

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

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**ICSID CASE NO. ARB/16/42**

**OMEGA ENGINEERING LLC**

and

**OSCAR RIVERA**

*Claimants*

v.

**REPUBLIC OF PANAMA**

*Respondent*

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**FIRST WITNESS STATEMENT OF NESSIM BARSALLO ABREGO**

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**7 January 2019**

I, **NESSIM BARSALLO ABREGO**, 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. Certain of the Claimants’ claims relate to their contracts to design, construct, furnish, and finance three health care facilities for the Ministry of Health of Panama, in Rio Sereno, Kuna Yala, and Puerto Caimito, Panama, (which I refer to collectively as “**Omega’s MINSA CAPSI Projects**” or the “**Projects**” and individually as the “**Rio Sereno Project**,” “**Kuna Yala Project**,” and “**Puerto Caimito Project**,” respectively), projects with which I am familiar.<sup>1</sup> On September 22, 2011, the Rio Sereno, Kuna Yala, and Puerto Caimito Contracts were executed by Dr. Franklin Vergara, Minister of Health,<sup>2</sup> on behalf of the Ministry of Health (the “**Ministry**”), and Mr. Rivera, on behalf of the Omega-Ciracet Consortium (“**Omega**”) composed of Omega Engineering, Inc., incorporated in Panama with its headquarters in Panama, Panama; Omega Engineering, LLC, incorporated in Puerto Rico and registered as a foreign company in Panama; and Ciracet Corp., incorporated in Puerto Rico and registered as a foreign company in Panama. On October 26, 2011, Gioconda Torres, the Comptroller General of Panama, endorsed the contracts on behalf of the Comptroller General’s office.
3. Except as otherwise stated, I make this statement on the basis of my personal knowledge or on the basis of documents that I have reviewed in the preparation of this statement. All of the matters set out in this witness statement are true to the best of my knowledge and belief.

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<sup>1</sup> Contract No. 077/2011 dated Sept. 22, 2011 (**C-0028**) (“**Rio Sereno Contract**”); Contract No. 083/2011 dated Sept. 22, 2011 (**C-0030**) (“**Kuna Yala Contract**”); Contract No. 085 (2011) dated Sept. 22, 2011 (**C-0031**) (“**Puerto Caimito Contract**”).

<sup>2</sup> These projects were initiated under the tenure of Minister Franklin Vergara and later, Minister Javier Diaz.

4. This statement has been prepared in Spanish and English. I anticipate giving testimony in Spanish.

## **II. BACKGROUND**

5. In this section, I briefly describe my educational and professional background, including my role on the MINSA CAPSI project.
6. I received my law degree from the Universidad de Panamá in 2002. Prior to working for the Ministry, I worked as a lawyer for eight years at the Judicial Authority. There I began work in the Sixth Municipal Civil Court between 2003 and 2005. Then, in November of 2005, I transferred to the Second Maritime Court of Panama where I worked until 2008. I then moved to work in the office of Judge Alberto Cigarruista of the Civil Section of the Supreme Court and in 2009, I transferred to the Eighth Circuit Court of Free Competition and Consumer Affairs. On May 3, 2010, I began working for the Ministry as a lawyer. In 2012, I became the Sub-Director of the Administration of Special Projects at the Ministry, the position I currently hold.
7. At the time of Omega's MINSA CAPSI Projects, I was a lawyer for the Ministry and the Sub-Director of the Administration of Special Projects. I was involved with each of Omega's MINSA CAPSI Projects from the beginning. In particular, I participated in the tender process and oversaw the administration of Omega's MINSA CAPSI Projects including the contractual elements, such as the drafting of addenda for extensions of time and additional costs of the project. With regard to the general MINSA CAPSI program, I assisted in the administration of the first tranche of 10 MINSA CAPSI projects (as discussed below) and assisted in advising the administration of the second tranche of 10 MINSA CAPSI projects, which included Omega's Projects.

## **III. MINSA CAPSI PROJECTS**

8. The MINSA CAPSI project is a public-works program within the Ministry of Health to construct 21 regional health facilities throughout Panama. This is a critical program, as it expanded available health care in numerous regions in Panama. The first of these facilities was built by the State, in order to assess the scope of work and the costs of

completion. The remaining 20 projects were put out for public bid, with notices placed on PanamaCompra. The projects were billed as engineering, procurement, and construction (EPC) projects, for which the contractor was required to provide all materials, labor, and plan development to complete the project. In addition, the Ministry required the winning bidders to finance their respective projects.

9. The difference between a traditional hospital and a MINSA CAPSI facility is the size and scope of services offered. MINSA CAPSI facilities are smaller, and provide primary care facilities, for example: laboratory capabilities, basic imaging (e.g., x-rays) and, in some cases, minor surgery capabilities and maternity wards. These are distinct from larger hospital facilities with full surgical facilities and extended stay rooms, which Panama was also building around this time.
10. For organizational purposes, the MINSA CAPSI projects (excluding the state-built project) were broken into two tranches of 10 facilities. Requests for bids on the first 10 facilities were published on PanamaCompra on June 11, 2010. Bidders were required to submit their proposals by August 23, 2010. Requests for proposals on the second 10 facilities were published on PanamaCompra on December 7, 2010.<sup>3</sup> Bids were due by January 17, 2011.<sup>4</sup>
11. Omega bid for nine facilities in the first tranche, but was not awarded any contracts. Omega also bid for nine facilities in the second tranche and was awarded contracts for the facilities in Rio Sereno, Kuna Yala, and Puerto Caimito.<sup>5</sup>
12. Seven companies (including Omega) bid on projects in the second tranche. An evaluation commission selected by the Ministry determined that only six of them met the

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<sup>3</sup> Request for Proposals No. 2010-0-12-0-99-AV-003042 “Estudio, Desarrollo de Planos, Construcción, Equipamiento and Financiamiento de Diez Centros de Atención Primaria de Salud Innovadores (MINSA CAPSI)” dated 2010 (C-0025-resubmitted).

