

Date of issuance: June 24, 2013

Sanctions Board Decision
(Sanctions Case No. 187)
IBRD Loan No. 4554
Colombia

Decision of the Sanctions Board to conclude that it is more likely than not that the Respondent engaged in the alleged fraudulent practices as defined in Paragraph 1.14(a)(ii) of the World Bank's Guidelines for Procurement under IBRD Loans and IDA Credits (May 2004) (the "May 2004 Procurement Guidelines").

I. INTRODUCTION

1. The Sanctions Board met in a plenary session on December 5, 2012, at the World Bank's headquarters in Washington, D.C., to review this case. The Sanctions Board was represented by L. Yves Fortier (Chair), Marielle Cohen, Catherine GNS, and David P. Nield. The Respondent, [REDACTED], Integrity Vice Presidency ("INT") requested a hearing. Accordingly, the Sanctions Board deliberated and reached its decision based on the written record.

2. 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 Office ("EO") on December 7, 2011 (the "Notice"), appending the Statement of Accusations and Evidence (the "SAE") presented to the EO by INT;
- ii. Response submitted by the Respondent to the Sanctions Board on August 21, 2012, following four extensions (the "Response").

¹ In accordance with Section 1.02 of the World Bank Sanctions Procedures as amended through July 6, 2011 (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 includes the guarantee operations of IBRD and IDA, but does not include the International Centre for the Settlement of Investment Disputes ("ICSID"). In the Sanctions Procedures, the terms "World Bank" and "Bank" refer to the World Bank Group. See Sanctions Procedures, Section 1.02.

² Effective March 1, 2013, the EO's title changed to "Sanctions and Dispute Resolution Office" ("SDRO"). For consistency with the Sanctions Procedures and the pleadings in this case, this decision refers to the former title.

- iii. Reply in Support of Notice of Sanctions Proceedings, submitted by the Respondent to the Secretary to the Sanctions Board on October 13, 2011 (the "Reply").

3. Pursuant to Sections 4.01(c), 9.01, and 9.04 of the Sanctions Procedures, the EO recommended in the Notice that Respondent, together with any Affiliate that Respondent directly or indirectly controls, be declared ineligible to (i) be awarded a contract for Bank-financed or Bank-executed project or program governed by the Bank's Procurement Guidelines, Consultant Guidelines, or Procurement Guidelines (collectively, the "Bank-Financed Projects") or (ii) be awarded a contract for Bank-financed or Bank-executed project or program governed by the Bank's Procurement Guidelines, Consultant Guidelines, or Procurement Guidelines (collectively, the "Bank-Financed Projects") as a manufacturer or supplier, or service provider³ of an otherwise eligible firm being awarded a Bank-financed or Bank-executed project or program governed by the Bank's Procurement Guidelines, Consultant Guidelines, or Procurement Guidelines (collectively, the "Bank-Financed Projects") or otherwise to participate in the preparation or implementation of any Bank-financed or Bank-executed project or program governed by the Bank's Procurement Guidelines, Consultant Guidelines, or Procurement Guidelines (collectively, the "Bank-Financed Projects"). Respondent may be released from ineligibility if it has, in accordance with Section 9.03 of the Sanctions Procedures, demonstrated to the Secretary that (a) it has taken all reasonable measures to address the sanctions-related practices for which it has been sanctioned and (b) it has in place an effective integrity compliance program in a manner satisfactory to the Bank.

4. Effective December 7, 2011, Respondent and its Affiliates are prohibited from entering into or indirectly participating in contracts for Bank-financed Projects or participating in new activities in connection with Bank-financed Projects pending the final outcome of the sanctions.

II. GENERAL BACKGROUND

5. This case arises in the context of the Cartagena Water Supply, Sewerage and Environmental Management Project (the "Cartagena Project") in Colombia. On December 10, 1999, the Bank and the Distrito Turístico y Cultural de Cartagena de Indias, Colombia (the "Borrower") entered into a Loan Agreement to finance the Cartagena Project. On the same day, the Bank entered into a Project Agreement (the "Cartagena Project Agreement") with ACUACAR, S.P. ("ACUACAR"), the Borrower's project agency. The Cartagena Project's objectives were to improve sanitary conditions, water and sewage services, and the sustainability of those services in the Borrower's territory, as well as to facilitate the environmental cleanup of areas bordering the Borrower's territory.

