THE WORLD BANK GROUP
SANCTIONS BOARD

Date of issuance: June 29, 2016

Sanctions Board Decision No. 88
(Sanctions Case No. 372)

IDA Credit No. 4215-SE
IDA Credit No. 4646-SE
Senegal

IDA Credit No. 4216-MLI
IDA Credit No. 4645-MLI
Mali

IDA Credit No. 4217-MAU
Mauritania

Decision of the World Bank Group[1] Sanctions Board imposing a sanction of reprimand on the respondent entity in Sanctions Case No. 372 (the "Respondent") by means of a formal letter of reprimand to be posted on the World Bank's website for a period of one (1) year 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 plenary session on March 9, 2016, at the World Bank Group's headquarters in Washington, D.C., to review this case. The Sanctions Board was composed of J. James Spinner (Chair), Teresa Cheng, Ellen Gracie Northfleet, Catherine O'Regan, and Anne van't Veer.

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

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[1] In accordance with Section 1.02(a) of the World Bank Sanctions Procedures as adopted April 15, 2012 (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"). For the avoidance of doubt, 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. 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 of Sanctions Proceedings issued by the World Bank's Evaluation and Suspension Officer (the "EO")[2] to the Respondent on February 11, 2015 (the "Notice"), appending the Statement of Accusations and Evidence (the "SAE") presented to the EO by INT, dated December 3, 2014;

ii. Explanation submitted by the Respondent to the EO on March 25, 2015 (the "Explanation");

iii. Response submitted by the Respondent to the Secretary to the Sanctions Board on May 13, 2015 (the "Response"); and

iv. Reply submitted by INT to the Secretary to the Sanctions Board on June 15, 2015 (the "Reply").

4. Pursuant to Sections 4.01(c), 9.01, and 9.04 of the Sanctions Procedures, the EO recommended debarment with conditional release for the Respondent, together with any entity that is an Affiliate[3] directly or indirectly controlled by the Respondent. The EO initially recommended a minimum period of ineligibility of three (3) years, after which period the Respondent may be released from ineligibility only if it has, in accordance with Section 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. Upon review of the Respondent's Explanation, the EO revised the recommended minimum period of ineligibility to two (2) years.

5. Effective December 4, 2013, the EO temporarily suspended the Respondent pursuant to Article II of the Sanctions Procedures, which provides for temporary suspension prior to sanctions proceedings in certain circumstances. Under the suspension, the Respondent, together with any entity that is an Affiliate directly or indirectly controlled by the Respondent, was temporarily suspended from eligibility to (i) be awarded or otherwise benefit from a Bank-financed contract, financially or in any other manner;[4] (ii) be a nominated sub-contractor,

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[2] Effective March 31, 2013, the EO's title changed to "IBRD/IDA Suspension and Debarment Officer" ("SDO"). For consistency with the Sanctions Procedures applicable in this case, this decision refer to the former title.

[3] The term "Affiliate" means "any legal or natural person that controls, is controlled by, or is under common control with, the Respondent, as determined by the Bank." Sanctions Procedures at Section 1.02(a).

[4] For the avoidance of doubt, the scope of 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.

consultant, manufacturer or supplier, or service provider[5] 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 project or program financed by the Bank and governed by the Bank's Procurement Guidelines, Consultant Guidelines, or Anti-Corruption Guidelines (referred to collectively as "Bank-Financed Projects"[6]). INT's request for an early temporary suspension was based on the same allegation of fraudulent practice as presented in the SAE in this case. Upon submission of the SAE to the EO, the Respondent's temporary suspension was automatically extended pending the final outcome of the sanctions proceedings pursuant to Sections 2.04(b) and 4.02 of the Sanctions Procedures. The Notice specified that the temporary suspension would apply across the operations of the World Bank Group.

II. GENERAL BACKGROUND

6. This case arises in the context of the OMVS Félou Hydroelectric Project (the "Project"), which seeks to (i) augment the supply of low-cost hydroelectricity to national power utilities and (ii) develop a nucleus of a cooperative power-pooling mechanism in West Africa. IDA and the European Investment Bank jointly financed the Project. IDA provided financing through two sets of agreements. On September 13, 2006, IDA entered into separate initial financing agreements with the Republic of Senegal, the Republic of Mali, and the Islamic Republic of Mauritania (together, the "Borrowers"), each for the approximate equivalent of US$25 million. On February 17, 2010, IDA entered into separate agreements with the Republic of Senegal and the Republic of Mali for additional financing for the approximate equivalent of US$42.5 million each. The Project became effective on June 29, 2007, and is scheduled to close on December 31, 2019.

7. The specific contract at issue in this case is a contract for the "[a]ssessment, construction, implementation and operational support, and maintenance during the guarantee period" for a hydroelectric plant in Félou, Senegal (the "Contract"). The Respondent, a wholly-owned subsidiary of a state-owned company, first submitted a bid for the Contract as part of a joint venture with another firm. The Respondent's joint venture partner was disqualified, however, and the procurement process was re-launched. The project implementation units (the "PIUs") then issued a new set of bidding documents for the Contract on October 9, 2008 (the "Bidding Documents"). Acting on its own, the Respondent submitted a new bid for the Contract on November 28, 2008 (the "Bid"). The PIUs determined that the Respondent was the lowest qualified bidder, and awarded the Contract to the Respondent. The Contract attached and

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[5] 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.

