THE WORLD BANK GROUP
SANCTIONS BOARD

Date of issuance: April 1, 2019

Sanctions Board Decision No. 117
(Sanctions Case No. 563)

IDA Credit No. 5638-KE
Republic of Kenya

Decision of the World Bank Group[1] Sanctions Board imposing a sanction of debarment with conditional release on the respondent entity in Sanctions Case No. 563 (the "Respondent"), together with certain Affiliates,[2] with a minimum period of ineligibility of one (1) year beginning from the date of this decision. This sanction is imposed on the Respondent for fraudulent practices.

I. INTRODUCTION

1. The Sanctions Board convened in February and March 2019, as a panel composed of Ellen Gracie Northfleet (Panel Chair), Cavinder Bull, and Alejandro Escobar to review this case. Neither the Respondent nor the World Bank Group's Integrity Vice Presidency ("INT") requested a hearing in this matter. Nor did the Panel Chair[3] decide, in her discretion, to convene a hearing. Accordingly, the Sanctions Board deliberated and reached its decision based on the written record.[4]

2. In accordance with Section III.A, sub-paragraph 8.02(a) of the Sanctions Procedures, the written record for the Sanctions Board's consideration included the following:

i. Notice of Sanctions Proceedings issued by the World Bank's Acting Suspension and Debarment Officer (the "Acting SDO") to the Respondent on March 30, 2018 (the "Notice"), appending the Statement of Accusations and Evidence (the "SAE") presented to the Acting SDO by INT (undated);

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[1] In accordance with Section II(y) of the World Bank Procedure: Sanctions Proceedings and Settlements in Bank Financed Projects issued on June 28, 2016 (the "Sanctions Procedures"), the term "World Bank Group" means, collectively, the International Bank for Reconstruction and Development ("IBRD"), the International Development Association ("IDA"), the International Finance Corporation ("IFC"), and the Multilateral Investment Guarantee Agency ("MIGA"). The term "World Bank Group" includes Bank Guarantee Projects and Bank Carbon Finance Projects, but does not include the International Centre for Settlement of Investment Disputes ("ICSID"). As in the Sanctions Procedures, the terms "World Bank" and "Bank" are here used interchangeably to refer to both IBRD and IDA. See Sanctions Procedures at Section II(x).

[2] Section II(a) of the Sanctions Procedures defines "Affiliates" as "any legal or natural person that controls, is controlled by, or is under common control with, the Respondent, as determined by the Bank." The sanction imposed by this decision applies only to those Affiliates that are directly or indirectly controlled by the Respondent. See infra Paragraph 46.

[3] Sanctions Procedures at Section II(s).

[4] See Sanctions Procedures at Section III.A, sub-paragraph 6.01.

ii. Explanation submitted by the Respondent to the World Bank's Suspension and Debarment Officer (the "SDO") on April 23, 2018 (the "Explanation");

iii. Response submitted by the Respondent to the Secretary to the Sanctions Board on June 6, 2018 (the "Response"); and

iv. Reply submitted by INT to the Secretary to the Sanctions Board on July 20, 2018 (the "Reply").

3. On March 30, 2018, pursuant to Section III.A, sub-paragraphs 4.01 and 4.02 of the Sanctions Procedures, the Acting SDO issued the Notice and temporarily suspended the Respondent, together with a number of specific controlled affiliates and any other entity that is an Affiliate directly or indirectly controlled by the Respondent, from eligibility[5] with respect to any Bank-Financed Projects,[6] pending the final outcome of these sanctions proceedings. The Notice specified that the temporary suspensions would apply across the operations of the World Bank Group. In addition, pursuant to Section III.A, sub-paragraphs 4.01(c), 9.01, and 9.04 of the Sanctions Procedures, the Acting SDO recommended in the Notice debarment with conditional release for the Respondent and the specified controlled affiliates, together with any other entity that is an Affiliate directly or indirectly controlled by the Respondent. The Acting SDO recommended a minimum period of ineligibility of three (3) years and seven (7) months for the Respondent, after which period the Respondent may be released from ineligibility only if it has, in accordance with Section III.A, sub-paragraph 9.03 of the Sanctions Procedures, demonstrated to the World Bank Group's Integrity Compliance Officer (the "ICO") that it has (i) taken appropriate remedial measures to address the sanctionable practices for which it has been sanctioned and (ii) adopted and implemented an effective integrity compliance program in a manner satisfactory to the Bank. The Notice specified that the same sanction was recommended for each of the identified affiliates controlled by the Respondent.

