

FIDIC Latin America Contract Users' Conference

Use of FIDIC in the Panama Canal Expansion Program

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Vice-president for General Counsel

October 2, 2018



International Federation of Consulting Engineers
The Global Voice of Consulting Engineers



AGENDA

- ✧ Panama Canal Legal Framework
- ✧ Panama Canal Performance
- ✧ Components of the Expansion Program
- ✧ Use of FIDIC in the Third Set of Locks Contract
 - Selection process
 - Contract Relevant Clauses
 - Claims and Disputes Mechanism

Panama Canal Constitutional Title

The Canal has a special or exceptional legal regime which is not subject to the public administration regulations.

CONSTITUCIÓN POLÍTICA DE PANAMÁ
TITULO XIV

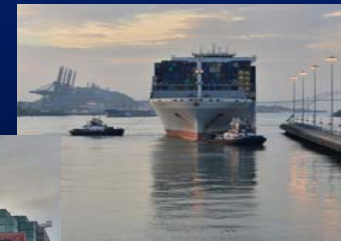


- ☆ The Panama Canal constitutes an **inalienable patrimony** of the Panamanian Nation; it shall remain open to the peaceful and uninterrupted transit of ships of all nations
- ☆ The Panama Canal Authority (ACP) **is an autonomous public legal** entity that have its own patrimony, and the right to administer it
- ☆ The ACP's budget is separate from the budget of the rest of the Government and have full financial autonomy
- ☆ The ACP shall be responsible for the administration, operation, conservation, maintenance and modernization of the Panama Canal and its related activities, in order to operate the Canal in safe, continuous, efficient, and **profitable manner**
- ☆ The regime contained in the Constitutional Title shall only be developed by laws that establish general rules which will be further exclusively regulated by the **Board of Directors** of the Authority