[6] For the avoidance of doubt, 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.

incorporated by reference a bidding letter completed and signed by the Respondent (the "Bidding Letter").

8. INT alleges that the Respondent engaged in a fraudulent practice in its Bid and the Bidding Letter by misrepresenting commissions paid or to be paid to an agent in relation to the Contract.

III. APPLICABLE STANDARDS OF REVIEW

9. 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. 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.

10. 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.

11. The initial financing agreements in place at the time of the alleged misconduct provided that the World Bank's Guidelines: Procurement under IBRD Loans and IDA Credits (May 2004) (the "May 2004 Procurement Guidelines") would apply. The Bidding Documents, on the other hand, referenced a number of different definitions of fraudulent practice. In accordance with the Bank's legal framework applicable to sanctions, as well as considerations of equity, the standards applicable in the event of a conflict shall be those agreed between the borrowing or recipient country and the respondent, rather than the standards agreed between the borrowing or recipient country and the Bank.[7] The Sanctions Board therefore looks to the definitions of sanctionable practices referenced in the Bidding Documents in this case, as the Respondent was on notice of those definitions when submitting the Bid and signing the Bidding Letter.

12. The question remains, however, as to which of the definitions referenced in the Bidding Documents shall control. The Sanctions Board applies the definition of fraudulent practice contained in the Instructions to Bidders. In contrast to the other definitions referenced in the Bidding Documents, this definition was set out directly in the text of the Bidding Documents, rather than incorporated by reference to a certain version of the Guidelines as applicable. The definition set out in the text also accorded with a standard Bank definition of fraudulent practice: namely, the definition of fraudulent practice contained in the World Bank's Guidelines: Procurement under IBRD Loans and IDA Credits (January 1995, revised January and August 1996, September 1997, and January 1999) (the "January 1999 Procurement Guidelines"). In

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

reaching this decision, the Sanctions Board has taken into consideration the views expressed by the World Bank's Legal Vice Presidency pursuant to Section 1.02(b)(iii) of the Sanctions Procedures.

13. Paragraph 1.15(a)(ii) of the January 1999 Procurement Guidelines defines the term "fraudulent practice" as "a misrepresentation of facts in order to influence a procurement process or the execution of a contract to the detriment of the Borrower." This definition does not include an explicit mens rea requirement such as the "knowing or reckless" standard adopted by the Bank from October 2006 onward.[8] However, the legislative history of the Bank's various definitions of "fraudulent practice" reflects that the October 2006 incorporation of the "knowing or reckless" standard was intended only to make explicit the pre-existing standard for mens rea, not to articulate a new limitation.[9] Accordingly, the Sanctions Board has held that the "knowing or reckless" standard may be implied under the pre-October 2006 definitions.[10]

IV. PRINCIPAL CONTENTIONS OF THE PARTIES

A. INT's Principal Contentions in the SAE

14. INT alleges that the Respondent engaged in fraudulent practices in its Bid and the Bidding Letter by knowingly misrepresenting commissions paid or to be paid to agents in relation to the Contract. INT asserts that in response to a requirement in the Bidding Documents and the Bidding Letter to disclose such commissions, the Respondent stated "[n]one," although it intended to pay, and later paid, commissions to a local consulting firm (the "Consulting Firm") and to an individual who was the complainant in this case (the "Complainant"). According to INT, the representative of the Respondent who prepared the Bid and the Bidding Letter (the "Respondent's Employee") acted knowingly and with the intent to influence the procurement process. INT also asserts that the Respondent's misrepresentation was to the detriment of the Borrowers because it misled the Borrowers "to contract with a bidder willing to engage in unethical behavior."

15. With respect to sanctioning factors, INT asserts that aggravation is warranted for deletion of emails relevant to INT's investigation; and mitigation is warranted for "some cooperation."

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

16. The Respondent denies that it engaged in any fraudulent practices. First, the Respondent asserts that it never retained or intended to retain the Complainant for services in relation to the Contract. Second, the Respondent argues that the Consulting Firm was its consultant rather than

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[8] See, e.g., Guidelines: Procurement under IBRD Loans and IDA Credits (May 2004, rev. October 2006) at para. 1.14(a)(ii) (defining "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") (emphasis added).

[9] See Sanctions Board Decision No. 41 (2010) at para. 75.

[10] Id.

an "agent" in relation to the Contract. The Respondent contends that it therefore did not need to disclose any commissions paid to the Consulting Firm. In the alternative, the Respondent asserts that if it inadvertently failed to make a required disclosure, it did not do so knowingly or recklessly, or with any intent to influence the procurement process. Finally, the Respondent contends that INT failed to show detriment to the Borrowers because it did not establish that the Borrowers were harmed by the alleged misconduct.