II. GENERAL BACKGROUND

4. This case arises in the context of the Eastern Africa Regional Transport, Trade and Development Project (the "Project"), which was designed to improve the movement of goods and people in a section of northwestern Kenya and to enhance connectivity between Kenya and South Sudan. On July 20, 2015, IDA entered into a financing agreement with the Republic of Kenya (the "Borrower") for a credit of approximately US$500 million to help finance the Project (the "Financing Agreement"). The Project became effective on November 16, 2015, and remains open as of the date of this decision.

5. In late 2015, the relevant implementation unit for the Project (the "PIU") issued bidding documents (the "Bidding Documents") for two contracts to upgrade separate road sections under

[5] The full scope of ineligibility effected by a temporary suspension is defined in the Sanctions Procedures at Section III.A, sub-paragraphs 4.02(a) and 9.01(c), read together.

[6] The term "Bank-Financed Projects" encompasses "an investment project or a program for results operation, for which IBRD or IDA (as the case may be), whether acting for its own account or in the capacity as administrator of trust funds funded by donors, has provided financing in the form of a loan, credit or grant and governed by the Bank's Procurement Guidelines, Consultant Guidelines or Anti-Corruption Guidelines." Sanctions Procedures at Section II(e).

the Project ("Contract 1" and "Contract 2," respectively or, together, the "Contracts"). On March 3, 2016, the Respondent submitted its bid for Contract 1 ("Bid 1") to the PIU. On April 7, 2016, the Respondent submitted its bid for Contract 2 ("Bid 2") to the PIU. Both Bid 1 and Bid 2 (the "Bids") appended various supporting documents, including with respect to the Respondent's past experience. The Respondent won both of the Contracts and entered into separate agreements for each of them with the PIU in late 2016 and early 2017, respectively, for a combined value of approximately US$142 million.

6. INT alleges that the Respondent engaged in fraudulent practices by misrepresenting its past experience in both Bids in order to satisfy the bidding requirements set out in the Bidding Documents.

III. APPLICABLE STANDARDS OF REVIEW

7. *Standard of proof*: Pursuant to Section III.A, sub-paragraph 8.02(b)(i) of the Sanctions Procedures, the Sanctions Board determines whether the evidence presented by INT, as contested by a respondent, supports the conclusion that it is "more likely than not" that the respondent engaged in a sanctionable practice. Section III.A, sub-paragraph 8.02(b)(i) defines "more likely than not" to mean that, upon consideration of all the relevant evidence, a preponderance of the evidence supports a finding that the respondent engaged in a sanctionable practice.

8. *Burden of proof*: Under Section III.A, sub-paragraph 8.02(b)(ii) of the Sanctions Procedures, INT bears the initial burden of proof to present evidence sufficient to establish that it is more likely than not that a respondent engaged in a sanctionable practice. Upon such a showing by INT, the burden of proof shifts to the respondent to demonstrate that it is more likely than not that its conduct did not amount to a sanctionable practice.

9. *Evidence*: As set forth in Section III.A, sub-paragraph 7.01 of the Sanctions Procedures, formal rules of evidence do not apply; and the Sanctions Board has discretion to determine the relevance, materiality, weight, and sufficiency of all evidence offered.

10. *Applicable definition of fraudulent practice*: The Financing Agreement provided that the World Bank's Guidelines: Procurement of Goods, Works, and Non-Consulting Services under IBRD Loans and IDA Credits and Grants by World Bank Borrowers (January 2011, revised July 2014) would govern procurement under the Project. However, the Bidding Documents referred to the World Bank's Guidelines: Procurement of Goods, Works, and Non-Consulting Services under IBRD Loans and IDA Credits and Grants by World Bank Borrowers (January 2011) (the "January 2011 Procurement Guidelines") and defined fraudulent practices in accordance with the same Guidelines. Consistent with the Bank's legal framework applicable to sanctions, as well as considerations of equity, the standards applicable in the event of such a conflict shall be those agreed between the borrowing or recipient country and the respondent as governing the particular contract at issue, rather than the standards agreed between the borrowing or recipient country and the Bank.[7] Therefore, the alleged fraudulent practices in this case have the meaning set forth in the January 2011 Procurement Guidelines. Paragraph l.16(a)(ii) of these Guidelines defines a fraudulent practice as "any act or omission, including a misrepresentation,

[7] See Sanctions Board Decision No. 59 (2013) at para. 11.