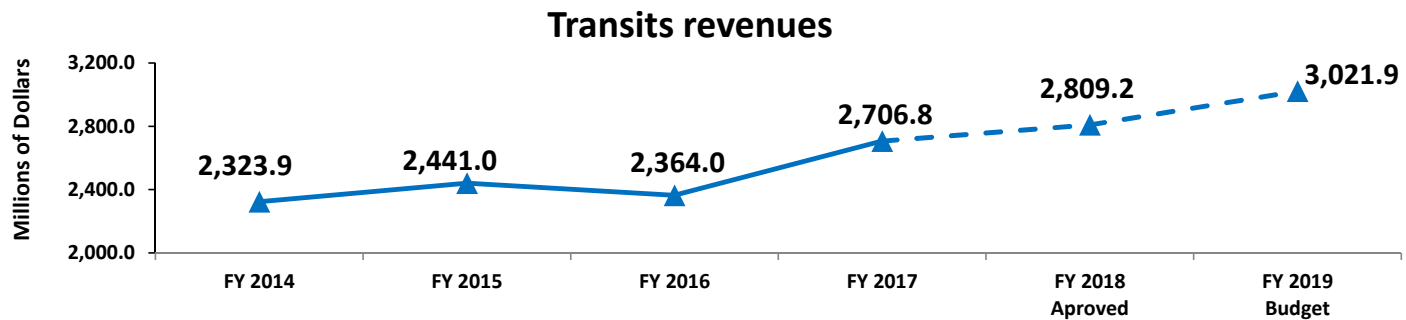
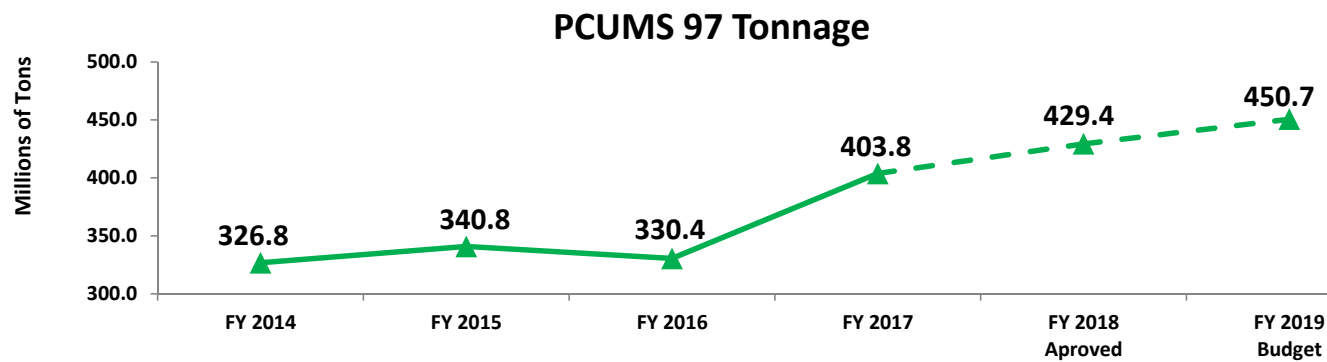
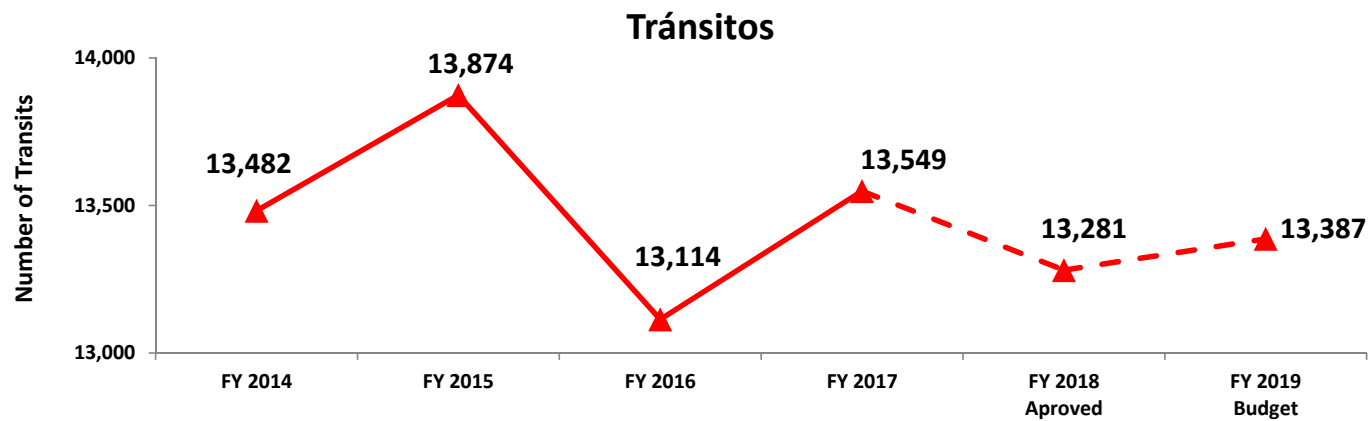
Supreme Court of Justice

Ruling of May 8, 2017

"...having seen the foregoing, and knowing the history of the origin of the Panama Canal Authority, we observe that through its Article 315, the Constitution established a different hierarchy of normative order, compared with the rest of the other public entities, with the objective that the Canal, an asset of great importance to the Panamanian Nation for its significance and strategic value for our country and the international community, was not affected or altered. Article 315 prescribes that the use of the Panama Canal will be subject to the requirements and conditions establishes in the Constitution, the Law and its Administration ".

