

## Access to Information Appeals Board Decision

Case Number AI7243-A

### Documents concerning the Contract for Audit Services in Sierra Leone for Covid-19 Project

Decision Dated July 15, 2022

#### Decision of the AI Appeals Board

The Access to Information Appeals Board (“AI Appeals Board” or “AIAB”) has reviewed the application for appeal in this case and decided to admit the application in its entirety and to agree in part with the decision of the Access to Information Committee (“AIC”) to deny some of the requested information in its entirety, while releasing information outlined in the Appendix, for the reasons set out below.

#### Background of Initial Request and Appeal to AIC

1. The initial request and much of the subsequent correspondence between the requester and the World Bank (“Bank”) is set out in the [AIC decision dated November 3, 2021](#), which is available on the Bank’s website. Nevertheless, we summarize here the correspondence that preceded this appeal.
  - a. On November 2, 2020, the Bank received a public access request for: “all Bank documents concerning” a specific contract for audit services in Sierra Leone as part of the Covid-19 project, *including* Bank review documents about this contract.” (emphasis added).
  - b. On February 23, 2021, the Bank responded to the request by denying access to the contract for the audit services, which it said was restricted from public access by the Bank’s prerogative to restrict. AIC Decision, para. 2.
  - c. The requester filed two appeals to the AIC in March 2021: one appealing the denial of the contract (Case No. AI7461) and another appealing the denial of his request for documents about the contract (Case No. AI7243).
  - d. Communications thereafter between the Bank and the requester clarified that the requester had intended his request to include not just the contract itself but also any documents relating to the contract. The Bank’s business unit located six additional pieces of information located as a result of the appeal that had not been considered during the initial request phase. In the meantime, on May 26, 2021, the [AIC issued its decision in Case No. AI7461](#), affirming the denial of the contract under the Bank’s prerogative to restrict.
  - e. Subsequently the Bank consulted with and obtained from the member country their written consent to disclose one of the six documents identified as responsive to the request that was the subject of Case No. AI7243, *i.e.*, the terms of reference (“TOR”). As a result, the [TOR was disclosed and is available online](#).
  - f. By its decision of November 3, 2021, the AIC affirmed the Bank’s denial of access to the five remaining documents, holding that the information “is properly and reasonably restricted by the *Deliberative Information and Information Provided by*

*Member Countries or Third Parties in Confidence* exceptions under the AI Policy and, thus, there is no violation of policy.” AIC Decision, p. 1.

### **AIC Decision on Appeal**

2. In its decision dated November 3, 2021, the AIC found that “the requested Information contains information that (a) serves both the Bank’s own decision-making process and deliberative process with the borrower on operational procurement matters; and (b) contains information provided to the Bank in confidence for such deliberations. The AIC found that such information is crucial for the Bank’s relationship and open communication with the borrower, and the carrying out of the Bank’s business and fiduciary obligations under the Bank’s Articles of Agreement as set forth in the Procurement Regulations.” AIC Decision, para. 18.
3. In relying upon the two AI Policy exceptions—Deliberative Information and Information Provided by Member Countries or Third Parties in Confidence—the AIC emphasized the Bank’s Procurement Regulations as grounds for affirming the withholding of the five documents. In paragraph 15 of its decision, the AIC stated:

The Procurement Regulations include requirements for the disclosure of certain procurement information under Bank financed projects, *e.g.*, procurement plans and contract award information (see Procurement Regulations, at paras. 4.2, 5.93, 5.94, and 5.95). However, the Procurement Regulations also states that:

Without prejudice to the principle of transparency and other obligations pursuant to these Procurement Regulations, in particular those relating to the publication of the Contract Award Notice and debriefing of unsuccessful Bidders/Proposers/Consultants, ***the Borrower shall not disclose information provided by Applicants/Bidders/Proposers/ Consultants in their Applications/Bids/Proposals, which they have marked as confidential.*** This *may* include proprietary information, trade secrets and commercial or financially sensitive information. (See Procurement Regulations, at para. 5.19, emphasis added).

