

Date of issuance: December 22, 2017

Sanctions Board Decision No. 106¹
(Sanctions Case No. 433)

IDA Credit No. 4954-BD
Bangladesh

Decision of the World Bank Group² Sanctions Board imposing a sanction of debarment on the Respondent, together with certain Affiliates,³ for a period of three (3) months, beginning from the date of this decision. This sanction is imposed on the Respondent for a fraudulent practice.

I. INTRODUCTION

1. The Sanctions Board met in a panel session on March 20, 2017, at the World Bank Group's headquarters in Washington, D.C., to review this case. The Sanctions Board was composed of Olufunke Adekoya (Panel Chair), Ellen Gracie Northfleet, and Anne van't Veer.

2. A hearing was held on the same day, following a request from the Respondent and in accordance with Article VI of the Sanctions Procedures. The World Bank Group's Integrity Vice Presidency ("INT") participated in the hearing through its representatives, all attending in person. The Respondent was represented by staff and outside counsel, also attending in person. The Sanctions Board deliberated and reached its decision based on the written record and the arguments presented at the hearing.

¹ Note from the World Bank's Legal Vice Presidency: On January 7, 2016, the World Bank Sanctions Procedures as adopted April 15, 2012 (the "Sanctions Procedures") were re-adopted and retrofitted as "Bank Procedure: Sanctions Proceedings and Settlements in Bank Financed Projects" (the "2016 Sanctions Procedures"). On June 28, 2016, the 2016 Sanctions Procedures were issued on the Policy and Procedure Repository of the World Bank. At the time of the issuance of the Notice of Sanctions Proceedings (the "Notice") to the respondent entity in Sanctions Case No. 433 (the "Respondent") on June 22, 2016, the applicable procedures made available to the Respondent were the Sanctions Procedures. The so-called "retrofit" of the sanctions framework, initiated in 2014, aimed at codifying and reconstructing the normative architecture of the World Bank's sanctions system. The structure and numbering of the sections and paragraphs under the 2016 Sanctions Procedures was changed, without affecting the content of the rules of the Sanctions Procedures applicable to this case.

² In accordance with Section 1.02(a) of 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 the guarantee operations of IBRD and IDA, but does not include the International Centre for the 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 1.01(a), n.1.

³ Section 1.02(a) of the Sanctions Procedures defines "Affiliate" to include "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.

3. In accordance with Section 8.02(a) of the Sanctions Procedures, the written record for the Sanctions Board's consideration included the following:

- i. Notice issued by the World Bank's Evaluation and Suspension Officer ("EO")⁴ to the Respondent on June 22, 2016, appending the Statement of Accusations and Evidence (the "SAE") presented to the EO by INT, dated June 7, 2016;
- ii. Explanation submitted by the Respondent to the EO on August 25, 2016 (the "Explanation");
- iii. Response submitted by the Respondent to the Sanctions Board on October 25, 2016 (the "Response"); and
- iv. Reply submitted by INT to the Sanctions Board on November 28, 2016 (the "Reply").

4. Effective January 8, 2016, pursuant to Article II of the Sanctions Procedures, which provides for temporary suspension prior to sanctions proceedings in certain circumstances, the EO temporarily suspended the Respondent, together with any entity that is an Affiliate directly or indirectly controlled by the Respondent, from eligibility⁵ with respect to any Bank-Financed Projects.⁶ The EO specified that the temporary suspension would apply across the operations of the World Bank Group. On June 8, 2016, the EO informed the parties and the Sanctions Board that INT had submitted the SAE and the Respondent's temporary suspension was therefore automatically extended, pending the final outcome of these sanctions proceedings.⁷

5. On June 22, 2016, pursuant to Sections 4.01, 9.01, and 9.04 of the Sanctions Procedures, the EO issued the Notice to the Respondent and recommended the following sanction for the Respondent, together with any entity that is an Affiliate directly or indirectly controlled by the Respondent: debarment with conditional release after a minimum period of two (2) years and seven (7) months.⁸ The EO identified the following conditions for the Respondent's release from debarment: (i) appropriate remedial measures to address the sanctionable practices alleged by INT against the Respondent and (ii) an effective integrity compliance program, to be adopted and implemented in a manner satisfactory to the Bank.⁹ On September 22, 2016, the EO issued a determination with respect to the Respondent's Explanation, finding no basis to withdraw the

⁴ Effective March 31, 2013, the EO's title changed to "IBRD/IDA Suspension and Debarment Officer" ("SDO"). For consistency with the Sanctions Procedures, this decision refers to the former title.

