

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

ICSID CASE NO. ARB/16/42

OMEGA ENGINEERING LLC

and

OSCAR RIVERA

Claimants

v.

REPUBLIC OF PANAMA

Respondent

FIRST WITNESS STATEMENT OF VIELSA RIOS

7 January 2019

I, **VIELSA RIOS**, state:

I. INTRODUCTION

1. I make this statement in connection with the arbitration commenced by Omega Engineering LLC and Oscar Rivera, (collectively, the “**Claimants**”) against the Republic of Panama (“**Panama**”).
2. I understand that certain of the claims put forth by the Claimants relate to their contract with the Judicial Authority to construct the Regional Courthouse of La Chorrera, Panama (“**La Chorrera Project**” or the “**Project**”).¹ On November 22, 2012, the La Chorrera Contract was executed by Alejandro Moncada Luna, then-President of the Supreme Court of Justice, on behalf of the Judicial Authority and Mr. Rivera on behalf of the Omega Engineering Consortium (“**Omega**”) composed of Omega Engineering, Inc., registered in Panama with its headquarters in Panama, Panama; Omega Engineering LLC, incorporated in Puerto Rico and registered as a foreign company in Panama; Cielo Grande, S.A., incorporated in Panama with its headquarters in Chiriquí, Panama.² On December 27, 2012, Gioconda Torres, then-Comptroller General of Panama, endorsed the La Chorrera Contract on behalf of the Comptroller General’s office.
3. Except as otherwise stated, I make this statement on the basis of my personal knowledge and from documents that I have reviewed. All of the matters set out in this witness statement are true to the best of my knowledge and belief.
4. This statement has been prepared in Spanish and English. I anticipate giving testimony in Spanish.

¹ Contract No. 150/2012 (Nov. 22, 2012) (**C-0048-Resubmitted**) (the “**La Chorrera Contract**”).

² *Id.*

II. BACKGROUND

5. In this section, I briefly describe my educational and professional background. In 1997, I received my undergraduate degree in economics in 1997 from the University of Panama. That same year, I participated in a course in Programming and Political Finance held by the International Monetary Fund Institute in Washington, D.C., and in 2002, received my Ph.D. in Business and Economics from the Universidad Latina de Panama. In 2016, I completed a program on Leadership of Special Projects conducted by the IESE Business School at the Universidad de Navarra, and in 2017, I completed Georgetown University and INCAE Business School's joint Executive Program for Public Administration.

6. I began my career at the Ministry of Economy and Finance, where I worked from 1993 to 1999 as a Central Budget Analyst. In 1998, I was selected to be a participating member in the Group for the Integration of the Financial Aspects of the Panama Canal to the Finances of the State. During that time, I also assisted in the creation and enforcement of the Integrated System of the Financial Administration of Panama (SIAFPA), an electronic accounting system to process and control budget expenditures. In 1999, I joined the Inter-American Development Bank where I worked as a Section Specialist in the Program for Improvement in the Administration of Justice until December of 2003, where I was in charge of the management of the financial management of a US\$ 30 million project which included implementation of two regional judicial buildings in Panama. From 2004 to 2006, I worked for the European Union as the Director of the Project to Strengthen the Institution of the Judiciary. Since January of 2007, I have served as the Administrative Secretary of the Panamanian Supreme Court. In my role, I am in charge of directing the Administrative Departments including accounting and finance, purchasing, legal advice, and general services management, which are in charge of supervising all of the Judicial Organ's programs and investment projects.

7. In addition, I have been a Professor at the Universidad Latina de Panamá since 2001, where I have taught classes in business economics; formation and evaluation of investment projects; and investment and financial decisions. Since 2014, I have been a Professor in the Economics, Finance, and Banking Master's Program at the same

institution. I have also been the President of the Association of Economists of Panama since 2006.

8. I have known about the La Chorrera Project from the development of the plans for the project by the Technological University of Panama through the present. During this time, I held my current position as the Administrative Secretary of the Supreme Court. In that role, I supervised the administrative portions of the Project, including the bidding process, the negotiations for extensions of time, payments, and any problems that arose.

III. THE LA CHORRERA PROJECT

9. In Panama, the Judicial Authority is an independent branch of the government which oversees the court system. The Judicial Authority is headed by the Supreme Court, which is composed of nine justices, appointed by the Council of Ministers and subject to approval by the Legislative Branch. The President of the Supreme Court is elected every other year by a majority vote of the Supreme Court. In addition to hearing cases, the President of the Supreme Court has administrative duties, such as executing contracts with suppliers and vendors for the Judicial Authority. The Supreme Court is the final appellate court and is divided into four divisions: civil, criminal, administrative litigation, and general business. Panama is then divided into four judicial districts which each have an appellate civil and criminal court, the Superior Court. Each of the four judicial districts has a civil and criminal circuit court, and at least one municipal court, which handles cases worth under US\$ 1,000 or crimes punishable with less than two years' imprisonment.
10. The La Chorrera judicial district is one of the four judicial districts and covers the city of La Chorrera and its surrounding region. It is located approximately 30 kilometers southwest of Panama City and, in 2012 had approximately 161,400 residents. At the time, the district had over 4,000 active civil and criminal cases pending before the courts.

