Date of issuance: June 22, 2023

Sanctions Board Decision No. 140
(Sanctions Case No. 762)

IBRD Loan No. 8460-VN
IDA Credit No. 5568-VN
Socialist Republic of Vietnam

Decision of the World Bank Group[1] Sanctions Board imposing a sanction of conditional non-debarment on each of the respondents in Sanctions Case No. 762 (respectively, the “First Respondent” and the “Second Respondent,” together, the “Respondents”), together with certain Affiliates.[2] The Respondents must comply with the conditions of non-debarment within two (2) years from the date of this decision. In case of non-compliance within this

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.

10. Burden of proof: Under Section III.A, sub-paragraph 8.02(b)(ii) of the Sanctions

14. Fraud allegation 2: INT alleges that the Respondents failed to disclose fees paid or to be paid to the Consultants that the Respondents engaged to provide services related to the execution of the Contract.

15. Sanctioning factors: INT contends that aggravation is warranted for the repetition of fraudulent acts and harm to the Project. Although the Respondents provided some documentation, made their employees available for interview, and responded to INT's inquiries, INT asserts that any mitigation applied for cooperation should be considered in light of the Respondents' categorical denial of culpability despite evidence to the contrary

B. The Respondents' Principal Contentions in the Explanation and the Response

16. Fraud allegation 1: The Respondents acknowledge that they did not make any conflict-of-interest disclosures. They argue that there was no conflict of interest because the Shareholder's 2.13% stake in the First Respondent did not confer power or control over the First Respondent and the Shareholder's financial success had no impact on the First Respondent's corporate interests. The Respondents argue that they did not knowingly or recklessly commit a misrepresentation, considering that there is no evidence that any of their relevant team members knew of the Shareholder's status as a shareholder, as none of these individuals were high-level members of management; and that the team leader was just a freelance consultant. In addition, the Respondents contend that the top ten shareholders of a publicly traded company like the First Respondent could only be identified as of the record date; and that there is no evidence that anyone in the team could have concluded that a 2.13% shareownership was or could be perceived as a conflict of interest requiring disclosure.

engaged in a misrepresentation. Specifically, INT submits that the Respondents knew that they hired and intended to pay the Consultants even before bidding for the Contract. INT further argues that, at the very least, the Respondents knew of the risk of making false statements yet took no steps to address this risk. Concerning both fraud allegations, INT contends that the Respondents intended to influence the selection process and execution of the Contract, given that they might not have been awarded the Contract had they disclosed the relevant facts.

20. Sanctioning factors. INT argues that either the Respondents deserve aggravation for the repetition of their misrepresentations or the two separate fraudulent practices each merit its own base sanction. INT further maintains that the Respondents' conflict of interest prompted the PMU to mobilize a new consultant, delayed the DBO tender process, and exposed that process to financial and reputational harm. Finally, INT submits that the Respondents deserve mitigation for

D. Presentations at the Hearing

21. At the hearing, INT argued that the Respondents had ongoing obligations to disclose conflicts of interest and payments made to third parties. With respect to the first all (m)-hRdnd en i

28. The relevant provision in the RFP imposes a disclosure obligation covering "any situation of actual or potential conflict that impacts [the consultant's] capacity to serve the best interest of its [c]lient." The Contract contains a similar provision that encompasses "any situation of actual or potential conflict that impacts their capacity to serve the best interest of their [c]lient, or that may reasonably be perceived as having this effect." The RFP, the Contract, and subsequent disclosure obligations at later stages of the procurement process for the DBO required written certifications with respect to actual, potential, reasonably perceived conflicts of interest. These certifications are important to maintain the confidence of all parties and observers in the integrity of the procurement process and particularly the award process resulting from bid evaluations. It is essential that all parties involved in a bidding process and in undertaking bid evaluation have systems in place to identify, declare, and manage actual, potential, and reasonably perceived conflicts of interest.

29. The Sanctions Board interprets the disclosure obligations in the RFP and the Contract as encompassing not only situations that demonstrate actual or potential conflict of interest, but also those that may be reasonably perceived as affecting the Respondents' capacity to serve the best interests of the PMU. These best interests include upholding the integrity of the procurement process by ensuring that all bidders, potential bidders, and other stakeholders and beneficiaries have confidence in the procurement process and that the process is transparent, impartial, and accountable.

