

Representation to ECGD June 2005
By John Burbidge-King MCIM

Background

1. This representation is in response to the public consultation on changes to ECGD's anti bribery and corruption procedures introduced in December 2004, and the subject of a document issued by ECGD to potential respondents, dated 18th March 2005.

Export Credit Guarantee Department (ECGD)

2. ECGD is the UK's Export Credit Agency (ECA) and a Department of State. Its core statutory powers are to facilitate the export of goods from the UK and to insure overseas investment made by UK entities. In May 2004, ECGD changed its procedures in relation to disclosure. Some of ECGD's clients and other interested parties resisted those changes. The changes which related to enforcing a stronger anti-bribery regime and included disclosure of agents, were modified in December 2004. As a consequence The Corner House¹ (an NGO) instituted legal proceedings against the UK's Secretary of State for Trade and Industry, Ms Patricia Hewitt and an out of court settlement was reached whereby it was agreed to instigate a full public consultation on ECGD's changes to its anti-corruption rules.

The Respondent

3. John Burbidge-King was until 2004 Director of Key Accounts for the British company De La Rue plc². A part of his responsibilities was to initiate and deliver a consistent process across all operating divisions for the appointment, management, renewal and termination of third party partners; namely agents, consultants and distributors, mostly based overseas. He has also presented externally on this subject.

4. Third party partners were an essential component of De La Rue's indirect sales channels. As De La Rue's business activities expanded in the 1990's along with the need to ensure compliance with the Anti Terrorism, Crime and Security Act 2001, John initiated the steps to ensure that De La Rue's partner processes were robust, accorded good governance, provided clear accountability, appropriate visibility and business advantage. The process was internally hosted on a secure web portal. It provided an audit trail of the company's business connection and performance of all its third party partners worldwide, including many in developing countries.

5. John has now established a start-up company, Interchange Solutions Limited, which as part of its overall customer offering, a module called Network Partners™, will provide both the training and on/offline software system for the B2B management and governance process for third party partners.

The Consultation

6. ECGD has embarked on a consultation exercise based on the following question:-

“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 www.thecornerhouse.org.uk

² www.delarue.com

(1) taxpayer's 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.”

7. This representation firstly addresses some of the drivers associated with bribery and corruption; secondly why clients of ECGD should fully conform and the potential impact of client non conformity on ECGD itself; lastly recommendations in response to the consultation question. The representation is limited to the scenario of UK companies exporting overseas and their association with third parties; agents and consultants in particular. Attached are some guidelines on the components of a company due diligence system.

Representation

How are companies drawn into bribery?

8. Bribing commonly takes place through a third party, an intermediary between the supplier and the customer. The purpose of the bribe is to facilitate a contract in favour of the supplier (the principal). In addition to securing the contract itself, it may also be used to secure a higher price, especially in a tender. Such facilitation is normally by a payment to the person who makes the final decision on the award of the contract. The award decision may not necessarily be made by one person; it could be several or a committee.

9. The intermediary is likely to be either an agent, who receives payment in the form of a commission (a percentage of the contract value) or a consultant, who is more generally on a fixed fee.

10. In many parts of the world, especially in South America and some countries of the Middle East, sales agents are a legal requirement to do business in that country. They are the in-country representative of the principal and held to account for the performance of the principal's business in that country. They have a defined role in local law and are normally registered at the ministry responsible for commerce or equivalent body.

11. The agent and/or consultant, properly briefed and directed plays an important legitimate role in the securing of orders and/or providing market advice to their principals; particularly where the principal does not have its own registered presence in country.

12. The risk to the principal comes in those countries where corruption is endemic and *“the way business is done in this country”*, which leads to the excuse *“if we do not do it our competitors will”*.

13. The drivers, cause and effect of bribery and corruption itself are well researched. Suffice to say, that in countries where salaries are low relative to western lifestyles and power is seen as a wealth accumulating opportunity, suppliers can quickly be tempted to engage in bribery, knowingly or otherwise, to secure contracts. The *“at risk countries”* are well documented in such tables as those of Transparency International and PWC's Opacity index.

14. The principal's own commercial interface is generally via their own direct sales and marketing people. It is they who have either identified (perhaps with the help of the agent or consultant) the sales opportunity or they are following up a sales lead or a published tender. The local relationships with the potential customer(s) and knowledge of the country may have been built up over many years. The sales people are driven by targets and often remunerated on the achievement of those targets. The company relies on these commercial relationships and will generally trust good sales people.

