

PANAMA CANAL AUTHORITY	VARIATION	PAGE 1 OF 5
1. REQUEST FOR PROPOSAL No.: RFP-76161	2. CONTRACT No.: CMC-221427	3. DATE: August 8, 2012
		4. VARIATION No.: 043

5. ISSUED BY:

PANAMA CANAL AUTHORITY
Employer's Representative
Locks Project Management Division
Building 740, Corozal
Panama, Republic of Panama

6. NAME AND ADDRESS OF CONTRACTOR (INCLUDE PHYSICAL & POSTAL ADDRESS) Grupo Unidos por el Canal, S.A. Building 22B, Brujas Road Cocoli, Republic of Panama	7. CONTRACTOR'S TELEPHONE NUMBER: 507-316-9900
	8. CONTRACTOR'S FACSIMILE NUMBER:

9. VARIATION:

- ☒ The contract referred to in item No. 2 is hereby varied as set forth in item 10, entitled "DESCRIPTION OF VARIATION".
☒ YES. ☐ NO. The contractor shall send a copy, duly signed, of this Variation to the Employer's Representative/Contracting Officer.

	9 A. THIS VARIATION IS EXECUTED ON THE BASIS OF: <i>(Specify the legal authority)</i> . THE VARIATION DESCRIBED IN ITEM 10 IS HEREBY INCORPORATED AND MADE A PART OF THE CONTRACT.
	9 B. THE CONTRACT REFERRED TO IN ITEM NO. 2, IS VARIED TO INCORPORATE ADMINISTRATIVE CHANGES (such as the paying office, account numbers, etc.).
X	9 C. THIS BILATERAL AGREEMENT IS SIGNED AND INCORPORATED INTO THE CONTRACT REFERRED TO IN ITEM NO. 2 OF THIS FORM, ON THE BASIS OF: <i>(Specify the legal authority)</i> Volume III, Conditions of Contract, Sub-Clause 1.16 [Entire Agreement]
	9 D. OTHER. <i>(Specify manner and the legal authority)</i> .
	9 E. ACCOUNT NUMBER <i>(If required)</i> :

10. DESCRIPTION OF THE VARIATION *(List in accordance with the order of the Contract. If additional space is required, use blank sheets).*

See attached

Except for the variation(s) herein specified, all other terms and conditions of the Contract remain unchanged.

11. NAME AND TITLE OF THE PERSON AUTHORIZED TO SIGN <i>(Type or print)</i> Bernardo Gonzalez Contractor's Representative	12. NAME AND TITLE OF THE EMPLOYER'S REPRESENTATIVE/CONTRACTING OFFICER <i>(Type or print)</i> Jorge de la Guardia, Employer's Representative
13. CONTRACTOR  <i>(Authorized signature)</i>	14. DATE: 8/08/2012
	15. PANAMA CANAL AUTHORITY  <i>(Employer's Representative/Contracting Officer's signature)</i>
	16. DATE: 8/VIII/2012

This Variation Agreement Number 043, is dated as of the 8th day of August 2012 and made

Between: Autoridad del Canal de Panama, Building 740, Corozal Panama, Republic of Panama (hereinafter called the "**Employer**") on the one part,

and

Grupo Unidos por el Canal, S.A., Building 22B, Brujas Road, Cocoli, Republic of Panama, a corporation organized under the laws of the Republic of Panama, registered under microjacket number 682266, document number 1683284 of the Mercantile Section of the Public Registry Office of the Republic of Panama (hereinafter called the "**Contractor**" and together with Employer, the "**Parties**") on the other part.