⁵ The full scope of ineligibility effected by a temporary suspension is defined in the Sanctions Procedures at Sections 4.02(a) and 9.01(c), read together.

⁶ The term "Bank-Financed Projects" encompasses any project or program financed by the Bank and governed by the Bank's Procurement Guidelines, Consultant Guidelines, or Anti-Corruption Guidelines. The term "Bank-Financed Projects" includes activities financed through trust funds administered by the Bank to the extent governed by said Guidelines. Sanctions Procedures at Section 1.01(c)(i), n.3.

⁷ See Sanctions Procedures at Section 2.04(b).

⁸ See Sanctions Procedures at Sections 1.02(a) and 9.04.

⁹ See Sanctions Procedures at Section 9.03.

Notice but also finding additional mitigating factors and revising the recommended sanction to one (1) year and eleven (11) months.¹⁰ On October 25, 2016, the Respondent filed a Response, in which the Respondent contested the EO's finding of liability and recommended sanction.¹¹

II. GENERAL BACKGROUND

6. This case arises in the context of the Bangladesh Health Sector Development Program (the "Project"), which sought to "enable [Bangladesh] to strengthen its health systems and improve its health services, particularly for the poor." On September 12, 2011, IDA entered into a financing agreement with the People's Republic of Bangladesh (the "Borrower") for a credit of approximately US\$359 million to help finance the Project (the "Financing Agreement"). The Project became effective on October 23, 2011, and closed on June 30, 2017.

7. On January 20, 2013, the implementation unit for the Project (the "PIU") issued bidding documents (the "Bidding Documents") for a contract to supply certain anti-tuberculosis pharmaceuticals under the Project (the "Contract"). On May 8, 2013, the Respondent submitted its bid to perform the Contract (the "Bid") to the PIU, which identified an agent (the "Agent") to be used in procurement and Contract execution, as appropriate. On August 18, 2013, the PIU issued its final bid evaluation report recommending that the Contract be awarded to the Respondent. The Respondent signed the Contract with the PIU on September 23, 2013. INT alleges that the Respondent engaged in fraudulent practices by misrepresenting the amount of commission to be paid to the Agent.

III. APPLICABLE STANDARDS OF REVIEW

8. *Standard of proof:* Pursuant to Section 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 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.

9. *Burden of proof:* Under Section 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.

10. *Evidence:* As set forth in Section 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.

11. *Applicable definition of fraudulent practice:* The alleged fraudulent practice in this case has the meaning set forth in the World Bank's Guidelines: Procurement under IBRD Loans and

¹⁰ See Sanctions Procedures at Sections 4.02(b)-(c).

¹¹ See Sanctions Procedures at Section 5.01(a).

IDA Credits (May 2004, revised October 1, 2006 and May 1, 2010) (the “May 2010 Procurement Guidelines”), which governed procurement for the Project and whose definition of fraudulent practice was included in the Bidding Documents. Paragraph 1.14(a)(ii) of these Guidelines defines a fraudulent practice as “any act or omission, including a misrepresentation, 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.¹²

IV. PRINCIPAL CONTENTIONS OF THE PARTIES

A. INT’s Principal Contentions in the SAE

12. INT alleges that the Respondent agreed and planned to pay the Agent a commission valued at 3% of the Contract’s value, but disclosed a commission of only 0.5% to the PIU. INT argues that the Respondent communicated this incorrect figure to the PIU “deliberately” and on multiple occasions: in the Bid, in a clarification to the Bid, and in an annex to the Contract. INT submits that the misconduct was knowing or at least reckless, and that the Respondent believed that the alleged misrepresentation would help it avoid disqualification during the bid review process.

13. INT asserts that the Respondent’s repeated misrepresentations, concealment and attempted destruction of certain evidence, and improper belated modification of its Bid warrant aggravation. INT submits that, although the Respondent provided some cooperation with the investigation, any mitigation on this basis “is cancelled out” by the Respondent’s later evasiveness.

