

Date of issuance: December 15, 2020

**Sanctions Board Decision No 129  
(Sanctions Case No 546)**

**IBRD Loan No 7985 CO  
Republic of Colombia**

**Decision of the World Bank Group<sup>1</sup> Sanctions Board imposing a sanction of debarment with conditional release on the respondent entity in Sanctions Case No 546 (the “Respondent”), together with certain Affiliates<sup>2</sup> with a minimum period ( ) r m fficer (“CE**

**Company”) – all attending via videoconference. The Sanctions Board deliberated and reached its decision based on the written record and the arguments presented at the hearing.**

**2 In accordance with Section III A, subparagraph 80(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 Suspension and Debarment Officer (the “SDO”) to the Respondent on November 22, 2019 (the**

<sup>1</sup> In accordance with Section III (y) of the World Bank Procedure Sanctions Proceedings and Settlements in Bank Financed Projects iv ns i n eg (the ( artisS r cedues’s

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 III (x).

<sup>2</sup> Section III (a) of the Sanctions Procedures defines “Affiliate” as “any legal or natural person that controls, is controlled by, or is under common control with the Respondent, as determined by the Bank.” The sanction imposed by this decision applies only to those Affiliates that are directly or indirectly controlled by the Respondent. See infra Paragraph 64.

**‘Notice’), appending the Statement of Accusations and Evidence (the ‘SAE’) submitted by INT to the SDO (undated);**

- ii. Explanations submitted by the Respondent to the SDO on January 10, 2020**
- iii. Response submitted by the Respondent to the Secretary to the Sanctions Board on March 13, 2020 (the ‘Response’);**
- iv. Reply submitted by INT to the Secretary to the Sanctions Board on April 17, 2020 (the ‘Reply’);**
- v. Post hearing submission filed by the Respondent on October 27, 2020 (the ‘Respondent’s Post Hearing Submission’);**
- vi. Post hearing submission filed by INT on November 4, 2020 (‘INT’s Post Hearing Submission’); and**
- vii. Additional evidence submitted by the Respondent on November 11, 2020 (the ‘Additional Evidence’).**

**II. GENERAL BACKGROUND**



to the Respondent, it did not act with the requisite intent because its personnel believed at all relevant times that its arrangements were common, legal, and appropriate. In support of this position, the Respondent makes the following principal arguments. First, the Respondent contends that it believed its arrangements were appropriate based on its experience under European Union ("EU") and Greek law. Second, the Respondent argues that it conferred with external counsel that its arrangements were legal under Colombian law and under the Contract prior to execution of the Contract. Third, the Respondent submits that it had no reason to believe that its arrangements were otherwise improper under the Contract, arguing *inter alia* that it understood that subcontracting was permissible. Fourth, the Respondent argues that INT overstates evidence suggesting the Respondent's awareness that the arrangements were prohibited. And fifth, the Respondent argues that its actions were not undertaken at risk of being attempted to mislead agency. In addition, the Respondent submits that its representations were not made to obtain a financial benefit to which it was not entitled.

14. The Respondent opposes any aggravation and requests mitigation for cooperation, voluntary restraint, temporary suspension, acceptance of responsibility, cessation of misconduct, compliance program, changes in management and governance, proportionality, passage of time, and good faith.

C. INT's Prohibited Practices

Respondent's representations in the EOI, the Bid, and the Contract. INT further argues that the Respondent was required to disclose all parties implementing the Contract as subcontractors, who must meet certain qualification requirements and be subjected to scrutiny. According to INT, the Bank's procurement rules are meant to ensure that the Bank and the Borrower know who is implementing the Contract and do not permit the sort of "indemnity based model" the Respondent arranged. INT disputes the Respondent's submission that it had confirmed that its arrangements were legal prior to Contract execution, arguing that the legal opinions from Colombian counsel did not answer the question of whether the arrangements complied with World Bank regulations and, in any event, were obtained after submission of the EOI and the Bid and therefore have no bearing on the Respondent's mens rea at the time of those submissions.

