

ICSID CASE NO. ARB/16/42

OMEGA ENGINEERING LLC

and

OSCAR RIVERA

Claimants

v.

REPUBLIC OF PANAMA

Respondent

FIRST WITNESS STATEMENT OF CARMEN CHEN

7 January 2019

I, **CARMEN CHEN**, 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 to design and construct an education facility for cultural and artistic disciplines in Curundú, Panama (the “**Ciudad de las Artes Project**” or “**Project**”).¹ The Contract was awarded on May 11, 2012 to 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.
3. I understand that the Claimants accuse the National Institute of Culture of Panama (“**INAC**”) of unlawfully terminating the Contract and of not properly notifying them of the termination. In this statement, I respond to those accusations and I address the notification of the termination of the Ciudad de las Artes Contract under Panamanian law.
4. 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.
5. This statement was prepared in Spanish and English. If I am called to testify at an evidentiary hearing in this arbitration, I will testify in Spanish.

¹ The contract for works on the project is referred to herein as the “**Ciudad de las Artes Contract**” or “**Contract**.”

II. BACKGROUND

6. In this section, I briefly describe my educational and professional background.
7. I received my law degree from the University of Panama on December 22, 1995. I began working at INAC on July 4, 1997 as a legal advisor, and I continue to hold that position today.
8. At INAC, I have taken part in multiple legal aspects relating to the Project, and I have studied documentation relating to the termination of the Contract and the negotiations with ASSA Compañía de Seguros, S.A. (“ASSA”), Omega’s Panamanian insurance company, for the resumption of works on the Project pursuant to Omega’s completion bond and ASSA’s decision to replace Omega as the contractor on the Project.

III. THE CIUDAD DE LAS ARTES PROJECT

9. The Ciudad de las Artes Contract is a turnkey contract pursuant to which Omega was to design and construct a large-scale education facility for cultural and artistic disciplines in Panama City – the City of Arts. The City of Arts will be a cutting-edge facility equipped with the latest technological advances that will include separate buildings housing theater, plastic arts, music, and dance schools, as well as a museum, a theatre, and a multi-purpose auditorium. The City of Arts will replace five existing art schools currently managed by INAC which serve approximately 5,000 students. The current facilities are in need of replacement and upgrade, and are not sufficient to promote artistic and cultural education in Panama. As a result, the City of Arts is a significant step forward in the country’s promotion of the arts and, therefore, is of critical importance to the country.
10. The Ciudad de las Artes Project is the largest construction project ever undertaken by INAC. Before 2012, INAC’s construction projects were minor and of very limited technical complexity – in fact, the price of INAC’s projects tended to be below US\$ 1 million. Since 2012, however, INAC has begun to undertake larger projects, among which the Ciudad de las Artes Project is the largest and most costly. Other medium-scale projects put up for tender by INAC in recent years include the restoration of the National

Theatre of Panama and the renovation of Panama City's Metropolitan Cathedral, each of which will cost approximately US\$ 10 to 12 million.

11. The Project was put up for tender by INAC in January 2012, and it was awarded to Omega on May 11, 2012. On July 6, 2012, the Contract was executed by María Eugenia Herrera, then Director of INAC, on behalf of INAC, and Mr. Oscar Rivera on behalf of Omega. The Contract was endorsed by Panama's Comptroller General on September 19, 2012.
12. According to the Contract, Omega was to finance the Project in its entirety and would have 645 days from the date of the notice to proceed to deliver the Project.² The total price was set at [REDACTED] including value-added tax (or ITBMS).³ As required by the Contract and Panamanian law, Omega provided a performance guarantee for its works. This guarantee was in the amount of [REDACTED], and was underwritten by ASSA.⁴

IV. INAC'S TERMINATION OF THE CONTRACT

13. As reported by the Project's inspector, Omega abandoned the Project on November 21, 2014.⁵ As a result, INAC terminated the Contract by Resolution No. 391-14 DG/DAJ of December 23, 2014 (the "**Termination Resolution**").⁶ As stated in the Termination Resolution, the Contract was terminated due to Omega's default on its contractual obligations.⁷ On December 26, 2014, INAC informed ASSA of the Contract's

² Contract No. 093-12 dated July 6, 2012 (C-0042), Cls. 5 & 10.

³ Contract No. 093-12 dated July 6, 2012 (C-0042), Cl. 35.

⁴ Completion Bond No. 85B64510, executed between ASSA and Omega for the Ciudad de las Artes Project dated June 26, 2012 (R-0034).

⁵ See Resolution No. 391-14 DG-DAJ dated Dec. 23, 2014 (C-0044), p. 4.

⁶ Resolution No. 391-14 DG-DAJ dated Dec. 23, 2014 (C-0044).

