

PANAMA CANAL AUTHORITY	VARIATION	PAGE 1 OF 8
1. REQUEST FOR PROPOSAL No.:  RFP-76161	2. CONTRACT No.:  CMC-221427	3. DATE: August 29, 2012
		4. VARIATION No.: 049

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: (Specify the legal authority).  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: (Specify the legal authority) Volume III, Conditions of Contract, Sub-Clause 1.16 [Entire Agreement].]
	9 D. OTHER. (Specify manner and the legal authority).
	9 E. ACCOUNT NUMBER (If required):

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

**See Variation Agreement 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 (Type or print)  Bernardo Gonzalez Contractor's Representative	12. NAME AND TITLE OF THE EMPLOYER'S REPRESENTATIVE/CONTRACTING OFFICER (Type or print)  Jorge de la Guardia, Employer's Representative
13. CONTRACTOR   (Authorized signature)	14. DATE: 29/08/2012
	15. PANAMA CANAL AUTHORITY   (Employer's Representative/Contracting Officer's signature)
	16. DATE: 29/08/2012

**This Variation Agreement Number 049, is dated as of 29th 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., of Building 22B, Brujas Road, Cocoli, Panama, 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 Contract 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) The Contractor:
  - (i) Requested through RFV No 0134, dated July 20, 2012, that the Employer agree to make an advance payment in respect of payments to certain key suppliers for the supply of materials nominated by the Contractor being cement, pozzolan, silica fume, additives for concrete (Additive Evolution XP2) and diesel for use in connection with the Works ("**Key Suppliers**"); and
  - (ii) by letter dated June 19, 2012 (Reference GUPC-IAE-1284), 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 in general terms and without specific conditions the payment of key supplies on receipt at the site, with a copy of payment receipt to be provided in each such case to the Employer.
- (c) 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 agrees to an advance payment in respect of Key Suppliers (in conjunction with various other measures such as but not limited to Variation Agreement No. 042, No. 043, No. 045 and No. 049, 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.



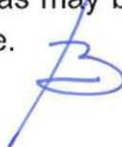


- (d) Accordingly, the Employer has responded through letter IAE-UPC-1190 dated August 9, 2012 indicating to the Contractor that the Employer was willing to consider making an advance payment up to a maximum sum of \$82.5million (albeit not precisely in the terms requested in RFV 0134 which, for the avoidance of any doubt, is not part of this agreed Variation Agreement No. 049) but subject to the Parties agreeing a formal variation to reflect such revised arrangements;
- (e) Therefore, subject to the terms of this Variation Agreement No. 049, 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.
- (f) It is agreed in making this variation to the requirements of the Contract that this Variation Agreement No. 049 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 PARTIES HEREBY AGREE AS FOLLOWS:**

The Employer and the Contractor agree to vary the Contract as follows:

1. In this Variation Agreement No. 049, 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 Party 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 Agreement No. 049 or in any way argue or use the fact or the terms of this Variation Agreement No. 0049 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. 049 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 Parties agree that 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. 049 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.049 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.049 had been originally contained in the Contract. Any ambiguity or uncertainty in the meaning and effect of this Variation Agreement No.049 shall be resolved in favour of the Employer.
5. This Variation Agreement No. 049 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 Parties agree to amend Sub-Clause 1.1[Definitions] of the Contract as follows:

- 6.1 The Parties agree to add the following Definitions to the Contract (which shall be added in proper alphabetical order but without any number):

**"Advance Payment for Key Suppliers"** has the meaning provided in Sub-Clause 14.2.C."

**"Advance Payment for Key Suppliers Security"** means the security or securities required pursuant to Sub-Clause 14.2E [Advance Payment for Key Suppliers Security] which shall be provided in the form of a bond issued by an Acceptable Bond Issuer or an Acceptable Local Bond Issuer and in any such case in a form satisfactory to the Employer in its absolute discretion; provided that, sub-clauses (c) and (z) of the definition of Acceptable Local Bond Issuer shall be inapplicable if the Employer, in its absolute discretion, can independently and satisfactorily determine the matters otherwise to be addressed by such sub-clauses (c) and/or (z), as the case may be."

**"Cut-Off Date"** has the meaning provided in Sub-Clause 14.2.C.

**"Payment Certificate Deductions"** means the deductions to be made from the amount of any Payment Certificates in respect of any of (i) the Advance Payment for Plant, (ii) the Advance Payment for Mobilisation (including the Late Repayment and the Deferred Repayment), (iii) the Advance Payment for Key Suppliers, and (iv) the retention pursuant to sub-paragraph (c) of Sub-Clause 14.3.3 of the Contract."





**"Variation Agreement No. 042"** means Variation Agreement Number 042, dated as of the 26th day of July 2012 between the Employer and the Contractor."

**"Variation Agreement No. 043"** means Variation Agreement Number 043, dated as of the 8th day of August 2012 between the Employer and the Contractor."

**"Variation Agreement No. 045"** means Variation Agreement Number 045, dated as of the 10th day of August 2012 between the Employer and the Contractor."

**"Variation Agreement No. 049"** means Variation Agreement Number 049, dated as of the 29th day of August 2012 between the Employer and the Contractor."

6.2 The Parties agree to amend the following Definitions as follows:

**"1.1.6.4 Acceptable Bond Issuer Rating"** shall be amended to amend the final clause thereof to read as follows:

and (ii) with respect to the issuer of any Advanced Reinforcement Adjustment Amount Security Bond, or any Advance Payment for Key Suppliers Security, the requirements of sub-clause (b) of, and, if applicable, Sub-Clause (y) of the provision to, the definition of Acceptable Local Bond Issuer.