6. In September 2005, ACUACAR entered into a contract with Respondent for the construction of Underwater Sewage Outfall at Punta Canoa in Cartagena.

³ In accordance with the Sanctions Procedures, 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 a particular skill or expertise to the project; or (ii) appointed by the borrower. See Sanctions Procedures at Section 9.01 n.14.

“Cartagena Contract” (the “Contract”). The bidding documents for the Contract (the “Bidding Documents”) required each bidder to include in its bid a list of principal contractor of marine works of equal complexity to a 1,200 meters in length of piping at least 48 inches in diameter.”

7. On September 20, 2006, Respondent submitted its bid (the “Bid”) with a list of projects that Respondent or two other related entities had purportedly implemented. On October 17 and December 13, 2006, ACUACAR asked Respondent to submit supporting documents in response to the bidding requirements. Respondent submitted a “Certificate” purportedly signed by an individual (the “Purported Signator”) on behalf of an entity (the “Purported Issuer”) involved in one of the listed projects (the “Project”). Under the subject line “1.2 m. DIAMETER HDPE INTAKE SYSTEM CONSTRUCTION . . . successfully executed the above project and . . . November 2004.” INT alleges that the Certificate is a forgery and a false signature.

III. APPLICABLE STANDARDS

8. Section 8.02(b) of the Sanctions Procedures requires the Sanctions Board to determine whether it is “more likely than not” that such respondent engaged in a sanctionable practice. Section 8.02(b)(i) defines “more likely than not” as a consideration of all the relevant evidence, a preponderance of which supports a finding that the respondent engaged in a sanctionable practice. As set forth in Section 7.01 of the Sanctions Procedures, the Sanctions Board shall consider the materiality, weight, and sufficiency of all evidence offered; formal rules of evidence do not apply.

9. Under Section 8.01 of the Sanctions Procedures, the 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 not more likely than not that its conduct did not amount to a sanctionable practice.

10. The alleged sanctionable practice at issue has the meaning set forth in the May 2004 Procurement Guidelines, which the Bidding Documents specified would govern the procurement of the Cartagena Contract. As set forth in Paragraph 1.14(a)(ii) of the Guidelines, the term “fraudulent practice” is defined as “a misrepresentation or omission of facts in order to influence a procurement process.” The Guidelines do not define the term to include an explicit mens rea requirement such as the knowledge or

reckless” standard adopted by the Bank from October 2006 onward.⁴ However, the legislative history of the Bank’s revised definitions of fraud and misrepresentation make explicit the pre-existing standard for mens rea, not to “articulate a new limitation.” According to the October 2006 definitions, the standard implied under the pre-October 2006 definitions.

11. The Cartage Procurement Guidelines, which provide a different definition for “fraudulent practices” in procurement for the Cartage Project, and the Bank’s regular framework applicable to sanctions, however, the legal standards governing the procurement process do not form a different standard by reference to another version of the Bank’s Procurement or Contract Guidelines. In the event of potentially conflicting standards, the Bank has recognized that considerations of equity should compel it to accept the standards agreed between the borrower and a respondent as governing the particular contract in connection with the procurement process. In the May 2004 Procurement Guidelines specified in the Bidding Document for the January 1999 Procurement Guidelines referenced under the Cartage Project Agreement.

IV. PRINCIPAL CONTENTIONS OF THE PARTIES

A. INT’s Contentions

12. INT asserts that the records reflect that it engaged in fraudulent practices by knowingly submitting a bid containing false information in support of the Bid. INT relies primarily on the following assertions:

- i. The Purported Signatory denied having signed the Certificate, and the Purported Issuer confirmed that the Signatory did not have the authority to sign the Certificate. The Certificate, on its face, including misstatements, and the first initial, which support a finding of fraud.

⁴ See, e.g., Guidelines: Procurement Under IBRD Loans and IDA Credits (May 2004, rev. October 2006) (the “October 2006 Guidelines”) at para. 10.10 (ii) (defining “fraudulent practices” as a misrepresentation or omission, including a misrepresentation, by a party to obtain a financial or other benefit or to avoid a financial or other obligation).

⁵ See Section 10.10 (ii) of the October 2006 Guidelines.

