of the contract they will enter into and which they will not.

5. Inspection or audit clauses are entirely standard in the insurance industry and an essential safeguard to ensure that contract terms are being complied with. Such clauses have a well-recognised deterrent effect. Inspection or audit clauses are also entirely normal practice in contracts between government departments and private sector operators [for an example, see Annex A]. In this context, the ECGD's argument that it was taking "powers in excess of those enjoyed by the investigatory agencies for it to conduct quasi-criminal investigations" under the May provisions is somewhat disingenuous. The ECGD was taking perfectly normal inspection rights that were consistent with audit rights contained in other contracts between government departments and private sector operators. It would in fact be unusual if ECGD were to adopt audit rights which were less rigorous than those deployed by other government departments or than those which the ECGD itself deploys with regard to contracts with suppliers of goods and services to the ECGD itself.
6. Both the CBI and BAE Systems themselves acknowledged in their submissions to the consultation that ECGD "should be able to take steps to verify that it is not supporting contracts tainted by bribery" (para 68 of BAE Systems' submission.) The exporters argue that the verification process should, however, be targeted towards risk. They argued that "requiring suspicion of Corrupt Activity … enables ECGD to focus its audit in areas of high risk and reduces the amount of unnecessary disruption to an exporter's business".
7. In principle, the Corner House believes that spot checks would provide the best deterrent against bribery. However, if one is to accept the argument that ECGD should target audits towards risk, it does not follow that the appropriate level of risk begins with a suspicion of corruption. Indicators of risk that could prompt an audit might include red flags that arose during ECGD's due diligence procedures or as the project has progressed, or that the project supported is in a high risk country or sector where bribery is common. Limiting the right to audit where there is a suspicion of corruption unnecessarily fetters the ECGD's ability to verify anti-bribery statements made by applicants on a genuine basis of risk. For obvious reasons, the ECGD should not make public its indicators of risk to exporters as this would give exporters the opportunity to keep their books according to how likely they believed themselves to be audited. However, if ECGD makes a policy decision to take a risk-based approach, exporters should be able to accept and trust that ECGD, when it conducts audits, is doing so on risk-based criteria.
8. The Corner House believes that maintaining the position that ECGD will write to inform exporters stating that they have a reasonable belief in suspected wrong doing is highly undesirable and that it is not acceptable that ECGD maintain this position in its final response. Writing to exporters to alert them to the fact that ECGD has a suspicion could result in exporters removing incriminating documents to files that are outside of the audit remit or destroying documents before the auditors arrive. This could make it much more difficult for future law enforcement investigators to find the evidence they need should they open an investigation, and might thereby prejudice future law enforcement operations.

9. For similar reasons, it is also highly undesirable for ECGD to maintain the five business days' notice before undertaking an audit. The Corner House believes that the ECGD should change this to 'reasonable notice'. In certain instances, where there is a significant risk that bribery might have occurred, this would then give ECGD the flexibility to undertake an audit at short notice so as to avoid any danger of records being removed or destroyed. This would be consistent with audit clauses recommended by the Office of Government Commerce (see Annex A).
10. The Corner House notes that at paragraph 1.8 of the Premium and Recourse Agreement, ECGD proposes to maintain the definition of 'Contract Records' that may be inspected as records that relate "only to the period up to the date of the award of the Supply Contract". This is wholly inadequate and should be removed. It would not be unusual for companies to pay agents and intermediaries after a Supply Contract has been awarded. ECGD would be unable to inspect such payments if it maintains this unnecessary and restrictive time limit in its definition.
11. **The Corner House's view on the ECGD's proposed response to the audit clause is as follows:**
    a. **The ECGD is not an investigatory body, in the sense that it is not and does not act as a law enforcement body, but it is entitled to take contractual rights to inspection and audit in order to verify that breaches of contract and of warranties are not occurring.**
    b. **The ECGD has a regulatory and oversight role to play in detecting and preventing corruption.**
    c. **It is unacceptable to maintain the audit clause that the ECGD currently proposes to do.**
    d. **The best form of deterrent would be a spot-check regime of audit. However, if the ECGD is to adopt a risk-based approach, it should not limit this to where there are suspicions of corruption but to where there are genuine risks, including where projects are in high risk countries or sectors or where red flags have been raised by due diligence.**
    e. **The ECGD must remove the condition that it will write to exporters to inform them that they have a reasonable belief in suspected wrong-doing before they conduct an audit.**
    f. **The ECGD should replace 'five business day's notice' with 'reasonable notice' in order to give it greater flexibility with regard to undertaking audits.**
    g. **The ECGD must remove the unnecessary and restrictive definition of Contract Records, which limits them to Records relating 'only to the period up to the date of award of the Supply Contract'.**

Replacement of the Concept of Affiliate

12. The Corner House welcomes the fact that ECGD believes that it is reasonable to ask Applicants for ECGD support for a pre-contractual representation that the Applicant has made reasonable enquiry about the behaviour of co-venturers in relation to the supply contract. The Corner House is disappointed however that ECGD has limited this pre-contractual representation to co-venturers.