4. The AIC explained (paragraph 16 of its decision) the policy reasons for confidentiality during the procurement process, specifically that the withheld information:
  - (a) was prepared by the bidder in response to an invitation for bids by the borrower. As such, it contains confidential commercial and financial information (such as cost breakdown of financial proposal) that may impact future participation of the bidder in future competitive procurement. Such information remains confidential during the bidding and evaluation of bids/proposals and becomes part of the contract after negotiations between the borrower and the bidder. Pursuant to the Procurement Regulations, “The Borrower shall not divulge any other Consultant’s confidential or

proprietary information such as: cost breakdown, trade secrets, methodology or other confidential business or financial information”. (see Procurement Regulations, at para. 5.77(f));

- (b) was produced by the Bank as part of project implementation support and is solely for use by the Bank for its project supervision obligations and the Borrower to improve procurement performance. Disclosing such information during a project under implementation may cause reputational risk to the Bank and strain the relationship between the Bank and the borrower;
  - (c) consists of background information for developing and/or updating the procurement plan. As such, the information is subject to constant change based on input from the project’s implementation and is, for this reason, deliberative in nature;
  - (d) reflects the deliberations between the borrower’s project management and the Bank.
5. The AIC summed up its decision as follows, in para. 19: “For the above reasons, the AIC found that the remaining portion of the Requested Information considered under appeal is properly and reasonably restricted by the *Deliberative Information and Information Provided by Member Countries or Third Parties in Confidence* exceptions under the AI Policy.” We comment on the AIC’s approach to Third Parties in Confidence in paragraphs 11—14 below.

### **Arguments on appeal to AIAB**

6. The requester’s appeal to the AIAB dated December 31, 2021, sets out a number of complaints, which we summarize as follows:
- a. That the AIC improperly excluded from the instant appeal his request for the contract for audit services itself, which was the subject of a separate [AIC decision \(#83, No. AI7461, dated May 26, 2021\)](#). At the least, the requester argues, the AIC should have considered whether its earlier decision had been affected in the interim by changed circumstances.
  - b. That it is not clear how the two cited exceptions (*Deliberative Information and Information Provided in Confidence by a Third Party*) apply to the five unspecified documents.
  - c. That the Bank has not explained the basis for its claim of confidentiality, at the same time that the Bank states that it did not seek the Member Country’s views on disclosure because even if the Member Country agreed to disclosure, the Bank would not agree.
  - d. That the Bank has failed to explain whether all or part of the withheld information is subject to the *Deliberative Information* exception and that the invocation of that exception is not in the public interest. [We note that the AIAB does not have authority to hear appeals concerning the public interest override of exceptions. AI Policy Sec. III.B.8(b)(ii)]
  - e. That the Bank’s consistent refusal to use redaction is contrary to the AI Policy’s presumption of disclosure.

## **Admission of the Appeal**

7. The Bank's AI Policy, Sec. III.B.8(b) sets out a two-stage appeal process. At the second appeals stage, the AIAB must look at whether the appeal is timely; establishes a *prima facie* case that the Bank has violated the AI Policy by "improperly or unreasonably restricting access to information that it would normally disclose under the Policy" (*i.e.*, that it provides sufficient information that would reasonably support the appeal that the Bank violated the Policy by improperly or unreasonably restricting access to information that it would normally disclose under the Policy); and involves a matter that the AIAB "has authority to consider." [See also AIAB Operating Procedures, Sec. III.A.2(a)-(c)].
  - a. The appeal before the AIAB was filed on December 31, 2021, within the 60 calendar day period to file an appeal before the AIAB, and therefore we find that the requester was timely in making their appeal.
  - b. The AIC decided to deny access to documents that fall within the ambit of the requested information on the basis that to do so does not constitute a violation of the AI Policy and, moreover, that the justification for denying access rests upon the deliberative information exception and the information provided by member countries or third parties in confidence exception. We do, therefore, have authority to hear the appeal in relation to documents for which these exceptions have been utilized, but not the document that has been withheld on the basis of the Bank's prerogative to restrict, over which we have no jurisdiction (see paragraph 9 below on that point).
  - c. With regard to whether the appeal reveals a *prima facie* case that the Bank has violated the policy, we ask whether the appeal provides sufficient information that would reasonably support the case that the Bank violated the Policy by improperly or unreasonably restricting access to information that it would normally disclose under the Policy. We find that the requester has laid out several grounds for questioning the validity of the AIC's decision and thus has made a *prima facie* case for an appeal.