11. Due to the size of the region and the number of cases, the Judicial Authority determined in 2012 that the La Chorrera district needed new judicial facilities.³ On September 18, 2012, the then-President of the Supreme Court, Alejandro Moncada Luna, issued an administrative resolution establishing a commission of three architects, all officials of the Judicial Authority, to review and evaluate bids for the construction of the new La Chorrera courthouse.⁴ The Tender was published and bids were accepted through October 1, 2012. On October 9, 2012, the commission provided Justice Moncada Luna with its assessment of the four contractors that had bid on the Project – Omega, Constructora Nova, S.A., Constructora Corcione & Asociados, S.A., and Consorcio Construcciones La Chorrera.⁵ Omega received the highest score from the commission among the four bidders.⁶
12. On October 17, 2012, Justice Moncada Luna, taking into consideration the report from the evaluation commission designated to evaluate the companies that participated in the Public Act, selected Omega as the Contractor for the La Chorrera Project⁷ and, at Justice Moncada Luna’s direction, and in accordance with the Law of Public Contracts, the Judicial Authority executed the La Chorrera Contract with Omega on November 22, 2012.⁸ Justice Moncada Luna signed the Order to Proceed authorizing Omega to begin working on the Project on January 15, 2013. The contract amount for the Project was [REDACTED].⁹

³ Tender Abbreviated for Best Value for “Construction of A Building for the Regional Judicial Unit of the District of La Chorrera,” No. 2012-0-30-0-08-AV-004833 dated 2012 (**C-0024 Resubmitted**) (the “**Tender**”).

⁴ Administrative Resolution No. 082/2012 dated Sept. 18, 2012 (**R-0005**).

⁵ Report of the Evaluation Commission dated Oct. 9, 2012 (**C-0083**).

⁶ *Id.*

⁷ Administrative Resolution No. 092/2012 for determination of the Abbreviated Bid for Best Value No. 2012-0-30-08-AV-004833 dated Oct. 17, 2012 (**R-0006**).

⁸ Contract No. 150/2012 (**C-0048-Resubmitted**), Cl. 2

⁹ Administrative Resolution No. 092/2012 for determination of the Abbreviated Bid for Best Value No. 2012-0-30-08-AV-004833 dated Oct. 17, 2012 (**R-0006**).

13. The new La Chorrera facility was designed to be a three-story, 15,730.57 square meter building, with two wings containing judicial offices, hearing rooms, offices for clerks and staff, archives, and common spaces with bathrooms and dining facilities.¹⁰ The La Chorrera Contract was essentially a procurement and construction contract, with all materials to be supplied by, and construction-related work to be performed by, Omega. That work included: constructing the foundation and structure of the building; installing technical equipment such as alarm systems, telephones, closed-circuit TV, assistance paging, mechanical and electrical systems; and providing all necessary finishes.¹¹ Omega was required to supply all materials, equipment, tools, labor and any other good or service required to properly finish the agreed works, at its own cost.¹² The Judicial Authority would provide the design and plans for the building.
14. Under the La Chorrera Contract, Omega was required to complete the Project within a period of 540 days from the initiation date.¹³ This meant that Omega had until July 9, 2014 to complete the Project.
15. On April 3, 2013, the Judicial Authority advanced Omega ██████████, equal to 15% of the value of the Contract, which was remitted to Omega by check.¹⁴ The remainder of contract amount was to be paid out periodically, based on the progress Omega made in the works. The Judicial Authority expected that Omega would use the funds advanced to it by the Judicial Authority solely on the La Chorrera Project. While we knew that Omega had secured contracts with other ministries, we expected that Omega would keep the money for each project separate and use the Judicial Authority's funds solely on the Judicial Authority's projects, regardless of the status of other projects, as each Entity or

¹⁰ Letter from Ing. Luis Carlos Broce, Project Inspector General Services Department, Judicial Organ to Jaime Ernesto Villar Vargas, General Director of Fireman of Benemerito Cuerpo of Panama dated Aug. 20, 2014 (R-0065).

¹¹ Tender (C-0024 Resubmitted), Ch. II, Special Conditions, Art. 27.2 (providing description of the Project's scope).

¹² Contract No. 150/2012 (C-0048-Resubmitted), Cl. 4

¹³ Contract No. 150/2012 (C-0048), Cl. 2; see Order to Proceed for Contract No. 150/2012 (C-0151).