30. The Respondents were tasked under the Contract to assist the PMU in the prequalification process, bidding, negotiation, and award of the DBO for a wastewater treatment plant in Vietnam. These tasks are very much part of the core business of the Respondents, which have extensive experience with such assignments, including Bank-financed projects. At relevant times, the Shareholder was the only shareholder that was not a financial institution or investment vehicle in the First Respondent's publicly disclosed list of its top ten "Major Shareholders." The Shareholder's core business activities included implementing large contracts to design and build water and wastewater management systems. These circumstances thus created a risk of a reasonable perception on the part of third parties, such as other bidders or potential bidders, that the Respondents' impartiality in carrying out their duties might be affected. Moreover, the Respondents' failure to disclose the relationship deprived the PMU of the opportunity to take a view on the matter and to manage or mitigate the situation

31. Because the Sanctions Board found that INT sufficiently established that the Respondents more likely than not committed a misrepresentation, the burden shifts to the Respondents to demonstrate that their nondisclosure did not amount to a misrepresentation. The Respondents argue in their defense that the Shareholder's ownership of 2.13% of the First Respondent's shares does not confer power or control over the First Respondent, that the Shareholder's financial success had no impact on the First Respondent's corporate interests, and that finding a conflict interest in this case would set an arbitrary and unworkable standard for Bank contracts. The Sanctions Board finds no merit in these arguments. First, the disclosure obligations under the RFP and the Contract are broad, encompassing actual, potential, or reasonably perceived conflicts of interest. The disclosure obligation is not triggered solely by the existence of control or impact on corporate interests. Second, the claim that the Respondents did not consider the Shareholder's 2.13% shareholding as affecting their capacity to serve the best interests of the PMU is no

determinative. The Sanctions Board has previously held that a bidder's subjective assessment as to the impact of a conflict of interest does not determine whether such a conflict must be disclosed.[6] As explained in the preceding paragraph, the disclosure obligation in this particular case was triggered by, _inter alia_, the nature of the Shareholder's core business activities and the Respondents' specific tasks under the Contract. Taken together, these circumstances may reasonably be perceived as affecting the Respondents' capacity to serve the best interests of the PMU. Finally, the Sanctions Board does not agree with the Respondents' supposition that finding an obligation to disclose under the circumstances of this case will result in an arbitrary and unworkable standard for the Bank. Given the sensitivity of the Respondents' role in the DBO tender process, best practices call for regular and continuous conflicts checks to avoid any appearance of potential bias. The Sanctions Board notes that disclosing the Respondents' potential reasonably perceived conflict of interest would not have automatically barred them from

as harm to the integrity of the Bank's procurement process due to false or misleading bid documents – but nevertheless failed to act to mitigate that risk.[8] With respect to disclosure obligations in particular, the Sanctions Board has held that a respondent's experience as a bidder and the apparent importance of the relevant disclosure requirement may support a finding that the omission of the disclosure was, at a minimum, reckless.[9] The Sanctions Board has also found a respondent to have been at least reckless in omitting required information when the record showed no evidence of internal due diligence, discussion, or correspondence to suggest that the disclosure requirements had been considered closely.[10] The import of these precedents applies here.

35. First, given the Respondents' vast experience in undertaking bid preparation and evaluation activities and in participating in Bank-financed projects, they should have been aware that it is critical to maintain the integrity of procurement and selection processes, and that fulfilling disclosure obligations carefully fthsug(s)-1 (r-2 (ge)-1 but)-1 (pa)-1 .1 (20 (ha)-0.o0.002 Tc 0.083 Tw 0.

attempted to mislead a party when it failed to disclose its potential or reasonably perceived conflict of interest.

c. To obtain a financial or other benefit or to avoid an obligation

38. The Sanctions Board has consistently held that, where the record demonstrates that a misrepresentation was made in response to a tender requirement — as in the case of conflict-of-interest disclosures — the intent to obtain a benefit or avoid an obligation may be inferred.[11] As discussed in Paragraph 28, the RFP and the Contract contain similar language providing that a consultant's failure to disclose an actual or potential conflict that impacts the consultant's capacity to serve the best interest of the client, or that may reasonably be perceived as having this effect, may lead to consultant disqualification, contract termination, and/or Bank sanctions. Further, as discussed in Paragraph 30, the Respondents' failure to disclose their potential perceived conflict of interest with the Shareholder deprived the PMU of the opportunity to consider the matter and to take appropriate action thereon.