## **AI Appeals Board Reasoning**

8. The requester's appeal to the AIAB argues that the AIC improperly excluded from his appeal his request for the contract for audit services itself, which was the subject of a separate [AIC decision \(#83, No. AI7461, dated May 26, 2021\)](#). At the least, the requester argues, the AIC should have considered whether its earlier decision to deny access to the contract had been affected in the interim by changed circumstances.
9. The AIAB does not find merit in the requester's argument. First, we note that the AIC's decision to deny access to the contract itself under the Bank's prerogative to restrict ([#83, No. AI7461](#)) is a final decision that is not appealable to the AIAB. See AIAB Operating Procedures Sec. III.A.2(c)(iii). Second, although the Bank appears to have erred initially in

reading the request too narrowly and treating the contract to procure audit services as the only responsive document, the Bank did rectify its error and located additional responsive documents, the denial of which is properly before the AIAB now. Having dealt separately with the request (and the appeal) for the contract itself, it was reasonable for the Bank and the AIC to consider that matter (the contract) to be closed.

10. As noted above, in addition to the contract for audit services, the Bank located six documents related to the contract. One of those documents, the Terms of Reference (TOR), was released. See paragraph 1(e) above. The remaining five documents were withheld by the Bank (and affirmed by the AIC) under two AI Policy exceptions: Deliberative Information and Information Provided by Member Countries or Third Parties in Confidence.
11. Under the AI Policy, the Bank allows access to any information in its possession that is not on the list of exceptions, although the Bank also reserves the right “under exceptional circumstances” to restrict information that it normally discloses. AI Policy Sec. III.B.1. In this case, in addition to the two AI Policy exceptions, we note the AIC also made direct reference to the Bank’s Procurement Regulations, Section V, Paragraph 5.77(f).
12. Paragraph 5.77(f) covers Notification of Intent to Award where all bidders’ financial proposals (total prices only) are disclosed.<sup>1</sup> In particular the AIC drew attention to the provision: “The Borrower shall not divulge any other Consultant’s confidential or proprietary information such as: cost breakdown, trade secrets, methodology or other confidential business or financial information.” AIC Decision dated November 3, 2021, para. 16(a).
13. The AIAB recognizes that procurement regulations provide the policy context in which exceptions are considered but have a concern that they have been applied in this case in such a way as to suggest they are a further ground for withholding the document. In conducting our review, the AIAB is clear that there are two exceptions that can be applied under the AI policy in this case, and reference to the Procurement Regulations is not one of them.
14. The AIAB has considered the relationship between the Procurement Regulations and the Information Provided by Member Countries or Third Parties in Confidence exception. While we do not consider that the Procurement Regulations of themselves provide a reason to withhold the document, we recognize that the policy provides support for the application of Information Provided by Member Countries or Third Parties in Confidence exception, as it reinforces the Third Party’s expectation of confidentiality (even if not explicitly stated by the bidder at the time).
15. The AI Policy states in relation to **Deliberative information** in Section III.B.2(i) that:

---

<sup>1</sup> [ProcurementRegulations.pdf \(worldbank.org\)](#)