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

14. The Respondent asserts that INT has failed to prove to the necessary standard that the Respondent engaged in a sanctionable practice and that INT has also failed to consider the Respondent’s explanation of events. Although the Respondent does not dispute that the Bid included a misrepresentation of the Agent’s commission, the Respondent argues that INT’s conclusions regarding intent rely on inaccurate testimonial evidence, and that the commission was misstated at the Agent’s request and sought only to reduce the Agent’s tax obligations. The Respondent thus submits that the overall record does not support a finding that the Respondent intended to obtain a benefit and to influence the procurement process.

15. The Respondent objects to the proposed aggravation and requests mitigation for cooperation, minor role, lack of management involvement, cessation of and attempt to remediate the conduct at issue, internal action against responsible staff, internal compliance program, low severity of alleged misconduct, lack of harm, lack of prior history of misconduct, conduct of INT’s investigation, period of temporary suspension, lapse of time, and adverse consequences of any debarment.

¹² May 2010 Procurement Guidelines at para. 1.14(a)(ii), n.20.

16. The Respondent asserts that INT's investigative tactics amounted to an "ambush" of the Respondent's offices and contributed to a delay in the Respondent's decision to involve legal counsel. The Respondent also claims that INT rebuffed the Respondent's repeated attempts to discuss with INT the allegations and the show cause letter prior to the Respondent's temporary suspension.

C. INT's Principal Contentions in the Reply

17. INT reiterates its allegations set out in the SAE and asserts that the evidence is sufficient for a finding of fraudulent practice. With respect to the element of intent, INT argues that the inculpatory testimonial evidence is "categorical," unambiguous, and provided by persons with direct knowledge of the Respondent's bid preparation process who were neither peripheral to the misconduct nor unprepared to speak with INT. With respect to the Respondent's claim that its understatement of the Agent's commission related to the Agent's expected tax obligations, INT argues that this claim is not clearly supported by contemporaneous evidence during the procurement process, and appears instead to be a belated contention in defense to INT's allegations of fraud. INT submits that, notwithstanding the numerous mitigating factors proposed in the Explanation and the Response, the record does not support any additional mitigation.

18. Finally, INT describes the Respondent's criticism of INT's investigation as meritless and submits that, given the Respondent's cooperation during the investigation, INT was not obligated to issue an audit letter, and that the investigative interviews and visits to the Respondent's offices were always conducted during mutually agreed-upon days and times.

D. Presentations at the Hearing

19. In its presentation, INT asserted that the Respondent made the alleged misrepresentations knowingly and repeatedly. INT stated that the Sanctions Board may refer to its own precedent in finding sufficient intent,¹³ because the Respondent's misrepresentation related directly to a disclosure required by the Bidding Documents. INT noted that the Respondent's proposed explanation for the misrepresentation – an attempt to help the Agent minimize its tax burden – is neither sufficiently supported by the evidence, nor a valid defense, even if true. INT expressed general opposition to application of any mitigation to the Respondent's sanction and stated that the Respondent's pleadings presented irrelevant claims that sought to distract. INT specifically argued that the Respondent's asserted compliance program warrants only minimal mitigation, and that the Respondent does not appear to have taken such internal actions against its staff as would warrant mitigating treatment. Finally, INT proposed that the Sanctions Board apply aggravation for the involvement of the Respondent's management in the misconduct.

20. The Respondent conceded to having made a knowing misrepresentation as described by INT. However, the Respondent argued that INT did not prove the final and necessary element of the fraudulent practice alleged in this case, which the Respondent described as "the intent to avoid an obligation or secure a benefit for the party in the procurement." The Respondent reiterated that it had made the misrepresentation at the request of the Agent and to assist the Agent in avoiding

¹³ See Sanctions Board Decision No. 83 (2015) at para. 52; Sanctions Board Decision No. 88 (2016) at paras. 36-38; Sanctions Board Decision No. 91 (2016) at paras. 30-31.

unspecified tax burdens. The Respondent submitted that, should the Sanctions Board nevertheless determine that evidence is sufficient for a finding of fraudulent practice, the Sanctions Board should decline to apply aggravation for any pattern of repeated misconduct, improper bid modification, interference with investigation, or management role in misconduct. Finally, the Respondent requested that the Sanctions Board consider the Respondent's cooperation and the period and impact of the Respondent's temporary suspension as grounds for mitigation.