17. With respect to any potential sanctions, the Respondent submits that no aggravation is warranted for interference because it did not delete emails as part of an attempt to circumvent or obstruct INT's investigation. The Respondent seeks mitigation for its compliance program; its cooperation with INT's investigation; the period of time it has served under temporary suspension; and INT's prolongation of the Respondent's early temporary suspension. The Respondent also argues that the alleged misconduct was limited, had "little to no" influence on the procurement process, and did not harm the Borrowers.

C. INT's Principal Contentions in the Reply

18. In the Reply, INT reasserts that the Respondent made a misrepresentation in its Bid and the Bidding Letter. In addition, INT argues that the term "agent" is broad and unambiguous. According to INT, the term is commonly understood as meaning a local representative. INT asserts that the Consulting Firm was the Respondent's "agent" because it was hired to perform the functions of an agent, and received a type of remuneration typical for agents. Alternatively, even if the meaning of the term were ambiguous, INT argues that the Respondent could have sought clarification, but failed to do so.

D. Presentations at the Hearing

19. At the hearing, INT reiterated its allegation that the Respondent fraudulently denied commissions paid or to be paid to the Consulting Firm, but clarified that it did not intend to pursue any allegations of fraudulent practices with respect to payments made to the Complainant. On the meaning of the term "agent," INT argued that the term should be interpreted in the context of the Bank's disclosure requirements. With respect to the mens rea requirement, INT modified its original assertion that the Respondent's Employee had acted knowingly and asserted that he had acted at least recklessly. On sanctioning factors, INT proposed that the Sanctions Board consider seeking the ICO's verification of the Respondent's asserted compliance program before applying any mitigation on that ground. INT also denied that it had unnecessarily prolonged the Respondent's period of temporary suspension.

20. In its presentation, the Respondent disputed INT's allegation of fraudulent practice. In particular, the Respondent argued that the term "agent" was a legal term of art meaning a company or individual with the authority to legally bind another. The Respondent asserted that it had specifically structured its agreements with the Consulting Firm to avoid a binding principal-agent relationship. The Respondent also reiterated that it could not be found to have acted with fraudulent intent when it was unaware of INT's more expansive interpretation of the disclosure requirement. With respect to sanctioning factors, the Respondent asserted that involving the ICO as INT proposed would cause undue delays. The Respondent contended that

it had already used its lengthy suspension period to develop and implement a comprehensive integrity compliance program.

V. THE SANCTIONS BOARD'S ANALYSIS AND CONCLUSION

21. As a preliminary matter, the Sanctions Board notes that INT's designation of a wholly-owned subsidiary of a state-owned entity as the Respondent does not run counter to the Bank's general policy that governments and government officials should not be sanctioned when acting in their official capacity, because this policy does not extend to state-owned enterprises that operate autonomously and are thus eligible to bid on Bank-financed contracts.[11]

22. 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 sanctions, if any, should be imposed on the Respondent.

A. Evidence of Fraudulent Practices

23. In accordance with the definition of "fraudulent practice" under the January 1999 Procurement Guidelines, INT bears the initial burden to show that it is more likely than not that the Respondent (i) made a misrepresentation of facts (ii) that was knowing or reckless (iii) in order to influence a procurement process or the execution of a contract (iv) to the detriment of the Borrowers.

1. Misrepresentation of facts

24. The Bidding Documents required bidders to disclose "[c]ommissions or gratuities, if any, paid or to be paid by us to agents relating to this bidding process, and to contract execution if we are awarded the contract." The Bidding Letter likewise required the Respondent to disclose "[c]ommissions or gratuities, if any, paid or to be paid by us to agents relating to this Bid, and to contract execution if we are awarded the contract." Both the Bid and the Bidding Letter had blank lines to list (i) the name and address of the agent, (ii) the amount and currency of the commissions or gratuities, and (iii) the purpose of the commissions or gratuities. In response to these disclosure requirements, the Respondent's Employee stated "none" in both the Bid and the Bidding Letter, and did not correct these statements before signing the Contract on May 18, 2009.

25. For the reasons set out below, the Sanctions Board finds that it is more likely than not that the Consulting Firm was the Respondent's agent in relation to the Contract within the meaning of the Bidding Documents and the Bidding Letter, and that commissions paid or to be paid to the Consulting Firm should accordingly have been disclosed.