that knowingly or recklessly misleads, or attempts to mislead, a party to obtain a financial or other benefit or to avoid an obligation." A footnote to this definition explains that the term "party" refers to a public official; the terms "benefit" and "obligation" relate to the procurement process or contract execution; and the "act or omission" is intended to influence the procurement process or contract execution.[8]

IV. PRINCIPAL CONTENTIONS OF THE PARTIES

A. INT's Principal Contentions in the SAE

11. INT alleges that the Respondent submitted the same three falsified documents, which misstated details regarding the Respondent's past experience (the "Experience Documents"), in both Bid 1 and Bid 2. INT submits that these misrepresentations served to benefit the Respondent by rendering each of the Bids compliant with the respective bidding requirements for the Contracts.

12. INT asserts that the repeated nature of the Respondent's submissions warrants aggravation. INT submits that mitigation "could be considered" for the Respondent's admission that two of the Experience Documents were inaccurate.

B. The Respondent's Principal Contentions in the Explanation and the Response

13. The Respondent does not contest that the Experience Documents contained misrepresentations. However, the Respondent submits that it was nevertheless qualified as a bidder on the Contracts, and claims that it did ultimately complete at least some of the work described in the Experience Documents. The Respondent states that a staff member at the Kenya branch introduced misrepresentations into the Experience Documents when preparing Bid 1 and did so "for [his] own convenience." The Respondent asserts that the same documents were also included, without scrutiny, in Bid 2. The Respondent submits that the "negligence and malpractice of the staff and the flaws in the [Respondent's] managerial and monitoring system" placed the Respondent in this "predicament."

14. The Respondent objects to application of aggravation requested by INT and appears to request mitigation for its lack of a prior history of misconduct, various corrective and cooperative actions, period of temporary suspension, and its capacity to execute both Contracts.

C. INT's Principal Contentions in the Reply

15. INT reaffirms its allegations set out in the SAE and asserts that the evidence is sufficient for a finding of fraudulent practices. INT submits further arguments in support of aggravation for repeated pattern of conduct, and states that the record does not support a finding that false documents were submitted in a single course of action. Additionally, INT argues that the Respondent's partial admissions warrant only limited mitigation and objects to any mitigation for the Respondent's asserted lack of prior misconduct, various remedial measures, internal investigation, voluntary restraint, or capacity to execute both Contracts.

[8] January 2011 Procurement Guidelines at para. 1.16(a)(ii), n.21.

V. THE SANCTIONS BOARD'S ANALYSIS AND CONCLUSIONS

16. The Sanctions Board will first consider whether it is more likely than not that the Respondent engaged in the alleged fraudulent practices. The Sanctions Board will then determine what sanction, if any, should be imposed on the Respondent.

A. Evidence of Fraudulent Practices

17. In accordance with the definition of "fraudulent practice" under the January 2011 Procurement Guidelines, INT bears the initial burden to show that it is more likely than not that the Respondent (i) engaged in any act or omission, including a misrepresentation, (ii) that knowingly or recklessly misled, or attempted to mislead, a party (iii) to obtain a financial or other benefit or to avoid an obligation.[9]

1. Misrepresentation

18. INT asserts that each of the three Experience Documents included misrepresentations in their descriptions of the Respondent's work. The Respondent does not dispute these assertions. In past decisions finding that respondents included misrepresentations in their bids, the Sanctions Board has considered written statements from parties named in or supposedly issuing the documents,[10] contemporaneous evidence that contradicted representations made in those documents,[11] and the respondents' own admissions.[12] In the present case, the record includes more than one example of such evidence with respect to each of the Experience Documents. Specifically, the purported issuer of the first of the three Experience Documents (a certificate of completion) denied producing that certificate. With respect to the second and third Experience Documents, the record includes copies of press releases issued by relevant implementing agencies as well as the Respondent during the period of 2015-2017, which plainly contradict the completion dates and scope of work claimed by the Respondent in those two Experience Documents. Finally, as noted above, the Respondent does not contest the misrepresentations and states that an employee who prepared Bid 1 "misrepresented the fact of the specific experiences" and made a "decision to forge" the Experience Documents. In these circumstances, the Sanctions Board finds the evidence sufficient to support a finding that the Respondent's staff made misrepresentations by submitting the Experience Documents with each of the Bids.

