

Date of issuance: June 24, 2013

Sanctions Board Decision No. 59
(Sanctions Case No. 187)
IBRD Loan No. 4507-CO
Colombia

Decision of the World Bank Group Sanctions Board finding insufficient evidence to conclude that it is more likely than not that the respondent entity in Sanctions Case No. 187 (“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”).¹

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-Branche, Patricia Diaz Dennis, Catherine O’Regan, and Randi Ryterman. Neither Respondent nor the World Bank Group’s 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 and Suspension Officer (the “EO”)² to Respondent 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 Respondent to the Secretary to the Sanctions Board on August 31, 2012, following four extensions (the “Response”); and

¹ In accordance with Section 1.02(a) of the World Bank Sanctions Procedures as amended through July 8, 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 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”). As in the Sanctions Procedures, the terms “World Bank” and “Bank” are here used interchangeably to refer to both IBRD and IDA. See Sanctions Procedures at Section 1.01(a), n.1.

² Effective March 31, 2013, the EO’s title changed to “IBRD/IDA Suspension and Debarment Officer” (“SDO”). 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 INT to the Secretary to the Sanctions Board on October 5, 2012 (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 any Bank-financed or Bank-executed project or program governed by the Bank’s Procurement Guidelines, Consultant Guidelines, or Anti-Corruption Guidelines (hereinafter collectively referred to as “Bank-Financed Projects”), (ii) be a nominated sub-contractor, consultant, manufacturer or supplier, or service provider³ 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 to participate further in the preparation or implementation of any Bank-Financed Projects; provided, however, that after a minimum period of ineligibility of three (3) years, Respondent may be released from ineligibility only if it has, in accordance with Section 9.03 of the Sanctions Procedures, demonstrated to the World Bank Group’s Integrity Compliance Officer that it has (a) taken appropriate remedial measures to address the sanctionable practices for which it has been sanctioned and (b) put in place an effective integrity compliance program acceptable to the Bank and implemented this program in a manner satisfactory to the Bank.

4. Effective December 7, 2011, Respondent, together with any Affiliate that it directly or indirectly controls, was temporarily suspended from eligibility to be awarded additional contracts for Bank-Financed Projects or participate in new activities in connection with Bank-Financed Projects pending the final outcome of the sanctions proceedings.

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 Turistico 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 Aguas de Cartagena S.A., E.S.P. (“ACUACAR”), the Borrower’s agency responsible for carrying out the Cartagena Project. The Cartagena Project’s objectives were to improve sanitary conditions, water and sewerage services, and the sustainability of those services in the Borrower’s territory, as well as to facilitate the environmental clean-up of water bodies surrounding the Borrower’s territory.

6. In September 2005, ACUACAR issued bidding documents for a contract for Construction of Underwater Sewage Outfall at Punta Canoa in Cartagena de Indias (the

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 specific and critical experience and know-how that allow the bidder to meet the qualification requirements for the particular bid; or (ii) appointed by the borrower. See Sanctions Procedures at Section 9.01(c)(i), n.14.

“Cartagena Contract” or “Contract”). The bidding documents for the Contract (the “Bidding Documents”) required each bidder to include information relating to its experience “as principal contractor of marine works of equal complexity . . . involving the installation of 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 companies had purportedly implemented. On October 17 and December 13, 2006, ACUACAR asked Respondent to submit supporting documentation for the listed marine construction project experience responsive to the bidding requirements. Respondent then provided a performance certificate (the “Certificate”) purportedly signed by an individual (the “Purported Signatory”) on behalf of an entity (the “Purported Issuer”) involved in one of the listed projects (the “Marine Works Project”). Under the subject line “1.2 m DIAMETER HDPE INTAKE SYSTEM CONSTRUCTION,” the Certificate stated that Respondent as “a Main Contractor for the above System . . . successfully executed the above project and completed the works in November 2004.” INT alleges that the Certificate is a forgery containing false statements and a false signature.

