

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

**OMEGA ENGINEERING LLC**

and

**OSCAR RIVERA**

*Claimants*

v.

**REPUBLIC OF PANAMA**

*Respondent*

---

**FIRST WITNESS STATEMENT OF ERIC DÍAZ**

---

**7 January 2019**

I, **ERIC DÍAZ**, 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**” or the “**Republic**”).
2. Certain of the Claimants’ claims relate to their contract for the design, construction and furnishing of two public markets in the Municipality of Panama (the “**Municipality**”), the Pacora Market and the Juan Díaz Market (the “**Markets**”), comprising open-air areas with enclosed stands where local vendors would sell their products (the “**Contract**”). The single Contract, covering both Markets, was executed by Roxana Méndez, then Mayor of Panama City, on behalf of the Municipality, and Mr. Oscar Rivera on behalf of the Omega Consortium (“**Omega**”), composed of Omega Engineering Inc., incorporated in Panama, and Omega Engineering LLC, incorporated in Puerto Rico and registered as a foreign company in Panama. On September 12, 2013, the Contract was approved by the Comptroller General.
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.
4. This statement has been prepared in English. While I understand and speak English, if I am called to testify at an evidentiary hearing in this arbitration, I anticipate I will do so in Spanish.

## **II. BACKGROUND**

5. In this section, I briefly describe my educational and professional background.
6. I received my law degree from Universidad Latina de Panamá on May 21, 2010, and a master’s degree in commercial law from the same university on April 13, 2013. Prior to joining the Municipality of Panama, I acted as a Legal Advisor on matters of public

procurement at various government institutions, namely the Social Security Fund, the Authority for Small and Medium-Sized Enterprises, and the Ministry of Education. I began working at the Municipality of Panama on August 1, 2016 as a Legal Advisor in the Public Procurement Division, and on August 13, 2018, I was promoted to Legal Advisor to the Municipality's General Secretariat, a position I continue to hold.

7. Since joining the Municipality, I have been involved in the supervision of the Contract, as well as in its termination and subsequent efforts to put various incomplete and abandoned markets up for tender so that other construction companies can complete the works. In exercising these roles, I have had to closely study the history of the Markets. To that end, I have reviewed the project files and consulted with my colleagues at the Municipality.

### **III. THE PACORA AND JUAN DÍAZ MARKETS**

8. The Pacora and Juan Díaz Markets were to be markets comprised of open-air plazas with enclosed stands where local vendors would sell their products to the people living in the towns (*corregimientos*) of Pacora and Juan Díaz, which are located within the Municipality of Panama. These markets would include vending plazas, loading docks, trash disposal areas, restrooms, refrigeration facilities, and administrative offices. Each of the Markets would comprise approximately 800 square meters.
9. Pursuant to the Contract, Omega was to design, construct, and furnish the Markets for a total price of [REDACTED]. The Contract provided that Omega would receive an advance payment of 20% of the Contract's price ([REDACTED]), after which Omega would submit invoices with its monthly progress reports for both Markets collectively, which the Municipality would pay when and if each invoice was approved by the Municipality and the Comptroller General.<sup>2</sup>

---

<sup>1</sup> Contract No. 857-2013 dated Sept. 12, 2013 (C-0056-Resubmitted), Cls. 1 & 8.

<sup>2</sup> Contract No. 857-2013 dated Sept. 12, 2013 (C-0056-Resubmitted), Cl. 8; Request for Proposals No. 2013-5-76-0-08-AV-004644 dated Mar. 2013 (R-0099), pp. 19-20, Ch. II, Cl. 11.

10. From the date of the notice to proceed, Omega would have 300 days to complete the Pacora Market and 360 days to complete the Juan Díaz Market.<sup>3</sup> The Contract was approved by the Comptroller General on September 12, 2013,<sup>4</sup> and the Municipality issued the notice to proceed on September 18, 2013.<sup>5</sup>

#### IV. OMEGA'S DESIGN FLAWS AND ENSUING DIFFICULTIES

11. Pursuant to its obligation to design the Markets, Omega was required to develop and present complete designs comprising, among other things, all of the necessary permits, certificates and technical studies.<sup>6</sup> Omega's design of each of the Markets, however, was deficient and lacked some of the necessary permits and certificates.