2. That knowingly or recklessly misled, or attempted to mislead, a party

19. INT does not present any argument in this case as to whether the Respondent's staff acted knowingly or recklessly and whether the misrepresentations misled or attempted to mislead a party. The Respondent states that the Experience Documents were prepared by one staff member working on Bid 1 and used again, without additional scrutiny, by staff who prepared Bid 2. INT

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[9] January 2011 Procurement Guidelines at para. 1.16(a)(ii).

[10] See, e.g., Sanctions Board Decision No. 68 (2014) at para. 22.

[11] See, e.g., Sanctions Board Decision No. 81 (2015) at para. 38.

[12] See, e.g., Sanctions Board Decision No. 79 (2015) at para. 21.

describes the Respondent's explanation as "unverifiable" but does not itself propose a theory as to how the misrepresentations occurred.

20. The Sanctions Board has discretion to infer that an individual acted knowingly from circumstantial evidence.[13] Any kind of evidence may form the basis of conclusions reached by the Sanctions Board.[14] The Sanctions Board has found sufficient evidence of knowledge in cases of alleged fraud where the respondents directly admitted to having acted knowingly,[15] or where the record otherwise supported an inference of knowledge.[16] By contrast, in determining whether an individual acted recklessly, the Sanctions Board has considered whether the record indicated that an individual was, or should have been, aware of a substantial risk but nevertheless failed to act to mitigate that risk.[17] Where the evidence may be insufficient to infer subjective awareness of risk, the Sanctions Board has measured the individual's conduct against the common "due care" standard.[18] This standard is the degree of care that a "reasonable person" would exercise under the circumstances.[19] In determining whether a respondent was aware or, based on apparent red flags, should have been aware of a substantial risk that a document is false, the Sanctions Board has considered, inter alia, whether the respondent's staff employed any process of due diligence or other review with respect to the documents later found to be false.[20] In the event that the Sanctions Board finds that it is more likely than not that a respondent was or should have been aware of a substantial risk of misrepresentation, the Sanctions Board considers whether the record shows that the respondent took precautions that were commensurate with the risk involved.

21. The Respondent states that its employees acted with "negligence and malpractice" and concedes that submission of at least one of the false supporting documents with Bid 2 was "reckless." The Respondent asserts, and the record does not contradict, that the employee involved in preparing Bid 1 falsified the Experience Documents for greater convenience, and that the employee preparing Bid 2 used the Experience Documents without any attempt at verification. The Sanctions Board finds the Respondent's own description of events to support a finding of recklessness. What the Respondent describes is the failure to apply any scrutiny to key parts of the Bids on two significant infrastructure contracts, which is particularly risky in a corporate environment admittedly absent of appropriate mechanisms to mitigate the possibility of misrepresentation.

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[13] Sanctions Procedures at Section III.A, sub-paragraph 7.01.

[14] Id.

[15] See, e.g., Sanctions Board Decision No. 49 (2012) at paras. 15, 18, 25 (finding that the misrepresentation was carried out knowingly where the respondent and its affiliate admitted to creating and using forged documents).

[16] See, e.g., Sanctions Board Decision No. 55 (2013) at para. 46 (finding that misrepresentations were made knowingly where the falsity of the forged documents would have been readily apparent to the respondent firm's representative); Sanctions Board Decision No. 69 (2014) at para. 22 (finding evidence sufficient to infer knowledge where the misrepresentations involved claims of past experience of significant value).

[17] See, e.g., Sanctions Board Decision No. 51 (2012) at para. 33.

[18] Id.

[19] Id.

[20] Sanctions Board Decision No. 98 (2017) at paras. 46-47.

22. The record also reflects that the Respondent's Director omitted to review either of the Bids prior to signing each document and approving it for submission to the PIU. Again, these actions reflect a reckless approach to bid preparation and submission. Whereas some scrutiny of official documents being prepared for submission is always prudent, such review is especially critical when – as was the case here – the staff were aware of an absence of controls during the tender preparation process.

23. In these circumstances, the Sanctions Board concludes that it is more likely than not that the Respondent's employees who prepared the Bids or approved their submission to the PIU acted at least recklessly.