<sup>4</sup> Minutes to the Opening of Proposal Envelopes dated Jan. 17, 2011 (C-0026-resubmitted).

<sup>5</sup> Report from the Evaluation Commission Public Act N° 2010-0-12-0-99-AV-003042, undated (C-0349), pp. 3-4 (Omega bid on all except for the Tortí project).

minimum requirements necessary to be awarded a contract.<sup>6</sup> Of these companies, Omega, Consorcio HPC Contratas-P&V, S.A., and Sociedad Espanola de Montajes Industriales bid on the Rio Sereno Project; Omega, Panama Salud, and Sociedad Espanola de Montajes Industriales bid on the Kuna Yala Project, and Omega and Consorcio Galdiano Bertoz-Heymocol Procomon bid on the Puerto Caimito Project.<sup>7</sup>

13. All 20 of the MINSA CAPSI contracts put out for public bid were awarded to a foreign contractor or a group with at least one foreign contractor in the consortium.<sup>8</sup> While Panamanian contractors are capable, they generally do not have the ability to finance projects of this type on their own. The Ministry requires that contractors finance a minimum of 90% of the project. This means that the contractor must have enough capital to ensure positive cash flows throughout the project and to sustain them in situations where financing may be delayed.
14. Of the 20 MINSA CAPSI projects put out for public bid, 14 have been completed. Seven of those were finished, or at least were operational, at the time President Varela was elected in May 2014.<sup>9</sup> Seven were completed after the election.<sup>10</sup> Of the remaining six projects, two are still in progress and likely to be completed in 2019, one is in the process of negotiations to reinstate work, and three – just the Omega Projects – have not been worked on since 2015.<sup>11</sup> The Ministry works closely with its contractors to assist where possible and to help get the projects completed. Omega was the only contractor working

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<sup>6</sup> See Minutes to the Opening of Proposal Envelopes dated Jan. 17, 2011 (**C-0026-resubmitted**); See Report from the Evaluation Commission Public Act N° 2010-0-12-0-99-AV-003042, undated (**C-0349**), p. 2 (concluding that Consorcio Becsa Eduinter did not comply with the mandatory requirements and was disqualified).

<sup>7</sup> Report from the Evaluation Commission Public Act N° 2010-0-12-0-99-AV-003042, undated (**C-0349**), pp. 3-4 (setting out the final conclusions of the evaluation commission).

<sup>8</sup> See Resolution of Adjudication No. 345 dated Mar. 28, 2011 (**C-0027**) (awarding three contracts to TEYCO, SL, a team lead by a Spanish construction company, and four contracts to Contratas Iglesias, S.A., a team lead again by a Spanish construction company).

<sup>9</sup> MINSA CAPSIs: Volcán, Pesé, Ocú, Las Tablas, Changuinola, Marcaras, and La Mata.

<sup>10</sup> MINSA CAPSIs: La Villa, El Coco, Dolega, Pedasí, Burunga, Tigre de los Amarillos, and Tortí.

<sup>11</sup> The two MINSA CAPSIs to be completed in 2019 are Santa Fe and Nueva Italia. The MINSA CAPSI in the reactivation process is Ciricio.

with my Ministry that abandoned the country and has not worked on its projects since 2015.<sup>12</sup>

15. Initially, the Ministry required that the winning bidder on each project obtain bank financing for 90% of the contract value. The remaining 10% was to be paid directly to the contractor by the Ministry as an advance payment.<sup>13</sup> This advance payment was to cover the up-front costs incurred to mobilize, purchase materials, and start a project. Unfortunately, we learned in April 2011 that not all of the funds required to make the advance payments on the MINSA CAPSI projects had been allocated to the Ministry's budget. As a result, the Ministry informed each of the winning bidders that they would be required to obtain bank financing for the full amount of their respective contracts.<sup>14</sup> An advance payment of 10% of the contract would still be permitted. However, rather than receive that money directly from the Ministry, the contractors were issued a payment certificate from the Ministry that could be presented to their financing bank and discounted for cash. The bank would provide the financing and would then submit the certificate to the Ministry for reimbursement at a later date.
16. Each of the MINSA CAPSI projects operated under the same basic contract form and had the same payment processes. Each contractor was paid a percentage of the contract price upon completion of the project designs, which would be paid through the issuance of Certificates of No Objection ("CNO"), as described below.<sup>15</sup> During the construction phase, payments were made based on the progress each contractor achieved.<sup>16</sup> To initiate payment, the contractor would prepare a progress report. That report would first be reviewed at the project site by inspectors from the Ministry and on-site officials from the

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<sup>12</sup> Sociedad Española de Montajes Industriales also left the country but still is involved in negotiations with the State to finish the Project.

<sup>13</sup> Request for Proposals No. 2010-0-12-0-99-AV-003042 "Estudio, Desarrollo de Planos, Construcción, Equipamiento and Financiamiento de Diez Centros de Atención Primaria de Salud Innovadores (MINSA CAPSI)" dated 2010 (C-0025-resubmitted), Ch. II (Special Conditions), ¶ 20 (Payments).

<sup>14</sup> Note No. 749-DMS/DAPE-2011 from Ministry of Health to Omega dated Apr. 5, 2011 (C-0141).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

Comptroller General's office. This review would focus on technical issues and would confirm that the information in the progress report matched the conditions on-site. If both inspectors approved the progress report, it would be submitted to the Office of the Minister for further review and approval. The Minister's office would check to ensure that the payment amounts were in line with the contract, all of the supporting documentation was provided, and that other contractual requirements were met (for example, that all taxes had been paid and insurance policies were in place, among others).