**"1.1.6.11 Contractor Security Instrument"** shall be amended to read as follows:

**"Contractor Security Instrument"** means each of the Performance Bond, the Payment Bond, each Contractor Security LOC, any Advanced Reinforcement Adjustment Amount Security, and any Advance Payment for Key Suppliers Security.

7. The Parties agree to amend the Contract by adding the following new Sub-Clauses 14.2 C, 14.2.D and 14.2E:

**14.2 C Advance Payment for Key Suppliers**

Subject to Sub-Clause 14.2E [Advance Payment for Key Suppliers Security], the Employer shall make advance payments for Key Suppliers, as an interest free loan, up to a maximum sum of \$82.5 million to be repaid in accordance with this Sub-Clause 14.2 C in respect of payments made by the Contractor to Key Suppliers in respect of invoices dated from May 2012 up to the date of the Contractor's application for interim payment pursuant to Sub-Clause 14.3 in December 2012 (the **"Advance Payment for Key Suppliers"**).



The first application for payment of the Advance Payment for Key Suppliers may be included in the Contractor's application for interim payment August 2012. No applications for the Advance Payment for Key Suppliers may be made after December 23, 2012 (the "**Cut Off Date**").

In order for any part of the Advance Payment for Key Suppliers to be certified for payment, any Contractor's application for payment of the Advance Payment for Key Suppliers shall include, to the satisfaction of the Employer's Representative, in respect of all sums applied for:

1. spread sheets detailing the number of the invoices that reference the Advance Payment for Key Suppliers requested in the Payment Application. These spreadsheets should also include: invoices dates, invoices numbers, amount of the check.
2. copies of proof of payment by the Contractor to the supplier such as: signed check, bank transfer, bank debit note or any other supporting payment documents referenced to the invoices submitted
3. confirmation of the payment from the relevant supplier such as: receipt, or any other supplier confirmation;
4. such other evidence or substantiation that may be reasonably required by the Employer's Representative in order to validate the invoices.

It shall be a precondition to payment that all original invoices which have been paid by the Contractor are duly stamped by authorized personnel of the Contractor evidencing the receipt of the relevant materials on Site and shall be made immediately available for inspection upon receipt of Payment Application.

All local invoices must comply with Panamanian fiscal laws.

The Contractor may continue to make application for the Advance Payment for Key Suppliers until the total of certified invoices amount to a maximum sum of \$82.5M, save that no further applications may be made after the Cut-Off Date, even if by that time the maximum amount of the Advance Payment for Key Suppliers has not been certified.

For the avoidance of any doubt, if during the verification and certification process or after certification, during any audit conducted by the Employer, any discrepancies are found, the Employer's Representative may not certify such sums for payment and/or may, in any subsequent Payment Certificate, make any correction, modification or adjustment of any amount not duly





supported in accordance herewith and certified in any previous Payment Certificate.

The Advance Payment for Key Suppliers shall be repaid by the Contractor through percentage deductions in Payment Certificates commencing in the Payment Certificate issued in response to the January 2013 interim application for payment and continuing in each subsequent Payment Certificate at the rate of 5% of the amount of each Payment Certificate until the Advance Payment for Key Suppliers is repaid in full (or in the case of the final such deduction such lesser percentage of the applicable Payment Certificate as is necessary to make such repayment in full).

The whole of the balance of the Advance Payment for Key Suppliers outstanding shall immediately become due and payable by the Contractor to the Employer and the Employer shall be entitled to make a claim for the entire outstanding amount under the Advance Payment for Key Suppliers Security, if:

- (a) the Advance Payment for Key Suppliers has not been repaid in full prior to the issue of the Taking-Over Certificate for the Works or prior to a termination under Clause 15 [Termination by Employer], Clause 16 [Suspension and Termination by Contractor] or Clause 19 [Force Majeure] (as the case may be);
- (b) the Advance Payment for Key Suppliers has not been repaid 45 days prior to the expiry date of the Advance Payment for Key Suppliers Security and the Contractor fails to extend the validity of the Advance Payment for Key Suppliers Security in accordance with this Sub-Clause 14.2C;
- (c) the Employer is entitled to terminate the Contractor's right to complete the Contract under Sub-Clause 15.2 [Termination by Employer], irrespective of whether notice of termination has been given;
- (d) the Contractor fails to pay the Employer an amount due, as either agreed by the Contractor or determined under Sub-Clause 2.5 [Employer's Claims] or Sub-Clause 20 [Claims, Disputes and Arbitration] within 42 days of its agreement or determination; and/or(e) the Contractor fails to remedy a default within the time stated in the Employer's notice requiring the default to be remedied.

#### **14.2D Payment Certificate Deductions**

For the avoidance of any doubt, the Parties agree and acknowledge that when calculating the amount of any Payment Certificate Deductions to be made from an Interim Payment Certificate, such Payment Certificate




Deductions shall be calculated by reference to the amount of such Payment Certificate before any such Payment Certificate Deductions are made.

**14.2E Advance Payment for Key Suppliers Security**

By no later than September 30, 2012, the Contractor shall obtain, at his own cost, and furnish to the Employer, the Advance Payment for Key Suppliers Security. For the avoidance of doubt, the terms of Sub-Clause 4.2D shall apply to the Advance Payment for Key Suppliers Security, but it is expressly agreed that the terms of Sub-Clause 4.2E shall not so apply thereto. Notwithstanding any other term of Variation Agreement No. 049 or the Contract, should the Contractor fail to provide by September 30, 2012 the Advance Payment for Key Suppliers Security, the Employer may at its absolute discretion deduct from the next Interim Payment Certificate or any subsequent Interim Payment Certificate the full amount of any amount previously paid to the Contractor pursuant to the terms of Sub-Clause 14.2C.

**In Witness** whereof the Parties hereto have caused this Variation Agreement No. 049 to the Contract to be executed on the 29th 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