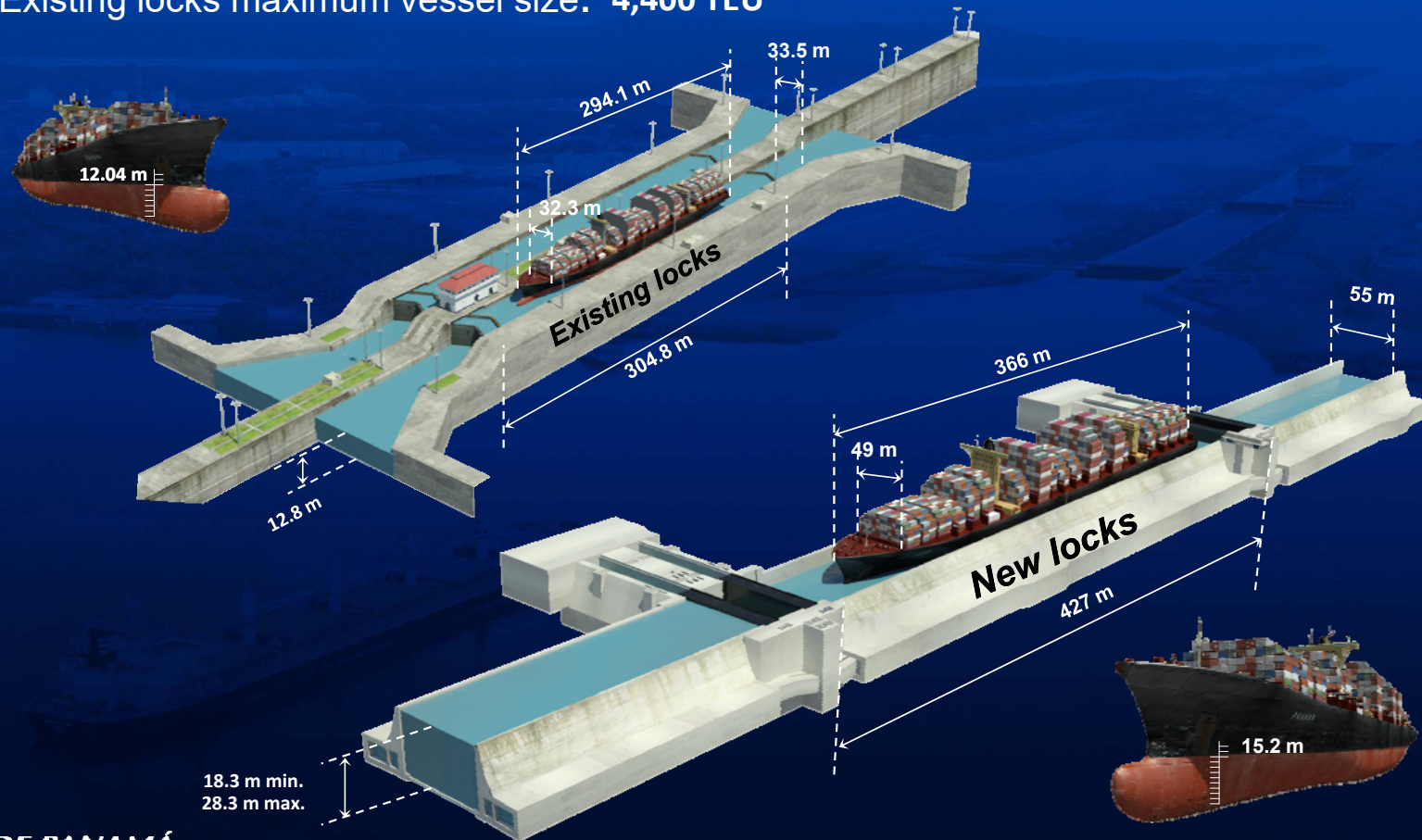


Volume of Tons and Transits revenues

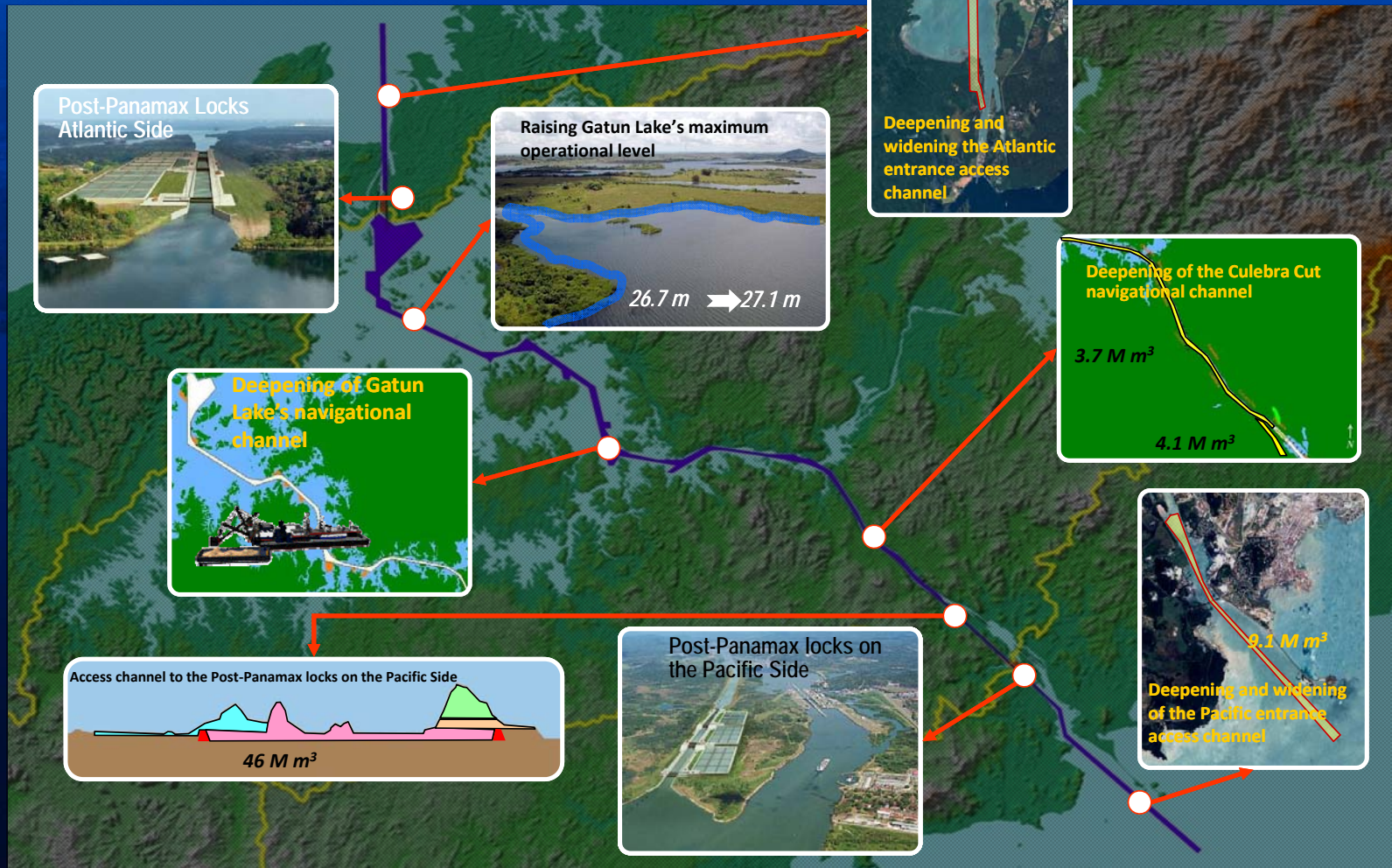


THIRD SET OF LOCKS AND VESSELS SIZE

Existing locks maximum vessel size: 4,400 TEU



Expansion Program Components



Recommended methods of project delivery and type of contracts

PROJECTS	METHODS OF PROJECT DELIVERY	AMOUNT OF CONTRACTS	DESIGNER	TYPE OF CONTRACT
Dredging of Pacific entrance	Design-Bid-Build	1	ACP	Negotiated – lower price
Dredging of Atlantic entrance	Design-Bid-Build	1	ACP	Negotiated – lower price
Dredging of Gaillard cut	Made by ACP	N/A	ACP	ACP
Dredging of Gatun Lake	Made by ACP	N/A	ACP	ACP
Dry excavation of the navigation channel	Design-Bid-Build	4	ACP / URS	Lower price
Increase of the maximum operating level of Gatun Lake	Design-Bid-Build	Various contracts	ACP / contractors	Lower price
Construction of the Atlantic and Pacific Pospanamax Locks	Design-Build	1	Contractor	Best value not negotiated with prequalification

Transparency in the contracting process is vital to attract quality international contractors

An aerial photograph of the Panama Canal locks, showing the waterway and surrounding land. A large cargo ship is visible in the lower left foreground. The image is overlaid with a blue gradient and a horizontal blue line near the top.