¹⁴ Payment Table for Contract No. 150/2012 from the Accounting and Finance Department in the Judicial Authority (R-0007); Contract 150/2012 (C-0048-Resubmitted), Cl. 5.

Ministry has an independent contract number, which in our case is No. 150/2012, as well as an independent budget.¹⁵

16. As required under the La Chorrera Contract, Omega provided a performance bond for 50% of the value of the Contract. Omega was required to maintain that bond until three years after the Final Record of Acceptance.¹⁶ This protected the Judicial Authority against any latent defects that were discovered in Omega's works. Omega also was required to provide a bond securing the full amount of the advance payment made to them. This bond had to remain effective until thirty days after the works were completed and accepted by Panama.¹⁷ As I discuss below, Omega failed to properly maintain its bonds and Panama was left with no recourse against Omega for its failure to complete the La Chorrera Project.
17. The payment structure under the La Chorrera Contract was consistent with Panama's ordinary practice: Omega would be paid according to the progress they achieved on the works. They would submit periodic invoices (typically, every two months) with information necessary to show progress achieved during the billing period. An inspector in the Judicial Authority's General Services Department would review the invoice and either approve or return it for correction or clarification.¹⁸ If approved, the invoice would be sent to the Comptroller General (who is required to endorse all public works contracts) for review and approval. The Comptroller General's office is responsible for providing oversight and final approval on all public works contracts and invoices. In that role, the

¹⁵ Omega's Bid Proposal for Contract No. 150/2012, Equal or Similar Projects Completed and/or in Execution of US \$5,000,000 in the Last Five Years dated Oct. 1, 2012 (**R-0066**), pp. 176-182 (citing the three MINSICA CAPSI projects as the only equal or similar projects of over US\$ 5,000,000 completed or in execution in the last five years).

¹⁶ Contract No. 150/2012 (**C-0048-Resubmitted**), Cl. 8. ASSA agreed to provide the performance bond on November 1, 2012. Performance Bond, No. 85B64988 executed between ASSA Compania de Seguros, S.A. and Omega on Nov. 1, 2012 (**R-0067**).

¹⁷ Contract No. 150/2012 (**C-0048-Resubmitted**), Cl. 8. ASSA agreed to secure the advanced payment on Nov. 1, 2012. Advanced Payment Bond, No. 87B50778 executed between ASSA Compania de Seguros S.A. and Omega on Nov. 1, 2012 (**R-0068**).

¹⁸ Contract No. 150/2012 (C-0048-Resubmitted), Cl. 5; Addendum No. 1 to Contract No. 150/2012 dated Nov. 14, 2013 (**C-0305**), Cl. 5 (revising the payment schedule so that one payment of [REDACTED] was made in 2013 instead of two separate payments of [REDACTED] in 2013).

Comptroller General has the authority to approve or deny payments and requests to extend or amend public works contracts.

18. If the Comptroller General's office approved the invoice, Omega would be paid by the Judicial Authority 75% of the amount specified in that invoice. Of the remaining 25%, 10% would be withheld as retainage to be paid to Omega at the conclusion of the Project, and 15% would be offset as partial recoupment of the 15% advance payment made to Omega.¹⁹ The Contract provided that Omega would be paid within 90 days of receipt of the invoice, provided that there were no issues with the materials submitted by Omega.²⁰ On November 14, 2013, the parties entered into Addendum No. 1 to the La Chorrera Contract to modify the Judicial Authority's financing of the Project, so that the Judicial Authority's general budget for 2013 was expressed in the lump sum of [REDACTED], instead of two separate amounts of [REDACTED].²¹ This did not alter payments made to Omega or the structure of these payments.
19. The Comptroller General reviews all invoices for payment by contractors working on public works projects in Panama to ensure that they meet the commercial, technical, financial, and legal requirements under the contract. The Comptroller General's review provides a secondary check on government contracts, ensuring that the national government's funds are being spent appropriately, and its infrastructure projects are protected by insurance and security bonds. This also helps Panama to centralize data relating to its public works projects.
20. When there is a change in Panama's presidential administration (which occurs every five years, and which took place in 2014), this review process takes longer to complete. It is routine for most new administrations to conduct an audit of all ongoing public works projects that are still in progress from the prior administration, prior to approving

¹⁹ Contract No. 150/2012 (C-0048), Cl. 6; *see also* Chart of Payments for La Chorrera Projected Prepared by Marcial Martinez G., Project Accountant, Judicial Authority dated May 10, 2018 (R-0007) (showing 15% was withheld to recuperate the advanced payment and 10% was withheld as retention to be paid at the Project's conclusion).

²⁰ Contract No. 150/2012 (C-0048-Resubmitted), Cl. 5.