13. The Corner House believes that the pre-contractual representations should apply not only to co-venturers but also to 'affiliate' companies (i.e. companies in the same group of companies as the applicant, including parent, sister and non-controlled subsidiaries) that are involved in the Supply Contract or any related agreement. Use of uncontrolled subsidiaries or parent or sister companies to make bribe payments is neither unlikely nor uncommon, and it is entirely reasonable for ECGD to expect applicants to make pre-contractual representations with regard to due diligence on these parties where they are also involved in the Supply Contract to be supported by ECGD or related agreements.
14. **The Corner House strongly recommends that paragraph 9.2 of the application form be amended to read:**

    "if we have a consortium Partner or Consortium Partners, *or if any Affiliate of ours is involved in any capacity with the Supply Contract or any related Agreement*, we have made reasonable enquiries regarding each Consortium Partner *and Affiliate* and its conduct in relation to the Supply contract and any related Agreement" (italics indicate recommended additions).

    The Corner House believes that the definition for Affiliate should be "any company which is a member of the same group of companies".
15. The Corner House welcomes the fact that ECGD has retained the requirement on exporters to alert the ECGD should they become aware of any corruption by anyone including a consortium partner. The Corner House notes however that while stating in paragraph 47 of its interim response that the ECGD does not believe that notifying ECGD would constitute 'tipping-off' under section 333 of the Proceeds of Crime Act, it has retained this language in the amended application forms.
16. **The Corner House believes that the ECGD should ensure its application forms are consistent in this regard with the interim response so as to avoid confusion and recommends that the ECGD remove from the application form the wording with regard to 'tipping-off' from paragraph 11.2 of the Application Form.**

Clarification of knowledge of the Applicant company

17. ECGD notes that it has clarified "what individual knowledge constitutes knowledge of an Applicant Company". The ECGD has defined knowledge by an Applicant as "knowledge possessed by one or more of the Applicant's directors or by the signatory to this form".
18. It is appropriate for ECGD to define knowledge as that held by the 'controlling mind' of a company. However, by limiting such knowledge to the knowledge of one or more of the Applicant's directors, the ECGD has adopted a much weaker and more limited concept of 'controlling mind' than that suggested by criminal law in the UK. This is unacceptable. Under UK law, 'controlling mind' refers not just to directors but to anyone with senior management capacity or with powers of representation, decision or control within the company. It is inconsistent of the ECGD to have apparently accepted this argument with regard to declarations to be made by applicants about convictions and past track record with regard to corruption, where the

ECGD has included not just directors but also 'senior managers', but not to extend this to knowledge of the Applicant.

19. **The Corner House believes that the ECGD must amend the definition of knowledge of the Applicant company to reflect more accurately UK law on 'controlling mind'. The ECGD should include knowledge held by 'senior managers' and by anyone with powers of representation, decision and control within the company in its definition.**

Employees

20. As noted above, the ECGD has recognised in its interim response that the declarations with respect to past convictions and World Bank debarment should apply not just to directors but also to senior managers. The Corner House welcomes the fact that the ECGD propose to take this step. However, the Corner House believes that in order to ensure a more consistent approach across government departments, in light of the forthcoming EU Procurement Directive 2004/18/EC, the ECGD should adopt the wording suggested by the Office of Government Commerce in its draft regulations on article 45 of this Directive. These draft regulations refer to convictions by "the economic operator or its directors or any other person who has powers of representation, decision or control of the economic operator."
21. In addition, there is an inconsistency in the ECGD's proposed requirement for applicants to make declarations of this sort on behalf of themselves, their directors and senior managers, but to limit the declarations required with regard to co-venturers to the Board Directors only. Appropriate due diligence checks into co-venturers should automatically include checks on the company itself and senior management, not just the Board Directors. The Corner House also believes that these declarations should also apply to any Affiliate of the Applicant who is involved in any capacity in relation to the Supply Contract or any related agreement.
22. **The Corner House believes that the ECGD should adopt the definition used by the Office of Government Commerce with regard to directors or "any other person who has powers of representation, decision or control". The Corner House believes that the ECGD should extend the declarations about past convictions or debarment of employees to Affiliates of the applicant who are involved in any capacity in the Supply Contract or any related agreement. The Corner House also believes that the declarations with regard to co-venturers should be consistent with that of applicants themselves, and cover the co-venturer itself (as a company), its directors and its senior managers.**