⁷ See Resolution No. 391-14 DG-DAJ dated Dec. 23, 2014 (C-0044). INAC based its decision on the following grounds for termination established in Clause 45 of the Contract: 45(1) (non-compliance with the Project's schedule and any other condition set forth in the Contract or the Request for Proposals); 45(3) (the contractor's failure to carry out the Contract with the necessary diligence to guarantee its satisfactory completion within the specified timeframe); 45(5) (abandonment or suspension of the works without INAC's authorization); 45(6) (refusal to comply with indications and instructions provided by INAC or the

termination,⁸ and on February 12, 2015, INAC officially informed ASSA that it had decided to call Omega's completion bond.⁹

14. I understand that the Claimants argue that President Varela's administration took a series of adverse measures against Omega with the intention of harming its business. According to the Claimants, one of said adverse measures was the termination of the Contract. I never received any instructions to harm Omega in any way, and I am not aware of anyone at INAC having received instructions of that kind.
15. Omega was notified of the Termination Resolution in accordance with Panama's general administrative procedure, established in Law 38 of 2000.
16. Title VII of Law 38 of 2000 governs the notification of administrative resolutions issued by public entities. According to Articles 89 and 90, as a general rule, administrative resolutions from public entities shall be notified to the relevant individuals by edict.¹⁰ On the other hand, Articles 91 to 94 govern personal notifications, providing that a party who is to be notified in person shall be notified by edict if that party cannot be reached in its offices.¹¹
17. As established in Edict No. 001 dated January 27, 2015, INAC attempted to personally notify Omega of the Termination Resolution. Given that INAC was not able to locate Omega's representatives, INAC proceeded to notify Omega of the Termination Resolution by Edict No. 001 dated January 27, 2015.¹²

inspector); and 45(7) (not having enough personnel required to perform the works in a satisfactory manner within the specified timeframe). *See* Contract No. 093-12 dated July 6, 2012 (**C-0042**), Cl. 45.

⁸ Letter No. 364-14/D.A.J. from National Institute of Culture to ASSA dated Dec. 26, 2014 (**C-0379**).

⁹ Letter No. 056/D.A.J. from INAC to ASSA dated Feb. 12, 2015 (**R-0097**).

¹⁰ Law 38 of 2000 (**R-0053**), Arts. 89-90.

¹¹ Law 38 of 2000 (**R-0053**), Art. 94.

¹² Edict No. 001 of the National Institute of Culture dated Jan. 27, 2015 (**C-0243**).

18. At the request of Omega's legal counsel, on March 25, 2015 INAC issued a certification that the Termination Resolution was duly executed.¹³ The following day, Omega's legal counsel filed an application for administrative review (*recurso de revisión administrativa*) under the aforementioned general administrative procedure, requesting INAC's Board of Directors to declare the Termination Resolution null.¹⁴ That application was denied by INAC's Board of Directors on July 19, 2016 by Resolution No. 025-16 J.D.¹⁵ By a document dated August 12, 2016, which was received by INAC on August 23, 2016, Omega's legal counsel acknowledged in writing that it was notified of Resolution No. 025-16 J.D dated July 19, 2016.¹⁶
19. Omega had five days from the date it was notified of the denial of its application for administrative review to challenge the Termination Resolution before Panama's Administrative Tribunal for Public Procurement (i.e. to file a *recurso de apelación*).¹⁷ Omega did not exercise its procedural right to file this challenge and, therefore, the Termination Resolution became final.¹⁸
20. On March 4, 2015, ASSA acknowledged the Contract's termination and INAC's decision to claim the completion bond, and officially informed INAC that it had decided to exercise its option under the bond to replace Omega under the Contract and to assume Omega's obligations to complete the Project.¹⁹

¹³ See INAC certification requested by IGRA dated Mar. 25, 2015 (**R-0054**).

¹⁴ See Omega's Application for Administrative Review dated Mar. 26, 2015 (**R-0055**).

¹⁵ See Resolution No. 025-16 J.D. dated July 19, 2016 (**R-0056**).

¹⁶ See IGRA notification of Resolution No. 025-16 J.D, dated Aug. 12, 2016 (**R-0098**).

¹⁷ See Law 22 of 2006 (**R-0026**), Art. 131.

¹⁸ See Law 38 of 2000 (**R-0053**), Art. 46.

¹⁹ Letter from ASSA to INAC dated Mar. 4, 2015 (**R-0057**).

21. On August 31, 2018, ASSA and INAC executed (i) an agreement by which ASSA officially replaced Omega under the Contract,²⁰ and (ii) Addendum 2, by which they amended certain clauses of the Contract.²¹
22. ASSA has since entered into a subcontract with a construction company to continue the works. On October 8, 2018, INAC issued a notice for the continuation of the works, and work on the Project has now resumed, under the control of ASSA and without participation by Omega.

²⁰ Agreement between INAC and ASSA to replace the contractor dated Aug. 31, 2018 (**R-0058**).

²¹ Addendum No. 2 to the Ciudad de las Artes Contract dated Aug. 31, 2018 (**R-0059**).

Dated:

Panama City, Panama

Carmen Chen
Lawyer
National Institute of Culture