V. THE SANCTIONS BOARD'S ANALYSIS AND CONCLUSIONS

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

A. Evidence of Fraudulent Practice

22. In accordance with the definition of "fraudulent practice" under the May 2010 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 mislead, or attempted to mislead, a party (iii) to obtain a financial or other benefit or to avoid an obligation.¹⁴ 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.¹⁵

1. Misrepresentation

23. INT asserts that the Respondent incorrectly stated a commission of 0.5% of the Contract's value as payable to the Agent, on multiple occasions, i.e., in the Bid, in later correspondence with the PIU, and in an annex to the Contract. INT claims that the Respondent had in fact agreed to pay the Agent a greater commission of 3% of the Contract's value. The Respondent concedes that it misrepresented the commission to be paid to the Agent. The Sanctions Board notes that the Bid and additional correspondence from the Respondent's staff to the PIU identified a planned commission of 0.5% of the Contract's value. However, contemporaneous correspondence among the Respondent's staff and those individuals' later statements to INT investigators consistently reflected an agreement to pay the Agent 3% of the Contract's value. In these circumstances, and taking into account the Respondent's admission, the Sanctions Board finds that the Respondent's staff made a misrepresentation in relation to the procurement process.

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

24. INT asserts that the misrepresentations were deliberate and that the Respondent's staff "made a conscious decision to lie" given the Respondent's asserted expectation that it was not permitted to apply a commission above 0.5%. The Respondent concedes that the misrepresentation was made knowingly. The Sanctions Board has previously reached a finding that a

¹⁴ May 2010 Procurement Guidelines at para. 1.14(a)(ii).

¹⁵ *Id.* at para. 1.14(a)(ii), n.20.

misrepresentation was made knowingly where the record contained contemporaneous correspondence and post-factum admissions that reflected awareness of the misrepresentation.¹⁶ In the present case, the record includes contemporaneous correspondence between the Agent and the Respondent's assistant manager (the "Assistant Manager") requesting that the Bid disclose a commission no greater than 0.5%. The record also includes undisputed testimonial evidence reflecting that the Assistant Manager, the Respondent's deputy general manager (the "Deputy General Manager"), and other staff were aware, at the time of the Bid submission, of the discrepancy between the commission disclosed to the PIU and the higher commission agreed upon with the Agent. Finally, the misrepresentation was directed at PIU staff, whom the Sanctions Board considers public officials and therefore a "party" for purposes of this definition of fraudulent practice.¹⁷ In these circumstances, and taking into account the Respondent's admission, the Sanctions Board finds that it is more likely than not that the Respondent's staff knowingly misled, or at least attempted to mislead, a party.

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

25. INT asserts that the misrepresentation served the Respondent's interests with respect to procurement of the Contract in that (i) the disclosure of the commission was made in response to a requirement set out in the Bidding Documents and (ii) the Respondent's staff understood, and admitted to INT, that bidding rules limited the amount of an agent's commission to 0.5% of the Contract's value. The Respondent submits that INT's testimonial evidence of intent should be given little weight. The Respondent also asserts that its understatement of the Agent's commission did not seek or serve to benefit the Respondent, but was done to comply with the Agent's wishes to minimize its tax obligations. In past cases, as INT noted in its arguments, the Sanctions Board has found the record to reflect an intent to obtain a financial or other benefit where the misrepresentation was made in response to a tender requirement.¹⁸ The Sanctions Board has specifically found sufficient evidence of intent where a respondent understated or failed to disclose an agent's commission,¹⁹ including where the commission was misstated at the advice of the receiving agent.²⁰

26. The record reflects that the Bidding Documents required disclosure of any past or anticipated "commissions or gratuities" for local agents. The Bid included this information in the prescribed format. The Respondent's argument that, because the misrepresentation sought to minimize the Agent's tax liability, it could not serve to benefit the Respondent, is unpersuasive. First, the Sanctions Board notes that the Respondent's staff initially unambiguously disclosed to INT that the misrepresentation served to render the Bid compliant with perceived tender requirements. Second, the contemporaneous correspondence submitted by the Respondent in

¹⁶ See Sanctions Board Decision No. 90 (2016) at para. 29.

¹⁷ See, e.g., Sanctions Board Decision No. 97 (2017) at paras. 45-48 (applying the May 2010 Procurement Guidelines' definition of fraudulent practice, the Sanctions Board found misrepresentations to the PIU to satisfy the element of intent to mislead a party).

¹⁸ See, e.g., Sanctions Board Decision No. 99 (2017) at paras. 23-25.

