



Date of issuance: December 22, 2017

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

IDA Credit No. 4954-BD
Bangladesh

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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,

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 15

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.

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

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."Td ((o)-a)4 (c)4 (t)- un2.1 (ke)4 .up1-0.002 Tw -18.52 -1.15 Td [(o)2 (b)2 (2 T (s)-1-5 (

misrepresentation was made knowingly where the record contained contemporaneous correspondence and post-

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

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 (a)4 (a)6 (o)2 (ri)2 (rn Tc 0 Tw ()Tj 4w -()Tj -39 -1.-1t233 0[(91t23)]TJ 0.002

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

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

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

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

A handwritten signature in blue ink, appearing to read "E. Delo", is centered on the page. The signature is written in a cursive style with a large initial "E" and a circular flourish at the end.