39. On the basis of this record, and consistent with precedent, the Sanctions Board finds that it is more likely than not that the Respondents engaged in the misrepresentation with the intent to obtain a benefit.

2. Fraud allegation 2: Alleged misrepresentation of payments made to third parties

41. In their defense, the Respondents contend that they were not required to disclose their payments to the Consultants because these payments were not commissions or gratuities that relate to the proposal or contract execution, which pertains to the signing and finalization of the Contract rather than its performance. According to the Respondents, even if contract execution means contractual performance, the Consultants provided services that fell outside the scope of services under the Contract because these companies supported the Second Respondent and not the Contract. Finally, the Respondents submit that the Consultants were not subconsultants subject to the same disclosure.

42. The Sanctions Board has generally interpreted various disclosure obligations in procurement/selection documents and contracts quite broadly and has consistently rejected attempts by respondents to attribute narrow or specialized interpretations to certain[12] terms. Consistent with precedent, the Sanctions Board declines to adopt the Respondents' narrow reading of the disclosure obligations set out in the RFP and the Contract. First, both the RFP and the Contract make it clear that the disclosure obligation encompasses any fees made to

b. <u>That knowingly or recklessly misled, or attempted to mislead, a party</u>

44. As discussed in Paragraph 34, the Sanctions Board has assessed a respondent's alleged recklessness based on circumstantial evidence indicating that the respondent was or should have [redacted] against the common standard of "due care" that the proverbial "reasonable person" would exercise in the circumstances.[14] In the context of Bank-financed projects, the standard of care should be informed by the Bank's procurement policies, as set out in the applicable Procurement or Consultant Guidelines and the standard bidding6bv1 (o)7 (mm)-25mocun totan1 ( oa7 (an)1 a)6 (u)1 (n)5.9snce

46. Accordingly, and consistent with precedent,[18]

present and the record does not provide any basis for a rogue-employee defense. In these circumstances, the Sanctions Board finds the Respondent liable for the misconduct carried out by its employees.

D. Sanctioning Analysis

1. General framework for determination of sanctions

51.

contracts, or projects, over a period of time.[28] By contrast, the Sanctions Board has declined to apply aggravation where the sanctionable conduct was attributed to a "single scheme"[29] or a "single course of action."[30] INT asserts that the Respondents'

current or in place at the time of the misconduct—that deals specifically with disclosure obligations or the detection of actual or potential conflicts of interest. Nevertheless, the Sanctions Board acknowledges the Respondents' recognition that their compliance program could be improved and their willingness to engage with the ICO on enhancing it. The Sanctions Board concludes that, on balance, some mitigation is appropriate 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 ICO may conduct to more fully evaluate the adequacy and implementation of integrity compliance measures taken by the Respondents.

d. Cooperation

62. Section III.A, sub-paragraph 9.02(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 and voluntary restraint from bidding on Bank-financed tenders as examples of cooperation.

63. Assistance and/or ongoing cooperation: Section III.A, sub-paragraph 9.02(e) of the Sanctions Procedures provides for mitigation where a respondent "cooperated in the investigation or resolution of the case." Section V.C.1 of the Sanctioning Guidelines provides that mitigation may be appropriate for assistance and/or ongoing cooperation, "[b]ased on INT's representation that the respondent has provided substantial assistance in an investigation," with consideration of the "truthfulness, completeness, reliability of any information or testimony, the nature and extent of the assistance, and the timeliness of assistance." In this case, INT acknowledges that the Respondents provided documents, made employees available for interview, and responded to written inquiries. The Respondents argue that they fully cooperated with INT, highlighting that they made current and former personnel available for interviews and voluntarily provided the overwhelming majority of INT's exhibits. The Sanctions Board acknowledges the extent of the Respondents' cooperation and notes INT's confirmation during the hearing about its substantial reliance on evidence that the Respondents voluntarily provided. The Sanctions Board thus grants mitigation under this factor.