17. If the Minister's office approved the progress report, it would issue a CNO that would be sent to the Comptroller General for a final review and endorsement. The Comptroller General endorses each of the MINSA CAPSI contracts and is responsible for providing oversight and final approval on requests for payment and requests to amend any of the contract terms. In practice, the Comptroller General reviews requests for payment or contract amendments for errors, omissions, or elements that are not in line with the contractual requirements. On occasion, the Comptroller General will return (with observations) a request for payment or a request for a contract amendment to obtain additional information or clarification on specific points. If this is the case, the Comptroller General will return the request with instructions to provide the missing materials.
18. If the Comptroller General endorses the CNO, the Ministry will issue the endorsed CNO to the contractor, which the contractor can present to its financing bank to obtain payment. Typically, if the Comptroller General's office does not have any questions, a CNO will be approved in approximately 10-15 business days from the date that it is received in the office. However, it is not unusual for the Comptroller General to return the CNO with questions or observations for clarification. Thereafter, the bank can present the CNO to the Ministry to receive payment on a determined later date.
19. The time necessary to approve an addendum, such as those for an extension of time, can vary depending on the Comptroller General's workload and whether there are any issues with a particular amendment. During that period, it is not unusual for the Comptroller General to return the requested addendum with questions or requests for additional

information. Under the Panamanian law governing public works contracts, work on the projects must continue during this period.<sup>17</sup> I understand that this can be a difficult period for our contractors. If a contractor has requested an extension of time and the completion date passes while that extension is under review, the contract will be deemed to have expired. As a result, the contractor will not be able to have CNOs processed for work conducted after the completion date. This is not an infrequent occurrence and in fact, this happened to some CNOs for many other contractors on MINSA CAPSI projects.<sup>18</sup> However, once the extension is granted, all past payment certificates would be endorsed and paid. The difficulty, though, is ensuring that a contractor has sufficient cash flow to cover its costs during the period between the expiration of the contract and the endorsement of the extension of time. Our Ministry's expectation was that each contractor on the MINSA CAPSI project would have sufficiently strong financial backing to sustain periods of delayed payment or approvals where necessary. This would allow them to continue working on their projects until the extensions were granted and the CNOs could be processed.

#### **IV. OMEGA'S MINSA CAPSI PROJECTS**

20. As I mentioned, Omega was awarded three projects in the towns of Rio Sereno, Puerto Caimito, and Kuna Yala. Rio Sereno is a small, rural town near Panama's border with Costa Rica. Puerto Caimito is a small coastal town located approximately 42 kilometers west of Panama City. Kuna Yala is a coastal region in the north-east portion of Panama, and it is home to an indigenous and traditionally underserved people, the Gunas.
21. Due to the great need for improved health facilities in rural communities, Omega's MINSA CAPSI Projects are important to the Ministry. Omega was awarded contracts for its three MINSA CAPSI projects on March 28, 2011.<sup>19</sup> Several days later, on April 5, 2011, the Ministry notified Omega that due to budgetary restrictions it would be unable

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<sup>17</sup> Law 22 of June 27, 2006, Art. 77.4 (applicable to Omega's MINSA CAPSI projects) (**R-0026**).

<sup>18</sup> See Note N. 5275-2014-DFG-UCEF from Comptroller General to the Ministry of Health dated Nov. 14, 2014 (**R-0091**) (noting that 11 CNOs for companies working on MINSA CAPSi projects, including but not limited to Omega, were returned for being presented after the completion date, among other reasons).

<sup>19</sup> Resolution of Adjudication No. 345 dated Mar. 28, 2011 (**C-0027**).



to provide the advance payment directly and that Omega would be required to secure that payment through BAC International Bank, S.A. (f/k/a BAC Panama, S.A. and Banco Bilbao Viscaya Argentaria), the bank financing the MINSA CAPSI Projects for Omega.<sup>20</sup> Omega agreed<sup>21</sup> and, on September 22, 2011, the Ministry and Omega executed the three Contracts.<sup>22</sup> On September 23, 2011, Omega and the Ministry entered into Addenda No. 1 reflecting the change in the financing provisions and formalizing that Omega would obtain the advance payment through its financing bank.<sup>23</sup> As part of those addenda, Omega requested and the Ministry agreed that the advance payment be increased from 10% to 20% of the contract value. The Contracts and Addenda were endorsed by the Comptroller General on October 26, 2011, issuing the Orders to Proceed for each of the three Projects the next day, October 27, 2011.<sup>24</sup>

22. Each of Omega's Projects was a turnkey construction contract under which Omega was to provide various services, including development of plans, construction, furnishings, and financing.

PROJECT	SIZE (m2) <sup>25</sup>	CONTRACT VALUE (US\$)
Rio Sereno	3,368	████████
Puerto Caimito	3,246	████████
Kuna Yala	4,916	████████

<sup>20</sup> Note No. 749-DMS/DAPE-2011 from Ministry of Health to Omega dated Apr. 5, 2011 (C-0141).

<sup>21</sup> Letter from Omega to the Ministry of Health dated May 5, 2011 (C-0350).

<sup>22</sup> Contract No. 077 (2011) dated Sept. 22, 2011 (C-0028); Contract No. 083 (2011) dated Sept. 22, 2011 (C-0030); Contract No. 085 (2011) dated Sept. 22, 2011 (C-0031).

<sup>23</sup> Addendum No. 1 to Contract No. 077 (2011) dated Sept. 23, 2011 (C-0142); Addendum No. 1 to Contract No. 083 (2011) dated Sept. 23, 2011 (C-0143); Addendum No. 1 to Contract No. 085 (2011) dated Sept. 23, 2011 (C-0144).

<sup>24</sup> Order to Proceed for Contract No. 077 (2011) dated Oct. 27, 2011 (C-0145); Order to Proceed for Contract No. 083 (2011) dated Oct. 27, 2011 (C-0146); Order to Proceed for Contract No. 085 (2011) dated Oct. 27, 2011 (C-0147).

<sup>25</sup> These numbers reflect the approximate square footage for each facility to be constructed.