26. The Respondent contends that the term "agent" as used in the Bidding Documents should be given a narrow construction to include only those who have been afforded legal

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[11] See Advisory Opinion on Certain Issues Arising in Connection with Recent Sanctions Cases, No. 2010/1 at pp. 32-33, paras. 128-129 (Legal Vice Presidency of the World Bank, November 15, 2010), available at: http://go.worldbank.org/CVUUIS7HZ0.

authority to act on behalf of the Respondent; in other words, where a principal-agent relationship existed between the Respondent and the third party to whom a gratuity or commission was paid. In support of this argument, the Respondent refers to an earlier Sanctions Board decision. The Sanctions Board observes, however, that the cited decision does not assist the Respondent. Contrary to the Respondent's suggestion, Sanctions Board Decision No. 77 (2015) addressed only whether a third party's acts could be attributed to a respondent for purposes of assigning liability, and not whether that third party was the respondent's "agent" for purposes of the respondent's own disclosure obligation.[12] In addition, the Respondent contends that the term "agent" should bear the narrow meaning it assertedly has under the Respondent's national law. Here, the Sanctions Board notes that it is not appropriate for the Bidding Documents or the Bidding Letter to be interpreted by reference to the Respondent's national law.

27. The Sanctions Board recognizes that the term "agent" has a range of possible meanings and that, in some circumstances, it may have the narrow meaning the Respondent asserts. However, the Sanctions Board concludes that this narrow meaning is not the meaning that should be attributed to the term "agent" as used in the Bidding Documents and the Bidding Letter. The Sanctions Board notes that the meaning of the term "agent" must, in the first place, be determined by a consideration of the context in which it appears. The term "agent" is used in the Bidding Documents and the Bidding Letter as part of a provision that imposes an obligation of disclosure upon bidders in respect of any "commissions or gratuities" paid or to be paid to "agents." In the view of the Sanctions Board, a key purpose of this disclosure requirement, as described by INT, is to help reveal and deter potentially corrupt relationships in Bank-Financed Projects. The risk of corrupt relationships arises not only when a principal-agent relationship exists between a bidder and a third party, but whenever a bidder pays a commission or gratuity to a third party in relation to the contract. Therefore, a narrow reading of the term "agent" would be inconsistent with both the structure and the underlying purpose of the disclosure requirement for "commissions or gratuities" as set out in the Bidding Documents and the Bidding Letter.

28. In addition, the Sanctions Board notes that in determining whether a counterpart may be an agent for purposes of disclosure requirements, the Sanctions Board has previously considered factors such as the nature of the services provided, the remuneration structure, and the understanding of the parties involved in the alleged misconduct.[13] The Sanctions Board has not limited its understanding of the term "agent" to circumstances where a principal-agent relationship exists. The record reveals, and the Respondent does not contest, that the Respondent engaged the Consulting Firm to represent it and provide services in relation to the Contract. The Consulting Firm's role included advising the Respondent on "strategies and

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[12] See Sanctions Board Decision No. 77 (2015) at paras. 27-31.

[13] See Sanctions Board Decision No. 56 (2013) at paras. 45-46 (finding that the respondent should have disclosed its relationship with an agent that was hired to help fulfill the respondent's obligations under the contract, that was paid a "marketing fee," and whose status as an "agent" was not contested by the respondent); Sanctions Board Decision No. 83 (2015) at paras. 48-50 (finding that the respondent should have disclosed commissions paid to an agent that was engaged to provide local services relating to contract acquisition and contract execution, was paid a certain percentage of the respondent's "net consultancy fee amount," and was determined to be an "agent" in the respondent's own internal audit).

tactics" for its participation in the procurement process, promoting the Respondent among the relevant government authorities, and rendering "business intelligence services" concerning the procurement process and the signing of the Contract. The Respondent entered into three successive "consultancy service agreements" with the Consulting Firm, the last of which was signed a day before the Contract was signed. Under these agreements, the Consulting Firm was to receive a "service fee" of 3%, later amended to 5%, of the Contract price if the Respondent was awarded the Contract. After the award of the Contract, the Respondent paid a total of approximately US$6.9 million to the Consulting Firm. Moreover, when interviewed by INT, the owner of the Consulting Firm referred to himself as the Respondent's agent.

29. For these reasons, the Sanctions Board finds that it is more likely than not that the Respondent had retained the Consulting Firm to act as its agent, and should have disclosed the agency relationship and commissions accordingly. The Sanctions Board thus finds that the Respondent's Employee misrepresented in the Bid and the Bidding Letter commissions paid or to be paid to the Consulting Firm as its agent in relation to the Contract.

2. Made knowingly or recklessly

30. INT asserts that the Respondent's Employee acted knowingly or at least recklessly when he denied in the Bid and the Bidding Letter commissions paid or to be paid to the Consulting Firm. The Respondent asserts that it did not act knowingly or recklessly because it was reasonable for the Respondent to understand the term "agent" more narrowly. The Respondent also asserts that it never made any effort to conceal its relationship with the Consulting Firm, which would have been "logical" had it knowingly or recklessly failed to disclose the relationship before.

31. The Sanctions Board finds that the Respondent's Employee acted at least recklessly. In assessing recklessness, the Sanctions Board may consider whether circumstantial evidence indicates that a respondent was or should have been aware of a substantial risk – such as harm to the integrity of the Bank's procurement process due to false or misleading bid documents – but nevertheless failed to act to mitigate that risk.[14] Where circumstantial evidence is insufficient to infer subjective awareness of risk, the Sanctions Board has measured a respondent's conduct against the common "due care" standard of the degree of care that the proverbial "reasonable person" would exercise in the circumstances.[15] In other words, the question is whether the respondent knew or should have known of the substantial risk.[16] In the context of Bank-Financed Projects, the standard of care should be informed by the Bank's procurement policies, as set out in the applicable Procurement or Consultant Guidelines and the

[14] See, e.g., Sanctions Board Decision No. 82 (2015) at para. 31.

