



December 2, 2014

DCN: IAE-UPC-2342

Mr. Giuseppe Quarta  
Grupo Unidos por el Canal, S.A.  
Building 22B, Brujas Road  
Cocoli, Republic of Panama

Reference: Contract No. CMC-221427, Design and Construction of the Third Set of Locks,  
Panama Canal

Subject: Numbering of Variations

Dear Mr. Quarta:

The Employer refers to a number of determinations, as listed below, which have resulted in changes to the Contract Price. For administrative purposes, the Employer has assigned variation numbers to each determination as shown in the table below. This is not intended to have any defining, modifying or other effect on the contents of the letters referred to.

ITEM	REFERENCE	DATE	VO NUMBER
Range Tower No. 2	IAE-UPC-1201	13-Aug-2012	122
Claim No. 10 Fiscal Law 8	IAE-UPC-1202	13-Aug-2012	123
On-Site Testing	IAE-UPC-1203	13-Aug-2012	124
Transition Walls	IAE-UPC-2119	25-Jun-2014	125
Gate Drive Mechanism	IAE-UPC-2122	25-Jun-2014	126
Claim No. 66 Increase in Wages	IAE-UPC-2127	2-Jul-2014	127
VDS Semaphores	IAE-UPC-2156	24-Jul-2014	128
Claim No. 96 - Labor Strike	IAE-UPC-2192	6-Aug-2014	129
Maintenance Closure System	IAE-UPC-2199	8-Aug-2014	130
Fingerprint Readers	IAE-UPC-2217	26-Aug-2014	131

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The Employer attaches a variation form in respect of each of the items above. The Contractor's Representative's signature is not required.

Sincerely yours,



Jorge de la Guardia

Employer's Representative

Locks Project Management Division





August 13, 2012

DCN: IAE-UPC-1203

Mr. Bernardo Gonzalez  
Grupo Unidos por el Canal, S.A.  
Building 22B, Brujas Road  
Cocoli, Republic of Panama

Reference: Contract No. CMC-221427, Design and Construction of the Third Set of Locks,  
Panama Canal

Subject: On-Site Testing Laboratories - Adjustment of the Contract Price – Employer  
Representative's Determination

Dear Mr. Gonzalez:

The Employer refers to letter GUPC-IAE-1308, dated June 26, 2012, in which GUPC responds to the Employer's letter IAE-UPC-1046 of April 13, 2012. Both letters deal with an adjustment of the Contract Price concerning the independent operation of the On-Site Testing Laboratories, which the DAB decided had been instructed by the Employer.

Under the Items listed below the Employer provides a comprehensive response which reflects the final position of the Employer on the matter.

### **A. Scope of the Instruction Issued by the Employer**

The **Contractor** complains that the Employer has not identified correctly the true scope of the Variation which the DAB decided had been instructed, and which required that the Independent Testing Organization (ITO) to operate (manage and staff) the On-Site Laboratories be a Sub-Contractor to GUPC.

The **Employer** considers that the DAB phrased its Decision in clear and plain English and that no special interpretation is necessary.

The Employer notes that the Contractor's argumentation about the scope of the testing work and its differential cost to be covered under the Variation concerns essentially:

- The cost of testing that GUPC decided to entrust to Fall Line which is above and beyond that covered under Paragraph 1.10 J [Quality Control and Verification of the

Works/Laboratory Testing] of Section 01 40 00 [Quality Requirements] of the Employer's Requirements.

The Sub-Contract awarded to Fall Line by GUPC and/or the actual scope of work currently being carried out by Fall Line includes, in addition to the above noted Paragraph 1.10 J testing, testing required to develop designs for the Project as well as testing that GUPC uses to monitor the calibration of its equipment. The Employer maintains that the differential cost that GUPC should recover according to the DAB's Decision should be limited to that related solely to the testing covered under Paragraph 1.10 J.

- The differential cost, if any, between the provision of motor vehicles by Fall Line rather than directly by GUPC.

The Employer addresses the two above items as follows:

### **1. Testing Required to be Carried Out by an ITO**

The Employer considers that there can be no question that Paragraph 1.10 J of Section 01 40 00 of the Employer's Requirements pertains solely to the testing of Materials and Plant necessary *to demonstrate compliance with applicable standards and the Contract.*

The Employer has never issued any instruction imposing on GUPC any requirement to engage Fall Line, or any other sub-contractor, to carry out other testing that GUPC and/or its Designer might require to carry out the Works.

The Employer is confident that, in rendering its Decision, the DAB fully understood that the sub-contracted ITO was required solely to manage and staff the On-Site Testing required to demonstrate compliance with applicable standards and the Contract.