23. As turnkey projects, Omega was required to perform all work necessary to provide the Ministry with functioning health care facilities, including: development of the plans for the facilities to meet the Ministry's specifications and requirements; procure all materials necessary to construct and operate the facilities (including necessary medical and nonmedical equipment); perform all construction; install all equipment in the facilities; source and train all personnel necessary to complete its works; and finance the Projects.<sup>26</sup> Initially, each Project was to be completed by no later than January 28, 2013 – fifteen months (or 458 days) from October 27, 2011, the date the Order to Proceed was issued.<sup>27</sup>
24. On October 27, 2011, BAC International Bank, the financing entity for the Projects, using the procedure described above for issuance of a CNO, issued by the Ministry of Health, gave Omega an advance payment of [REDACTED] for the Rio Sereno Project, [REDACTED] for the Kuna Yala Project, and [REDACTED] on the Puerto Caimito Project, 20% of the value of each Contract.<sup>28</sup> The remainder of the amount owed under each contract would be paid based on Omega's progress, as provided for in the contracts. In accordance with the contracts, however, the Ministry would retain 20% of the amount owed on each payment certificate, as a means of recouping the advance payment.
25. As required under Omega's Contracts and Panamanian law, Omega provided a completion bond for each Project of 20% of the value of that Contract.<sup>29</sup> Omega was required to keep this bond valid until three years after the construction of the Projects as insurance against any latent defects in Omega's works. Omega was also required to

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<sup>26</sup> See Contract No. 077 (2011) dated Sept. 22, 2011 (C-0028), Cl. 1, 16-17; Contract No. 083 (2011) dated Sept. 22, 2011 (C-0030), Cl. 1, 16-17; Contract No. 085 (2011) dated Sept. 22, 2011 (C-0031), Cl. 1, 16-17.

<sup>27</sup> Contract No. 077 (2011) dated Sept. 22, 2011 (C-0028), Cl. 3; Contract No. 083 (2011) dated Sept. 22, 2011 (C-0031), Cl. 3; Contract No. 085 (2011) dated Sept. 22, 2011 (C-0031), Cl. 3.

<sup>28</sup> See Addendum No. 1 to Contract No. 077 (2011) dated Sept. 23, 2011 (C-0142), Cl. 56; Addendum No. 1 to Contract No. 083 (2011) dated Sept. 23, 2011 (C-0143), Cl. 56; Addendum No. 1 to Contract No. 085 (2011) dated Sept. 23, 2011 (C-0144), Cl. 56.

<sup>29</sup> Contract No. 077 (2011) dated Sept. 22, 2011 (C-0028), Cl. 22 (Omega submitted a completion bond for [REDACTED] issued by ASSA Compania de Seguros, S.A.); Contract No. 083 (2011) dated Sept. 22, 2011 (C-0030), Cl. 22 (Omega submitted a completion bond for [REDACTED] issued by ASSA Compania de Seguros, S.A.); Contract No. 085 (2011) dated Sept. 22, 2011 (C-0031), Cl. 22 (Omega submitted a completion bond for [REDACTED] issued by ASSA Compania de Seguros, S.A.).

provide bonds to secure the advanced payments made to them under the Contracts.<sup>30</sup> These bonds were to remain effective during the entire execution of the contract and until thirty days after the contract's expiration or until full reimbursement of the advance is recovered by the State.<sup>31</sup>

**V. EXECUTION OF OMEGA'S MINSA CAPSI PROJECTS DURING THE MARTINELLI ADMINISTRATION**

26. The Omega MINSA CAPSI Projects experienced a number of delays, and today the three Omega Projects remain incomplete. Some of these delays were attributable to Omega. For example, Omega had issues with a number of its subcontractors, which caused the works to slow down. Some of the delays, however, were attributable to the Ministry. A cause of delay by the Ministry, for example, was the length of time it took to approve the medical equipment proposed to install in the facilities. While each contractor on the MINSA CAPSI projects was required to procure and install all required medical equipment, the Ministry had to approve those purchases to ensure we were receiving equipment that met our specifications. During the time when Omega was working, the Ministry had only two biomedical specialists who were responsible for approving the equipment on each project. That resulted in delays in the approvals, which in turn, resulted in delays in the procurement and installation of equipment. When the Ministry was responsible for these types of delays, we allocated Omega (and other contractors) with additional time to complete their projects.
27. A second cause of delay attributable to the Ministry was the length of time it took to approve extension of time requests. In some cases, the delay in approving the extension requests resulted in periods where the contractor could not be paid because the contract had technically expired. During those periods, Omega formally communicated to the Ministry first that it would reduce personal and thereafter would suspend the work by the

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<sup>30</sup> Contract No. 077 (2011) dated Sept. 22, 2011 (C-0028), Cl. 22; Contract No. 083 (2011) dated Sept. 22, 2011 (C-0030), Cl. 22; Contract No. 085 (2011) dated Sept. 22, 2011 (C-0031), Cl. 22.

<sup>31</sup> Contract No. 077 (2011) dated Sept. 22, 2011 (C-0028), Cl. 22; Contract No. 083 (2011) dated Sept. 22, 2011 (C-0030), Cl. 22; Contract No. 085 (2011) dated Sept. 22, 2011 (C-0031), Cl. 22.

end of the year given the lack of a current contract.<sup>32</sup> When the work stopped or slowed, it added to the amount of time Omega would need to complete the project.