²¹ Addendum No. 1 to Contract No. 150/2012 (C-0305), Cl. 5.

invoices or contracts. This audit necessarily slows down the payment and approval process. Because of this audit, the Comptroller General for the outgoing administration typically slows or suspends the payment of invoices and execution or amendment of contracts in the period between election and inauguration. This is done to avoid undermining the new administration's ability to review and act on the projects as appropriate. This is common practice in Panama and well understood by companies contracting on public works projects. (President Varela was inaugurated on July 1, 2014).

IV. EXECUTION OF THE LA CHORRERA PROJECT

21. The La Chorrera Project was – and remains – an important project for Panama, the Judicial Authority, and the people of the La Chorrera district. We had high expectations that the Project would be completed on time and, consistent with that, made numerous accommodations for Omega and worked closely with Omega to help ensure as smooth a project as possible.
22. As mentioned above, work was authorized to begin on the La Chorrera Project on January 15, 2013. However, the Project began to sustain delays starting in the early spring of 2013, for multiple reasons. Regardless of whether the delays were the responsibility of Omega or the State, the Judicial Authority continuously granted Omega extra time to ensure the Project was completed as seamlessly as possible.
 - a. First, according to Omega, work on the Project was delayed due to rain in the rainy season (May – August) of 2013.²² As is well known, Panama has an annual rainy season, and it could not have been a surprise to any contractor for their work to be slowed by rain. Consistent with that fact, the La Chorrera Contract allocated to Omega the costs associated with ordinary rainfall, and made Omega responsible for requesting extensions of time for rain delays, subject to approval

²² Letter: 2014 04 08 – P007-037: Request for Addendum concerning Time Extension- *Construction of a Building for the Regional Judicial Unit of the District of Chorrera* – Contract No. 150/2012 dated Apr. 8, 2013 (C-0065 resubmitted) (requesting 18 calendar days of delay for rain between May and August 2013).

by the Judicial Authority.²³ Over the contract period, Omega repeatedly made claims for time relating to predictable rain.²⁴ Although the Judicial Authority had no contractual obligation to do so, we nevertheless agreed to grant Omega an extension, due to our strong desire to get the Project done.²⁵

- b. Second, the Project incurred delays due to an issue related to ownership of the worksite. Shortly after entering into the La Chorrera Contract, the Judicial Authority learned that the Ministry of Health was actually the owner of the worksite and promptly applied for the transfer of the land on December 26, 2012.²⁶ The transfer process took about eight weeks, and was ultimately completed by the National Department of Title and Regularization on February 22, 2013.²⁷ However, the land transfer process delayed the National Environmental Authority of Panama's approval of the environmental impact assessment (EsIA), as the Environmental Authority required a certificate demonstrating that the Judicial Authority was the owner of the worksite to approve the EsIA. On March 19, 2013, the Environmental Authority approved the EsIA for the Project.²⁸ Again, the Judicial Authority granted Omega an

²³ Tender (C-0024), Ch. II (Special Conditions), Art. 46.6.9 (prohibiting the Contractor from adding rain days to the calendar without the prior approval of the Inspector); *id.* Art. 53 (Contractor is responsible for damage to the worksite from rain).

²⁴ See Letter: 2014 04 08 – P007-037: Request for Addendum concerning Time Extension- *Construction of a Building for the Regional Judicial Unit of the District of Chorrera* – Contract No. 150/2012 dated Apr. 8, 2013 (C-0065 resubmitted); Letter No. P007-064 from Omega to the Judicial Authority dated Aug. 10, 2015 (R-0069) (requesting twenty days for rain between May and December 2014).

²⁵ See General Services Department of the Judicial Authority Report with the state of the *Construction of a Building for the Regional Judicial Unit in the Chorrera District up to March 10, 2015* dated Mar. 11, 2015 (R-0009), pp. 1-2 (showing Addendum No. 2 provided Omega with 18 days for rain between May and October and the proposed Addendum No. 3 planned to provide Omega with two additional days for rain from May to December of 2014).

²⁶ National Department of Title and Regularization, Resolution No. 15 dated Feb. 22, 2013 (R-0071) (requesting on December 26, 2012 that the worksite be transferred from the Ministry of Health to the Judicial Authority).