The time limit of the no-bribery pre-contractual representations

23. The ECGD has significantly reduced the scope of the no-bribery contractual representations required of applicants at Paragraphs 9.1 and 9.3 of the application form by limiting it only to corrupt activity that may have already taken place. The December 2004 forms required applicants to state that neither they nor their controlled companies "shall have engaged or shall engage in any Corrupt Activity". The proposed forms amended in the ECGD's interim response require applicants to state that neither they nor their controlled companies "have/has engaged in any Corrupt Activity". It is entirely

reasonable for ECGD to require exporters to declare not only that they *have* not but that they *will* not engage in bribery on the contract to be supported. Likewise, it is reasonable for exporters to be required to declare at paragraph 9.3 that their enquires with regard to co-venturers and other parties give them no cause to believed that these parties "has engaged or <u>will engage</u> in any Corrupt Activity".

24. **The Corner House believes that the ECGD must amend the proposed pre-contractual warranties at both paragraphs 9.1. and 9.3 to cover future as well as past corrupt activity.**

<u>*Details of Agents*</u>

25. The Corner House welcomes the fact that the ECGD has removed the exception for providing details of agents on contracts below 5% where agent's commission is not supported by the ECGD.
26. With regard to the identity of agents and whether exporters should be required to provide the name and address of the agent, the Corner House notes with serious concern that the ECGD appears, at paragraph 61 of its interim response, to have accepted in part the exporters' argument that knowing the name of the agent would not be of much use to ECGD because ECGD is not an investigatory body. The exporters argue that because ECGD is not an investigatory body, it is therefore likely to be able to conduct only limited due diligence. This is totally mistaken. The ECGD is no less able to conduct detailed due diligence because it is not an investigatory body than an exporter is able to do so for the same reason. The Corner House believes that the ECGD must make a firm statement that it does and intends to conduct detailed due diligence where appropriate on the identities of agents employed on contracts underwritten by ECGD. The ECGD also acknowledged in paragraph 61 of its Interim Response that knowledge of agents' identities would have a deterrent value. A publicly stated commitment by ECGD to conduct due diligence on agents would act as a considerable deterrent to exporters considering using an agent as a means to make illegal payments.
27. ECGD has set out two alternatives for how to deal with the identity of agents. The ECGD has in the past acknowledged the risk that agents may be used to make improper payments. In light of this risk, the Corner House believes that the first variant is the only acceptable policy option for the ECGD, and that the second variant would be an abnegation of the ECGD's responsibilities on deterring and combating corruption. The reasons the Corner House believes this are as follows:
    a. The second variant suggested by ECGD would mean that the Applicant would only face any real liability in the event that corrupt activity was uncovered and prosecuted (which of course, in many instances it is not) and if there were a default leading to financial loss. It is by no means the case that there is a financial loss in every case that there is corruption. Indeed several recent cases (such as the Lesotho Highlands Water Project) suggest that no default may occur where there are prosecutions for bribery. The circumstances where applicants may face liability for their refusal to provide the name of an agent to the ECGD may therefore be few and far between.