15. Whilst not intending to malign the sales function, because of the nature of their role it is common for the internal reporting for the sales function, apart from sales figures to be more qualitative/anecdotal than quantitative ~ *"information is power!"*; particularly when compared with other business functions such as finance or operations.

16. Senior management up to and including the board, especially in larger companies, are more likely to be focused on the general financial health of the company and in the case of the board, on their shareholders, rather than in the detail of relationships in a given country. CEO's and others will of course meet and talk to customers and may lead customer driven initiatives, but they will rarely know the intricacies of the relationship to the same extent as the commercial people.

17. This leads to a particular culture of **"corporate disconnect"**, worsened by any lack of accountability and process where a wilful act of bribery might take place. Senior executives are happy to talk financial numbers, strategy, health and safety etc, but few if any, would want to know that part of a commission payment was used to bribe an official. Executives will of course insist that their employees adhere to the law and many companies have a code of conduct. But others will resist this level of transparency and process for third party partners compared with what they have in such areas as accounting, HR etc.

18. Where this **"corporate disconnect"** exists, either by management failure or design, it provides the in-company signal to continue inappropriate behaviour in respect of complicity in bribery and corruption; effectively a management blind eye. The House of Commons Trade and Industry Committee stated in its Ninth Report of Session 2004-2005,³ *"We are not persuaded by the arguments put forward by ECGD's customers that the Department had no right to information on the agents they use and the money to be paid to them"*.

Why business must challenge bribery

Because it is Illegal~

19. The Anti Terrorism, Crime and Security Act 2001 Section 108 is explicit on the matter of bribery and corruption. Companies pay strict attention to other legislation that shapes the way they behave, and are well aware of the consequences of breaking the law in the UK or elsewhere.

UK Trade and Investment issued clear guidelines to companies on the legislation in May 2004⁴. It was prepared in conjunction with the Home Office, the Foreign and Commonwealth Office, ECGD and the Department for International Development; it

³ "Implementation of ECGD's Business Principles" Section 5 paragraph 5 ECGD's Anti Corruption Procedures

⁴ UK Bribery and Corruption Law, May 2004, www.tradeinvest.gov.uk

states "By upholding the law and promoting transparency in business activities, UK companies enhance their own reputation and staff morale".

Social and Economic Consequences~

20. The economic and social consequences of bribing to secure contracts are well known. In the buyers country the few get rich quick and the many suffer the consequences of an over priced contract award. More countries are taking a stand against bribery and corruption. The old paradigm *"that's the way we always do business here"* will diminish as countries known for corruption receive less favourable treatment and recognition from international bodies such as the G8, the World Bank and IMF.

21. In countries where corruption is rife and appears to be the only way to do business, a company must firstly properly understand the business environment to ensure that this is a market in which it wants to do business; due diligence on the appointment of reliable and ethical third party partners can be conducted through the British Embassy and the chambers of commerce or similar. Companies should use both their partner and the embassy in the event that they discover an unethical approach by their competitors. The best insurance on the ground is to build a wide support base including parliamentarians who are often against corruption and use the press skilfully.

The recent criminal case in South Africa involving the business advisor to the former Vice President may have serious business repercussions for the French arms company Thales that is reportedly at the centre of the allegations. It is therefore likely that companies known for their ethical behaviour are more likely to secure future contracts.

Benefits to business~

22. Appropriate transparency and process facilitates better commercial decision making. Commission levels can be properly related to the success of the third party which in the respondent's experience will lead to improving the contract margins and changing the sales culture.

23. Agents and consultants are generally businessmen in their own right and will perfectly understand the need for their principals to adhere to the law. They are well aware of the US Foreign and Corrupt Practices Act. It is reasonable in the respondent's experience, to expect them to sign an undertaking of conformity with the principal's code of conduct in respect of this UK legislation and to ensure that their local affairs and, the way that they conduct their own business leave no cause for concern.

Good business practice and process has a beneficial economic effect for a company. If there is proper due diligence in the appointment of the third party partner, and subsequent robust management, the commercial outcome is likely to be more favourable and advantageous to all parties without contravention of the law.

Shareholder Concerns~

24. Investors are increasingly seeking to reduce risk. In recent years there have been numerous ways in which this has been affected through ethical indices, adherence to health, safety and the environment etc. Increasingly key executives and to some extent the board itself may face criminal rather than civil action as new legislation is

introduced which affects companies and the way they behave. Reportedly, FTSE4Good is considering how non-conformance with anti-bribery and corruption legislation might impact on company value.