²⁷ *Id.*

²⁸ Resolution ARAPO-IA-047-13 from National Authority of Environment dated Mar. 19, 2013 (R-0072).

extension of time, for the entire period from December 26, 2012 through February 22, 2013 along with additional days for other project delays.²⁹

23. Once the work commenced, Omega provided the Judicial Authority with bimonthly invoices and supporting documentation. The Judicial Authority worked hard to ensure that all of these invoices were paid in a timely manner. It is my understanding that all but three of the invoices submitted by Omega were paid within the contractually allotted 90-day period. Two others were paid no more than five days late and the third was paid 15 days late.³⁰
24. The many delays sought by Omega, and accepted by the Judicial Authority made for an unusual start to the Project, but the Judicial Authority was willing to accommodate Omega and extend its time to finish the Project without imposing any delay penalties. While the Contract provided for an initial completion period of 540 days, the Judicial Authority ended up granting Omega 260 days of extended time – an extension equal to almost one-half of the initial Project period.³¹ This brought the total completion time granted to Omega by the Judicial Authority for the Project to 800 days.
25. Addendum No. 2, which extended the completion time to 800 days, was originally signed by the Judicial Authority and Omega and submitted to the Comptroller General for endorsement on August 21, 2014.³² The Comptroller General's office returned the Addendum on October 2, 2014 with observations explaining that because the extension of time in Addendum No. 2 moved the end date into 2015 and a new fiscal year, changes needed to be made to the payment schedule, so that funds available in 2014 could be

²⁹ Letter: 2014 04 08 – P007-037: *Request for Addendum concerning Time Extension* dated Apr. 8, 2014 *sic* letter incorrectly dated 2013 (**C-0065-resubmitted**) (requesting 63 calendar days in consideration of unanticipated time for processing documentation necessary for approval of Environmental Impact Assessment by ANAM, not attributed to developer or contractor); Addendum No. 2 to Contract 150/2012 dated Oct. 24, 2014 (**R-0008**) (providing 260 extra days).

³⁰ Payment Table for Contract No. 150/2012 from the Accounting and Finance Department in the Judicial Authority (**R-0007**) (invoice No. 6 paid in 105 days; No. 7 paid in 94 days; and No. 13 paid in 95 days).

³¹ Addendum No. 2 to Contract 150/2012 dated Oct. 24, 2014 (**R-0008**).

³² Letter No. 1211/S.A./2014 from the Judicial Authority to the Comptroller General dated Aug. 21, 2014 (**R-0073**) (attaching the first version of Addendum No. 2).

transferred to the budget for the 2015 fiscal year. This required a certificate from the Ministry of Economy and Finance (MEF) ensuring that there was budgetary availability for this change and additional information regarding payments made on the project to be sent to the Comptroller General's office.³³ After receiving the approval from MEF and collecting the necessary documents for the Comptroller General's office,³⁴ the Judicial Authority and Omega re-signed the Addendum on October 24, 2014 and re-sent it to the Comptroller General for endorsement on October 27, 2014.³⁵ The addendum was endorsed 61 days later on December 23, 2014.³⁶

26. This was not unusual for the Comptroller General's office to request additional documentation, especially when it related to allocation of the budget. Additionally, a delay in request for and review of the documents was not uncommon, given that President Varela had been elected in May of 2014, leading to the customary pause in activity in the Comptroller General's office.

V. OMEGA ABANDONS THE LA CHORRERA PROJECT

27. On December 17, 2014, the Judicial Authority received a letter from Omega unilaterally declaring that due to an alleged delay in approval of Addendum No. 2, it was suspending work on the La Chorrera Project.³⁷ There was no basis for Omega to do that. Omega was being paid and was not approaching the completion date with 161 days left on the

³³ See Form 128325-129440 from Comptroller General to the Judicial Authority dated Oct. 2, 2014 (**R-0074**).

³⁴ Letter DIPRENA-DPSG-GC-8184 from MEF to Judicial Authority dated Oct. 20, 2014 (**R-0075**) (approving request for certificate of budgetary availability); Letter re Remedy Action Regarding Addendum No. 2 to Contract No. 150/2012 from Judicial Authority's Prosecutor's Office to the Legal Department at the Judicial Authority dated Oct. 2, 2014 (**R-0076**) (asking the legal office to attach all the payments made on the Project through Oct. 2, 2014 along with their supporting documents and approvals from the Comptroller General, so that they can determine the amount of the budget pending for payment in 2014 and being considered in the addendum); Letter No. 1549/S.A./2014 from Administrative Secretary of the Supreme Court to Director of the National Budget at MEF dated Oct. 14, 2014 (**R-0077**) (showing the proposed payments for Addendum No. 2 in 2015).

³⁵ Letter No. 1614/S.A./2014 from Judicial Authority to Comptroller-General dated Oct. 27, 2014 (**R-0078**) (attaching Addendum No. 2 for endorsement).

³⁶ Addendum No. 2 to Contract 150/2012 dated Oct. 24, 2014 (**R-0008**).