12. Omega's design of the Pacora Market lacked a necessary certificate of soil use from the Ministry of Housing. Without this certificate, the Municipality's Directorate of Projects and Construction was unable to fully approve Omega's design. As discussed in Section VI below, the Municipality went to great lengths to assist Omega in obtaining the soil use certificate, even though it was not contractually required to do so.<sup>7</sup>

13. The Juan Díaz Market, on the other hand, was to be designed and constructed on a site where the neighboring terrain was not owned by the Municipality. As the market's designer, Omega was required to find solutions to allow individuals to adequately access

---

<sup>3</sup> Contract No. 857-2013 dated Sept. 12, 2013 (**C-0056-Resubmitted**), Cl. 4.

<sup>4</sup> Contract No. 857-2013 dated Sept. 12, 2013 (**C-0056-Resubmitted**).

<sup>5</sup> Notice to Proceed for Contract No. 857-2013 dated Sept. 18, 2013 (**C-0153**).

<sup>6</sup> *See e.g.*, Contract No. 857-2013 dated Sept. 12, 2013 (**C-0056-Resubmitted**), Cl. 6 (“THE CONTRACTOR formally agrees to execute the services and supplies referred to herein [...]”); *Id.*, Cl. 11 (“THE CONTRACTOR fully and expressly exonerates and releases THE MUNICIPALITY regarding third parties on all civil, employment, tax or any other type of liability that may arise based on the execution of this contract”); Request for Proposals No. 2013-5-76-0-08-AV-004644 dated Mar. 2013 (**R-0099**), p. 10, Ch. II, Cl. 2 (“The Proponent to whom the present tender is awarded shall have exclusive responsibility for complying satisfactorily with the technical requirements demanded in this Request for Proposals”); *Id.*, p. 32, Ch. III, Introduction (stating that the contractor is obligated to “provide all the [...] paperwork” and to develop “complete” designs); *Id.*, p. 33, Ch. III, Cl. 1 (“The total scope of the works consists of, but is not limited exclusively to, the following points or necessary works [...]: -Preparation of the design and layout for the market building [...] -Preparation and approval of the technical studies regarding: (a) Environmental impact [...] (b) Soil [...]”).

<sup>7</sup> *See* discussion at Section VI below.

the market once it had been completed. One possible solution would have been for Omega to obtain a right of way (*servidumbre de tránsito*) from the Authority for Transit and Land Transportation. Omega, however, did not provide any solution to this issue as part of its design of the Juan Díaz Market. As with the Pacora Market, Omega's failure to provide a solution meant that the design of the Juan Díaz Market could not be approved in its entirety by the Municipality's Directorate of Projects and Construction.

14. Since Omega's designs were not capable of being fully approved, the Comptroller General's office, in turn, was unable to endorse the payment applications submitted by Omega. Thus, due to Omega's design flaws, none of Omega's payment applications on the projects were approved.

## **V. THE MUNICIPALITY'S SUSPENSION OF THE JUAN DÍAZ MARKET**

15. The current Mayor of Panama City, José Isabel Blandón, took office on July 1, 2014. Once Mr. Blandón took office, one of the first things he did was to place all of the contracts that had been awarded during the previous administration under review to ensure that they were being properly executed. This is routine practice in State institutions throughout Panama during transition periods between administrations.
16. Based on the results of this review of the projects, the Municipality decided to suspend the Juan Díaz Market. Thus, on September 2, 2014, the Municipality wrote to Omega requesting that it suspend work on the Juan Díaz Market so that the Municipality could perform a comprehensive review of that project to ensure that the terms of the Contract were being complied with.<sup>8</sup>
17. Omega duly complied with this request, informing the Municipality on September 5, 2014 that work on the Juan Díaz Market would be suspended and staff on the project would be demobilized.<sup>9</sup>

---

<sup>8</sup> Letter No. S.G.-087-A from the Municipality of Panama to the Omega Consortium dated Sept. 2, 2014 (C-0058-Resubmitted).

<sup>9</sup> Letter No. MAP-5-09-14 from the Omega Consortium to Panama's Office of the Mayor dated Sept. 5, 2014 (C-0071-Resubmitted).