3. To obtain a financial or other benefit or to avoid an obligation

24. INT submits that the Respondent's misrepresentations sought to satisfy the bidding requirements for each of the Contracts. The Respondent appears to propose that the misrepresentations were not motivated by intent to profit but by staff seeking their "own convenience." The Respondent also asserts that, notwithstanding issues in the Experience Documents, the Respondent's actual past experience was sufficient to satisfy the bid requirements for the respective Contracts. The Sanctions Board has previously found sufficient evidence of intent to obtain a financial or other benefit or to avoid an obligation where the record showed that misrepresentations were made in response to a tender requirement,[21] and "[i]rrespective of the bid requirement's actual significance, and the subjective assessment thereof by a bidder."[22]

25. The record reflects that the Bidding Documents required bidders to provide supporting documentation that they had satisfactorily and substantially completed, within a specified time period, at least two contracts with a specified cumulative value. The bidders were obligated to include information on contract award dates, completion dates, contract amounts, and key activities. The record also reflects that the Experience Documents were presented in each of the Bids in response to these bidding requirements as evidence of the Respondent's "Bidder Qualifications" and to support the Respondent's Bids by reflecting the scope and details of its past work.

26. In these circumstances, the Sanctions Board finds that it is more likely than not that misrepresentations in the Experience Documents served to obtain a financial or other benefit for the Respondent or to avoid the obligation of obtaining valid documents as required.

B. The Respondent's Liability for the Acts of its Employees

27. In past cases, the Sanctions Board has concluded that an employer could be found liable for the acts of its employees under the doctrine of respondeat superior, considering in particular whether an employee "act[ed] within the course and scope of his employment and with a purpose,

[21] See, e.g., Sanctions Board Decision No. 92 (2017) at para 72.

[22] Sanctions Board Decision No. 71 (2014) at para. 76.

at least in part, to serve [the] [r]espondent."[23] Where a respondent entity has denied responsibility for the acts of its employees based on a rogue employee defense, the Sanctions Board has assessed any evidence presented regarding the scope and adequacy of the respondent entity's controls and supervision at the time of the misconduct.[24]

28. In the present case, INT states that the conduct of responsible employees who prepared one of the Experience Documents relating to Contract 1 may be imputed to the Respondent, and argues more generally that the Respondent should be sanctioned for the alleged misconduct. The record supports a finding that the Respondent's branch employees (i) were responsible for preparing both Bid 1 and Bid 2, including compilation of necessary supporting documents; (ii) acted within the course and scope of their employment in preparing those bids; and (iii) acted with a purpose to serve the Respondent by preparing the Bids and submitting them to the PIU. The Respondent does not present, and the evidence does not provide any basis for, a rogue employee defense. On the basis of this record, the Sanctions Board finds the Respondent liable for the fraudulent practices carried out by its employees in the course and scope of their duties.

C. Sanctioning Analysis

1. General framework for determination of sanctions

29. Where the Sanctions Board determines that it is more likely than not that a respondent engaged in a sanctionable practice, Section III.A, sub-paragraph 8.01(b) of the Sanctions Procedures requires the Sanctions Board to select and impose one or more appropriate sanctions from the range of possible sanctions identified in Section III.A, sub-paragraph 9.01. The range of sanctions set out in Section III.A, sub-paragraph 9.01 includes: (i) reprimand, (ii) conditional non-debarment, (iii) debarment, (iv) debarment with conditional release, and (v) restitution or remedy. As stated in Section III.A, sub-paragraph 8.01(b) of the Sanctions Procedures, the Sanctions Board is not bound by the Acting SDO's recommendations.

30. As reflected in Sanctions Board precedent, the Sanctions Board considers the totality of the circumstances and all potential aggravating and mitigating factors to determine an appropriate sanction.[25] The choice of sanction is not a mechanistic determination, but rather a case-by-case analysis tailored to the specific facts and circumstances presented in each case.[26]

31. The Sanctions Board is required to consider the types of factors set forth in Section III.A, sub-paragraph 9.02 of the Sanctions Procedures, which provides a non-exhaustive list of considerations. In addition, the Sanctions Board refers to the factors and principles set out in the World Bank Sanctioning Guidelines (the "Sanctioning Guidelines"). While the Sanctioning Guidelines themselves state that they are not intended to be prescriptive in nature, they provide guidance as to the types of considerations potentially relevant to a sanctions determination. The Sanctioning Guidelines further suggest potentially applicable ranges of increases or decreases from

[23] Sanctions Board Decision No. 48 (2012) at para. 29.

[24] See, e.g., Sanctions Board Decision No. 55 (2013) at paras. 52-55.

[25] See Sanctions Board Decision No. 40 (2010) at para. 28.

[26] Sanctions Board Decision No. 44 (2011) at para. 56.

a proposed base sanction of debarment with the possibility of conditional release after a minimum period of three years.