Whereas:

- (a) The Employer and the Contractor are party to Contract CMC-221427 for the Design and Construction of the Third Set of Locks, dated August 11, 2009 (as the same has or may be varied, amended, modified or supplemented, the "**Contract**");
- (b) For the purposes of interim payments in Sub-Clause 14.3.3 (a) in relation to the estimated contract value of the Works executed under the Contract, and in accordance with Paragraph 1.09 R.2 of Section 01 31 00 [*Project Management and Co-ordination*] of the Employer's Requirements, the Contractor is paid by reference to its progress measured against the Current Programme;
- (c) The Contractor included, as stated in the Schedule of Project Elements and Prices at Item 2.3.1.8 (\$165,255,196) for the Atlantic Locks and in Item 2.3.2.8 (\$221,273,424) for the Pacific Locks, a total sum of \$386,528,620 in respect of reinforcing steel as part of the lump sum Contract Price (the "**Reinforcing Steel Price**"). However, in the Accepted Baseline Programme (and hence Current Programme) the Contractor included no separate activities for reinforcing steel which for payment and progress purposes were included within the structural concrete activities, meaning that the Contractor is only entitled to 100% payment in respect of reinforcing steel as and when it is incorporated into the Permanent Works (structural concrete);
- (d) Notwithstanding the contractual position as generally described in Recitals (b) and (c), the Employer has, since April 2011 until May 2012 according to Letter IAE-UPC-0995 of March 2, 2012, and at the request of the Contractor, assessed the Contractor's interim applications for payment in respect of reinforcing steel on the basis that the Contractor would be paid 40% of the sums due on an interim basis for reinforcing steel on arrival at Site upon verification by the Employer's Representative and 60% according to progress of the Works as the reinforcing steel was incorporated into the Permanent Works (structural concrete), although such arrangement has not been the subject of any formal Variation;



- (e) By letter dated June 19, 2012 (Reference GUPC-IAE-1284), the Contractor informed the Employer of very serious financial problems which it contends that it is facing as a consequence of the global financial and liquidity crisis and therein requested financial assistance from the Employer, including that the Employer advance sums to the Contractor earlier than would otherwise have become due under the Contract in respect of certain supplies when received on Site;
- (f) Further, the Contractor then requested through Request for Variation No. 0127 (RFV 127), dated July 6, 2012, a revised payment profile in respect of progress payments for reinforcing steel intended for incorporation in the Permanent Works based generally upon a 50% payment on delivery to Site and 50% upon installation (i.e. modifying, in favour of the Contractor, the informal arrangement described in Recital (d));
- (g) In reliance on the Contractor's representations and assertions regarding its financial condition and cash flow difficulties, which the Parties agree that the Employer is not able to independently verify, the Employer considers that unless it grants the Contractor's request for the revised arrangement for payment in respect of reinforcing steel, (in conjunction with various other measures such as but not limited to Variation Agreement No. 042) there could be serious risk to the completion of the Project and therefore the Employer's agreement to the terms hereof is in the best interests of the Project;
- (h) Accordingly, the Employer has responded through letters IAE-GUPC-1146 and 1155 indicating to the Contractor that the Employer was willing to consider such a revised arrangement for payment in respect of reinforcing steel, and in Interim Payment Certificate No. 31 the Employer has certified sums on this revised 50:50 basis for reinforcement steel, including with retrospective effect, but subject to the Parties agreeing a formal Variation to reflect such revised arrangements;
- (i) Therefore, subject to the terms of this Variation Agreement No. 043, and based upon the representations and statements made by the Contractor concerning its financial position and ability to obtain funding, in order to assist the cash flow of the Contractor and for no other reason, the Parties have agreed to a variation to the Contract as hereinafter stated, but not further or otherwise.
- (j) It is agreed in making this variation to the requirements of the Contract that this Variation Agreement No. 043 is approved and dated in writing by the authorized representatives of the Contractor and the Employer and in doing so the Parties acknowledge and identify that this is done in accordance with Sub-Clause 1.16 (*Entire Agreement*) of the Contract.

THE EMPLOYER AND THE CONTRACTOR HEREBY AGREE AS FOLLOWS:

1. In this Variation Agreement No. 043, words and expressions shall have the same meanings as are respectively assigned to them in the Contract, save as



amended below or as expressly stated.