b. The ECGD recognised at paragraph 21 (vi) of its interim response that "it is legitimate and appropriate nevertheless for ECGD, in view of both the moral and business cost of corruption, to play a wider part in [the anti-corruption] effort than one restricted solely to the protection of the Exchequer interest in transactions to which it makes a commitment". This includes, as the ECGD itself has stated, at paragraph 22 of the Interim Response, doing "all it reasonably can to avoid the taxpayer's money being used to support transactions tainted with bribery and corruption, and to support wider efforts to deter these practices". The second variant however suggests that with regard to assessing whether bribery may have occurred through an agent on the contract to be supported, the ECGD would accept only the restricted role of protecting the Exchequer or taxpayer's interest, rather than its wider role of deterring and preventing bribery. Requiring the name of an agent from an applicant, subject to appropriate confidentiality clauses, has a significant deterrent effect for companies, and is likely to ensure that they only use bona fide agents on ECGD-supported contracts. Furthermore, the ECGD can only be said to be truly doing "all it reasonably can to avoid the taxpayer's money being used to support transactions tainted with bribery and corruption" if it requires the name of the agent and conducts appropriate due diligence on the agent. If the ECGD were to adopt the second variant, it would put ECGD's anti-corruption procedures at odds with the ECGD's own understanding of its role in combating and deterring corruption.
c. The ECGD also stated earlier in its interim response at paragraph 24 that "nothing prohibits ECGD from asking further questions or requiring elaborations where appropriate". However, the second variant would put in place a procedure that does effectively prohibit the ECGD from asking further questions.
d. Despite lack of agreement at the recent negotiations at the OECD with regard to a new agreement for Export Credit Agencies on combating bribery, some consensus emerged during those negotiations that names of agents should be required by ECAs. If ECGD were to decide in its final response to the consultation not to require names of agents, it would not only put ECGD behind other leading Export Credit Agencies on this issue, but would send a very poor signal to other Export Credit Agencies involved in the OECD negotiations that ECGD supported lowering standards on disclosure with regard to agents rather than raising them.
e. The ECGD states that it promotes the OECD Guidelines on Multinational Enterprises. As the Corner House pointed out in its submission to the first consultation, these Guidelines specifically recommend that companies make available details of their agents to competent authorities where appropriate. It would be difficult for ECGD to continue to argue that it is promoting the Guidelines with any seriousness if it allows companies to opt out of procedures that reflect the recommendations contained in the Guidelines.

28. The Corner House believes that the ECGD must be able to ask for and receive the name and address of an agent to be used by an exporter. It would be extremely difficult for ECGD to conduct proper due diligence

with regard to the possibility that an agent may be used to pay bribes unless it has access to this information. The Corner House believes that ECGD must therefore adopt the first variant with two crucial caveats.

29. **Paragraph 65 suggests that the ECGD will only require information on an agent 'acting on behalf of the Applicant or any Controlled Company'. This means that where an agent acts on behalf of a joint venture or consortium to which the company is a party, the applicant need not provide any details even where a company is making direct contributions towards the agent's fee or commission. It also encourages Applicants for ECGD's support to ensure that agent's fees or commissions are paid by other parties other than itself in order to avoid scrutiny. This is a serious loophole and the Corner House believes that the ECGD must be able to know details of any agents used in relation to the Supply Contract or any related agreement, whether by a joint venture partner, a consortium to which the applicant is a party or by any other party involved in the contract. The Corner House believes that ECGD should include an additional paragraph in section 4.1. of the application form to read:**

    "who has been instructed by, or on behalf of, any joint venture or consortium to which we are a party, or by any other party involved in obtaining and performing the Supply Contract."

30. **In some instances, the agent may be a company rather than an individual. It is vital that ECGD should be able to know who the owners and beneficiaries of any such company is. The Corner House believes that ECGD should make clear that where an agent is a company, the names of all owners and beneficiaries of the company will have to be declared.**

ECGD's policy on debarment/blacklisting of companies convicted of corruption

31. In Annex D of the Interim Response, ECGD has re-iterated its current policy about withholding support for future transactions for those who have been found guilty of bribery and corruption. It has done this despite the legal opinion submitted along with the Corner House's submission that stated that ECGD was entitled to operate a stricter 'blacklisting' policy. The ECGD has not provided any reasons for rejecting the analysis or conclusions of the legal opinion.
32. The Corner House recognises that the issue of whether ECGD should adopt a stricter 'debarment' policy was outside of the original scope of its consultation. However, the Corner House notes that with the approaching deadline of January 2006 for the implementation of the EU Procurement Directive 2004/18/EC, article 45 of which requires contracting authorities to exclude companies convicted of corruption from public procurement, the issue of how the ECGD will interpret its policy on excluding companies from future support in light of this Directive is a matter of some urgency.
33. **The Corner House believes that the ECGD must issue, in its final response to the consultation, a more considered response to the legal opinion on blacklisting obtained by the Corner House in light of the impending implementation across government of article 45 of the EU Procurement Directive 2004/18/EC.**

Conclusion

34. ECGD has stated in its Interim Response, at paragraph 22 that the ECGD "should do all it reasonably can to avoid taxpayer's money being used to support transactions tainted with bribery and corruption". Yet, the ECGD has recognised in the new draft Regulatory Impact Assessment released with the Interim Response that the fact that many of their proposed measures are not as strong as the original May 2004 procedures means that there is an increased risk of ECGD supporting a transaction tainted by bribery or corruption. The ECGD did not produce in the Regulatory Impact Assessment any assessment of what the real costs (administrative and legal) to companies would be of complying with strengthened ECGD procedures. Nor did any of the exporters in their submissions outline what specific costs they would incur from complying with strengthened anti-corruption procedures by the ECGD.
35. The Corner House believes that the several of the proposed measures in the ECGD's Interim Response do not suggest that ECGD would be doing "all it reasonably can" to avoid corruption and bribery on projects it supports, and that the risks that taxpayer's money may be used to support transactions tainted with bribery and/or corruption remain unacceptably high.

