

Date of issuance: April 25, 2019

**Sanctions Board Decision No. 119
(Sanctions Case No. 458)**

**IDA Credit No. 4392-NI
IDA Grant No. H817-0-NI
Nicaragua**

Decision of the World Bank Group¹ Sanctions Board finding insufficient evidence to conclude that it is more likely than not that the respondent entity in Sanctions Case No. 458 (the “Respondent”) engaged in the alleged fraudulent practice.

I. INTRODUCTION

1. The Sanctions Board met in a panel session on March 8, 2019, 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), Cavinder Bull, and Ellen Gracie Northfleet. Neither the Respondent nor the World Bank Group’s Integrity Vice Presidency (“INT”) requested a hearing in this matter. Nor did the Sanctions Board Chair decide, in his discretion, to convene a hearing. Accordingly, the Sanctions Board deliberated and reached its decision based on the written record.²

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

- i. Notice of Sanctions Proceedings issued by the World Bank’s Acting Suspension and Debarment Officer (the “Acting SDO”) to the Respondent on March 27, 2018 (the “Notice”), appending the Statement of Accusations and Evidence (the “SAE”) presented to the Acting SDO by INT (undated);
- ii. Explanation submitted by the Respondent to the World Bank’s Suspension and Debarment Officer (the “SDO”) on May 11, 2018 (the “Explanation”);
- iii. Response submitted by the Respondent to the Secretary to the Sanctions Board on September 5, 2018 (the “Response”);
- iv. Reply submitted by INT to the Secretary to the Sanctions Board on October 9, 2018 (the “Reply”); and

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

² See Sanctions Procedures at Section III.A, sub-paragraph 6.01.

- v. Additional arguments and evidence separately filed by INT and the Respondent in February 2019 (the “Additional Submissions”).

3. On March 27, 2018, pursuant to Section III.A, sub-paragraphs 4.01 and 4.02 of the Sanctions Procedures, the Acting SDO issued the Notice and temporarily suspended the Respondent, together with any entity that is an Affiliate directly or indirectly controlled by the Respondent, from eligibility³ with respect to any Bank-Financed Projects,⁴ pending the final outcome of these sanctions proceedings. The Notice specified that the temporary suspension would apply across the operations of the World Bank Group. In addition, pursuant to Section III.A, sub-paragraphs 4.01(c), 9.01, and 9.04 of the Sanctions Procedures, the Acting SDO recommended in the Notice debarment with conditional release for the Respondent, together with any entity that is an Affiliate directly or indirectly controlled by the Respondent. The Acting SDO recommended a minimum period of ineligibility of one (1) year and nine (9) months for the Respondent, after which period the Respondent may be released from ineligibility only if it has, in accordance with Section III.A, sub-paragraph 9.03 of the Sanctions Procedures, demonstrated to the World Bank Group’s Integrity Compliance Officer 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.

II. GENERAL BACKGROUND

4. This case arises in the context of the Nicaragua Hurricane Felix Emergency Recovery Project (the “Project”), which sought to support the sustainable recovery of communities affected by Hurricane Felix in the Northern Atlantic Autonomous Region of Nicaragua. On May 17, 2008, IDA entered into an initial financing agreement with the Republic of Nicaragua (the “Borrower”) for a credit of approximately US\$17 million to help finance the Project (the “Initial Financing Agreement”). IDA and the Borrower entered into an agreement for additional financing of approximately US\$5 million on December 4, 2012 (the “Additional Financing Agreement”). The Project became effective on October 31, 2008, and closed on December 31, 2014.

5. In July 2012, the relevant implementation unit for the Project (the “PIU”) issued a request for proposals (the “RFP”) for a contract to supervise the construction of three health centers under the Project (the “Supervision Contract”). On September 21, 2012, the Respondent submitted its proposal for the Supervision Contract to the PIU. On November 27, 2012, the Respondent was awarded the Supervision Contract, valued at US\$146,496.10. On December 14, 2012, the PIU awarded three contracts for construction of three health centers, respectively, under the Project to a single company (the “Supervised Company”). On February 13, 2013, the Respondent began

³ The full scope of ineligibility effected by a temporary suspension is defined in the Sanctions Procedures at Section III.A, sub-paragraphs 4.02(a) and 9.01(c), read together.