Deliberative Information. The Bank, like any institution or group, needs space to consider and debate, away from public scrutiny. It generally operates by consensus, and it needs room to develop that consensus. During the process it seeks, and takes into account, the input of many stakeholders; but it must preserve the integrity of its deliberative processes by facilitating and safeguarding the free and candid exchange of ideas. Therefore, while the Bank makes publicly available the decisions, results, and agreements that result from its deliberative processes, it does not provide access to the following information:

- i. Information (including e-mail, notes, letters, memoranda, draft reports, or other documents) prepared for, or exchanged during the course of, its deliberations with member countries or other entities with which the Bank cooperates.
- ii. Information (including e-mail, notes, letters, memoranda, draft reports or other documents) prepared for, or exchanged during the course of, its own internal deliberations, (...).

16. The AI Policy states in relation to **Information Provided by Member Countries or Third Parties in Confidence** exception in Section III.B.2(g) that:

Information provided by Member Countries or Third Parties in Confidence. The Bank has an obligation to protect information that it receives in confidence. Thus, the Bank does not provide access to information provided to the Bank by a member country or a third party on the understanding of confidentiality, without the express permission of that member country or third party.

17. The requester argues that it is not clear how the two cited exceptions apply to the five unspecified documents, and that the Bank has not explained the basis for its claim of confidentiality, at the same time that the Bank states that it did not seek the Member Country's views on disclosure because even if the Member Country agreed to disclosure, the Bank would not agree. See paragraph 6 above. The AIAB has reviewed the five documents that are before it for appeal and sets out here its conclusions.
18. The requester's frustration with the lack of description of the withheld documents, and the reasons for the withholding of each of them, is understandable. Accordingly, the AIAB includes in its decision below an Appendix listing and briefly describing the documents at issue, the AI Policy exceptions that were confirmed by the AIC as the basis for withholding them, and the AIAB's decision to affirm their withholding with the exception of one document that must be released.
19. As noted above (paragraphs 1.e and 9), two documents that were the subject of the appeal to the AIAB are not at issue: Doc. 2 (TOR) has been released and Doc. 3 (the contract) is not properly before the AIAB.

20. With regard to Documents 1, 4 and 7 (see Appendix), the AIAB finds that both the Deliberative Information and the Third Party in Confidence exceptions apply and that there is no violation of the AI Policy. The Financial Proposal (Doc. 1), the Project Procurement Post Report (Doc. 4), and the Amended Annual Work Plan (Doc. 7) contain proprietary information and/or financially sensitive information, *e.g.*, details of the project and how the work will be done, that was provided to the Bank by the bidder. These documents also contain analysis, opinions and recommendations that, if released, would harm the Bank's deliberative process. Document 4, for example, is a lengthy (71 page) document concerning nine contracts, only one of which is the subject of the instant access request.
21. With regard to Document 5 (two pages of emails exchanged regarding negotiations with the bidder), the AIAB finds that it is not clear how its release would reveal information provided in confidence by a third party. However, the document consists of analysis and opinions that if released would harm the Bank's deliberative process. Thus, the Deliberative Information exception applies and that there is no violation of the AI Policy.
22. Document 6 is undated and consists of four lines of text in table form. On its face it consists solely of factual information, none of which indicates that it was provided by a third party in confidence. There also is no context or content that would reveal anything about the deliberative process. Accordingly, the AIAB concludes that the withholding of this document violates the AI Policy and must be released.
23. In previous cases, the AIAB has dealt with the interpretation of the AI Policy in relation to redaction. See [AI Appeals Board Decision Case Number AI6479-A](#) - All documents concerning amendments to the Tanzanian Statistics Act (Decision dated May 4, 2021); [AI Appeals Board Decision Case No. AI3634](#) - World Bank's review of the procurement process for the dewatering of the Tamnava West Field mine in Serbia (Decision dated December 3, 2015). As noted in those decisions, it is the role of the AIC to issue AI Policy interpretation, and it has done so regarding redaction, making clear that the Bank is under no obligation or duty to consider redaction. The AIAB has no jurisdiction to require information to be redacted and disclosed under the AI Policy because of the AIC-issued interpretation.