³⁷ Note No. 2014 12 17 – P007-055, Notification of Temporary Recess from Omega to Judicial Authority dated Dec. 17, 2014 (**C-0367**).

project.³⁸ On December 29, 2014, the Judicial Authority responded that it had taken all the necessary steps to receive approval of Addendum No. 2 and that Omega could not unilaterally suspend work on the grounds of the delay of approval from the Comptroller General's office.³⁹ At this point, the Judicial Authority had paid Omega [REDACTED] [REDACTED] for work done on the La Chorrera Project.⁴⁰

28. In any event, the Comptroller General had endorsed Addendum No. 2 on December 23, 2014. The Judicial Authority promptly informed Omega of this and provided it with instructions on how to ensure that it would be paid for work performed under this addendum.⁴¹
29. After receiving notice of the endorsement of Addendum No. 2, Omega submitted a letter to the Judicial Authority on January 12, 2015 thanking the Judicial Authority for its help in securing the endorsement of Addendum No. 2 and informing the Judicial Authority that Omega's "offices, projects and operations have newly begun operations during their regular hours" on the La Chorrera Project.⁴² However, Omega never in fact restarted work on the Project. Today, that Project remains incomplete.

³⁸ See Payment Table for Contract No. 150/2012 from the Accounting and Finance Department in the Judicial Authority (**R-0007**) (showing Omega was paid in the Summer and Fall of 2014). The original contract termination date was July 9, 2014.

³⁹ Note No. 1832/S.A./2014 from Judicial Authority to the Omega Engineering Consortium dated Dec. 29, 2014 (**C-0368**).

⁴⁰ *Id.* Later, the Judicial Authority paid invoice No. 13 in the amount of [REDACTED] for the period between July 1, 2014 and December 31, 2014.

⁴¹ Letter No. 1093/DALSA/2014 from Judicial Authority to Omega dated Dec. 23, 2014 (**R-0079**).

⁴² Letter 2015 01 12 – P-007-057, Restart of Regular Hours in the Construction of the La Chorrera Project from Omega to the Judicial Authority dated Jan. 12, 2015 (**R-0011**).



Photograph of the worksite taken on January 14, 2015

30. Three days later, on January 15, 2015, Omega submitted a letter to the Judicial Authority demanding a further 310 days to complete the Project, which would have resulted in a total contract period of 1,110 days, compared to an initial period of 540 days.⁴³ This was a remarkable request since we had already provided Omega a 260-day extension as part of Addendum No. 2 and, in my view, the Judicial Authority had done nothing to contribute to delay of the Project. Omega, however, claimed it was entitled to the additional time because of delays due to rain from May to December 2014, delays in approval of Addendum No. 2 (which the Comptroller General signed within 61 days of receipt of the corrected version), and the modifications, additions, and adjustments in the systems for rain collection, sanitation, electric, telephone and structure.⁴⁴
31. Since Omega had stopped working on the Project in December of 2014, on March 11, 2015, the Judicial Authority notified Omega that it intended to terminate the Contract due to Omega's failure to perform. The Judicial Authority gave Omega five business days to respond and present any evidence it deemed relevant.⁴⁵ Omega responded on March 18, 2015 alleging that the Judicial Authority was in breach of the Contract, and notified the

⁴³ Note N. 2014 01 15 – P007-058 from Omega to Judicial Authority dated Jan. 15, 2015 [*sic*] (**R-0012**) (erroneously dated 2014).

⁴⁴ *Id.*; see Report from the General Services Department dated Mar. 11, 2015 (**R-0009**), p. 2.

⁴⁵ Letter N. P.C.S.J./604/2015 from the Judicial Authority to Omega dated Mar. 11, 2015 (**R-0013**).

Judicial Authority that if they could not reach an equitable and just agreement, Omega would be forced to refer the dispute to ICSID arbitration.⁴⁶ This was strange given that the Contract mandated that disputes be submitted first to the Judicial Authority for resolution and if the contractor was not satisfied with the resolution, it could solicit an ad hoc arbitration where the parties would select the arbitrator or arbitrators.⁴⁷

32. After this exchange of correspondence, the parties agreed to meet to discuss a resolution. Through a letter on March 25, 2015, the then-President of the Supreme Court, Jose Ayu Prado Canals, told Omega that the Judicial Authority had decided to temporarily suspend the Administrative Resolution of the Contract and offered Omega an additional extension of 202 days to complete the Contract, bringing the total time allocated to Omega to an extraordinary 1,002 days, provided that Omega renew the performance and advance payment bonds issued at Omega's request in favor of the Judicial Authority by ASSA Compania de Seguros, S.A. as soon as possible.⁴⁸ However, Omega never renewed those bonds, and never returned to work on the Project.⁴⁹
33. Still hopeful, on May 7, 2015, the Judicial Authority presented Omega with Addendum No. 3, which provided the additional time offered by Justice Prado Canals and a month of additional time for a total of 232 days, which would have given Omega 1,032 days to complete the Project – almost twice the amount of the original Project time.⁵⁰ The Judicial Authority followed up on the status of the Addendum on May 11, 2015; Omega

⁴⁶ Letter Responding to N. P.C.S.J./604/2015 from the Judicial Authority to Omega dated Mar. 18, 2015 (**R-0015**), pp. 13-14.