⁴ The term “Bank-Financed Projects” encompasses an investment project or a program for results operation, for which IBRD or IDA (as the case may be), whether acting for its own account or in the capacity as administrator of trust funds funded by donors, has provided financing in the form of a loan, credit or grant and governed by the Bank’s Procurement Guidelines, Consultant Guidelines, or Anti-Corruption Guidelines. See Sanctions Procedures at Section II(e).

implementation of the Supervision Contract, which included oversight responsibilities with respect to the Supervised Company.

6. INT alleges that the Respondent engaged in a fraudulent practice by improperly approving three payments to the Supervised Company.

III. APPLICABLE STANDARDS OF REVIEW

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

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

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

10. *Applicable definition of fraudulent practice:* The Initial Financing Agreement provided that the World Bank’s Guidelines: Selection and Employment of Consultants by World Bank Borrowers (May 2004, revised October 1, 2006) would govern the selection of consultants under the Project. The Additional Financing Agreement provided that the World Bank’s Guidelines: Selection and Employment of Consultants under IBRD Loans and IDA Credits & Grants by World Bank Borrowers (January 2011) (the “January 2011 Consultant Guidelines”) would govern the selection of consultants under the Project. The RFP and the Supervision Contract each included a definition of fraudulent practice that is consistent with the language of the January 2011 Consultant Guidelines. The Sanctions Board notes that the Additional Financing Agreement was issued after the Respondent was awarded the Supervision Contract. Therefore, this decision must address the apparent conflict between provisions of the Initial Financing Agreement and the provisions of the RFP and the Supervision Contract. Consistent with the Bank’s legal framework applicable to sanctions, as well as considerations of equity, the standards applicable in the event of such a conflict shall be those agreed between the borrowing or recipient country and the respondent as governing the particular contract at issue, rather than the standards agreed between the borrowing or recipient country and the Bank.⁵ Therefore, the alleged fraudulent practice in this case has the meaning set forth in the January 2011 Consultant Guidelines. Paragraph 1.23(a)(ii) of these Guidelines defines a fraudulent practice as “any act or omission, including misrepresentation, that knowingly or recklessly misleads, or attempts to mislead, a party to obtain financial or other benefit or to avoid an obligation.” A footnote to this definition explains that the term “party” refers to a

⁵ See Sanctions Board Decision No. 59 (2013) at para. 11.

public official; the terms “benefit” and “obligation” relate to the selection process or contract execution; and the “act or omission” is intended to influence the selection process or contract execution.⁶

IV. PRINCIPAL CONTENTIONS OF THE PARTIES

A. INT’s Principal Contentions in the SAE

11. INT alleges that the Respondent knowingly approved three fraudulent requests for payment, submitted by the Supervised Company, in order to prompt the Bank’s unjustified disbursement of Project funds. INT states that the approvals contradicted the terms of reference of the Supervision Contract, which obligated the Respondent to verify that the Supervised Company’s payment requests were based on executed works. INT asserts that the Respondent is liable for the actions of its staff member (the “Supervising Engineer”) who signed the approvals in the course of his duties and on behalf of the Respondent.

12. INT requests aggravation for the negative impact of these payment approvals on Project execution, which INT asserts removed the Supervised Company’s incentive to complete the work and resulted in a high risk to the public’s safety and welfare. INT submits that mitigation may be warranted for the Respondent’s cooperation and admissions during the course of the investigation. INT also states, as a mitigating circumstance, that the PIU pressured the Respondent to grant the improper approvals by withholding the Respondent’s remuneration under the Supervision Contract.