28. By way of example of how the Ministry worked with Omega, I recall a series of extensions provided for delays on the Omega's MINSA CAPSI Projects:

**a. Delays on the Rio Sereno Project**

29. In November 2012, Omega requested a five-month extension of time on the Rio Sereno Project for delays caused by rain, slow approval of the medical equipment to be procured, and a change in the scope of the work. Under Omega's request, this extension would have moved the completion date from January 28, 2013 to June 28, 2013.<sup>33</sup> The Ministry agreed to this request. In fact, while Omega sought only to move the completion date to June 28, 2013, the Ministry agreed to extend the completion date to August 5, 2013. We did this as part of our good-faith effort to accommodate our contractors and to give them the flexibility to finish their projects on time. On February 21, 2013, Omega and the Ministry signed Addendum No. 2 formalizing the extension.<sup>34</sup> Nearly five months later, the Comptroller General endorsed the Addendum on July 2, 2013.
30. On August 13, 2013, the Ministry and Omega signed Addendum No. 3 to the Rio Sereno Contract giving Omega an additional 147 days to complete the Project. This moved the completion date from August 5, 2013 to December 30, 2013. This extension brought the total number of days to complete the project to 794.<sup>35</sup> Five months later, on January 14, 2014, the Comptroller General endorsed Addendum No. 3.<sup>36</sup> Omega claimed to be

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<sup>32</sup> Omega informed the Ministry that it would be suspending work on the Puerto Caimito and Rio Sereno Projects between December 20, 2014 and January 12, 2015. Letter MINSA-55PC from Omega to the Ministry of Health dated Dec. 18, 2014 (**R-0092**); Letter MINSA-55RS from Omega to the Ministry of Health dated Dec. 18, 2014 (**C-0371**); Letter MINSA-55KY from Omega to the Ministry of Health dated Dec. 18, 2014 (**R-0093**).

<sup>33</sup> Letter from the Omega Consortium to the Ministry of Health dated Nov. 27, 2012 (**C-0154**).

<sup>34</sup> Addendum No. 2 to Contract No. 077 (2011) dated Feb. 21, 2013 (**C-0169**). This increased to 647 the total number of days Omega was given to complete the project.

<sup>35</sup> Addendum No. 3 to Contract No. 077 (2011) dated Aug. 13, 2013 (**C-0170**).

<sup>36</sup> Prior to the Comptroller General's endorsement, the Addendum went through a series of corrections. For example, after the Comptroller General's office reviewed the document it found there was a missing

unable to make progress on the work during the period between August 13, 2013 and January 14, 2014 because of a lack of cash flow, and requested yet another extension of time. This time, they sought to extend the completion date from December 30, 2013 to September 27, 2014 to complete the work.<sup>37</sup> The Ministry again agreed to accommodate Omega and signed an addendum for an extension of time; however it was never endorsed by the Comptroller General's office.<sup>38</sup>

#### **b. Puerto Caimito Project**

31. On January 25, 2013, Omega requested additional time and money on the Puerto Caimito Project due to delays caused by rain, a labor strike, changes to the scope of the medical plan for the facility, a change in the medical equipment to be purchased, floods in the La Chorrera district, and delays in the approval of construction plans.<sup>39</sup> Omega sought to move the completion date from January 28, 2013 to August 12, 2013 and claimed costs for extended presence on the project in an amount of [REDACTED]
32. The Ministry agreed to provide Omega the requested extension of time. On February 22, 2013, Omega and the Ministry formalized Addendum No. 2, which extended the completion date to August 12, 2013. This brought the total number of days to complete the project to 654.<sup>40</sup> The Ministry determined not to handle Omega's requests for additional costs for their extended time on the project in Addendum No. 2. The Comptroller General endorsed the addendum on July 5, 2013.<sup>41</sup> Omega continued to

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signature and there was a scrivener's error in the addendum – the letters and numbers for the added number of days were incorrect. See Memorandum No. 2568-2013-DAEF dated Oct. 4, 2013 (**R-0030**).

<sup>37</sup> Addendum No. 4 to Contract No. 077 (2011) dated May 7, 2014 (**C-0106-resubmitted**).

<sup>38</sup> Addendum No. 4 to Contract No. 077 (2011) dated May 7, 2014 (**C-0106-resubmitted**). While the addendum for an extension of time was pending, Omega and the Ministry introduced another addendum to annex a new list of medical equipment to be purchased for the Project to the contract. This was endorsed by the Comptroller General on December 26, 2014.

<sup>39</sup> Request for Extended Presence Time and Costs on Contract No. 85 (2011) from Omega to the Ministry of Health dated Jan. 25, 2013 (**C-0269**).

<sup>40</sup> Addendum No. 2 to Contract No. 85 (2011) dated Feb. 22, 2013 (**C-0268**); Request for Time and Costs Due to Extended Presence on Contract No. 085 (2011), Omega to the Ministry of Health dated July 19, 2013 (**C-0157**).

<sup>41</sup> Addendum No. 2 to Contract No. 85 (2011) dated Feb. 22, 2013 (**C-0268**).

work at normal levels during the period between when Addendum No. 2 was signed by the Ministry and when it was endorsed by the Comptroller General.<sup>42</sup>

33. In July 2013, Omega requested 140 days of additional more time to complete the Puerto Caimito Project. Again, Omega claimed the delays were caused by rain, late approval of medical equipment purchases and blueprints for the project, and the Comptroller General's delay in endorsing Addendum No. 2 (the Addendum had been endorsed, but Omega had not yet received the notification).<sup>43</sup> Omega also claimed [REDACTED] in additional compensation for costs due to delays.<sup>44</sup>
34. The Ministry agreed to the extension of time, and agreed to compensate Omega at an amount to be determined later. On August 2, 2013, Omega and the Ministry entered into Addendum No. 3, which extended the completion date to December 31, 2013.<sup>45</sup> The Comptroller General endorsed the Addendum on January 13, 2014, fourteen days after the extension period had expired. Omega did not work at full capacity during this period and did not finish the work.<sup>46</sup>
35. On April 9, 2014, Omega requested even more time, again claiming the delays in the approval of prior addenda, blueprints and medical equipment purchases and increases in the scope of their work had delayed the Project. Omega requested that the completion date be moved from May 21, 2014 to August 4, 2014.<sup>47</sup> The Ministry agreed to this

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<sup>42</sup> *Id.*; Request for Time and Costs Due to Extended Presence on Contract No. 085 (2011), Omega to the Ministry of Health dated July 19, 2013 (**C-0157**), p. 3 (lack of valid contract).