[15] See, e.g., id.

[16] See, e.g., id.

standard bidding documents for the contract at issue.[17] Industry standards or customary or firm-specific business policies, procedures, or practices may also be relevant in certain cases.[18]

32. Considering the above standards and the circumstances presented in this case, the Sanctions Board finds that the Respondent's Employee knew or should have known of a substantial risk that the Bid and the Bidding Letter misrepresented commissions paid or to be paid to the Consulting Firm as an agent. The record reveals that the Respondent's Employee was aware of the disclosure requirements in the Bid and Bidding Letter, the services the Consulting Firm was expected to provide in relation to the Contract, and the type of remuneration the Consulting Firm would receive for these services. The Sanctions Board also notes that the record reflects the Respondent's extensive previous experience with the bidding processes for Bank-financed contracts generally, which suggests that the Respondent's personnel could be expected to have a greater awareness and understanding of various bidding requirements.

33. As discussed earlier in Paragraphs 26-28, nothing in the record or Sanctions Board precedent supports the Respondent's asserted narrow understanding of the term "agent" as a representative vested with the authority to legally bind a principal. Moreover, such a narrow meaning would undermine the clear purpose of the duty of disclosure imposed by the Bidding Documents and the Bidding Letter, which is to reveal and deter corrupt relationships. The Respondent cannot be said to have acted reasonably in its reliance on the meaning of agency under its national law because the Respondent should have been aware, when preparing the Bid and completing the Bidding Letter, that the process was not governed by the rules of its national law.[19]

34. The Sanctions Board also finds that the Respondent's Employee failed to mitigate the risk of misrepresenting commissions paid or to be paid to the Consulting Firm. Particularly given the substantial commissions involved, the Respondent's Employee should have at least sought clarification of the term "agent" from the PIUs or the Bank before stating "none" in the Bid and Bidding Letter. While the disclosure requirements might benefit from clearer language to reinforce the scope of their coverage, it was the Respondent's responsibility to seek clarification of any ambiguous terms under the Bidding Documents. As set out in the January 1999 Procurement Guidelines at Appendix 4, Section 6, it is the bidders' responsibility to "critically review the [bidding] documents to see if there is any ambiguity, omission, or internal contradiction, or any feature of specifications or other conditions which are unclear or appear discriminatory or restrictive," and if so, to "seek clarification from the Borrower." The Guidelines at Appendix 4, Section 7, specify that this duty also applies to the criteria and methodology for selection of successful bidders. Yet the record does not reveal, and the Respondent does not assert, that the Respondent's Employee at any time sought to clarify the term "agent" in accordance with these provisions.

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[17] See, e.g., id.

[18] See Sanctions Board Decision No. 51 (2012) at para. 33; Sanctions Board Decision No. 82 (2015) at para. 31.

[19] As the Sanctions Board has previously held, national law standards are not per se binding on the Bank or the Sanctions Board's proceedings. See, e.g., Sanctions Board Decision No. 45 (2011) at para. 46.

35. Finally, the Sanctions Board is not persuaded by the Respondent's argument that it must have acted in good faith since it made no effort to conceal its relationship with the Consulting Firm. As an evidentiary matter, the record shows that the Respondent did indeed conceal both its use of the Consulting Firm as its agent, and the scope and purpose of its payments to the Consulting Firm, when specifically required to disclose this information in writing for purposes of bid evaluation and final signature of the Contract. To the extent that the Respondent's relationship with the Consulting Firm may have been revealed on other occasions, this may be considered inevitable given that the Respondent had specifically retained the Consulting Firm to promote it with relevant government authorities. In any event, the question to be addressed by the Sanctions Board is not whether the Respondent subjectively acted in good faith, but whether the Respondent either knew or objectively should have known of a substantial risk that the Bid and Bidding Letter misrepresented commissions paid or to be paid to agents. Thus even if the Respondent had acted subjectively in good faith, which is a point the Sanctions Board does not decide here, this would not preclude a finding of liability based on recklessness.

3. In order to influence the procurement process

36. INT asserts that the Respondent acted in order to influence the procurement process. The Respondent asserts that INT did not establish how the alleged misrepresentation helped the Respondent win the Contract or why the Respondent believed it would help win the Contract. The Respondent further asserts that it lacked intent to influence the procurement process or the execution of the Contract because (i) there was no indication that the non-disclosure of the Consulting Firm would have been material to the Bank; (ii) the PIUs were aware that the Consulting Firm had been assisting the Respondent in the procurement process; and (iii) the Respondent voluntarily disclosed its use of the Consulting Firm to the Bank two years prior to INT's investigation into the Project.