32. Where the Sanctions Board imposes a sanction on a respondent, it may also, pursuant to Section III.A, sub-paragraph 9.04(b) of the Sanctions Procedures, impose appropriate sanctions on any Affiliate of the respondent.

2. Factors considered in the present case

a. Severity of the misconduct

33. *Repeated pattern of conduct*: Section III.A, sub-paragraph 9.02(a) of the Sanctions Procedures requires the Sanctions Board to consider the severity of the misconduct in determining the appropriate sanction. Section IV.A of the Sanctioning Guidelines identifies a repeated pattern of conduct as an example of severity. In past cases, the Sanctions Board has applied aggravation where misconduct related to multiple contracts and/or projects,[27] but has declined to apply aggravation where the sanctionable conduct was attributed to a "single scheme"[28] or "single course of action."[29] INT seeks aggravation on this basis, arguing that the misrepresentations involved multiple documents, appeared in two bids, were introduced by different persons one month apart, took place in an environment without a centralized tender preparation system, and involved the failure of oversight on multiple levels of the organization. The Respondent submits that its staff had no intent to repeat the misrepresentations in Bid 2. The record reflects that the Respondent's staff twice submitted the same set of false documents that related to the same bidding requirement under two related contracts under the same Project. The record also suggests that the misrepresentations were facilitated by an overall failure by the Respondent to review and verify information submitted with its Bids.[30] The Sanctions Board has previously found the submission of the same false documents in multiple bids to constitute a single course of action, rather than a repeated pattern of conduct.[31] Consistent with this precedent, the Sanctions Board declines to apply aggravation on this basis.

b. Voluntary corrective action taken

34. Section III.A, sub-paragraph 9.02(e) of the Sanctions Procedures provides for mitigation where a sanctioned party took voluntary corrective action. Section V.B of the Sanctioning

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[27] See, e.g., Sanctions Board Decision No. 72 (2014) at para. 56 (applying aggravation for repetition where misrepresentations were made months apart and appeared in separate bids related to two contracts under different projects).

[28] See, e.g., Sanctions Board Decision No. 63 (2014) at para. 97 (declining to apply aggravation for repetition where respondents made multiple corrupt payments pursuant to a single scheme under the same contract).

[29] See, e.g., Sanctions Board Decision No. 79 (2015) at para. 39 (declining to apply aggravation for repetition where documents constituting the respondent's fraudulent misrepresentations were prepared in a single course of action before being submitted, in two batches in the same week, in several bid packages for contracts under the same project).

[30] See supra at Paragraphs 21-22.

[31] Sanctions Board Decision No. 79 (2015) at para. 39.

Guidelines identifies several examples of voluntary corrective actions that may warrant mitigation, with the timing, scope, and/or quality of those actions to be considered as potential indicia of the respondent's genuine remorse and intention to reform. A respondent bears the burden of presenting evidence to substantiate any claimed voluntary corrective action.[32]

35. *Internal action against responsible individuals*: Section V.B.2 of the Sanctioning Guidelines states that mitigation may be appropriate where "[m]anagement takes all appropriate measures to address the misconduct engaged in on its behalf, including taking appropriate disciplinary and/or remedial steps with respect to the relevant employee, agent, or representative." The Sanctioning Guidelines add that "[t]he timing of the action may indicate the degree to which it reflects genuine remorse and intention to reform, or a calculated step to reduce the severity of the sentence." The Sanctions Board has previously granted mitigation on this ground where the respondent's internal disciplinary action targeted participants in the misconduct and was reflected in documentary evidence.[33] The Respondent asserts that it demoted or reassigned specific staff members involved in the misconduct. INT opposes mitigation on this basis as not supported by evidence. In the present case, the Sanctions Board notes the absence of documentary evidence to support the asserted disciplinary measures against staff involved in the misconduct. In these circumstances, the Sanctions Board finds the record insufficient to support any mitigation for the Respondent's asserted internal actions against responsible individuals.

36. *Effective compliance program*: Section V.B.3 of the Sanctioning Guidelines suggests that mitigation may be appropriate where the record shows a respondent's "[e]stablishment or improvement, and implementation of a corporate compliance program." The Respondent asserts that it took measures to "enhance monitoring in the course of the overseas branches preparing the bid documents." INT opposes mitigation on this basis as not supported by evidence. The Sanctions Board has declined to afford mitigation where the record contained no evidence to support claimed establishment or improvement of a compliance program.[34] In the present case, the Sanctions Board notes the absence of documentary evidence to support the monitoring measures claimed by the Respondent. In these circumstances, the Sanctions Board finds the record insufficient to support any mitigation for the Respondent's asserted corporate compliance actions.

c. Cooperation

37. Section III.A, sub-paragraph 9.02(e) of the Sanctions Procedures provides for mitigation where a respondent "cooperated in the investigation or resolution of the case." Section V.C of the Sanctioning Guidelines identifies a respondent's assistance with INT's investigation, admission/acceptance of guilt/responsibility, internal investigation, and voluntary restraint as examples of cooperation.