<sup>43</sup> Request for Time and Costs Due to Extended Presence on Contract No. 085 (2011), Omega to the Ministry of Health dated July 19, 2013 (**C-0157**), pp. 2-3 (stating that they had not received the endorsed addendum, however, the addendum had been endorsed on July 5, 2013 and the Ministry of Health sent Omega a copy on July 18, 2013 (**C-0268**), p. 7).

<sup>44</sup> Request for Time and Costs Due to Extended Presence on Contract No. 085 (2011), Omega to the Ministry of Health dated July 19, 2013 (**C-0157**), pp. 4-6.

<sup>45</sup> Addendum No. 3 to Contract No. 085 (2011) dated Aug. 2, 2013 (**R-0031**).

<sup>46</sup> Between August 12, 2013 and January 13, 2014, Omega only advanced the work 11.87%, indicating that they were working much less than the normal working hours. *See* CNOs 17-19 (**C-0267**), pp. 62-67.

<sup>47</sup> Letter MINSA-PC-49 from Omega to Ministry of Health dated Apr. 9, 2014 (**C-0360**)

extension of time and executed the requisite addendum; however, it was never endorsed by the Comptroller General.<sup>48</sup>

**c. Delays on the Kuna Yala Project**

36. On July 4, 2013, Omega requested a 335-day extension of time and [REDACTED] in additional costs relating to the design, construction, and adaptation of a three-phase electric line needed for the Kuna Yala Project.<sup>49</sup> Omega's request was based on the lack of electricity at the project site but construction of the electric line was not contemplated in the work included in the original Contract. At that time, the Ministry decided not to move forward with the construction of the electric line as proposed by Omega. Ultimately, the Ministry did agree to provide Omega with 518 days of additional time to complete the work, which moved the completion date from January 28, 2013 to June 30, 2014 and the Ministry and Omega entered into Addendum No. 2.<sup>50</sup> The Comptroller General endorsed the addendum on October 9, 2013.
37. On April 4, 2014, Omega submitted another request for time and costs due to its extended presence on the Kuna Yala Project. In particular, Omega requested additional time through September 28, 2014 and costs for design and construction of the three phase line, limited access to the site between November 15, 2012 and July 15, 2013, Omega's extended presence, and the contractual balance as of December 30, 2013.<sup>51</sup> The Ministry agreed to provide additional time and Omega and the Ministry entered into an addendum,

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<sup>48</sup> Addendum No. 4 to Contract No. 085-2011 dated May 7, 2014 (C-0171). While the addendum for an extension of time was pending, Omega and the Ministry introduced another addendum to annex to the contract a new list of medical equipment to be purchased for the Project. This was never endorsed by the Comptroller General.

<sup>49</sup> Letter from Omega to Ministry of Health dated July 4, 2013 (C-0359).

<sup>50</sup> Addendum No. 2 to Contract No. 083 (2011) dated July 18, 2013 (C-0263), pp. 7-8 (there is an error in the Claimants' translation of this document – it states that the time was extended through September 30, 2014 for 668 total days to complete the project instead of June 30, 2014 and 976 total days to complete the project).

<sup>51</sup> Letter MINSA-KY-72 from Omega to Ministry of health dated Apr. 4, 2014 (C-0355).

which extended the Contract until September 28, 2014, however this was never endorsed by the Comptroller General<sup>52</sup>

38. It is apparent from these examples from the three Omega MINSA CAPSI Projects, that regardless of fault for the delays on the projects, the Ministry consistently worked with Omega to ensure it had adequate time to complete the health clinics, even though negotiating and executing addenda often took a substantial amount of time.
39. As described above, on May 7, 2014, the Ministry and Omega signed addenda for all three Projects. Each gave Omega an extension of time (the Rio Sereno Project extended until September 27, 2014, the Kuna Yala Project extended until June 30, 2014, and the Puerto Caimito Project extended until August 4, 2014).<sup>53</sup> The three Addenda were sent to the Comptroller General's office on May 19, 2014.
40. At that time, former-President Martinelli and Ms. Torres – the Comptroller General under President Martinelli's administration – were still in office. President Varela was sworn in on July 1, 2014 and Ms. Torres would remain in office until December 31, 2014. Nevertheless, the Addenda remained unendorsed throughout Martinelli's and the then Comptroller General's remaining time in office.<sup>54</sup> The three Addenda sent to the Comptroller General's office on May 19, 2014 were not signed before Ms. Torres left office.

## **VI. EXECUTION OF THE PROJECTS UNDER THE VARELA ADMINISTRATION**

41. I am aware that the Claimants allege their Projects were targeted by President Varela and that circumstances changed for Omega after President Varela was sworn into office on July 1, 2014. I know of no evidence of this. The Health Ministry was not asked or

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<sup>52</sup> While the addendum for an extension of time was pending, Omega and the Ministry introduced another addendum to annex to the contract a new list of medical equipment to be purchased for the Project. This was endorsed by the Comptroller General on December 26, 2014.

<sup>53</sup> See Addendum No. 4 to Contract No. 077 (2011) dated May 7, 2014 (C-0106); Addendum No. 3 to Contract No. 083 (2011) dated May 7, 2014 (C-0107); Addendum No. 4 to Contract No. 085-2011 dated May 7, 2014 (C-0171).

<sup>54</sup> Letter MINSA-50 from the Omega Consortium to Panama's Ministry of Health dated July 29, 2014 (C-0069), p. 3.



instructed to terminate or hinder Omega's projects, which would be a completely illegal act and outside the scope of the Ministry's function. In fact, (a) any slowing in the endorsement of payments or addenda was not the result of any politically motivated vendetta against Omega, but rather the result of the administrative transition period and the unfortunate illness of the outgoing Comptroller General; (b) the Ministry remained consistent in how it treated Omega's Projects throughout both the Martinelli and Varela administrations; (c) while Omega had worked with the Ministry in the past, it would not do so anymore; and (d) delays in payments in late 2014 and early 2015 were not politically motivated and instead resulted from complications in the Ministry's budget, and the lack of valid contracts to substantiate the invoices.