**VI. THE MUNICIPALITY'S EFFORTS TO ASSIST OMEGA WITH RESPECT TO THE PACORA MARKET**

18. Once the Juan Díaz Market had been suspended, the Municipality and Omega continued working together with a view to completing the Pacora Market.
19. As noted above, Omega failed to provide a required soil use certificate from the Ministry of Housing with its design of the Pacora Market. I understand that the Claimants argue in this arbitration that the Municipality ignored Omega's requests for assistance in obtaining this certificate. That is false. In fact, even though the processing of permits and certificates was entirely Omega's responsibility,<sup>10</sup> the Municipality cooperated fully with Omega in relation to the soil use certificate.
20. At the Municipality we are mindful that the Ministry of Housing may take several months to process permits or certificates. With that in mind, the Municipality seeks to assist contractors through its Directorate of Projects and Construction by following up with the Ministry of Housing on a weekly basis in relation to all of the pending certificates and permits for all of the projects being developed by the Municipality. Omega's soil use certificate was included in said weekly follow-ups with the Ministry of Housing. As explained below, however, the Municipality's efforts to assist Omega went much further.
21. The request for the soil use certificate was filed at the Ministry of Housing in June 2014.<sup>11</sup> On July 28, 2014, the Ministry of Housing wrote to the Municipality noting that the certificate would need to be processed using a different procedure (*trámite para Esquema de Ordenamiento Territorial*) than the one originally requested.<sup>12</sup> On August 28, 2014, the Municipality replied, stating the reasons why the Ministry's proposal to use

---

<sup>10</sup> See e.g., Contract No. 857-2013 dated Sept. 12, 2013 (**C-0056-Resubmitted**), Cls. 6 & 11; Request for Proposals No. 2013-5-76-0-08-AV-004644 dated Mar. 2013 (**R-0099**), p. 10, Ch. II, Cl. 2; *Id.*, p. 32, Ch. III, Introduction; *Id.*, p. 33, Ch. III, Cl. 1.

<sup>11</sup> Letter from the Municipality of Panama to the Ministry of Housing dated June 19, 2014 (**R-0100**).

<sup>12</sup> Letter from the Ministry of Housing to the Municipality of Panama dated July 28, 2014 (**R-0101**).

a different procedure was unfounded, and insisting that the certificate be processed using the requested procedure.<sup>13</sup>

22. On September 5, 2014, Omega wrote to the Municipality requesting our assistance in the processing of the soil use certificate, which had been with the Ministry of Housing for processing since June 2014.<sup>14</sup> As explained above, by then, the Municipality was already engaged in discussions with the Ministry with a view to expediting the processing of the certificate. These efforts continued after Omega's September 5, 2014 request for assistance.
23. On October 13, 2014, the Mayor of Panama City himself intervened in the discussions between the Municipality and the Ministry of Housing, reiterating the Municipality's request that the Ministry approve the certificate.<sup>15</sup> The Ministry of Housing was still not convinced, and on October 17, 2014, it decided to convene a meeting with the residents and land-owners of the areas close to the Pacora Market site to consider and discuss the soil use certificate request. To this end, the Ministry requested that the Municipality (i) publish a notice convening the meeting in a national newspaper, and (ii) attend the meeting in order to explain and substantiate the soil use certificate request before the attendees.<sup>16</sup> The Municipality duly convened<sup>17</sup> and held the meeting, and on July 7, 2015, the Ministry of Housing issued a resolution granting the soil use certificate.<sup>18</sup> As discussed below, however, by that date Omega had already abandoned the Pacora Market and the Contract.

---

<sup>13</sup> Letter from the Municipality of Panama to the Ministry of Housing dated Aug. 28, 2014 (**R-0102**).

<sup>14</sup> Letter No. MAP-5-09-14 from the Omega Consortium to Panama's Office of the Mayor dated Sept. 5, 2014 (**C-0071-Resubmitted**).

<sup>15</sup> Letter from the Mayor of Panama City to the Ministry of Housing dated Oct. 13, 2014 (**R-0103**).

<sup>16</sup> Letter from the Ministry of Housing to the Municipality of Panama dated Oct. 17, 2014 (**R-0104**).

<sup>17</sup> Letter from the Municipality of Panama to the Ministry of Housing dated Oct. 27, 2014 (**R-0105**).

<sup>18</sup> Resolution No. 412-2015 from the Ministry of Housing dated July 7, 2015 (**R-0106**).