¹⁹ See, e.g., Sanctions Board Decision No. 92 (2017) at para. 72.

²⁰ Sanctions Board Decision No. 97 (2017) at paras. 50-51.

support of its contention (an email between the Agent and the Respondent) does not mention tax liability or otherwise suggest that the Respondent's staff sought to benefit only the Agent in making the misrepresentation. Third, even if the record supported the Respondent's version of events, such a misrepresentation would still be related to the relationship between the Respondent and the Agent under the umbrella of the procurement process and would also still be responsive to a tender requirement, i.e., the mandatory disclosure of an agent's commission.

27. In these circumstances, the Sanctions Board finds that it is more likely than not that misrepresentation of the Agent's commission was made to obtain a financial or other benefit or to avoid an obligation, and that the Respondent's staff therefore engaged in a fraudulent practice.

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

28. 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 "acted within the course and scope of his employment and with a purpose, at least in part, to serve the [r]espondent."²¹ 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.²²

29. In the present case, the record supports a finding that the Respondent's Deputy General Manager and Assistant Manager (i) were responsible for negotiation with the Agent and preparation of the Bid, and were involved in determination of commissions to be paid to the Agent; (ii) acted within the course and scope of their employment; and (iii) acted with a purpose to serve the Respondent by preparing the Bid for submission, negotiating a commission with the Agent, and disclosing a commission in the Bid. The Respondent does not present, and the record 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 practice carried out by its staff in the course and scope of their duties.

C. Sanctioning Analysis

1. General framework for determination of sanctions

30. Where the Sanctions Board determines that it is more likely than not that a respondent engaged in a sanctionable practice, Section 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 9.01. The range of sanctions set out in Section 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 8.01(b) of the Sanctions Procedures, the Sanctions Board is not bound by the EO's recommendations.

²¹ Sanctions Board Decision No. 48 (2012) at para. 29. See also Sanctions Board Decision No. 68 (2014) at para. 30.

²² See, e.g., Sanctions Board Decision No. 55 (2013) at paras. 53-54.

31. 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.²³ 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.²⁴

32. The Sanctions Board is required to consider the types of factors set forth in Section 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 a proposed base sanction of debarment with the possibility of conditional release after a minimum period of three years.

33. Where the Sanctions Board imposes a sanction on a respondent, it may also, pursuant to Section 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

34. Section 9.02(a) of the Sanctions Procedures requires the Sanctions Board to consider of the severity of the misconduct in determining the appropriate sanction. Section IV.A of the Sanctioning Guidelines identifies a repeated pattern of conduct and management’s role in the misconduct as examples of severity.

35. *Repeated pattern of conduct:* INT supports aggravation on this basis, arguing that the misrepresentations were repeated in the Bid, the Contract, and in a letter to the PIU. The Respondent argues that the separate actions described by INT formed part of a single scheme and should not merit aggravation, consistent with Sanctions Board precedent. The Sanctions Board finds this conduct to constitute a single course of action and, consistent with precedent,²⁵ declines to apply aggravation on this basis.

36. *Management’s role in misconduct:* Section IV.A.4 of the Sanctioning Guidelines states that this factor may apply “[i]f an individual within high-level personnel of the organization participated in, condoned, or was willfully ignorant of the misconduct.” In considering potential aggravation under this factor, the Sanctions Board has assessed the seniority of staff positions on

²³ See Sanctions Board Decision No. 40 (2010) at para. 28.

²⁴ Sanctions Board Decision No. 44 (2011) at para. 56.

²⁵ See, e.g., Sanctions Board Decision No. 79 (2015) at para. 39 (declining to apply aggravation where the respondent included the same false document in several bid packages for contracts under the same project, which bid packages appear to have been prepared by the respondent in a single course of action before the bids were submitted in two batches in the same week).

a case-by-case basis.²⁶ INT requests aggravation under this factor. The record reflects that the Respondent's Assistant Manager prepared the Bid as part of a small team and communicated regularly with the Agent regarding the Bid; and the Respondent's Deputy General Manager approved the overall Bid price and oversaw Bid preparation. The Sanctions Board is not persuaded by the Respondent's bare assertion that these employees were "junior" and/or had no decision-making authority in the organization. However, the record also does not reflect these employees' specific levels of seniority within the organization. The Sanctions Board thus declines to apply aggravation under this factor.