37. The Sanctions Board has previously found sufficient evidence of an intent to influence the procurement process where the record showed that misrepresentations had been made in response to a tender requirement.[20] In the present case, the Respondent's Employee denied any commissions paid or to be paid to agents in direct response to a disclosure requirement in the Bidding Documents and the Bidding Letter. Accordingly, the Sanctions Board considers that the Respondent's Employee acted with an intent to influence the procurement process.

38. Even if the PIUs were aware that the Consulting Firm was assisting the Respondent, as the Respondent asserts, this would not mean that the PIUs also knew of the nature and extent of the commissions paid to the Consulting Firm, which were undisclosed. Moreover, the PIUs' asserted awareness of the Consulting Firm's assistance to the Respondent does not necessarily indicate a lack of intent to influence the procurement process on the Respondent's part. Consistent with the discussion above in Paragraph 35, agents may be expected to act openly in the interests of their clients. Lastly, the Respondent's subsequent behavior in disclosing its use of the Consulting Firm to the Bank, years after the award of the Contract, does not prove a lack

[20] See, e.g., Sanctions Board Decision No. 60 (2013) at paras. 100-101; Sanctions Board Decision 74 (2014) at para. 29.

of intent to influence the procurement process at the relevant times of the submission of the Bid and the signing of the Contract.

4. To the detriment of the Borrowers

39. INT alleges that the Respondent's actions were to the detriment of the Borrowers. The Respondent asserts that INT failed to prove detriment to the Borrowers because INT did not establish that the Borrowers were harmed by the alleged misconduct.

40. The Sanctions Board has previously held that "detriment to the Borrower," as an element of fraudulent practices under the January 1999 Procurement Guidelines, may be interpreted to include not only tangible or quantifiable harms, but also intangible harms.[21] In this context, the Sanctions Board has also held that in instances where the respondent ultimately received the contract, detriment to a borrowing country may include misleading the borrower to contract with a bidder willing to engage in unethical behavior.[22]

41. The record reveals that the Respondent's Employee misled the Borrowers into contracting with the Respondent, a bidder whose staff had at least recklessly misrepresented commissions paid or to be paid to the Consulting Firm and thereby engaged in unethical behavior. Accordingly, the Sanctions Board finds that it is more likely than not that the Respondent's Employee acted to the detriment of the Borrowers.

B. The Respondent's Liability for the Acts of Its Employee

42. INT asserts that the misrepresentations by the Respondent's Employee should be imputed to the Respondent, because the Respondent's Employee acted as a representative of the Respondent in preparing the Bid and the Bidding Letter. 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 the employees acted within the course and scope of their employment, and were motivated, at least in part, by the intent of serving their employer.[23] Where a respondent entity has denied responsibility for the acts of its employees based on a rogue employee defense, the Sanctions Board has considered any evidence presented regarding the scope and adequacy of the respondent entity's controls and supervision at the time of the misconduct.[24]

43. In the present case, the Bid and the Bidding Letter both identified the Respondent's Employee as the authorized representative of the Respondent. The Respondent's Employee also referred to himself as the authorized representative of the Respondent on the Project. The

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[21] See, e.g., Sanctions Board Decision No. 41 (2010) at para. 71.

[22] See, e.g., Sanctions Board Decision No. 47 (2012) at para. 29; Sanctions Board Decision No. 63 (2014) at para. 88; Sanctions Board Decision No. 69 (2014) at para. 24.

[23] See, e.g., Sanctions Board Decision No. 61 (2013) at para. 30; Sanctions Board Decision No. 68 (2014) at para. 72.

[24] See, e.g., Sanctions Board Decision No. 48 (2012) at para. 30; Sanctions Board Decision No. 55 (2013) at paras. 53-54; Sanctions Board Decision No. 61 (2013) at paras. 29-30.

Respondent does not deny responsibility for the acts of the Respondent's Employee, but asserts only that no sanctionable practices were committed. In these circumstances, the Sanctions Board finds that the Respondent is liable for the fraudulent misrepresentations in the Bid and the Bidding Letter under a theory of respondeat superior.

C. Sanctioning Analysis

1. General framework for determination of sanctions

44. 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.

45. 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]

46. 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.

47. Should the Sanctions Board impose 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 such respondent.

2. Factors applicable in the present case

a. Interference in the Bank's investigation

48. Section 9.02(c) of the Sanctions Procedures requires that "interference by the sanctioned party in the Bank's investigation" be considered in determining a sanction.[27] Section IV.C of

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

[26] See, e.g., Sanctions Board Decision No. 44 (2011) at para. 56.