2. Notwithstanding and without prejudice to the merits of any claims that either may have against the other relating to the Contract (as to which both Parties' positions are fully reserved) the Contractor acknowledges and agrees that the Employer is not responsible for the Contractor's financial position and its need to request financial assistance. The Contractor agrees and acknowledges that it shall not make any claims against the Employer arising out of or in connection with this Variation No. 043 or in any way argue or use the fact or the terms of this Variation Agreement No. 043 in a prejudicial way against the Employer or in support of any claims or future actions. The Contractor further agrees and acknowledges that the Employer's agreement to this Variation Agreement No. 043 and the accommodation to the Contractor provided herein is not and shall not be deemed to be an agreement to grant or otherwise provide any similar or other financial accommodation as may be requested by the Contractor on or before the date hereof or in the future.
3. The Contractor shall have no claims for additional time or money or any other relief or entitlement of any kind as a consequence of this Variation Agreement No. 043 or arising out of it or in any way in connection with it.
4. Further, the Contractor's obligations to complete the Works and comply with the Contract remain in all respects unaffected and nothing within this Variation Agreement No. 043 is intended to be a waiver or relaxation of the Contractor's obligations under the Contract save only as expressly stated herein and the Contract shall remain fully effective as varied herein and the Contract shall have effect as though the provisions contained in this Variation Agreement No. 043 had been originally contained in the Contract. Any ambiguity or uncertainty in the meaning and effect of this Variation Agreement No. 043 shall be resolved in favour of the Employer.
5. This Variation Agreement No. 043 shall be governed by the Laws of the Republic of Panama and is deemed to be incorporated into and form an integral part of the Contract.
6. The Contractor has, by virtue of Interim Certificate No 31 of June 2012, now been paid in respect of reinforcing steel as if this Variation 043 had been originally included within the Contract.
7. The Contractor shall be paid, subject to Clause 8 of this Variation Agreement No. 043, in respect of reinforcing steel on the basis generally of 50% for reinforcing steel once it has been delivered and stocked on Site and 50% following incorporation of the reinforcing steel into the Permanent Works (Concrete). In this regard, and to reflect this general intent, the Contractor has updated the Current Programme to cost load activities A-30960 A_Mtls: Procure, Deliver and Stock Re-Steel Bulk Materials and P-32240 P_MTLS: Procure, Deliver and Stock



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Re-Steel Bulk Materials so that progress and payment in respect of reinforcing steel can be measured and valued on an interim basis as aforesaid. The Parties acknowledge the revised budget allocation for reinforcing steel as shown in the tables to RFV No. 127 although both Parties agree that, notwithstanding such revised budget, the Contractor shall be paid for reinforcing steel according to its actual progress against the revised Current Programme which now includes cost loaded activities as aforesaid in respect of reinforcing steel, and in all respects subject to the provisions of the Contract.

8. In assessing and certifying payments in respect of reinforcing steel delivered to Site as aforesaid, the Contractor shall establish to the satisfaction of the Employer's Representative, that the required properties of the reinforcing steel are in all respects in accordance with the Contract.
9. Nothing in this Variation is intended to or does give the Contractor any greater entitlement in respect of payment for reinforcing steel than was included within the original Contract Price and thus nothing in this Variation is intended to or does increase the sum due to the Contractor above the Reinforcing Steel Price.
10. The Parties acknowledge and agree that the Employer's rights in relation to the processing of Interim Payments including but not limited to under Sub-Clause 14.6 (*Issue of Interim Payment Certificates*) remain unaffected by this Variation.
11. For the further avoidance of doubt, the Parties agree and acknowledge that save in relation to those specific items of Plant and Materials listed in the Appendix to Tender in respect of Sub-Clause 14.5 (*Plant and Materials Intended for the Works*) together with 50% for the reinforcing steel pursuant to this Variation No. 043, the Contractor is not entitled to payment in respect of Plant and Materials when they are delivered to Site, payment only becoming due in accordance with the provisions of Sub-Clause 14.3.3 (a) and paragraph 1.09 R.2 of Section 01 31 00 [*Project Management and Co-ordination*] of the Employer's Requirements.

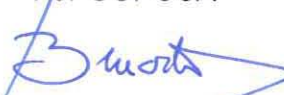
In Witness whereof the Parties hereto have caused this Variation Agreement No. 043 to the Contract to be executed on the 8th day of August 2012, by their duly authorized representatives.

For ACP



Jorge de la Guardia
Employer's Representative

For GUPCSA



Bernardo González
Contractor's Representative