b. Interference in the Bank's investigation

37. Section 9.02(c) of the Sanctions Procedures requires consideration of "interference by the sanctioned party in the Bank's investigation." Section IV.C.1 of the Sanctioning Guidelines describes this factor as including "[d]eliberately destroying, falsifying, altering, or concealing evidence material to the investigation or making false statements to investigators in order to materially impede a Bank investigation." INT requests aggravation on this basis and asserts that the Respondent concealed and deleted certain email correspondence. The Respondent agrees that it did not share some of its correspondence and that certain other "emails were deleted by a lower level employee," but argues that this should not warrant aggravation, considering the context of these deletions, absence of intent to conceal, lack of management involvement or instruction, and the Respondent's overall conduct during the investigation. The Respondent argues that INT's failure to invoke the Bank's audit rights and absence of management involvement in the alleged interference should be taken into account. The record reflects that the Respondent's Assistant Manager deliberately deleted two emails during the course of INT's investigation of the Respondent, and that the two emails were recovered and transmitted to INT two months later. The Sanctions Board notes that neither a formal audit nor the involvement of management is necessary to establish interference in this case. In these circumstances, the Sanctions Board concludes that the evidence supports a finding that the Respondent's employee engaged in deliberate deletion of evidence material to the investigation, but also notes that the records were ultimately provided to INT. The Sanctions Board therefore applies limited aggravation for interference with the Bank's investigation.

c. Minor role in the misconduct

38. Section 9.02(e) of the Sanctions Procedures provides for mitigation "where the sanctioned party played a minor role in the misconduct." Section V.A of the Sanctioning Guidelines states that mitigation may be warranted where "no individual with decision-making authority participated in, condoned, or was willfully ignorant of the misconduct." The Respondent seeks mitigation under this factor, based on its claim that it was the Agent who initiated the misrepresentation. INT submits that the Respondent, having prepared all documents that contained the misrepresentations, was the "sole player" in the misconduct. The Sanctions Board has previously required that a respondent bear the burden to show affirmatively that no one with decision-making authority participated in, condoned, or was willfully ignorant of the

²⁶ See, e.g., Sanctions Board Decision No. 97 (2017) at para. 71.

misconduct.²⁷ The Respondent has not carried this burden. The record reflects that the Respondent's Assistant Manager prepared the Bid as part of a small team and communicated regularly with the Agent regarding the Bid; and that the Respondent's Deputy General Manager approved the overall Bid price and oversaw Bid preparation. The Sanctions Board finds that these employees, more likely than not, held some decision-making authority in the organization and declines to apply mitigation on the basis of minor role.

d. Voluntary corrective action taken

39. Section 9.02(e) of the Sanctions Procedures provides for mitigation where a sanctioned party took voluntary corrective action. Section V.B of the Sanctioning 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.²⁸

40. *Cessation of misconduct:* Section V.B.1 of the Sanctioning Guidelines states that mitigation may be appropriate where a respondent ceases to engage in misconduct. The Respondent seeks mitigation on this basis and asserts that the Respondent's staff "sought guidance from INT on how it might remedy any potential misrepresentation." In declining to apply mitigation on this basis in similar circumstances, the Sanctions Board noted that the respondent did not appear to disclose to the relevant parties the actual commission planned and paid to its agent.²⁹ The record in the present case reflects that, during the investigation, the Respondent's staff stated to INT that they could "send a letter stating to the [A]gent that the actual commission is three percent." The Sanctions Board notes that the Agent, unlike the PIU, was not targeted by the Respondent's misrepresentation in the Bid and that, in any event, mere inquiries as to possible corrective action do not warrant mitigation. In these circumstances, the Sanctions Board declines to apply any mitigation on this ground.

41. *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 Respondent asserts that it has provided counseling to all staff interviewed by INT in the course of its investigation and "has reassigned these individuals to positions in which they will no longer be working on public tenders." The Respondent provides one-page job descriptions for the reassigned employees, including for the Assistant Manager and the Deputy General Manager. INT argues that these reassignments in fact constituted promotions, which should disqualify the Respondent from mitigation on this basis. The Sanctions Board has

²⁷ See, e.g., Sanctions Board Decision No. 100 (2017) at para. 49.

²⁸ See, e.g., Sanctions Board Decision No. 95 (2017) at para. 44.