III. APPLICABLE STANDARDS OF REVIEW

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

9. 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. 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 or the execution of a contract.” This definition does not include an explicit mens rea requirement such as the “knowing or

reckless” standard adopted by the Bank from October 2006 onward.⁴ However, the legislative history of the Bank’s various definitions of “fraudulent practice” reflects that the October 2006 incorporation of the “knowing or reckless” standard was intended only to make explicit the pre-existing standard for mens rea, not to articulate a new limitation.⁵ Accordingly, the Sanctions Board has held that the “knowing or reckless” standard may be implied under the pre-October 2006 definitions.⁶

11. The Cartagena Project Agreement stated that the Bank’s January 1999 Procurement Guidelines, which provide a different definition for “fraudulent practice,” would govern procurement for the Cartagena Project. Under the Bank’s legal framework applicable to sanctions, however, the legal standards governing the relationship between a borrower and bidders or contractors are the standards set forth in the bidding documents and contract forms, even where a legal agreement between the borrower and the Bank may incorporate different standards by reference to another version of the Bank’s Procurement or Consultant Guidelines. In the event of potentially conflicting legal standards for purposes of sanctions proceedings, 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 which the sanctions case arises. In the present proceedings, therefore, the Sanctions Board applies the standards and definitions contained in the May 2004 Procurement Guidelines specified in the Bidding Documents, rather than the January 1999 Procurement Guidelines referenced under the Cartagena Project Agreement.

IV. PRINCIPAL CONTENTIONS OF THE PARTIES

A. INT’s Principal Contentions in the SAE

12. INT asserts that the record shows that it is more likely than not that Respondent engaged in fraudulent practices by knowingly submitting a forged performance certificate 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 Purported Signatory did not have authority to sign the Certificate. The Certificate also contains inconsistencies on its face, including misstatements of the Purported Signatory’s title and first initial, which support a finding of forgery.

⁴ See, e.g., Guidelines: Procurement Under IBRD Loans and IDA Credits (May 2004, rev. October 2006) (the “October 2006 Procurement Guidelines”) at para. 1.14(a)(ii) (defining 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”) (emphasis added).

⁵ See Sanctions Board Decision No. 41 (2010) at para. 75.

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 ACUACAR’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 officials deny knowledge of how the Certificate was obtained, but do not dispute that Respondent submitted the Certificate; and information about Respondent’s actual experience 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 accusations and the validity of its 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 that it had gathered concerning Respondent’s role in the Marine Works Project. Respondent did not overstate its role in the Marine Works Project or, as 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 ACUACAR’s requests would support a conclusion that the Certificate was genuine, as a falsified document 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 result in any award; the Certificate was not included in Respondent’s original submission for the Bid; and the Certificate was unresponsive to the Bidding Documents’ requirements and ACUACAR’s requests.

- iv. The record does not support a finding of fraud where no Bank funds were misused and Respondent was qualified to perform, and did perform, the work for which it was paid on a later contract under the Cartagena Project.
 - v. INT has acted improperly in failing to disclose all evidence requested by Respondent, including exculpatory evidence; and in pursuing the investigation at ACUACAR's behest as part of ACUACAR's litigation strategy against Respondent in a separate civil action related to the Cartagena Project.
15. Respondent does not assert any mitigating factors.

C. INT's Reply

16. INT asserts that the Response is insufficient to exculpate Respondent, arguing that:
- i. Respondent mischaracterizes INT's evidence, including the opinion of the World Bank specialist and the interview with the Purported Signatory, and fails to show that the Certificate's contents were true.
 - ii. Contrary to Respondent's arguments, Respondent may be held liable for submitting 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. The May 2004 Procurement Guidelines cover the conduct of bidders at any time during the procurement process, regardless of the outcome of such process.
 - iii. Respondent's claim of improper collusion between INT and ACUACAR 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 the record contains sufficient evidence to show that it is more likely than not that Respondent engaged in fraudulent practices.

A. Evidence of Fraudulent Practices

18. In accordance with the applicable definition of fraudulent practices under the May 2004 Procurement Guidelines, INT bears the initial burden to show that Respondent (i) made a misrepresentation or omission of facts (ii) that was knowing or reckless (iii) in order to influence the procurement process or the execution of the Contract.

1. Misrepresentation of facts

19. *Allegation of forgery*: 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. In past decisions

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 the allegedly fraudulent documents, as well as the respondents' own admissions.⁷ Other types of corroborating evidence in such cases, in addition to written statements and admissions, have included signature samples from the purported signatory⁸ and various indicia of falsity on the face of the document in question.⁹ As discussed below, the record here contains no written denial from the Purported Issuer or Purported Signatory, no admission of falsification from Respondent, no signature sample, and only 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 reference to signature authority is not the same as a written confirmation or attestation that the Certificate was not in fact issued by the Purported Issuer or signed by the Purported Signatory.