18 The Respondent disputes INT's allegation, arguing that INT oversimplified the Respondent's intended participation. The Respondent submits that it understood from the outset that it was ultimately responsible for the success of the Contract, that the record shows that it behaved in a manner consistent with its Contract obligations, that its personnel were "on the ground" from the very beginning and that its internal arrangements were not improper. According to the Respondent, the key issue for the Sanctions Board to determine is whether the Respondent acted with the requisite intent to deceive. The Respondent argues that INT failed to meet its burden on this intent requirement, and that nothing in the PQ Documents, the Bidding Documents, or the Contract put the Respondent on notice that its conduct might not be proper. The Respondent further argues that the legal opinions from Colombian counsel confirmed that the arrangements in question were proper and legal. In addition, the Respondent argues that, should the Sanctions Board find it liable for misconduct, any sanctions should be limited to a letter for reprimand. For his part, the Respondent's CEO states that the Respondent has improved its governance structure and management since 2018— including through sweeping changes to the composition and governance of the Board of Directors, his appointment as CEO, and the Parent Company's hiring of a new chief financial officer, group-wide compliance officer, and general counsel.

19 At the conclusion of the hearing, the Panel Chair asked INT and the Respondent to confirm whether they had a fair hearing and opportunity to present their case. INT confirmed that it felt it had been heard completely. The Respondent stated that it felt heard on the merits, but that it did not feel fully heard on potential sanctioning factors. In light of the parties' oral submissions, the Panel Chair invited the Respondent to submit a request to make a post-hearing submission on sanctioning factors, which the Panel Chair would consider permitting in his discretion.

#### **E. The Respondent's Principal Contentions in its Post-Hearing Submission**

20 In its Post-Hearing Submission, the Respondent addresses arguments and evidence raised in INT's Reply in relation to sanctioning factors. The Respondent argues in this submission that (i) INT's theory that the Respondent's changes in management and counsel were part of a litigation strategy to intentionally delay these proceedings is meritless, (ii) its extensions to file its Explanation and Response were objectively reasonable and do not merit a deduction in mitigating credit, (iii) INT's efforts to undermine the Respondent's extensive cooperation with INT's investigation are unfounded, (iv) the Respondent merits substantial mitigating credit for the implementation of, and improvement to, its compliance program, (v) the voluntary measures that the Respondent took to remedy the alleged wrongdoing merits mitigating credit, and (vi) the

Respondent's acceptance of responsibility negates mitigation. In addition, the Respondent opposes aggravation for sophisticated means, arguing that INT attempts in its Reply "to stretch the sophisticated means factor to apply aggravation where there is none." The Respondent concludes by submitting that no aggravation is warranted in this case and requesting that the Sanctions Board apply full mitigating credit.

**F. INT's Principal Contentions in its Post-Hearing Submission**

21. INT argues that the Respondent "holds a significant share of responsibility for the timeline of these proceedings" and that, therefore, the passage of time in this case has limited mitigating impact. INT further argues that the Respondent deserves mitigating credit for its cooperation, but this cooperation "did not go above and beyond the scope of the applicable audit clause." INT also contends that the company's compliance documents were entirely in Greek as of October 2019 and that the Respondent has produced no evidence that the policies were effectively communicated to employees in a language they understand. In addition, INT submits that cessation of misconduct as a mitigating factor is incompatible with the fact that the Respondent has maintained its original indemnity protections against its partners, and that the Respondent has never accepted full responsibility for the misconduct at issue. Finally, INT reiterates its position on sophisticated means as an aggravating factor:

**G. The Respondent's Additional Evidence**

22. In support<sup>3</sup> Briefly, INT yd      ompia      me e      t i      rt      Respondent

**submission** The Sanctions Board Chair reminded the parties that they would have the opportunity to address or refute any arguments or evidence contained in the record during the oral hearing in this matter:

- 2 The Respondent's request to file a post hearing submission and additional evidence**