²⁹ Sanctions Board Decision No. 91 (2016) at para. 40.

previously granted mitigation on this ground where the respondent's internal disciplinary action targeted participants in the misconduct and was reflected in documentary evidence.³⁰ In the present case, the Sanctions Board notes the absence of documentary evidence to support the asserted disciplinary counseling of staff involved in the misconduct. In addition, the reassignments appear to have become effective in June 2016 – more than two years after the staff first met with INT for investigative interviews and almost a full year after the Respondent received INT's show cause letter. Third and finally, the Respondent has furnished no documents to permit the Sanctions Board to compare the affected staff members' former and current positions, which may have allowed the Sanctions Board to assess whether the reassignments did or did not amount to promotions. In these circumstances, the Sanctions Board finds the record insufficient to support any mitigation for the Respondent's asserted internal actions against responsible staff.

42. *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 Sanctions Board has previously granted mitigation on this ground upon a finding that a respondent's asserted compliance measures appeared to address, at least in part, the type of misconduct at issue and/or some of the elements suggested in the World Bank Group's Integrity Compliance Guidelines.³¹ The Respondent requests mitigation on this basis. INT submits that the Respondent should receive "minimal mitigation, if any," given that the improvements were belated and remain untested. The record reflects that the Respondent has created and filled the position of a corporate compliance officer and put together a number of internal policies relating to prevention of corruption and the Respondent's relationships with third parties. The Sanctions Board notes in particular that the Respondent's internal policies address fraudulent conduct as defined by the World Bank and other multilateral development banks and include stipulations for relationships with commission agents. The Sanctions Board finds some mitigation warranted in these circumstances.

e. Cooperation

43. *Assistance and/or ongoing cooperation with investigation*: Section 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.1 of the Sanctioning Guidelines states that cooperation may take the form of assistance to INT's 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 previously granted mitigation where, for example, a respondent's "managers met with INT on several occasions and provided relevant information,"³² or where a respondent corresponded with INT and made relevant personnel available for interviews.³³ The Respondent requests mitigation

³⁰ Sanctions Board Decision No. 63 (2014) at para. 106.

³¹ See, e.g., Sanctions Board Decision No. 79 (2015) at para. 46.

³² Sanctions Board Decision No. 53 (2012) at para. 58.

³³ See, e.g., Sanctions Board Decision No. 100 (2017) at para. 54.

on this basis. INT submits that, although the Respondent did cooperate, the evasiveness and interference of the Respondent's staff did not assist the investigation. The record shows that the Respondent's staff met with INT for a total of approximately six hours over four interviews; provided INT with documents and internal correspondence, which included material evidence; and responded to INT's correspondence and show cause letter. The Sanctions Board therefore finds that, despite interference in INT's investigation,³⁴ the actions of the Respondent's staff during the overall course of INT's investigation nevertheless warrant mitigation.

f. Period of temporary suspension

44. Pursuant to Section 9.02(h) of the Sanctions Procedures, the Sanctions Board takes into account that the Respondent has been suspended since January 8, 2016, pursuant to Article II of the Sanctions Procedures, which provides for early temporary suspension by the EO prior to sanctions proceedings.

g. Other considerations

45. Under Section 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."

46. *Improper bid modification:* INT submits that the Respondent, with the Agent's assistance, belatedly and improperly revised a section of the Bid; INT requests aggravation on this basis. The Respondent asserts that this is an "add-on charge" that INT should have to bring and prove as a separate allegation of sanctionable conduct. Although INT asserts that the conduct at issue shows the Respondent's circumvention of procurement rules, it is not clear how this conduct may reflect a greater level of culpability arising from the misconduct at issue in this case, i.e., misstatement of the commission. Consistent with past precedent,³⁵ the Sanctions Board declines to apply aggravation on this basis.

47. *Passage of time:* The Sanctions Board has previously considered as a mitigating factor the passage of a significant period of time from the commission of the misconduct, or from the Bank's awareness of the potential sanctionable practices, to the initiation of sanctions proceedings.³⁶ This passage of time may affect the weight that the Sanctions Board attaches to the evidence presented, as well as the fairness of the process for respondents.³⁷ The Respondent requests mitigation on this basis and submits that the delay was particularly harmful to the Respondent given its lack of a "sophisticated document retention system." The Respondent did not specify, however, what

³⁴ See supra Paragraph 37.

³⁵ See, e.g., Sanctions Board Decision No. 73 (2014) at para. 43.