⁶ *Id.*

- ii. The record supports a finding that the contents of the Certificate were inaccurate. For example, several individuals involved in the Marine Works Project confirmed that Respondent was not the main contractor for the intake system for the project; and a World Bank water and sanitation specialist opined that Respondent was not the main contractor for the marine pipeline works after reviewing invoices and other documents supplied by Respondent.
- iii. The record shows that Respondent's misrepresentations were made knowingly. Respondent twice submitted the Certificate in response to ACUACAP's requests after the Bid's original submission, giving Respondent time to review the Certificate and appreciate its significance in the procurement process. Respondent's conduct in submitting the Certificate was obtained, but do not dispute that Respondent submitted the Certificate, and from that point forward, Respondent's conduct is within the scope of its core corporate knowledge.

13. INT does not assert any aggravating or mitigating factors.

B. Respondent's Principal Contentions in the Response

14. Respondent contests INT's allegations and the validity of INT's investigation on the following principal grounds:

- i. INT's evidence of forgery is insufficient. The Purported Issuer's statement that the Purported Signatory lacked authority to sign the Certificate does not show that the Certificate was falsified. To the contrary, a lack of signature authority would help to explain why the Purported Signatory later denied having signed the Certificate and refused to provide a signature sample to INT.
- ii. The contents of the Certificate were accurate. INT did not properly assess or present the evidence which had gathered concerning Respondent's role in the Marine Works Project. Respondent did not overstate its role in the Marine Works Project or, INT appears to suggest, misrepresent the Purported Issuer as Respondent's direct client in that project. Moreover, the fact that the Certificate's contents were not precisely responsive to the Bidding Documents' technical specifications and requirements does not support a conclusion that Respondent's original submission would presumably be tailored to meet the exact requirements.
- iii. Respondent's submission of the Certificate could not and did not influence the procurement process, because the Bid for which the Certificate was submitted did not contain the Certificate. Respondent's original submission for the Bid, and the Certificate was unresponsive to the Bidding Documents' requirements and ACUACAP's requests.

- iv. The record does not support a finding of fraud where no Bank funds were used, and the Respondent was not a contractor for which it was paid.
- v. INT has acted improperly in failing to disclose all evidence requested by Respondent in its investigation and in its strategy against Respondent in a separate civil action related to the Cartagena Project.

15. Respondent does not assert that [REDACTED]

C. [REDACTED]

16. INT asserts that the Respondent is insufficient to exonerate Respondent, arguing that:

- i. Respondent mischaracterizes [REDACTED] World Bank Specialist and the interview with [REDACTED] Purportedly, Respondent fails to show that the Certificate's contents were true.
- ii. Contrary to [REDACTED] Respondent's argument, Respondent submitted fraudulent documents in support of its bid, even though the bid did not lead to a contract; and even though Respondent received a subsequent contract under the Cartagena Project. These documents cover the conduct of bidders at any time during the bid process, regardless of the outcome of such process.
- iii. Respondent's claim of improper collusion between INT and ACHUGAP is baseless. Respondent's claim that INT has withheld exculpatory or mitigating evidence is likewise unfounded. INT has already disclosed all exculpatory evidence in its possession.

V. THE SANCTIONS BOARD'S ANALYSIS AND CONCLUSIONS

17. The Sanctions Board first considers whether Respondent has met its burden to show that it is morally culpable for the alleged fraud.

A. Evidence of Fraudulent Practices

18. In accordance with the applicable Sanctions Board's findings, the May 2004 Procurement Guidelines, INT bears the initial burden to show that Respondent (i) misrepresented its qualifications, (ii) submitted fraudulent documents, or (iii) attempted to influence the procurement process or the execution of the Contract.

1. Misrepresentation of [REDACTED]

19. Allegation [REDACTED] The Sanctions Board finds that INT has not met its burden of proof to show that [REDACTED]

finding that respondents had submitted forged bid documents, the Sanctions Board has relied primarily on written statements from the parties named in or supposedly issuing allegedly fraudulent documents, as well as the respondent's own admissions. Other types of corroborating evidence included specimen signatures from the purported signatory and various indicia of falsity on the face of the document in question. As discussed below, the record here contains written denial from the Purported Signatory, the admission of falsification from Respondent, no signature sample, and limited indicia of falsity on the face of the Certificate.

20. INT cites to the Purported Issuer's written statement that the Purported Signatory was not authorized to sign the Certificate. Yet this statement's limited relevance to signature authority is not the same as a written confirmation. The Certificate was in fact issued by the Purported Issuer or signed by the Purported Signatory.