If companies are unwilling to change their culture or have insufficient visibility through a lack of process of the management of their third party partners, their senior management may be putting themselves at risk of conviction of a criminal offence. As a consequence of the imprisonment or disqualification of experienced key executives/directors⁵, stock market valuation may be adversely impacted as will reputation and brand value and a downgrading of credit ratings. Investors may withdraw their support.

Weak Business Culture Impact on ECGD

25. ECGD as a government department has a duty both to conform to the law and ensure that its procedures leave no room for error in its clients' conformity to law. The recent Commission for Africa⁶ report not only drew attention to the issue of corruption in general but was specific on the role and interaction of the ECA's. It stated, "ECA's are therefore in a strong position to demand high standards of governance from projects in which they become involved. However, in the past they have had a poor record of using their unique position to encourage better governance."; and, "developed countries should encourage their ECA's to be more transparent and to require higher standards of transparency in support of projects in developing countries."

26. ECGD as a public body has a right to know what arrangements its clients have with third parties to ensure that the use of tax payers' money is properly safeguarded, particularly in the context of any bribery and corruption. Assuming normal commercial confidentiality, there should be no concern over leakage to the client's competitors in respect of this disclosure. Unwillingness by the client to disclose is indicative of either something to hide, or a lack of suitable internal process and accountability; the former should serve as a warning, whilst the latter can be fixed.

27. It is also relevant that ECGD should be advised of the arrangements a client has with all third parties. This would embrace those who may be paid outside the amount included in the ECGD cover, but could be participatory in bribing to win the total contract value for which ECGD is underwriting a part.

28. There are UK companies that have both robust and transparent procedures for the management of their third party partners and behave ethically. Some may be clients of ECGD. It is likely that the December 2004 revisions to ECGD's procedures are at a lower level of due diligence than some of these companies own standards.

In the event of an ECGD client being convicted under the present legislation due to an avoidable oversight in ECGD's due diligence process(for whatever reason), ECGD's reputation and business is in danger of being damaged and, linked by association with the offending client, both at home and internationally. It is the respondent's opinion that this is an avoidable situation. .

⁵ e.g. Enron and Arthur Anderson.

⁶ Commission for Africa, March 2005, paragraph 4.5.2. line 95.

Recommendations

1. ECGD and the DTI have laid themselves open to challenge from NGO's and public bodies such as the House of Commons Trade and Industry Committee. ECGD has a duty to taxpayers to insist on the highest levels of good governance from its clients, without compromise. It is the responsibility of client companies to put their house in order where necessary, to comply with ECGD's requirement.
2. ECGD must insist on the full disclosure of agent's details regardless of any rate of commission. Commissions below 5% may in totality be above the amount that banks would normally be required to disclose under FSA rules in regard to money laundering. Given appropriate company culture and process disclosure should not compromise the client's confidentiality.
3. ECGD should be advised of the arrangements a client has with all third parties in connexion with the contract/project regardless of whether covered or not.
4. In Annex C "Proposal for an Export Insurance Policy" para 13 Code of Conduct and where relevant, insert in other documentation: *"briefly outline the nature (and if applicable supplier of the system) of your system/process for the appointment, management and payment of commission to agents/third party partners"* and, *"who in your company (name/position) approves and authorises the appointment of said agent and the payment of commissions"*.

None of the above recommendations put any undue burden or cost on either the taxpayer or the client.

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Broad Components of a Company Due Diligence System

The list is based on the respondents experience and is not necessarily inclusive, but includes some of the key areas that need to be assembled.

1. A board mandate and execution by management
2. A corporate/company wide code of conduct in respect of the anti bribery and corruption legislation
3. A policy in respect of the appointment, management and termination of third party partners to include:-
 - ~summary of the law,
 - ~definitions of third parties,
 - ~nature of agreements,
 - ~remuneration and methods of payment,
 - ~illegal acts and other prohibitions,
 - ~liabilities and any other legal requirements
 - ~etc
4. A procedure, effectively a document spelling out how the policy will be executed, how and by whom to include:-
 - ~commercial objectives,
 - ~due diligence and process for identifying suitable third party partners,
 - ~acceptable and unacceptable appointments,
 - ~forms of agreement,
 - ~appointment, management (including business performance), renewal and
 - ~termination processes and levels of accountability,
 - ~use of the system (software or paper based),
 - ~custody of agreement s and correspondence,
 - ~authorisation levels, especially of payments,
 - ~how payments should be made and to where,
 - ~etc
5. A procedures flow chart
6. Appointment and contacts for coordinators (if divisions/business units etc)
7. Documentation (either in the system or paper)
8. Business guide to using the system/process
9. Commission payment authorisation (part of Finance function)