Therefore, the Employer is not prepared to modify its position. The Contractor has not made a submission to establish the percentage of Fall Line's work that represents testing to demonstrate compliance with applicable standards and the Contract. Accordingly, the Employer is prepared to recognize that 54 % of the value of Fall Line's overall services reflects the cost of the aforesaid compliance (control and acceptance) testing.

### **2. Vehicles Provided by Fall Line**

The Employer considers that the issue of the vehicles is no issue at all, because GUPC is fully responsible for the reasonableness of any costs that it intends to pass on to the Employer. Accordingly, whether GUPC underestimated the cost of vehicles in its Tender or decided to award a sub-contract which included excessive compensation for vehicles is not an issue for the Employer's consideration.

## **B. Additional Costs Within Fall Line's Sub-Contract Amount**

The Employer is not prepared to entertain GUPC's arguments that it awarded a Sub-Contract for \$ 16,528,251.41, exclusive of tax, for a service that GUPC contends it could have provided for \$ 4,253,205.12.

The Employer understands that the Contractor has contended that it solicited the On-Site Testing Laboratory services competitively. However, the Employer considers that it should be abundantly obvious from the difference between the above noted amounts that:

- GUPC grossly underestimated the On-Site Testing cost in its Tender, or
- GUPC awarded the Sub-Contract irresponsibly and with lack of proper due diligence, or
- a combination of both of the above occurred.

It makes very little or no difference at all whether GUPC underestimated the cost of the testing or, by failing to carry out proper due diligence, negligently awarded a sub-contract for an excessive amount. In either case, GUPC has sole and complete responsibility for the outcome, and, therefore, should absorb any excess cost emanating from the above noted failures.

Accordingly, the Employer will recognize that the requirement for sub-contracting the compliance testing would or might involve some additional cost allowed for within the amount of the Sub-Contract as follows:

### **1. Technical Staff**

The Employer has considered the possibility that the requirement for the On-Site Testing Laboratories to operate independently from GUPC's other functions, regardless of whether or not sub-contracted, could have the potential to increase GUPC's reasonable overall costs.

Such reasonable costs would include the management staffing embedded in the On-Site Laboratories. Reasonable costs could also include other GUPC QC/QA staff that might have been eligible to provide technical direction and supervision from outside the On-Site Laboratory Team had a self-contained ITO not been required.

Based on the above, the Employer has concluded as follows:

- a. Because GUPC is only entitled to pass on to the Employer's account the differential costs that are reasonably incurred, the management and staffing engaged by Fall Line for compliance testing must be the minimum actually required to get the job done, unless **b** below applies.

- b. If the need for an ITO would necessarily require the engagement by Fall Line of technical management staff that cannot be fully utilized in the Testing Laboratories, there could have been a potential for savings by providing direction and/or supervision of the On-Site Laboratory by persons also engaged in other GUPC QC/QA functions.

The Employer points out in respect to **b** above that:

- The Contractor has not made a case that Fall Line has been obliged to, and has in fact, engaged technical management staff which are not fully utilized.
- The requirement for a self-contained On-Site Testing Laboratory, free from outside technical interference very obviously stems from the basic requirement for an ITO and not from the requirement to sub-contract the services.
- Unlike the Employer, GUPC perhaps believes that the DAB's Decision was that the requirement for a self-contained ITO, rather than solely the requirement for sub-contracting, constituted a Variation. Such uncertainty could have arisen from the fact that GUPC by-passed some of the provisions of Sub-Clause 20.1 [Contractor's Claims] of the Conditions of Contract, and decided to make its submission to the DAB essentially concerning the proper interpretation to be given to the words "independent" and "established".

On the above basis and considering the Contractor's submissions, the Employer is unable to determine any justification for additional compensation on account of Fall Line's complement of technical management staff and labor.

## **2. Health and Safety Management**

The Employer has also considered whether requirements for either sub-contracting the services or merely for a self-contained ITO have potential to impact GUPC's overall cost of providing the required Health and Safety Management.

Sections 01 35 23 [Health and Safety Requirements] and 01 35 29 [Health and Safety Management/Emergency Response Procedures] of the Employer's Requirements stipulate that the Contractor is responsible for the Health and Safety Management of its entire team inclusive of sub-contractors and without any special measures required for sub-contractors.

The Contractor's own Health and Safety Management System Manual requires in Section 17.0 that GUPC manage this aspect of its sub-contractors' conduct, and merely requires each sub-contractor to *identify the responsible person for all Health and Safety matters*. The aforesaid requirement can hardly be taken to imply a requirement that any sub-contractor should appoint a person to be 100% dedicated to Health and Safety Matters.

The Employer has never instructed GUPC to require Fall Line to provide its own separate Health and Safety Management, nor did the DAB Decision indicate that such a requirement had been imposed on GUPC or Fall Line.