⁴⁷ Tender (**C-0024 resubmitted**), Art. 49 (stating that if the contractor requested arbitration, the parties would have 72 hours to agree on a single arbitrator, but if no agreement was reached, the parties would each select an arbitrator and those two arbitrators would select the third, noting that arbitrators would preferably be engineers or architects).

⁴⁸ Note N. P.C.S.J./746/2015 dated Mar. 25, 2015 from President of the Supreme Court to Omega (**C-0248**) (suggesting a new completion date of October 12, 2015).

⁴⁹ *See* Letter VEPT-FIA-079-2015 from ASSA to Judicial Authority dated Oct. 22, 2015 (**R-0014**) (noting bond expired on March 25, 2015).

⁵⁰ Email Chain between Elena Jaen of the Judicial Authority and Francisco Feliu of Omega dated May 7, 2015 (**R-0010**); Letter No. 435/DALSA/2015 DE dated May 7, 2015 (**R-0070**); *See* Letter N. 402/DSG/2015 dated Apr. 27, 2015 (**R-0018**) (The General Services Department of the Judicial Authority as technical experts noted that it was viable to extend the time granted to Omega to 232 days).

replied that its bond company was reviewing the document and that they would be in touch.⁵¹

34. On August 10, 2015, the Judicial Authority again presented Addendum No. 3 to Omega.⁵² However, Omega responded that same day requesting 380 additional days, allegedly due to delays from twenty rain days between May and December 2014 and from delays in the approval of plans and in the approval of Addendum No. 2.⁵³ Omega also claimed US\$ 4,842,315.12 in costs for work not originally in the Contract.⁵⁴ After negotiations with Omega, the General Services Department recommended extending the contract for 492 days, because Omega could not work for 20 days in 2014 due to rain, there was a delay in approval of Addendum No. 2, and the design was modified requiring changes and adjustments.⁵⁵ On September 24, 2015, the Judicial Authority offered to give Omega an additional 492 days to complete the Project.⁵⁶ This would have brought the total completion time to 1,292 days – almost 250% of the original time allotted for the Project.⁵⁷ Omega rejected this offer – notably an offer of over the amount of time that Omega had requested – and, instead, on October 29, 2015, submitted a new request for, an additional 560 days.⁵⁸ We were shocked, and concluded that Omega was playing games and was not dealing with the Judicial Authority in good faith.

⁵¹ Email Chain between Elena Jaen of the Judicial Authority and Francisco Feliu of Omega dated May 11-12, 2015 (**R-0022**).

⁵² Letter No. 765/DALSA/2015 from the Judicial Authority to Omega dated Aug. 10, 2015 (**R-0019**).

⁵³ Letter No. P007-064 from Omega to the Judicial Authority dated Aug. 10, 2015 (**R-0069**). On August 27, 2015, the Judicial Authority also received an email from Omega's attorney, Ana Graciela Medina, regarding negotiations surrounding Addendum No. 3 and Omega's requests for time and money. Email from Ana Graciela Medina attorney for Omega to Elena Jaen of the Judicial Authority dated Aug. 27, 2015 (**R-0080**).

⁵⁴ Letter No. P007-064 from Omega to the Judicial Authority dated Aug. 10, 2015 (**R-0069**).

⁵⁵ Letter No. 950/DALSA/2015 from Judicial Authority to Omega dated Sept. 24, 2015 (**R-0017**).

⁵⁶ *See id.*

⁵⁷ *See* Note No. 1744/P.C.S.J./2016 dated Aug. 18, 2016 from Judiciary to Minister of Commerce and Industries (**C-0163**).

⁵⁸ Letter from Omega to Judicial Authority in response to Nota: 2015 10 29 – P007-067 Proposal of Addendum No. 3 dated Oct. 29, 2015 (**R-0081**).

35. Nevertheless, in view of the significance of the Project, the Judicial Authority continued to negotiate with Omega. Four months later, on January 26, 2016, during which time no work was being done on our Project, the Judicial Authority again wrote to Omega to negotiate an agreement to execute Addendum No. 3 and published the Addendum on PanamaCompra, with the hope that the parties could negotiate a way to reinstate construction of the Project.⁵⁹ Omega never signed Addendum No. 3, or otherwise responded.
36. With the bonds expired and Omega having walked off the Project, the Judicial Authority had no means of recourse.⁶⁰ On January 28, 2016, the Chief Legal Advisor for the Judicial Authority went to Omega's offices in Panama to deliver a copy of a letter from the Judicial Authority requesting that Omega recommence construction of the La Chorrera Project. When she arrived, at around 10:00 am, no one was there and a young man waiting for the elevator told her that Omega's offices were almost always empty.⁶¹ After finding the offices empty, the Judicial Authority submitted the letter to PanamáCompra to ensure that Omega received the notification.⁶²

⁵⁹ Letter N. 150/P.C.S.J/2016 from Judicial Authority to Omega dated Jan 26, 2016 (**R-0020**); Memorandum N. 161.2016-DALSA dated Jan. 26, 2016 (**R-0082**) (requesting publication of N. 150/P.C.S.J/2016 on PanamaCompra).