21. INT's transcript of interview with the Purported Signatory reveals that he denied having signed the Certificate, opined that "this is a fraud," 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 to it by INT. The Board also has 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 and/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 when he denied signing the Certificate, it is not clear why he would then refuse to provide a signature sample. When INT asked for a sample, he refused without explanation other than his comment, "[I]f I say it's not mine, believe me." The

⁷ See, e.g., Sanctions Board Decision No. 2 (2008) at para. 4 (stating the Sanctions Board "relied primarily" on the written statement of the bank that had supposedly issued the bid securities, stating the securities had been forged, as well as oral and written admissions of the respondent firm's director general); Sanctions Board Decision No. 6 (2009) at para. 6 (stating 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 who had falsified 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's authorized representatives, none of which matched 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 written confirmation 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 not issued 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 INT did not address in its 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 beyond the scope of his 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 would sign this type of document” for the Purported Issuer. Nowhere is it alleged, much less proven, that Respondent knew or should have known that the Purported Signatory lacked authority to sign on the Purported Issuer’s behalf.

23. Furthermore, the record contains some evidence calling into question the credibility of the Purported Signatory’s disavowal of any recollection of Respondent, 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 the parties agree was part of the joint venture that was Respondent’s direct client, reporting that the direct client had a duty to provide copies of any subcontracts – including the one with Respondent – to the Purported Issuer; and (iii) the Purported Signatory’s specific recollections, as reflected in his interview transcript, regarding the Marine Works Project’s other participants and details thereof.

24. Even where the evidence provided by a key witness such as the Purported Signatory may be less than entirely credible or complete, the Sanctions Board considers whether the record as a whole may contain sufficient additional evidence to corroborate or complement the witness’s statements.¹⁰ INT asserts errors on the face of the Certificate with respect to the Purported Signatory’s title and first initial, which – apart from the Purported Signatory’s own statements – raise questions about the Certificate’s authenticity. However, the record does not establish what title the Purported Signatory would have used in such documents, so 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 initial as typed on the Certificate, and the initial as it appears in the adjacent signature. As noted above, however, 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 document; and INT did not ask whether he would have reason to sign any documents with the initial or title used in the disputed signature. Finally, the record does not

¹⁰ See Sanctions Board Decision No. 50 (2012) at para. 40 (applying “extra scrutiny” to the reliability of witness testimony from representatives of a competitor that may have had its own prior improper arrangements with public officials, with consideration to whether the witnesses’ reported statements were corroborated by other evidence in the record; whether their statements revealed material errors or inconsistencies; and how INT obtained and documented 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 presented, 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 evidence, and does not require that INT support every forgery allegation with predetermined types of testimonial 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 itself; or other corroborating evidence. Accordingly, the burden does not shift to Respondent to demonstrate that it is more likely than not that Respondent did not use a forged Certificate.

26. *Alleged 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." INT asserts that the Certificate falsely 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 the lack of clear evidence as to Respondent's actual role under the Marine Works Project, combined with the difference between INT's paraphrase of the Certificate's wording and the exact wording of the Certificate itself, critical to its determination. Neither INT nor Respondent provides original contract documents or other contemporaneous evidence clearly defining Respondent's responsibilities so as to show 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 upon conflicting statements from various witnesses interviewed more than six years after completion of the Marine Works Project. The testimony that INT offers from a World Bank water and sanitation 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 "the best 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 pipeline works" (emphasis added), and does not address the Certificate's representation of Respondent as "a" main contractor for the intake system. In summary, the record does not disclose any helpful comparison between Respondent's actual involvement in the Marine Works Project and the claims in the Certificate. On the basis of such an inconclusive record,

the Sanctions Board finds that INT has failed to carry its burden to show that it is more likely than not that the Certificate misrepresented Respondent's experience.

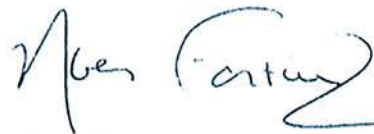
28. In addition, the Sanctions Board finds that INT does not show that it is more likely than not that the Certificate misrepresented the Purported Issuer as Respondent's direct client under the Marine Works Project. The Certificate claims to have been issued by the Purported Issuer, and states that the intake system was completed "to the satisfaction of the client and the consultant." However, the Certificate does not characterize or refer to the Purported Issuer as Respondent's direct client, and thus cannot be found to have falsely asserted such relationship.

2. Made knowingly or recklessly in order to influence the procurement process

29. In view of its findings above, the Sanctions Board need not consider whether Respondent acted knowingly or recklessly, or in order to influence the procurement process or execution of the Contract; or address the other issues raised by INT or Respondent.

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 the Respondent engaged in a Sanctionable Practice, the proceedings shall be terminated." Accordingly, the Sanctions Board declares 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 hereby terminated.



L. Yves Fortier (Chair)

On behalf of the
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