21. INT's transcript of the Purported Signatory's statements, after having signed the Certificate, opined that "this is a forgery" and stated that he did not remember the Respondent. The Purported Signatory's statements, which were recorded verbatim, provide some support for a finding of forgery. However, the Sanctions Board has found significant weaknesses in the evidence presented. There are some concerns with respect to the credibility of the Purported Signatory. Taken together, these factors lead the Sanctions Board to discount the weight of the Purported Signatory's statements regarding the Certificate's signature and his absence of recollection of the Respondent. For example, the recorded statements upon which INT relies were not reaffirmed in any statement written or signed by the Purported Signatory himself; nor were they corroborated by the Purported Issuer. While it is possible that the Purported Signatory was telling the truth, he denied signing the Certificate and would then refuse to provide a signature sample. When INT asked for a sample, he refused without explanation other than his comment "If I say it's not mine, believe me." The

⁷ See, e.g., Sanctions Board Decision No. 22 (2008) at para. 11 (finding a bid security to have been forged, as well as CV and CV's admissions or the respondent's director general); Sanctions Board Decision No. 46 (2012) at para. 23 (finding the Sanctions Board relied primarily on the written statement of the individual named in the CV, stating the CV had been falsified, contained a forged signature and had been submitted without her consent, as well as the admission of the respondent's director general that he had signed and submitted the CV).

⁸ See, e.g., Sanctions Board Decision No. 46 (2012) at para. 23 (finding forgery where the record included specimen signatures for the purported signatory, the Purported Issuer's denial of the signatures at issue, as well as the respondent's admission to signing for the purported signatory without the latter's authorization or agreement, and the purported signatory's explanation that the signatures were false and unauthorized).

⁹ See, e.g., Sanctions Board Decision No. 52 (2012) at paras. 20-21 (finding a bid security to have been forged where the respondent admitted to using "false documentation" for the contract; and the bank that had purportedly issued the security confirmed in writing that it had reviewed the document and also identified several errors, including the lack of a bid security number and specific bid code, as always included in its bid securities, and a different font size from the one regularly used).

transcript of his interview reveals that the matter was not pursued further, leaving the record without any signature sample or credible explanation as to why there was no sample.

22. In addition, there is nothing in the record to contradict, and in fact, in the Reply, the version proposed by the Respondent that the Purported Signatory signed the Certificate without authorization, but subsequently falsely denied doing so and refused to provide a signature sample to INT, precisely because he had acted without authority. The transcript of the Purported Signatory's interview with INT reflects that he failed to answer INT's repeated question whether, usually, he would be the one who signs this type of document for the Purported Issuer. Nowhere is it proven, that Respondent knew or should have known that the Purported Signatory would go sign on the Purported Issuer's behalf.

23. Furthermore, the record contains some evidence calling into question the credibility of the Purported Signatory's claim of any recollection of any incident, given (i) Respondent's undisputed status as a subcontractor under the Marine Works Project; (ii) INT's record of interview with the head of another firm, which is a past part of the joint venture that was Respondent's direct client, reporting that the direct client had a duty to provide copies of any documents including the Certificate to the Purported Issuer; and (iii) the Purported Signatory's specific recollection, as stated in his interview transcript, that the Marine Works Project was a joint venture, and details thereof.

24. Even when the record is viewed in its entirety, the evidence presented may be less than sufficient to establish the Respondent's liability. The record as a whole may contain sufficient circumstantial evidence to corroborate or complement the witness's statements.¹⁰ INT asserts errors on the face of the Certificate, including the Purported Signatory's title and first initial, which, apart from the Respondent's own statements – raise questions about the Respondent's liability. INT does not establish that the Respondent's liability is not established as to show that the title in the Certificate was necessarily incorrect. With respect to the Purported Signatory's first initial, INT asserts that "the forged nature of the signature is evident" from the apparent inconsistency between the Respondent's signature and the signature on the Certificate. The record does not contain any genuine signatures for comparison. In addition, the transcript of the Purported Signatory's interview reveals that, when he examined the Certificate, the Purported Signatory did not mention any inaccuracies in either his initial or his title on the face of the Certificate. The Respondent's failure to provide any other documents with the initial or title used in the disputed signature, and the record does not

¹⁰ See Sanctions Board Decision No. 50 (2012) at paragraph 49 (analyzing the reliability of the Respondent's statements in light of the Respondent's arrangements with public officials, with the Respondent's failure to corroborate the Respondent's statements in the record, whether their statements revealed material errors or inconsistencies, and whether INT believed and acted on the statements).

contain any samples of genuine documentation issued by the Purported Issuer to show discrepancies in the Certificate's letterhead, font, or form.