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

13. The Respondent confirms that the Supervising Engineer approved three requests for payment to the Supervised Company, which requests did not correspond with executed works. However, the Respondent asserts that these approvals were granted for projected works and with full knowledge of (and following significant pressure from) the PIU. The Respondent states that its staff, including the Supervising Engineer, frequently reported to the PIU the low rate of progress on construction assigned to the Supervised Company, and that the payment for projected works was – according to the PIU – designed to provide necessary resources to the Supervised Company and enable it to make progress on the construction. The Respondent asserts that its management opposed the approval of payments for incomplete works and without corresponding securities, and had instructed the Supervising Engineer to not grant the approvals. The Respondent contests INT’s conclusion that the PIU had withheld payments from the Respondent, and asserts that payments were indeed issued for its work under the Supervision Contract. Finally, the Respondent submits that INT had applied pressure on the Respondent’s representatives to “admit something that did not happen.”

C. INT’s Principal Contentions in the Reply

14. INT reaffirms its allegations set out in the SAE and notes that the Respondent does not dispute having approved payment requests for work not executed. INT denies having accused the

⁶ January 2011 Consultant Guidelines at para. 1.23(a)(ii) n.20.

Respondent, in the SAE, of issuing the payment approvals in exchange for payments under the Supervision Contract and describes the Respondent's arguments on this point as "irrelevant." With respect to the Respondent's culpability for the Supervising Engineer's actions, INT argues that the Respondent's management was fully aware of the improper approvals by the Supervising Engineer, and that the Respondent also lacked controls and supervision mechanisms to prevent the Supervising Engineer's misconduct. Finally, INT denies having sought inaccurate or involuntary admissions from the Respondent.

D. The Parties' Principal Arguments in the Additional Submissions

15. In additional submissions requested and authorized by the Sanctions Board Chair, INT provided clarifications, corrections, and additional translations; and the Respondent submitted additional materials relating to the Supervising Engineer's oversight of the construction works. Both parties had the opportunity to comment on each other's submissions and INT ultimately argued that new documents provided by the Respondent were immaterial.

V. THE SANCTIONS BOARD'S ANALYSIS AND CONCLUSIONS

16. The Sanctions Board now considers whether it is more likely than not that the Respondent engaged in the alleged fraudulent practice.

A. Evidence of Fraudulent Practice

17. In accordance with the definition of "fraudulent practice" under the January 2011 Consultant Guidelines, INT bears the initial burden to show that it is more likely than not that the Respondent (i) engaged in any act or omission, including a misrepresentation, (ii) that knowingly or recklessly misled, or attempted to mislead, a party (iii) to obtain a financial or other benefit or to avoid an obligation.⁷

1. Act or omission, including a misrepresentation

18. INT does not articulate in its submissions whether any specific statement or omission by the Respondent constituted a misrepresentation. Instead, INT alleges that the Respondent received three "fraudulent Requests for Payment" from the Supervised Company and improperly approved those requests. INT underscores that these approvals contradicted the Respondent's terms of reference under the Supervision Contract, particularly its obligation to verify that payments were based on executed work. The Respondent argues that the payment approvals were based on projected work and sought to enable that work. The Respondent does not comment on the specific content of the payment approvals and does not concede that the approvals included any false statements. In past decisions finding that respondents submitted false information or made a false statement, the Sanctions Board has considered contemporaneous evidence reflecting the falsity of

⁷ January 2011 Consultant Guidelines at para. 1.23(a)(ii).

information at issue,⁸ as well as the respondents' own acknowledgments.⁹

19. The record, including Project documents, contemporaneous correspondence, and testimonial evidence collected during INT's investigation, reflects that the Supervised Company had not completed its work on any of the contracts with the PIU at the time that the payments were approved. However, the Sanctions Board does not find that INT has met its burden of proof to show that the Respondent made a misrepresentation in its approvals of payments to the Supervised Company.