### **Findings of the AIAB**

24. Accordingly, we find that the Bank has violated the AI Policy in part and that the information specified and set out in the Appendix attached to this Decision should be disclosed.
25. The AI Appeals Board's decision is final.

## Appendix to AIAB Case Number AI7243-A

Doc No	Doc Name and description document <u>requested/ appealed</u>	AI Policy exceptions applied by Bank	AIAB decision
1.	<p><b>The financial proposal (FP)</b></p> <p>1) Prepared by: the Bidder in response to an invitation for bids issued by the Borrower.</p> <p>2) Document date: April 2020</p> <p>3) Document size (pp): 13</p> <p>4) Relevant pages/ sections: pp 1-5 are details of proposal/amounts pp 6-13 are C.V.s of team members &amp; “key experts”</p>	<p>Deliberative Information and information provided by member country or 3<sup>rd</sup> party in confidence.</p> <p>Not to be disclosed even if client consents, so permission from client will not be sought.</p>	<p>Deliberative Information and Information provided by member country or 3rd Party in Confidence exceptions properly applied</p>
2.	<p><b>Terms of reference</b></p>	<p>Initially withheld under the exceptions Deliberative Information and Information provided by member country or 3rd Party in confidence.</p> <p>Subsequently made public after the Borrower’s consent received. <u>Available online</u></p>	<p>Not an issue in this appeal to the AIAB</p>
3.	<p><b>BDO contract</b></p>	<p>Restricted per Bank’s prerogative to restrict.</p>	<p>Not an issue in this appeal to the AIAB</p>
4.	<p><b>COVID-19 Project PRR</b></p> <p><b>[Procurement Post Report]</b></p> <p>1) Document date: March 31, 2021</p> <p>2) Prepared by/ for the Bank</p> <p>3) Document size (pp.): 71pp</p> <p>4) Relevant pages/ sections: pp. 13, 29—34 (specific to contract); pp. 1—5 (general to all projects covered)</p> <p>5) Context: Review of nine contracts, one of which is the contract that is subject of this appeal; report includes detailed “Risk Ratings &amp; Recommendations”</p>	<p>Deliberative Information and Information provided by member country or 3rd party in confidence.</p>	<p>Deliberative Information and Information provided by member country or 3rd Party in Confidence exceptions properly applied</p>



Doc No	Doc Name and description document <u>requested/ appealed</u>	AI Policy exceptions applied by Bank	AIAB decision
5.	<b>Bank no objection to BDO negotiation</b> 1) Document date: Undated 2) Prepared by/ for: email exchange 3) Document size (pp.): 2 pp 4) Relevant pages/ sections: all 5) Context: email exchange between Bank and Borrower re payment of fees	Deliberative Information and Information provided by member country or 3rd party in confidence.	Deliberative Information exception properly applied
6.	<b>Excerpts of relevant portion of the Annual Work Plan (AWP)</b> 1) Document date: undated 2) Prepared by/ for: Internal Audit Services for Project P173803 – Sierra Leone COVID-19 Emergency Preparedness and Response Project 3) Document size (pp.): 1pp (four lines of text in table form) 4) Relevant pages/ sections: all 5) Context: AWP Estimate	Deliberative Information and Information provided by member country or 3rd party in confidence.	Violation of AI Policy - Release
7.	<b>Amended COVID-19 project AWP</b> 1) Document date: July 3—6, 2020 2) Prepared by/ for: emails between country team and bank 3) Document size (pp.): 6 4) Relevant pages/ sections: all	Deliberative Information and Information provided by member country or 3rd party in confidence.	Deliberative Information and Information provided by member country or 3rd Party in Confidence exceptions properly applied