**misled or attempted to mislead a party (iii) to obtain a financial or other benefit or to avoid an obligation**

**1. Act or omission including misrepresentation**

**31.**

**b Evidence of misrepresentation in the Bid**

**34** The record reflects that the misrepresentation in the EOI carried over into the Bid. The External Consortium submitted its Bid for the Contract on May 11, 2015. The Bid contained an incorporation agreement between the External Consortium members executed on May 5, 2015 (the "External Consortium Incorporation Agreement"), which maintained the same participation structure of 40/30/30. The External Consortium Incorporation Agreement stated that the "lead partner of the Consortium is [the Respondent]." The Agreement further provided that the partners "will be jointly and severally liable for the execution of the Contract and compliance of all provisions thereof" and that the partners agree that "together they will execute, through the Consortium, jointly and severally, all parts of the Part and all works of the Contract." The Form ELE 1.1 attached to the Bid confirmed that the Consortium would be composed of the Respondent, the First Partner, and the Second Partner. The proposed key sub contractor forms, EXP 242(a) [Key Sub Contractors Proposed for Important Installation and Construction Elements] and EXP 242(b) [Experience of Key Sub Contractors] attached to the Bid identified only one company (the "Named Sub Contractor") and the External Consortium as proposed key sub contractors.

**35** Three internal agreements executed by the Respondent and other entities indicate that the External Consortium's Bid misrepresented the Respondent's intended role with respect to the Contract. First, the External Consortium entered into a memorandum of understanding (the "MOU") on January 30, 2015 (over three months prior to Bid submission) with two local

needed for the Consortium to perform its obligations vis à vis the Customer.” Pursuant to the Internal Consortium Agreement, *inter alia*, the parties agreed that (i) for purposes of the bid and the relationship with the PIU, the parties will be represented by the External Consortium, according to the “External Interest Percentage[s]” (i.e., 40% for the Respondent and 30% each for the First Partner and the Second Partner); (ii) this notwithstanding the Internal Consortium will be responsible for the preparation of the proposal and implementation of the Contract, according to “Internal Interest[] Percentage[s]” (i.e., 33.3% each for the First Partner and one of the local companies, 16.7% for the Second Partner; 15.7% for the other local company, and zero for the Respondent); (iii) “[n]otwithstanding that [the Respondent] is a member of the Consortium towards the [PIU],” the Respondent will not be required to have an “active participation at any stage of the [Contract]” or bear any related costs or liability, and will assign its economic rights under the Contract to the First Partner and the Second Partner; (iv) the Internal Consortium will bear all costs or losses and retain all benefits and profits from the Contract; and (v) the Respondent will be entitled to a 3% success fee and may designate three engineers and one CPA professional to work on the Contract. Contrary to its obligations under the Clause 301 of the PQ Documents and relevant disclosure provisions of the Bidding Documents, other than the members of the External Consortium, none of the other members of the Internal Consortium were disclosed to the PIU or the World Bank in the EOJ, the Bid, the Contract or otherwise as members of the Consortium or as key subcontractors, nor were the indemnification or the alterations to participation percentages, the responsibilities of the Respondent or the economic rights of the Respondent.

### c. Evidence of misrepresentation in the Contract

36 On March 7, 2016, the PIU requested the External Consortium to confirm and update its corporate information, including its current composition. On March 16, 2016, the Respondent, on behalf of the External Consortium, responded that the composition of the External Consortium had not changed. Shortly thereafter, on May 20, 2016, the Contract between the PIU and the External Consortium was executed. The Contract provided that, among other documents, the “Bid Letter” and the “Other Forms of the Bid, duly completed and submitted with the Bid” constituted “the Contract between the Contracting Party and the Contractor; each one of which shall be considered and interpreted as an integral part of the Contract.” Following execution of the Contract, the External Consortium and the Internal Consortium signed an agreement to define rights and obligations between the partners vis à vis the PIU and the Bank (the “Joint Accounts Agreement”). This Agreement provided *inter alia* that “towards the [PIU], [the External Consortium] will be considered the sole owner of the legal business, and it will execute the awarded Contract in its sole name and under its personal credit,” but that the Internal Consortium will use its “capacity and experience for material execution of the Contract . . . making its knowledge, knowhow, human and material resources available” for that purpose. There is no indication in the record that the Respondent shared the Joint Accounts Agreement or any of the earlier internal agreements discussed above with the Bank or PIU during the relevant period, or otherwise made the requisite disclosures.

37 Considering the evidence discussed above, and the record as a whole, the Sanctions Board finds that it is more likely than not that the Respondent’s employees misrepresented the Respondent’s intended role in the implementation of the Contract.