³⁶ Sanctions Board Decision No. 48 (2012) at para. 48 (applying mitigation where almost three years had elapsed between the Bank's awareness of the potential misconduct and the initiation of sanctions proceedings); Sanctions Board Decision No. 87 (2016) at para. 154 (applying mitigation where sanctions proceedings were initiated approximately four years after the sanctionable practices had occurred and approximately three years after the Bank had become aware of the potential misconduct).

³⁷ See Sanctions Board Decision No. 50 (2012) at para. 71.

documents and/or other evidence may have been rendered unavailable by the passage of time in this case. At the time of the EO's issuance of the Notice in June 2016, over two and a half years had elapsed since the Bank apparently became aware of the potential fraudulent conduct at issue in this case; and approximately three years had elapsed since the Respondent's submission of the Bid. In these circumstances, the Sanctions Board applies limited mitigation under this factor.

48. *Absence of aggravating factors:* The Respondent seeks mitigation based on the asserted absence of the following aggravating factors: (i) management involvement in the misconduct, (ii) severity of the misconduct (iii) harm caused by the misconduct, and (iv) past history of misconduct. Consistent with past precedent,³⁸ the Sanctions Board finds the absence of potential aggravating factors to be a neutral fact, rather than a basis for mitigation.

49. *Adverse consequences of debarment:* The Respondent requests mitigation on this basis, asserting that debarment would harm both the Respondent and the vulnerable populations it serves as a pharmaceutical company. The Sanctions Board has consistently declined to consider the impact of a sanction as a basis for mitigation,³⁹ including where the respondent asserted an impact beyond its individual business.⁴⁰ Likewise, no mitigation is applicable on this basis in this case.

50. *Conduct of INT's investigation:* The Respondent requests mitigation on this basis, asserting that INT "engaged in numerous instances of questionable behavior" throughout the investigation and these sanctions proceedings. Specifically, the Respondent complains that INT failed to inform the Respondent of the purpose of its visits to the Respondent's offices, did not promptly share with the Respondent the fact of its ongoing investigation, did not issue a formal written audit request to the Respondent, and did not provide "context for many of the allegations set forth in the SAE." INT argues that its investigation was conducted properly and without undue pressure on the Respondent. Section 9.02 of the Sanctions Procedures does not provide for consideration of INT's conduct in the determination of an appropriate sanction; Section 9.02(i) of the Sanctions Procedures requires that any sanctioning factor in addition to the factors enumerated at Sections 9.02(a)-9.02(h) be, in the Sanctions Board's assessment, "relevant to the sanctioned party's culpability or responsibility in relation to the [s]anctionable [p]ractice" at issue in a given case. Taking into consideration these provisions, the Sanctions Board has previously declined to consider the conduct of INT's investigation as a basis for mitigation⁴¹ and similarly finds that no mitigation is warranted in the present case.

³⁸ See, e.g., Sanctions Board Decision No. 100 (2017) at para. 61.

³⁹ See, e.g., Sanctions Board Decision No. 98 (2017) at para. 72.

⁴⁰ See, e.g., Sanctions Board Decision No. 61 (2013) at para. 50.

⁴¹ See, e.g., Sanctions Board Decision No. 97 (2017) at para. 79. The Respondent inaccurately describes the Sanctions Board's precedent as "somewhat mixed" on this point. This is incorrect. In the single decision that considered the conduct of INT's investigation as a possible mitigating factor (Sanctions Board Decision No. 28 (2010)), the sanctions case was brought under an older version of the Sanctions Procedures.

D. Determination of Liability and Appropriate Sanction

51. 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, 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;⁴² (ii) be a nominated sub-contractor, consultant, manufacturer or supplier, or service provider⁴³ 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 for a period of three (3) months beginning from the date of this decision. The Respondent's ineligibility shall extend across the operations of the World Bank Group. This sanction is imposed on the Respondent for a fraudulent practice as defined in Paragraph I.14(a)(ii) of the May 2010 Procurement Guidelines.



Olufunke Adekoya (Panel Chair)

On behalf of the
World Bank Group Sanctions Board

Olufunke Adekoya
Ellen Gracie Northfleet
Anne van't Veer

⁴² The 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 9.01(c)(i), n.16.

⁴³ A nominated sub-contractor, consultant, manufacturer or supplier, or 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 9.01(c)(ii), n.17.