25. Considering the totality of the evidence, the Sanctions Board finds that INT has not met its burden of proof to show that it is more likely than not that the Certificate was forged. Consistent with Section 7.01 of the Sanctions Procedures, the Sanctions Board recalls that it adopts a flexible approach when considering all probative types of formal or documentary evidence – which, depending on the circumstances, may not always be available. At the same time, the Sanctions Board bases its findings on the record as presented, which in this case does not support a finding of forgery by a preponderance of the evidence in the absence of the Purported Issuer's written confirmation of forgery; a more credible denial, written statement, or signature sample from the Purported Signatory; clear indicia of forgery on the face of the Certificate; or corroborating evidence independent from the Certificate. The Board finds that the evidence demonstrates that it is more likely than not that Respondent did not use a forged Certificate.

26. *Allegee false statements in the Certificate:* The Sanctions Board also finds that INT has not met its burden of proof to show that it is more likely than not that the Certificate contains false information. The Bidding Documents and ACUACAR's requests sought evidence of Respondent's experience "as principal contractor" in that the Certificate describes Respondent as "the main contractor" (emphasis added) for the marine works component for the installation of an intake system under the Marine Works Project. In fact, the Certificate refers to Respondent's role as "a Main Contractor" for an intake system (emphasis added).

27. The Sanctions Board finds that there is not clear evidence as to Respondent's actual role under the marine works project, combined with the Certificate's wording, to make a determination. Neither INT nor Respondent provides original contract documents or other corroborating evidence to clarify whether it acted as "principal contractor" (as ACUACAR required), "the main contractor" (as INT contests), or "a main contractor" (as the Certificate asserts). Neither INT nor Respondent offers any explanation or evidence to clarify whether these terms may be equivalent or distinguishable in the relevant contractual context. In characterizing the work that Respondent performed, both parties rely on their own statements from various witnesses interviewed more than six months after the Marine Works Project. The testimony that INT relies on from a World Bank witness and its own specialist rests upon the specialist's review of limited information, apparently including invoices and purchase orders, but not the actual contract – which the specialist states would be a good source of information regarding the scope of work – or any transcripts or records of interview with the witnesses whom INT had previously interviewed. Moreover, the specialist's testimony addresses only whether Respondent acted as "the main contractor for the marine works" (emphasis added), and does not address the specialist's representation of Respondent as "a" main contractor for the intake system. In summary, the record does not

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the Sanctions Board finds that INT has failed to prove more likely than not that the Certificate misrepresented Respondent's competence.

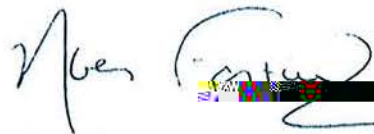
28. In addition, the Sanctions Board finds that INT does not prove more likely than not that the Certificate was issued to Respondent's client under the Marine Works Project. The Certificate claims to have been issued by the Purported Issuer, and states that it was issued to Respondent's client. The Certificate does not mention Respondent's name. Respondent's client is not a party to the proceedings, and Respondent has not provided any evidence to show that it is the client of the Purported Issuer.

2. Materiality
process

29. In view of its findings above, the Sanctions Board does not know whether Respondent acted knowingly or recklessly, or in order to influence the procurement process or execution of the Contract; or address the other findings in this Decision.

B. Termination of Sanctions Proceedings

30. Section 8.01(a) of the Sanctions Procedures requires that "if the Sanctions Board determines that it is not more likely than not that Respondent is responsible for the Practice, the proceedings shall be terminated." Respondent has not proven that the sanctions proceedings against Respondent in Sanctions Case No. 187, including the temporary suspension imposed by the EO for the pendency of such proceedings, are terminated.



L. Yves Fortier (Chair)

On behalf of the
World Bank Group Sanctions Board

- L. Yves Fortier
- Marielle Cohen-Bratton
- Patricia Diaz Dennis
- Catherine O'Regan
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