**a. Delays in Endorsements of Addenda or Invoices Were Not Politically Motivated**

42. Between July 2014 and end of the year, I noticed that the amount of time the Comptroller General's office took to approve contract addenda and payment certificates increased. This was due to two factors.
43. First, it is typical that approvals slow during the transition between presidential administrations. When there is a change in the administration, the incoming administration will usually do a full audit of the ongoing projects prior to approving invoices or addenda. The outgoing Comptroller General usually slows approvals so that the incoming Comptroller General can consider the pending request as part of its audit. This is common practice in Panama and well understood by companies contracting on public works projects.
44. Second, the situation during the transition between the Martinelli and Varela administrations was also complicated by the fact that Ms. Torres, the outgoing Comptroller General, was suffering from terminal cancer during the transition period. Unfortunately, her illness affected the efficiency of the Comptroller General and her office in reviewing and responding to invoices, addenda, and other matters. (Ms. Torres, sadly, has since died).

45. Consequently, any slowing in the typical approvals was due not to any political ill will toward Omega but rather due to the burdens of changing an entire administration and Ms. Torres' illness.

**b. The Ministry Was Consistent in its Treatment of Omega's Projects**

46. As a Ministry, we did not make any changes in the way we handled Omega's MINSA CAPSI Projects after President Varela was sworn into office. As we did throughout the previous administration, we continued to work with Omega with the goal of completing the projects as smoothly and efficiently as possible and consistently negotiated with Omega for reasonable extensions of time and additional costs on the three projects.
47. In fact, on July 18, 2014, the Rio Sereno Coordinator, Mr. Ricaurte Sandoval, from the Ministry prepared and Omega accepted a technical justification report which included an evaluation of the time and costs remaining on the Rio Sereno project based on a review conducted by the Ministry's technical inspectors.<sup>55</sup> In that report, the parties agreed that an extension of an additional 244 days would be appropriate on the Rio Sereno project due to rain, delays in demolition of a cafeteria on the worksite, a labor strike, relocation of a pipeline for utilities, and revision of the medical equipment to be procured.<sup>56</sup> In addition to an extension of time, the Ministry and Omega concluded that costs of [REDACTED] [REDACTED] were owed to Omega for delays on the project.
48. Additionally, the Ministry's effort to propel Omega's Projects forward during this time is evidenced by the Ministry's letter to Omega on August 11, 2014 requesting a work plan for completion of the three Projects. Even when the Ministry received no response from Omega, we wrote again to Omega requesting an updated work schedule for the Puerto Caimito project on September 3, 2014. Our intent was to align the schedule on that

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<sup>55</sup> Minutes of Meeting between Ministry of Health and Omega Engineering, Inc. dated July 18, 2014 (C-0361), p. 1-3.

<sup>56</sup> *Id.*

project with the actual progress onsite because, even though the completion date had passed and the contract had expired, work was still being performed.<sup>57</sup>

49. In the last quarter of 2014, while Ms. Torres was still the Comptroller General, each of the addenda for Omega's MINSA CAPSI Projects expired.<sup>58</sup> Nevertheless, the Ministry continued to request scheduling information from Omega and Omega persisted in requesting extensions of time from the Ministry, so that the parties could keep progressing on the Projects. For instance, on September 11, 2014, Omega requested an additional extension of 93 days from the Ministry to complete the Puerto Caimito Project.<sup>59</sup> At that time, Omega did not have a current, valid contract because Addenda No. 4 and No. 5 were pending in the Comptroller General's office. On that same date, the Ministry requested an updated work schedule from Omega with new completion dates for the Rio Sereno and Kuna Yala Projects.<sup>60</sup> The parties worked together through all of this because they understood that this was how public works normally proceed in Panama.

**c. Omega's Approach to the Projects Shifted in Last Quarter of 2014**

50. In the last quarter of 2014, however, there was a change in how Omega approached the normal delays in the endorsements of the contract addenda and payment approvals. As discussed above, earlier in the projects Omega would respond to such delays by submitting requests for more time and prolongation costs. Omega's experience on the project up to this point – three years into the projects – should have made it clear that requests for extensions of time took time to be reviewed and approved by the Comptroller General. And, in some instances, additional information was requested by the Comptroller General before an approval would be granted.

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<sup>57</sup> Nota No. 024 DI-DIS 2014 from the Ministry of Health to Omega dated Sept. 3, 2014 (**R-0032**).

<sup>58</sup> The Rio Sereno Project expired on September 27, 2014, the Kuna Yala Project expired on September 28, 2014, and the Puerto Caimito Project expired on August 4, 2014.

<sup>59</sup> Letter No. MINSA-PC-56 from Omega to Ministry of Health dated Sept. 11, 2014 (**R-0094**).

<sup>60</sup> Nota No. 011 DI-DIS-MINSA from Ministry of Health to Omega dated Sept. 11, 2014 (**R-0033**).

51. On October 31, 2014, Omega stated that it would be reducing personnel on the projects and would do so until the contract issues were resolved, as it was in a critical position because there had been no valid contract for about eleven months on any of the Projects.<sup>61</sup>
52. In late November 2014, Omega requested an additional 184 days to complete the Kuna Yala project. It claimed that the extension was needed due to issues with access to the region and delays in the Ministry's review of medical equipment. This proposed Addendum No. 5 would have made the contract valid through March 31, 2015.<sup>62</sup>
53. However, on December 18, 2014, Omega again informed the Ministry that it would be reducing personnel and suspending purchase of products for all its MINSA CAPSI Projects, and planned to suspend work between December 20, 2014 and January 12, 2015 due to the lack of valid contracts for each of the projects.<sup>63</sup> Omega notified the Ministry that it would reevaluate the situation after the recess and requested discussions to update the completion date after the Comptroller General had endorsed the outstanding addenda and Omega received payment.
54. On January 2, 2015, the Ministry responded, requesting Omega's revised plans for completion of each activity on the Projects including financial schedules for each activity, so that the Ministry could coordinate and optimize its financial flow and both parties could comply with their contractual obligations and continue the work on the

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<sup>61</sup> Letter No. MINSA-54 from the Omega Consortium to the Ministry of Health dated Oct. 31, 2014 (**C-0173**).