38. *Assistance and/or ongoing cooperation with investigation*: Section V.C.1 of the Sanctioning Guidelines states that cooperation may take the form of assistance to INT's

[32] Sanctions Board Decision No. 45 (2011) at para. 72.

[33] Sanctions Board Decision No. 79 (2015) at para. 44.

[34] See, e.g., Sanctions Board Decision No. 85 (2016) at para. 44.

investigation or ongoing cooperation, with consideration of "INT's representation that the respondent has provided substantial assistance in an investigation," as well as "the truthfulness, completeness, [and] reliability of any information or testimony, the nature and extent of the assistance, and the timeliness of assistance." The Sanctions Board has accorded varying levels of mitigation in cases where a respondent's managers met with INT on several occasions and provided relevant information and documentation;[35] corresponded with INT and made relevant personnel available for interviews;[36] or engaged in more limited forms of cooperation, e.g., by replying to INT's show-cause letter.[37] INT refers to the Respondent's "willingness to cooperate" during the investigation but appears to support only limited mitigating credit on this basis. The record in this case shows that the Respondent replied to INT's show-cause letter and appended additional evidence to that reply. Although the record does not suggest that the Respondent provided any further cooperation or sat for interviews, it also does not appear that INT made any such follow-up requests. In these circumstances, the Sanctions Board finds the record to support the finding that the Respondent's conduct was sufficiently cooperative so as to merit mitigation.

39. *Admission/acceptance of guilt/responsibility*: Section V.C.3 of the Sanctioning Guidelines recognizes cooperation in the form of a respondent's admission or acceptance of guilt or responsibility, with the condition that early admissions or acceptance should be given more weight than admissions or acceptance coming later in the investigation or sanctions proceedings. In considering whether admissions warrant mitigation, the Sanctions Board has looked to the timing of admissions as well as their scope (i.e., whether an admission related only to the conduct alleged or also accepted responsibility).[38] INT acknowledges the Respondent's admission of misrepresentation in one of the Bids, but argues that any mitigation on this basis should be limited by the partial nature of the admission and the Respondent's "lack of genuine contrition." The record reflects that the Respondent has not contested the misrepresentations and has described the Experience Documents, both in its Explanation and in its Response, as "forge[d]." In addition, the Respondent has repeatedly apologized and has acknowledged flaws in its "managerial and monitoring system." At the same time, the Respondent's admissions during the course of these sanctions proceedings lie in some contrast with earlier statements to INT during the investigation, where the Respondent described its staff conduct as merely a "mistake" and suggested that INT had misinterpreted the nature of one of the Experience Documents. The Sanctions Board finds that only limited mitigation is warranted in these circumstances.

40. *Internal investigation*: Section V.C.2 of the Sanctioning Guidelines refers to cooperation where a respondent has "conducted its own, effective internal investigation of the misconduct and relevant facts relating to the misconduct for which it is to be sanctioned and shared results with INT." The Respondent asserts that it "immediately conducted [an] investigation and verification" in relation to the alleged misconduct. INT opposes mitigation on this basis, claiming lack of supporting evidence. The Sanctions Board has previously declined to apply mitigation under this

[35] Sanctions Board Decision No. 53 (2012) at para. 58.

[36] Sanctions Board Decision No. 56 (2013) at paras. 72-73.

[37] Sanctions Board Decision No. 37 (2010) at para. 45; Sanctions Board Decision No. 51 (2012) at para. 90.

[38] Sanctions Board Decision No. 99 (2017) at paras. 33-34.

factor where the respondent did not provide any evidence or details of its asserted internal investigation.[39] The record does not include any documentary evidence to substantiate the nature or timing of the Respondent's asserted investigation. The Sanctions Board therefore declines to apply mitigation on this basis.