**2 That knowingly or recklessly misled or attempted to mislead a party**

**38** The record reveals that employees of the Respondent negotiated and signed the various internal agreements. These internal agreements support a finding that the employees knew that the Respondent's intended role with respect to the Contract conflicted with the role represented to the FIU. For instance, as noted above, the Indemnification Agreement was executed approximately one month prior to submission of the EOI and provided that the Respondent would not be required to participate in the implementation of Contract (save for limited obligations) - even though it



the Contract, and ultimately to benefit financially from the Contract as contemplated in the various internal agreements

### **C The Respondent's Liability for the Acts of Its Employees**

44 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 respondent 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.<sup>11</sup> In the present case, the record supports a finding that the Respondent's employees engaged in the fraudulent practice in accordance with the scope of their duties and with the purpose of serving the interests of the Respondent. For instance, the record reflects that employees of the Respondent signed the External Consortium's EOI and Bid, as well as the Contract. Each of these documents misrepresented the Respondent's intended role in implementing the Contract. The record also shows that the Respondent's employees negotiated and signed the various internal agreements setting out the actual role intended for the Respondent. There is no indication in the record that these individuals acted for any purpose other than serving the Respondent, i.e., to obtain a financial benefit and a Project reference for the Respondent in relation to the Contract. Moreover, the Respondent does not present, and the record does not provide any basis for, a rogue employee defense. Accordingly, the Sanctions Board finds the Respondent liable for the fraudulent practice carried out by its employees

### **D Sanctioning Analysis**

#### **1 General framework for determination of sanctions**

45 Where the Sanctions Board determines that it is more likely than not that a respondent engaged in a sanctionable practice, Section IIIA, subparagraph 80I(ii) 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 IIIA, subparagraph 90I. The range of sanctions set out in Section IIIA, subparagraph 90I are (a) reprimand (b) conditional non-debarment; (c) debarment; (d) debarment with conditional release; and (e) restitution. As stated in Section IIIA, subparagraph 80I(ii) of the Sanctions Procedures, the Sanctions Board is not bound by the SDO's recommendations

46 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.<sup>12</sup> The choice of sanction is not a mechanistic determination, but rather a casua

**47** The Sanctions Board is required to consider the types of factors set forth in Section III A, sub paragraph 902 of the Sanctions Procedures, which provides a nonexhaustive list of considerations. In addition, the Sanctions Board refers to the factors and principles set out in the World Bank Group 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 debayment with the possibility of conditional release after a minimum period of three years.

**48** When the Sanctions Board imposes a sanction on a respondent, it may also, pursuant to Section III A, sub paragraph 901(b) of the Sanctions Procedures, impose appropriate sanctions on any Affiliate of the respondent.

## **2** Factors considered in the present case

### **a**

personnel of the Respondent – including the president of the Board of Directors, who signed the Indemnification Agreement and other internal agreements – were involved in the fraudulent conduct. Accordingly, the Sanctions Board applies aggravation on this basis.

**b. Minor role in the misconduct**

52 Section IIIA, subparagraph 90(e) of the Sanctions Procedures provides for mitigation “where the sanctioned party played a minor role in the misconduct.” Section VA of the Sanctioning Guidelines states that mitigation may be warranted where “no individual with decisionmaking authority participated in, condoned, or was willfully ignorant of the misconduct.” The Respondent raises this factor as an alternative to mitigation for proportionality, as discussed in Paragraph 63 below. The Sanctions Board has previously observed that “a respondent bears the burden to show affirmatively that no one with decisionmaking authority participated in, condoned, or was willfully ignorant of the misconduct.”<sup>16</sup> As the Respondent has not carried this burden – considering in particular that the record indicates that the Respondent’s employees were directly involved in the fraudulent scheme – the Sanctions Board declines to apply mitigation on this basis.