<sup>62</sup> Letter MINSA-KY-83ET from Omega to the Ministry of Health dated Nov. 28, 2014 (**C-0175**).

<sup>63</sup> Omega informed the Ministry that it would be suspended work on the Puerto Caimito and Rio Sereno Projects between December 20, 2014 and January 12, 2015. Letter MINSA-55PC from Omega to the Ministry of Health dated Dec. 18, 2014 (**R-0092**); Letter MINSA-55RS from Omega to the Ministry of Health dated Dec. 18, 2014 (**C-0371**); Letter MINSA-55KY from Omega to the Ministry of Health dated Dec. 18, 2014 (**R-0093**).

Projects.<sup>64</sup> On January 16, 2015, Omega responded with a revised work schedule for the Rio Sereno Project with an extraordinary 368 days of additional time.<sup>65</sup>

55. Around the beginning of 2016, I spoke with [REDACTED], Omega's accountant, regarding additional extensions of time and to address payment issues. During this discussion, [REDACTED] mentioned that he was the only person left in Omega's offices or any of their worksites in Panama.

**d. Payment Delays in Late 2014 and Early 2015**

56. Payments on Omega's MINSA CAPSI Projects were slower than usual at the end of 2014 and beginning of 2015. This was a result of budgetary issues and delays in the endorsement of addenda needed to substantiate the invoices.
57. Under the budgetary rules of Panama, if a ministry or State institution does not spend its budget for the year in progress, it is not given that amount the next year for that particular project. Therefore, if invoices are not paid before the end of the fiscal year (which is the last day in April), then the ministry's funds are lost for that project. The Ministry was unable to make payments within the fiscal year for the amounts due to Omega, as well as many other contractors who were in the same situation. As a result, those funds were removed from the Ministry's 2015 budget. This created a back-log in the flow of payments. Nevertheless, the Ministry worked with the Ministry of Economy and Finance to remedy the situation so that it could remunerate the contractors owed for work on the MINSA CAPSI projects.
58. Even though the payments were made slower than usual, the Ministry still gave Omega the final endorsed CNOs: on March 26, 2015 for the Rio Sereno Project of [REDACTED]; on November 11, 2014 on the Kuna Yala Project for of [REDACTED]; and on May 29, 2014 on the Puerto Caimito Project for [REDACTED].<sup>66</sup>

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<sup>64</sup> Note No. 007-DI-DIS-2015 from Ministry of Health to Omega dated Jan. 2, 2015 (R-0095).

<sup>65</sup> Letter MINSA-RS-63 dated Jan. 16, 2015 (R-0096) (providing a revised schedule with a termination date of September 30, 2015 as revised from the September 27, 2014 termination date in Addendum No. 4).

<sup>66</sup> Certificates of No Objections for Contract No. 077 (2011), various dates (C-0252); Certificates of No

59. In the second quarter of 2015 after the administrative change in the Comptroller General – the Comptroller General’s office actively began reviewing the addenda and invoices for Omega’s MINSA CAPSI Projects. For example, on April 17, 2015, the Comptroller General’s office informed the Ministry that before it could endorse Addendum No. 4 to the Puerto Caimito Project, it needed a series of additional documents, including a technical data sheet to support the medical equipment purchasing list, information related to the contractor’s incorporation and certification to do business in Panama, and endorsement of the compliance bond to ensure its validity corresponded with the period of execution of the contract.<sup>67</sup> These were standard documents that were required for the Comptroller General’s review process and it was not unusual for a new Comptroller General’s office to request these documents since it was not familiar with the parties and the contracts.
60. The Comptroller General’s office also reviewed and approved a series of certificates and progress reports from Omega’s MINSA CAPSI Projects. The Ministry then issued a number of CNOs resulting in the payment of [REDACTED] as described above. However, in some cases the addenda permitting payment for several progress periods had expired and, as a result, the progress reports were returned to the Ministry. These periods were then included in subsequent addenda submitted for review and approval. In other cases, the addenda needed to be altered to reflect changes in the list of medical equipment to be purchased and installed in the project.
61. Each of the contractors on the MINSA CAPSI projects faced similar payment issues and delays in approval of project extensions. Many of their invoices also went unpaid during this time. We worked with them all, just as we worked with Omega. However, Omega permanently left the country, while all the other contractors maintained a presence on their respective projects or returned to work with the Ministry to resolve their issues.

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Objections for Contract No. 083 (2011), various dates (C-0260); Certificates of No Objections for Contract No. 085 (2011), various dates (C-0267).

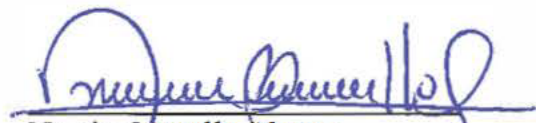
<sup>67</sup> Note No. 695-15-LEG-F.J.PREV. from the Comptroller General to the Ministry of Health dated Apr. 17, 2015 (C-0176).

That is why 14 of the projects have been completed and three are on their way to being completed.

62. In accordance with the information generated by the Comptroller General's office through their program Control of State Works (Control De Obras Del Estado (COBE)), the projects in October of 2014, Omega had completed 78.9% of the Rio Sereno Project, 50.14% of the Kuna Yala Project, 71.83% on the Puerto Caimito Project.<sup>68</sup> Since Omega left, no work has been completed on the Projects.

Dated: January 4th 2019

Panama City, Panama



Nessim Barsallo Abrego  
Sub-Director of Special Projects  
Ministry of Health

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<sup>68</sup> COBE Summary of Contract 077(2001) (R-0027); COBE Summary of Contract 083 (2011) (R-0028); COBE Summary of Contract 085 (2011) (R-0029).