41. *Voluntary restraint*: Section V.C.4 of the Sanctioning Guidelines provides for mitigation where a respondent has voluntarily refrained from bidding on Bank-financed tenders pending the outcome of an investigation. The Respondent requests mitigation on this basis, noting that it suspended bidding activities related to "ICB projects" in Kenya. INT opposes mitigation, claiming lack of supporting evidence. The record does not include any evidence of a policy whereby the Respondent would withdraw or avoid bidding on contracts financed by the Bank. The Sanctions Board has previously declined to apply mitigating credit on this basis where the respondent's asserted voluntary restraint was not corroborated by relevant evidence.[40] Similarly, the Sanctions Board declines to apply mitigation for voluntary restraint claimed in the present case.

d. Period of temporary suspension

42. Pursuant to Section III.A, sub-paragraph 9.02(h) of the Sanctions Procedures, the Sanctions Board takes into account the period of the Respondent's temporary suspension since the Acting SDO's issuance of the Notice on March 30, 2018.

e. Other considerations

43. Under Section III.A, sub-paragraph 9.02(i) of the Sanctions Procedures, the Sanctions Board may consider "any other factor" that it "reasonably deems relevant to the sanctioned party's culpability or responsibility in relation to the Sanctionable Practice."

44. *Absence of past misconduct*: The Respondent appears to raise as a mitigating factor its "[i]nnocent [p]ast [h]istory." INT opposes mitigation on this basis. The Sanctions Board has previously held that the absence of past misconduct is a neutral fact that does not warrant mitigation.[41] The Sanctions Board therefore also declines to apply any mitigating credit on this basis in the present case.

45. *Record of past performance and capacity to meet tender requirements*: The Respondent asserts that it has a good credit record and that it has successfully completed similar projects in the past. INT opposes mitigation on this basis. The Sanctions Board has previously declined to grant mitigation for a respondent's claimed record of general performance and satisfaction of contract

[39] See Sanctions Board Decision No. 74 (2014) at para. 43.

[40] Sanctions Board Decision No. 79 (2015) at para. 51 (denying mitigation where the respondent's asserted voluntary restraint was not corroborated by relevant evidence).

[41] See, e.g., Sanctions Board Decision No. 90 (2016) at para. 49.

obligations.[42] The Sanctions Board therefore also declines to apply any mitigating credit on this basis in the present case.

D. Determination of Appropriate Sanction

46. Considering the full record and all the factors discussed above, the Sanctions Board determines that the Respondent, together with any entity that is an Affiliate directly or indirectly controlled by the Respondent,[43] shall be, and hereby declares that it is, ineligible to (i) be awarded or otherwise benefit from a Bank-financed contract, financially or in any other manner;[44] (ii) be a nominated sub-contractor, consultant, manufacturer or supplier, or service provider[45] of an otherwise eligible firm being awarded a Bank-financed contract; and (iii) receive the proceeds of any loan made by the Bank or otherwise participate further in the preparation or implementation of any Bank-Financed Projects, provided, however, that after a minimum period of ineligibility of one (1) year beginning from the date of this decision, the Respondent may be released from ineligibility only if it has, in accordance with Section III.A, sub-paragraph 9.03 of the Sanctions Procedures, adopted and implemented an effective integrity compliance program, in a manner satisfactory to the World Bank Group. The ineligibility shall extend across the operations of the World Bank Group. This sanction is imposed on the Respondent for fraudulent practices as defined in Paragraph l.16(a)(ii) of the January 2011 Procurement Guidelines.

Ellen Gracie Northfleet (Panel Chair)

On behalf of the
World Bank Group Sanctions Board

Ellen Gracie Northfleet
Cavinder Bull
Alejandro Escobar

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[42] See, e.g., Sanctions Board Decision No. 79 (2015) at para. 55.

[43] This includes the specific controlled Affiliates identified in the Notice.

[44] A respondent's ineligibility to be awarded a contract includes, without limitation (i) applying for prequalification, expressing interest in a consultancy, and bidding, either directly or as a nominated sub-contractor, consultant, manufacturer or supplier, or service provider, in respect of such contract, and (ii) entering into an addendum or amendment introducing a material modification to any existing contract. Sanctions Procedures at Section III.A, sub-paragraph 9.01(c)(i), n.14.

[45] A nominated sub-contractor, nominated consultant, nominated manufacturer or supplier, or nominated service provider (different names are used depending on the particular bidding document) is one which has been: (i) included by the bidder in its prequalification application or bid because it brings specific and critical experience and know-how that allow the bidder to meet the qualification requirements for the particular bid; or (ii) appointed by the Borrower. Sanctions Procedures at Section III.A, sub-paragraph 9.01(c)(ii), n.15.