**c. Voluntary corrective action**

53



improvement, and implementation of a corporate compliance program and reflects “genuine remorse and intention to reform.” INT supports limited mitigating credit for the Respondent’s establishment of a compliance program, which INT argues is neither sufficiently tailored to the Respondent’s risk profile nor specifically designed to address the Respondent’s misconduct. The Respondent argues that INT’s characterization of the compliance program and code of conduct “unfairly diminishes [their] strength and completeness.” The record includes the Respondent’s detailed compliance program and code of conduct, which appear to have been improved and upgraded with the benefit of guidance from outside advisors. The Respondent sets out in its Response and its Post-Hearing Submission the continuing efforts of its Parent Company to strengthen the compliance program for its entire corporate group and the Respondent’s continued enhancements to its own compliance program. The Respondent also expresses in the Response its continued willingness to implement any further procedures the Integrity Compliance Officer may deem warranted. On the basis of this record, and considering that the compliance measures appear to address the type of fraudulent conduct at issue in this case<sup>18</sup> and at least some of the elements set out in the World Bank Group’s Integrity Compliance Guidelines (the “Integrity Guidelines”),<sup>19</sup> the Sanctions Board finds mitigation warranted under this factor. This finding is made based on the written record before the Sanctions Board, and therefore without prejudice to any future assessment that the World Bank Group’s Integrity Compliance Officer may conduct to more fully evaluate the adequacy and implementation of integrity compliance measures taken by the Respondent.

#### d. Cooperation

56 Section III.A, subparagraph 90(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 Guidelines identifies a respondent’s assistance with INT’s investigation, admission or acceptance of guilt or responsibility, and voluntary restraint from bidding on Bank-financed tenders as examples of cooperation.

57 Assistance and/or ongoing cooperation. Section V.C.1 of the Sanctioning Guidelines provides that mitigation may be appropriate for assistance with INT’s investigation or ongoing cooperation “[b]ased on INT’s representation that the respondent has provided substantial assistance,” as well as on “the truthfulness, completeness, [and] reliability of any information or testimony, the nature and extent of the assistance, and the timeliness of assistance.” According to INT, mitigating credit is warranted under this factor. The Respondent submits that it provided substantial cooperation, the nature and scope of which INT failed to adequately describe in its submissions. The record reveals that the Respondent made extensive document productions and



practices, to the initiation of sanctions proceedings.<sup>23</sup> 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.<sup>24</sup> The Sanctions Board has also applied mitigation where the record demonstrated a corporate restructuring and/or other changes in the respondent's management, particularly with respect to individuals involved in the misconduct.<sup>25</sup> The Respondent requests mitigation on these bases. At the time of the SDO's issuance of the Notice in November 2019, approximately six years and three months had elapsed since the External Consortium submitted the EOI containing the misrepresentation. The Sanctions Board considers this significant passage of time, as well as the changes in the Respondent's Board of Directors and governance structure since the misconduct, as weighing in favor of mitigation. However, the Sanctions Board also considers the Respondent's communication in March 2016, in which it confirmed to the FIU the composition of the External Consortium without disclosing the Internal Consortium, as weighing against mitigating credit. The Sanctions Board finds that only some mitigation is warranted in these circumstances.

**63 Proportionality:** The Respondent submits that any sanctions should reflect the principles of proportionality, arguing that the "instigator of the arrangements at issue" was the First Partner, which settled with the Bank "for a far lesser sanction" than the sanction recommended for the Respondent by the SDO. In past cases, the Sanctions Board has declined to consider the sanctions agreed between settling parties to bear upon its own determination of contested sanctions for respondents, noting that the final sanctions in settlements may be shaped by considerations intrinsic to the sanctioned party's relative culpability or responsibility for misconduct.<sup>26</sup> Consistent with this precedent, the Sanctions Board declines to apply mitigation under this factor:

**E**

nominated subcontractor; consultant; manufacturer or supplier; or service provider<sup>28</sup> of an otherwise eligible firm being awarded a Bank-financed contract; and (iii) receive the proceeds of any loan made by the Bank or otherwise participate further in the preparation or implementation of any Bank-Financed Projects, provided however, that after an initial period of ineligibility of one (1) year and three (3) months beginning from the date of this decision, the Respondent may be released from ineligibility only if it has, in accordance with Section III.A, sub paragraph 908 of the Sanctions Procedures, adopted and implemented effective integrity compliance measures that, inter alia, specifically address the misconduct at issue in this case, in a manner satisfactory to

*Mark Kantan*