20. First and foremost, the Sanctions Board notes the absence of an articulated argument from INT on this element of fraudulent practice. Rather than directly allege one or more specific misrepresentations or omissions, INT accuses the Respondent of "approving [the Supervised Company's] fraudulent Requests for Payment" in violation of the Respondent's Supervision Contract. The Sanctions Board notes that, even if certain conduct does not comport with a respondent's obligations under a contract with the PIU, this breach is not necessarily equivalent to a misrepresentation or omission of fact that may lead to a finding of sanctionable practice in accordance with the Bank's sanctions regime. Moreover, the failure to address an element of sanctionable practice in INT's statement of accusations may diminish a respondent's ability to articulate a meaningful defense on this point. Notwithstanding the gaps in INT's argument, the Sanctions Board looks to the overall text of the SAE for any indication of an alleged misrepresentation. The SAE includes one reference to the Supervising Engineer's "declar[ation]s," assertedly repeated in the text of each payment approval, that the Respondent had verified the performance of works underlying the payment requests. The Sanctions Board therefore examines whether it is more likely than not that the Respondent's approvals of the three payment requests falsely described the Supervised Company's work as completed. Evidence in the record suggests that the Respondent's approvals of payment requests related only to projected work and did not misrepresent that work as finished or otherwise mislead a party to believe that the work was complete.

21. In reaching this conclusion, the Sanctions Board reviewed INT's translations of the Spanish-language payment approvals, which the Sanctions Board found imprecise. The Sanctions Board notes that INT received an additional opportunity to review and correct the record in February 2019.¹⁰ The Sanctions Board also looked closely at the full text of the payment approvals, which included technical terms and references to numbered contract clauses. Taking into consideration the views of the World Bank's Legal Vice Presidency ("LEG"), as contemplated in Section III.A, sub-paragraph 1.02(c) of the Sanctions Procedures, the Sanctions Board finds one technical term ("memoria de cálculo") to suggest that the payment approvals were openly based on cost estimates rather than evidence of work completed or costs incurred in execution. The Sanctions Board was unable to assess the relevance of references to contract clauses in the payment approvals, as INT did not include any copies of those contracts in the record.

⁸ See, e.g., Sanctions Board Decision No. 81 (2015) at para. 38.

⁹ See, e.g., Sanctions Board Decision No. 112 (2018) at para. 31.

¹⁰ In his request for INT's additional translations and clarification, the Sanctions Board Chair invited INT, as a general matter, "to ensure that the record provides precise translations."

22. Finally, the Sanctions Board notes that the entirety of the record, including copies of correspondence contemporaneous to the alleged misconduct, testimonial evidence gathered during INT's many interviews with staff of the PIU and the Respondent, and the parties' written submissions in the course of these sanctions proceedings, reflects a consistent narrative: that all parties were aware that the Supervised Company had not made reasonable progress on work under the Project and that the Respondent's Supervising Engineer approved – at the PIU's insistence – payments designed to enable the future execution of projected work. Inter alia, all three payment requests from the Supervised Company referred to "valuation[s]"; the PIU's final Project report repeatedly referred to the requests for payment as "projected"; and INT acknowledged during its last interview with the Supervising Engineer that payments were for future construction, stating at one point that "it was not possible to approve a regular request for payment as should be done, in accordance with the actually executed rather than projected works. And that is why they were preparing the projected requests for payment . . ." In these circumstances, the Sanctions Board is unable to find that it is more likely than not that the Respondent's staff engaged in a misrepresentation or other misleading act.

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

23. In view of the findings above, the Sanctions Board need not separately consider whether the Respondent's statements at issue in this case knowingly or recklessly misled or sought to mislead a party; or address other issues raised by INT or the Respondent.

B. Termination of Sanctions Proceedings

24. Section III.A, sub-paragraph 8.01(i) of the Sanctions Procedures requires that "if the Sanctions Board determines that it is not more likely than not that the Respondent engaged in a Sanctionable Practice, the proceedings shall be terminated." Accordingly, the Sanctions Board declares that the sanctions proceedings against the Respondent in Sanctions Case No. 458, including the temporary suspension imposed by the Acting SDO for the pendency of such proceedings, are hereby terminated.



J. James Spinner (Chair)

On behalf of the
World Bank Group Sanctions Board

J. James Spinner
Cavinder Bull
Ellen Gracie Northfleet