Finally, and without any admission that the Contractor's submission of a draft sub-contract between GUPC and Fall Line attached any liability to the Employer, which is denied, it is noted that the Organization Chart for the On-Site Laboratories agreed between GUPC and Fall Line makes no provision for a dedicated Health and Safety Resource.

On the above basis, the Employer does not recognize any additional cost concerning Health and Safety Management obligations.

### **3. Accounting and Payroll**

The Employer recognises that the requirement for the Contractor to sub-contract the management and staffing of the On-Site testing Laboratories introduced a requirement for Fall Line to maintain separate accounting and payroll functions.

The Contractor has not submitted documentation to establish the cost of Fall Line's accounting and payroll functions. Accordingly, the Employer is prepared to recognize a total additional cost of \$ 157,950 for this component.

### **C. GUPC's Additional Overhead and Indirect Costs**

The Employer points out the following concerning additional Overhead and Indirect Costs reasonably incurred by the Contractor:

1. If the Contractor had provided its own management and staffing of the On-Site Laboratories, the Contractor would have incurred an Overhead and Indirect cost, presumably at the rate applicable to obligations that do not involve the conduct of physical construction work by GUPC.
2. It has to be assumed that when the above services were sub-contracted to Fall Line, the cost of most of the Overhead and Indirect obligations were absorbed within Fall Line's Overhead and Indirect Cost Rate and, therefore, became part of Fall Line's Contract Price. Since GUPC has not established otherwise, the addition of C.2 and the savings of C.1 are considered to balance each other out.
3. Because the Employer requires the On-Site Testing to be carried out by an ITO, technical administration or interference by GUPC is expressly precluded and so there should be no associated additional cost to be recognized.
4. The Employer recognizes that the Contractor incurred costs in soliciting for and awarding the sub-contracted services and is incurring costs in administering the sub-contract, including verification of Fall Line's invoices and making payments for Fall Line's Services.

The Contractor has not submitted documentation to establish the costs incurred for the above noted administrative obligations. Accordingly, the Employer is prepared to recognize an administrative cost of \$ 401,193 for the soliciting of proposals and award and administration of the Sub-Contract.

#### **D. Additional Cost of ITBMS**

The Employer reiterates its willingness to recognize as an additional cost the ITBMS at the rate of 5% on 54% of each payment made by GUPC to Fall Line in accordance with the Sub-Contract between GUPC and Fall Line.

The Employer notes that the current rate of ITBMS is 7% but that GUPC is already being reimbursed separately on a monthly basis for the 2% differential between 7% and 5% for its total ITBMS obligations including 2% of the assumed 46% of payments to Fall Line for services other than the required compliance testing.

#### **E. Additional Profit**

The Employer reiterates that it is prepared to recognize that GUPC is entitled to receive 5% profit on the sum of the additional costs recognized under Paragraphs A to C above.

#### **F. Conclusions**

As indicated above, the Employer will recognize and compensate the Contractor for the following additional costs:

Item Reference	Description	Rate	Total Amount for the Service
B.3	Costs within Fall Line's Contract Price - Payroll and Accounting functions	N/A	\$ 157,950
C.4	GUPC's Sub-Contract award and administration cost	N/A	\$ 401,193
D	ITBMS	5% of 54% of each payment made to Fall Line	\$ 446,263
E-1	GUPC's Profit on Fall Line Costs pertaining to Compliance Testing	5% of Items B.3 and C.4 above	\$ 27,957
		Total Adjustment	\$ 1,033,363

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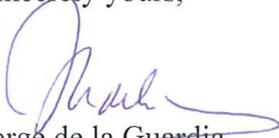
August 13, 2012

The Employer's Representative hereby determines, under the provisions of Sub-Clause 3.5 [Determinations] of the Conditions of Contract, that the Contractor is entitled to be paid the sum of \$ 1,033,363 arising from the DAB's Decision on Referral No. 1.

For the avoidance of any doubt, and as GUPC is aware, the Employer does not agree with the DAB's Decision and has issued a Notice of Dissatisfaction to that effect. Therefore, any sums paid to GUPC in respect of services which the Employer maintains were, despite the DAB's Decision, always required by the Contract, are paid without prejudice to the Notice of Dissatisfaction and the Employer's rights to reclaim such sums in due course in arbitration or otherwise, remain fully reserved.

Accordingly, the Contract Price will be adjusted, and the sum of \$ 1,033,363 will be paid through the Interim Payment Certificates. The amount payable each month will be determined pro-rata to the total that GUPC has paid to Fall Line for the services over the \$ 16,528,251.40 subcontract amount before taxes.

Sincerely yours,



Jorge de la Guardia  
Employer's Representative  
Locks Project Management Division

c.

Joe Cazares/IAE

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José Pascal/IAE