[27] Sanctions Procedures at Section 9.02(c).

the Sanctioning Guidelines describes this factor as including "[d]eliberately destroying, falsifying, altering, or concealing evidence material to the investigation[,] making false statements to investigators . . . or acts intended to materially impede the exercise of the Bank's contractual rights of audit and access to information." In a past case, for example, the Sanctions Board applied aggravation for interference where evidence revealed that a respondent's manager gave explicit instructions to delete material relevant to INT's investigation.[28] In contrast, the Sanctions Board declined to apply aggravation in another case where the record lacked sufficient evidence to show that it was more likely than not that the respondents had instructed or participated in any deliberate destruction or concealment of evidence.[29]

49. INT asserts that the Respondent deserves aggravation for deleting emails relevant to INT's investigation. The record reflects that the Respondent failed to provide INT with full access to emails from relevant accounts and time periods. Moreover, the Respondent's proffered explanations as to the missing emails – including an asserted one-year retention policy – are neither well documented nor fully persuasive. However, the Sanctions Board does not find sufficient evidence in the record to conclude that it is more likely than not that the Respondent deliberately destroyed or concealed evidence. The Sanctions Board also notes that the Respondent's subsequent ability to retrieve limited email correspondence older than one year for its own use in the sanctions proceedings could potentially be explained by the Respondent's described practice of allowing employees to download and save web emails to personal computers. Consistent with its finding in a previous case presenting similar circumstances, the Sanctions Board declines to apply aggravation for interference.[30]

b. Voluntary corrective action taken

50. 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.[31]

51. *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

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[28] See Sanctions Board Decision No. 56 (2013) at paras. 58-59.

[29] See Sanctions Board Decision No. 61 (2013) at para. 38 (declining to apply aggravation for interference where the respondents asserted that a corporate server migration caused the unintentional loss of emails, even though the respondents failed to credibly explain the particular timing of the loss during the investigation or their ability to retrieve one potentially exculpatory email dating to the same time period as the missing emails).

[30] See id.

[31] See, e.g., Sanctions Board Decision No. 45 (2011) at para. 72; Sanctions Board Decision No. 63 (2014) at para. 104.

compliance measures appeared to address the types of misconduct at issue, and/or at least some of the elements set out in the World Bank Group's Integrity Compliance Guidelines (the "Integrity Compliance Guidelines").[32]

52. As a point of process, the Sanctions Board notes INT's suggestion – first raised at the hearing – that the Sanctions Board invite the ICO to verify the Respondent's asserted compliance program before the Sanctions Board would determine whether to grant any mitigation on this ground. Introduction of such a process at this time would depart from past practice and, as the Respondent asserts, may be expected to delay resolution of this case. As the Respondent here has timely presented evidence of its asserted compliance program to the Sanctions Board for consideration, it is not apparent what purpose would be served by adding a new round of review. Nor do the current Sanctions Procedures appear to contemplate the process that INT proposes. The Sanctions Procedures vest the Sanctions Board with the responsibility to determine appropriate sanctions in all contested cases,[33] and the "discretion to determine the relevance, materiality, weight, and sufficiency of all evidence offered."[34] On the other hand, the Sanctions Procedures refer to the ICO's role "to monitor compliance by each sanctioned party with the conditions for release or non-debarment" only in cases where a sanction has already been imposed.[35] Accordingly, the Sanctions Board declines to further consider INT's suggestion at this time.

53. On the record presented, the Sanctions Board finds that mitigation is warranted for the Respondent's demonstrated compliance improvements to date. The Respondent's written compliance program would appear to address the type of misconduct in this case, insofar as it contains a clear prohibition of fraudulent behavior; sets out standards for dealings with business partners, including agents; and requires adequate bookkeeping, including of services rendered by third parties such as agents. The compliance program also appears to address several other elements of the Integrity Compliance Guidelines, including by creating an independent high-level compliance function and setting out detailed internal compliance policies. The record also contains some evidence of the Respondent's compliance training, such as a training participation list including senior staff of the Respondent.

c. Cooperation

54. 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 of the Sanctioning

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[32] See, e.g., Sanctions Board Decision No. 83 (2015) at para. 93 (granting full mitigating credit for a compliance program that addressed the types of fraudulent misconduct committed by the respondent and most of the principles set out in the Integrity Compliance Guidelines).

[33] See Sanctions Procedures at Section 8.01(b) (stating that the Sanctions Board "shall impose an appropriate sanction or sanctions on the Respondent" if it determines that it is more likely than not that the respondent engaged in one or more sanctionable practices).

[34] See Sanctions Procedures at Section 7.01.

[35] See Sanctions Procedures at Section 9.03(c).

Guidelines identifies a respondent's assistance with INT's investigation as an example of cooperation.