Annex A:

Draft Technology Supply Agreement drawn up by Office of Government Commerce

"**19. AUDITS**

[Guidance: It is very important to an Authority that it can gain access to certain information held by the Contractor in relation to the Agreement and verify compliance with its provisions…..

The Authority should endeavour to provide notice of its intention to conduct an audit pursuant to clause 19.4. The Contractor may want the authority to accept more commitment than this clause provides for but there will be circumstances where the Authority cannot do so. For example: where the Authority has reasonable grounds to suspect that the Contractor is in material breach of its obligations or other circumstances (eg fraud) have arisen which would give rise to the Authority having the right to terminate this Agreement: the Authority has reasonably held concerns about the solvency of the Contractor; or where an audit is required by a Regulatory Body. Consequently, the Authority cannot commit to always giving prior notice of an audit.

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19.1 The Authority may, not more than [twice in any 12 month period], conduct audits for the following purposes:

- 19.1.1 to verify the accuracy of Charges (and proposed or actual variations to them in accordance with this Agreement);
- 19.1.2 [to review the integrity, confidentiality and security of the Authority Data;]
- 19.1.3 [to review the Contractor's compliance with the Data Protection Act 1998, the Freedom of Information Act 2000 in accordance with clauses 34 (Protection of Personal Data) and 35 (Freedom of Information) and any other legislation applicable to this Agreement;]
- 19.1.4 to review the Contractor's compliance with its obligations under clause 12 (Quality Assurance and Performance Monitoring);
- 19.1.5 to review any records created during the design and development of the [Deliverables] [Software Solution] [System] and pre-operational environment such as information relation to Testing;
- 19.1.6 to review any books of account kept by the Contractor in connection with the provision of the Services and the supply of the [Deliverables] [Software Solution] [System];
- 19.1.7 to carry out the audit and certification of the Authority's accounts;
- 19.1.8 to carry out an examination pursuant to Section 6 (1) of the National Audit Act 1983 of the economy, efficiency and effectiveness with which the Authority has used its resources;
- 19.1.9 [to verify the accuracy and completeness of any management information delivered or required by the Authority pursuant to this Agreement;]
- 19.1.10 to inspect the Authority ICT Environment (or any part of it);

19.1.11 to inspect the [Authority's] assets, including the Authority's IPRs, equipment, facilities and maintenance, for the purposes of ensuring that the Authority's assets are secure and that any register of assets is up to date;

19.1.12 to ensure that the Contractor is complying with the Standards; and

19.1.13 any other audit that may be required by any Regulatory Body.

[Note: This clause contains only an illustrative list, which should be reviewed on case by case basis and amended, if necessary, to meet requirements of specific projects.]

19.2 The Authority shall use its reasonable endeavours to ensure that the conduct of each audit does not unreasonably disrupt the Contractor or delay the provision of the Services and/or supply of the [Deliverables] [Software Solution] [System].

19.3 Subject to the Authority's obligations of confidentiality, the Contractor shall on demand provide the Authority (and/or its agents or representatives) with all reasonable co-operation and assistance in relation to each audit, [including:

19.3.1 All information requested by the Authority within the permitted scope of the audit;

19.3.2 Reasonable access to any premises controlled or used by the Contractor for the provision of Services and/or the supply of the [Deliverables] [Software Solution] [System] and to any equipment used (whether exclusively or non-exclusively) in the performance of the Services and/or the supply of the [Deliverables] [Software Solution] [System]; and

19.3.3 Access to Contractor Personnel.]

19.4 The Authority shall endeavour to (but is not obliged to) provide at least [15] working days notice of its intention to conduct an audit.

19.5 The parties agree that they shall bear their own respective costs and expenses incurred in respect of compliance with their obligations under this clause, unless the audit identifies a material Default by the Contractor in which case the Contractor shall reimburse the Authority for all the Authority's reasonable costs incurred during the course of the audit.

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