⁶⁰ Letter VEPT-FIA-079-2015 from ASSA to Judicial Authority dated Oct. 22, 2015 (**R-0014**) (the bond expired on March 25, 2015). Panama requested that ASSA continue the project to no avail. *See* Note No. 1744/P.C.S.J/2016 dated Aug. 18, 2016 from Judicial Authority to Minister of Commerce and Industries (**C-0163**) referring to Notes No. 150/P.C.S.J/2016 dated Jan. 28, 2016 and Note No. 750/S.A./2016 dated May 19, 2016 in which Panama requested ASSA continue the construction of the La Chorrera Project. ASSA never responded to these requests.

⁶¹ Report from Elena Jaen to Maria Elena Grimaldo of the Judicial Authority regarding N. 150/P.C.S.J/2016 of Jan. 26, 2016 to Oscar Ivan Rivera Rivera, Legal Representative of the Omega Consortium dated Jan. 28, 2016 (**R-0021**); Letter No. 150/P.C.S.J/2016 from Judicial Authority to Omega dated Jan. 26, 2016 (**R-0020**) (stating that in response to Omega's request for an additional extension of time, the Judicial Authority drafted and sent Addendum No. 3 to Omega on September 24, 2015 which has not been signed by Omega and requesting that Omega reinstate work on the Project).

⁶² *See* Note No. 177/P.C.S.J/2016 dated Aug. 18, 2016 (**C-0163**), p. 3.

VI. REMNANTS OF THE PROJECT AFTER THE ABANDONMENT BY OMEGA

37. Ultimately, after two years of work the La Chorrera Project was only 55% complete and Omega still held ██████████ in advance payment.⁶³
38. I understand that the Claimants claim that they were targeted by the Varela administration and that there was a concerted effort within the Panamanian government to harm their projects. As I stated, I was involved with the La Chorrera Project from the beginning. We in the Judicial Authority were never asked by anyone in President Varela's administration to take any adverse action against the Claimants or to harm the Project in any way. In fact, as can be seen from the events describe above, the Judicial Authority worked very hard to have the Project completed even after President Varela took office in June 2014.

VII. OMEGA'S POTENTIAL FUTURE PROJECTS

39. I understand that the Claimants claim Omega would have been awarded future contracts by the Panamanian State, based on its past success rate. This is not a reasonable assumption with regard to the Judicial Authority's projects, in light of the fact that the Judicial Authority is an independent branch.
40. First, the Judicial Authority does not often undertake projects of the size of the La Chorrera courthouse. Since 2012, we have only had two other projects that were of a similar size: (1) the Santa Maria project⁶⁴ and (2) the Coclé project.⁶⁵ There would be few projects, therefore, that Omega would be interested in or would be a good fit to submit a bid proposal. Second, Omega's performance during the time it was actually working was only average and nothing made them stand out as a construction company

⁶³ Letter N. 355/S.A./2016 from Judicial Authority to Superintendent of Security and Reinsurance of Panama dated Mar. 11, 2016 (**R-0025**).

⁶⁴ The Santa Maria contract was a design, construction, and procurement contract for a training center in the town of Santa María in the Province of Herrera. The value of the contract at the time of its execution was US\$ 7,117,687.40. *See* Contract No. 077/2016 dated Nov. 30, 2016 (**R-0023**).

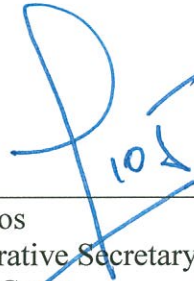
⁶⁵ The Coclé was a design and construction contract for another regional courthouse in the Penonomé region in the province of Coclé. The value of the contract at the time of the Order to Proceed was US\$ 2,415,616. *See* Order to Proceed, Contract No. 013/2017 dated Mar. 13, 2017 (**R-0024**).

that the Judicial Authority would hire over others in the future especially given Omega's abandonment of the project.

41. Consequently, it is an unreasonable and highly speculative assumption that Omega would win a future contract with the Judicial Authority.

Dated: January 4, 2019

Panama City, Panama



Vielsa Rios
Administrative Secretary
Supreme Court
Judicial Authority of Panama