55. *Assistance and/or ongoing cooperation*: Section V.C.1 of the Sanctioning Guidelines provides that mitigation may be appropriate for assistance and/or ongoing cooperation, "[b]ased on INT's representation that the respondent has provided substantial assistance in an investigation," with consideration of the "truthfulness, completeness, reliability of any information or testimony, the nature and extent of the assistance, and the timeliness of [the] assistance." INT asserts that the Respondent provided "some cooperation," while the Respondent asserts that its "extensive" cooperation should be "weighed heavily" as a mitigating factor. In past cases, the Sanctions Board has accorded mitigation for cooperation where respondents replied to INT's show-cause letter and follow-up inquiries,[36] made staff available for INT interviews,[37] and/or provided evidence to INT.[38]

56. The record reveals that the Respondent disclosed its use of the Consulting Firm as early as June 2011, when INT generally inquired about various projects. During INT's audit, the Respondent provided a number of relevant documents and financial records, including its agreements with the Consulting Firm and evidence of its payments to the Consulting Firm. The Respondent also made relevant personnel, including the Respondent's Employee, available for interviews over a five-day period. After the audit, the Respondent appears to have replied to other follow-up requests from INT in a timely manner. At the same time, as noted above in Paragraph 49, the Respondent failed to provide INT with full access to relevant emails, or to persuasively explain why it could not do so. On the basis of this record, the Sanctions Board finds that some mitigation is warranted for the Respondent's cooperation with INT's investigation.

d. Period of temporary suspension

57. Pursuant to Section 9.02(h) of the Sanctions Procedures, the Sanctions Board takes into account that the Respondent has been temporarily suspended since December 4, 2013, first pursuant to Article II of the Sanctions Procedures, which provide for early temporary suspension by the EO, prior to sanctions proceedings, in certain circumstances; and then pursuant to Sections 2.04(b) and 4.02 of the Sanctions Procedures.

e. Other considerations

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

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[36] See, e.g., Sanctions Board Decision No. 37 (2010) at para. 45; Sanctions Board Decision No. 51 (2012) at para. 54; Sanctions Board Decision No. 52 (2012) at para. 42.

[37] See, e.g., Sanctions Board Decision No. 40 (2010) at para. 28.

[38] See, e.g., Sanctions Board Decision No. 47 (2012) at para. 53; Sanctions Board Decision No. 53 (2012) at para. 58.

59. *Improper use of temporary suspension*: The Respondent appears to argue that mitigation is warranted because INT unnecessarily extended the Respondent's period of temporary suspension. INT asserts that it did not unnecessarily prolong the time served under temporary suspension, but engaged in investigative activities during the extended period. The Sanctions Board has previously observed that Section 9.02 of the Sanctions Procedures does not permit consideration of INT's conduct in the determination of an appropriate sanction.[39] In addition, the Sanctions Board notes that any time served under temporary suspension is already considered under Section 9.02(h) of the Sanctions Procedures. Therefore, the Sanctions Board declines to apply any mitigation on this basis.

60. *Absence of past misconduct*: The Respondent argues that "a lengthy debarment would be inappropriate" given the "single fraudulent practice alleged by INT," which the Respondent asserts is the only allegation that has ever been leveled against it "in any of the more than [US]$2 billion in Prior Reviewed Bank-financed contracts that the [Respondent] has won." The Sanctions Board has previously found that the absence of past misconduct does not warrant mitigation, but is a neutral fact.[40] The Sanctions Board therefore declines to apply any mitigation on this basis.

61. *Absence of harm*: The Respondent argues that a "lengthy debarment would be inappropriate" because any misconduct as alleged was limited in scope, had "little to no" effect on the procurement process, and did not harm the Borrowers. The Sanctions Board has repeatedly held that the absence of harm to the project is not a ground for mitigation, but a neutral fact.[41] Accordingly, the Sanctions Board finds that the Respondent's assertions with respect to the limited effect of its conduct do not justify any mitigation.

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[39] See Sanctions Board Decision No. 71 (2014) at para. 104 (noting that Section 9.02 of the Sanctions Procedures does not provide for the consideration of INT's conduct in the determination of an appropriate sanction and therefore denying mitigation where a respondent argued that INT committed "gross misconduct" in the course of its investigation by providing "improper benefits" to a witness, withholding exculpatory evidence, and engaging in "vindictive prosecution").

[40] See, e.g., Sanctions Board Decision No. 53 (2012) at para. 68 (finding that a single instance of submitting falsified documents constitutes sanctionable misconduct, even where a respondent may have participated extensively in Bank-financed contracts over the years); Sanctions Board Decision No. 56 (2013) at para. 85 (declining to apply mitigation for the respondents' purported lack of prior misconduct).

[41] See, e.g., Sanctions Board Decision No. 71 (2014) at para. 85; Sanctions Board Decision No. 73 (2014) at para. 45; Sanctions Board Decision No. 79 (2015) at para. 40.

D. Determination of Liability and Appropriate Sanction for the Respondent

62. Considering the full record and all the factors discussed above, the Sanctions Board issues a formal letter of public reprimand to the Respondent, which shall be posted on the World Bank's website for a period of one (1) year, beginning from the date of this decision, without prejudice to the Respondent's eligibility to participate in Bank-Financed Projects. This sanction is imposed on the Respondent for a fraudulent practice as defined in Paragraph 1.15(a)(ii) of the January 1999 Procurement Guidelines.

J. James Spinner (Chair)

On behalf of the
World Bank Group Sanctions Board

J. James Spinner
Teresa Cheng
Ellen Gracie Northfleet
Catherine O'Regan
Anne van't Veer