24. In addition to the foregoing efforts, the Municipality sought to deal with the Ministry of Housing's regular timeline by working with Omega to extend the Contract's term so that Omega would have an opportunity to complete the Pacora Market.
25. On September 15, 2014, Omega requested a 239-day extension of time ("EOT") to complete the Pacora Market. The majority of this EOT request (200 days) was due to the time it was taking to obtain the soil use certificate.<sup>19</sup> As noted above, even though the Municipality was not responsible under the Contract for any potential delays regarding the receipt of permits or certificates from other entities,<sup>20</sup> the Municipality adopted a cooperative approach and began negotiating Addendum 2 to the Contract in September 2014 to give Omega an opportunity to complete the Pacora Market.
26. After a series of negotiations in which the Municipality made its best efforts to accommodate Omega's EOT request, the Municipality and Omega reached an agreement on Addendum 2 in mid-November 2014, whereby Omega would be granted the 239-day EOT it had requested.<sup>21</sup> Once Addendum 2 had been agreed upon, it was forwarded to the Comptroller General's office for approval.
27. The Parties continued to hold discussions regarding the Pacora Market through the first few months of 2015. However, while Addendum 2 was pending approval by the Comptroller General, and despite the Municipality's efforts to allow Omega to see the Pacora Market through to completion, in April 2015 Omega simply disappeared, abandoning the Markets and the Contract.
28. Omega made an insufficient and unacceptable amount of progress on the projects. On the Juan Díaz Market, Omega only reached approximately 54% progress by the date the market was suspended (September 2, 2014), even though it was to have been completed by September 15, 2014. On the Pacora Market, Omega only attained 73% progress by

---

<sup>19</sup> Letter No. MUPA-5-09-14 from the Omega Consortium to City Hall dated Sept. 15, 2014 (**C-0235**).

<sup>20</sup> See e.g., Contract No. 857-2013 dated Sept. 12, 2013 (**C-0056-Resubmitted**), Cls. 6 & 11; Request for Proposals No. 2013-5-76-0-08-AV-004644 dated Mar. 2013 (**R-0099**), p. 10, Ch. II, Cl. 2; *Id.*, p. 32, Ch. III, Introduction; *Id.*, p. 33, Ch. III, Cl. 1.

<sup>21</sup> Email chain between the Municipality of Panama and Omega dated Nov. 27, 2014 (**R-0061**).

August 31, 2014, although this project was originally due to be completed by July 17, 2014.<sup>22</sup>

## **VII. THE MUNICIPALITY'S TERMINATION OF THE CONTRACT**

29. I understand that the Claimants suggest that the Municipality terminated the Contract in retaliation for the Claimants' initiation of arbitration proceedings against the Republic, given that (i) the Municipality informed Omega of its intention to terminate the Contract not long after the Claimants notified the Republic of their intention to initiate this arbitration, and (ii) the Municipality terminated the Contract not long after the Claimants initiated the arbitration proceedings.<sup>23</sup> Having been directly involved in the Contract's termination, I can say that the termination was not motivated by the Claimants' arbitration against the Republic. I was never asked to take any retaliatory or adverse measures against Omega, and I am not aware of anyone at the Municipality being asked the same.
30. Once Omega had abandoned the projects, they remained at a standstill for several months. In early 2016, however, the Mayor of Panama City decided that the Municipality should close out any pending issues regarding the markets initiated under the previous administration that remained unfinished and abandoned, so that they could be re-tendered and completed. Omega's projects were not the only ones that fell under this category – two other markets, the Chilibre Market and the Pueblo Nuevo Market, which were begun by the Spanish construction company Oligarry, were also abandoned. To this end, the Municipality informed Omega of its intention to terminate the Contract by a letter dated August 19, 2016.<sup>24</sup>
31. During the first few days of 2017, the Mayor turned his attention once again to the abandoned markets and the need to terminate their contracts so that they could be re-

---

<sup>22</sup> See Resolution No. C-10-2017 dated Jan. 11, 2017 (C-0234), p. 3.

<sup>23</sup> See Claimants' Memorial, ¶¶ 73, 81-82.

<sup>24</sup> Letter from City Hall for the District of Panama to the Omega Consortium dated Aug. 19, 2016 (C-0237).

tendered and completed. Thus, on January 11, 2017 the Mayor signed the resolution terminating Omega's Contract, which I had drafted.<sup>25</sup>

32. The foregoing course of events is not out of the ordinary – the Municipality often terminates contracts in thematic groups, and the period of time between the notification of intention to terminate and the termination itself varies, although it frequently extends several months.

---

<sup>25</sup> See Resolution No. C-10-2017 dated Jan. 11, 2017 (**C-0234**).

Dated: 4 Jan. 2019

Panama City, Panama

A handwritten signature in black ink, appearing to read "Eric Díaz", written over a horizontal line.

Eric Díaz  
Legal Advisor to the General Secretariat  
Municipality of Panama City