64. Voluntary restraint: Section V.C.4 of the Sanctioning Guidelines advises that voluntary restraint from bidding on Bank-financed tenders pending the outcome of an investigation may be considered as a form of assistance and/or cooperation. In past case

e. Period of temporary suspension

65. Pursuant to Section III.A, subparagraph 9.02(h) of the Sanctions Procedures, the Sanctions Board considers the period of the Respondent's temporary suspension since the SDO's issuance of the Notice on August 11, 2022.

f. Other considerations

66. Passage of time. The Sanctions Board has considered as a mitigating 4 (,Q q 351-(a)-1 .08 99.66

ii. The Second Respondent, as a wholly-owned subsidiary, shall be required to demonstrate within the prescribed period of non-debarment that it has (i) taken appropriate remedial measures to address the sanctionable practices for which it has been sanctioned; and (ii) adopted and implemented effective compliance measures in a manner satisfactory to the World Bank Group.

68. In the event that the Respondents fail to comply with these conditions within the prescribed period of non-debarment, the Respondents, together with said Affiliates, shall be automatically declared ineligible to (i) be awarded or otherwise benefit from a Bank-financed contract, financially or in any other manner;[40] (ii) be a nominated sub-contractor, consultant, manufacturer or supplier, or service provider[41] 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. The Respondents may be released from ineligibility after a minimum period of two (2) years, counted from the expiration of the period of non-debarment, only if they have each demonstrated compliance with the conditions originally stipulated for non-debarment in Paragraph 67 above, in accordance with Section III.A, sub-paragraph 9.03 of the Sanctions Procedures. This ineligibility shall extend across the operations of the World Bank Group. The Bank will also provide notice of the corresponding declaration of ineligibility to the other multilateral development banks ("MDBs") that are party to the Agreement for Mutual Enforcement of Debarment Decisions (the "Cross-Debarment Agreement") so that they may determine whether to enforce the declaration of ineligibility with respect to their own operations in accordance with the Cross-Debarment Agreement and their own policies and procedures.[42]

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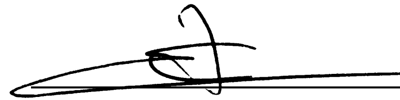
[40] A respondent's ineligibility to be awarded a contract includes, without limitation, (i) applying for prequalification, expressing interest in a consultancy, and bidding, either directly or as a nominated sub-contractor, nominated consultant, nominated manufacturer or supplier, or nominated service provider, in respect of such contract, and (ii) entering into an addendum or amendment introducing a material modification to any existing contract. Sanctions Procedures at Section III.A, sub-paragraph 9.01(c)(i), n.14.

[41] A nominated sub-contractor, nominated consultant, nominated manufacturer or supplier, or nominated service provider (different names are used depending on the particular bidding document) is one which has been: (i) included by the bidder in its pre-qualification 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. Sanctions Procedures at Section III.A, sub-paragraph 9.01(c)(ii), n.15.

[42] At present, the MDBs that are party to the Cross-Debarment Agreement are the African Development Bank Group, the Asian Development Bank, the European Bank for Reconstruction and Development, the Inter-American Development Bank Group, and the World Bank Group. The Cross-Debarment Agreement provides that, subject to the prerequisite conditions set forth in the Cross-Debarment Agreement, unless a participating MDB (i) believes that any of the prerequisite conditions set forth in the Cross-Debarment Agreement have not been met or (ii) decides to exercise its rights under the "opt out" clause set forth in the Cross-Debarment Agreement, each participating MDB will promptly enforce the debarment decisions of the other participating MDBs. More information about the Cross-Debarment Agreement is available on the Bank's website https://www.worldbank.org/en/about/unit/sanctions-

69. These sanctions are imposed on the Respondents for fraudulent practices as defined in Paragraph 1.23(a)(i) of the January 2011 and July 2014 Consultant Guidelines.



Eduardo Zuleta (Panel Chair)

On behalf of the
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