Selection Process

LOCKS CONTRACTOR'S SELECTION PROCESS

- ✧ Pre-qualifying tendering process
- ✧ The ACP uses the non-negotiated best value process
- ✧ The best value was weighted: 55% for the technical proposal and 45% for the price proposal.
- ✧ In order to award the Contract ACP confirmed:
 - Proposal complies with all of the requirements
 - Proposal obtains the best scores for both the technical and price proposal
 - Proposer has not experienced a substantial change in its composition and conditions as from their pre-qualification

PRE-QUALIFIED CONSORTIA

Consortium	Members	Designers	Gate Manufacturers
C.A.N.A.L.	ACS Servicios, Comunicaciones y Energía, S.L. – Leader 	Sener Ingeniería y Sistemas 	ACS Servicios, Comunicaciones y Energía, S.L. 
	Acciona Infraestructuras, S.A. 	Haskoning Nederland BV 	
	Fomento de Construcciones y Contratas, S.A. 	Mott Macdonald Limited 	
	Hochtief Construction AG 	Hochtief Consult 	
	Constructoras ICA S.A. de C.V. 		
Atlántico-Pacífico de Panamá	Bouygues Travaux Publics – Leader 	AECOM – Leader 	ALSTOM Hydro Energia Brasil 
	Bilfinger Berger 		
	VINCI Construction Grands Projets 		
	Construcoes e Comercio Camargo Correa S.A. 		
	Construtora Andrade Gutierrez S.A. 		
	Construtora Queiroz Galvao S.A. 		
	ALSTOM Hydro Energia Brasil 		
Bechtel, Taisei, Mitsubishi Corporation	Bechtel International, Inc. – Leader 	Bechtel International, Inc. – Leader 	Wuchang Shipyard 
	Taisei Corporation 		
	Mitsubishi Corporation 		
Grupo Unidos por el Canal	Sacyr Vallehermoso S.A. – Leader 	Montgomery Watson Harza (MWH) – Leader 	Heerema Fabrication Group 
	Impregilo S.p.A. 		
	Jan de Nul n.v. 		
	Constructora Urbana, S.A. 		
		IV-Groep 	
		Tetra Tech 	

RECEIPT OF PROPOSALS

- ☆ The proposals were received at ACP facilities on March 3, 2009, during a public ceremony.
- ☆ The proposals were not opened in public.
- ☆ ACP's Contracting Officer lead the proposals receipt process.
- ☆ ACP's Inspector General verified the proposals receipt process.
- ☆ A team from the external auditor (Deloitte) verified the proposals receipt process.
- ☆ A Notary Public certified that the envelopes containing the price proposals were closed and sealed, and that the envelope containing ACP's allocated funds amount was kept under custody until it was deposited in the vault of the National Bank.
















ORGANIZATION FOR THE EVALUATIONS OF PROPOSAL

- ☆ We had six (6) key participants in the evaluation process:
 - ACP's Contracting Officer coordinates the entire contractor selection process.
 - The Technical Evaluation Board scored the technical proposals.
 - The ACP and the international expert contractors provided technical advisory services to the Technical Evaluation Board.
 - ACP's Inspector General verified the process.
 - An External Auditor under contract with ACP audited and certified that the process was duly executed.
 - A Notary Public acts as witness, and attested the acts and certified the key milestones of the process.

TECHNICAL EVALUATION BOARD

- ☆ Integrated by 15 senior, permanent engineers from ACP work force.
- ☆ Organized in three groups composed by five-members.
- ☆ Initiated preparatory works more than 6 months before reception of proposals.
- ☆ Supported by over 50 contracted and ACP technical experts.
- ☆ Dedicated, uninterrupted work under supervision by the Contracting Officer.
- ☆ Work was conducted in a separate building and separate rooms, under special security conditions.

THREE OF THE FOUR PRE-QUALIFIED CONSORTIA SUBMITTED THEIR PROPOSAL

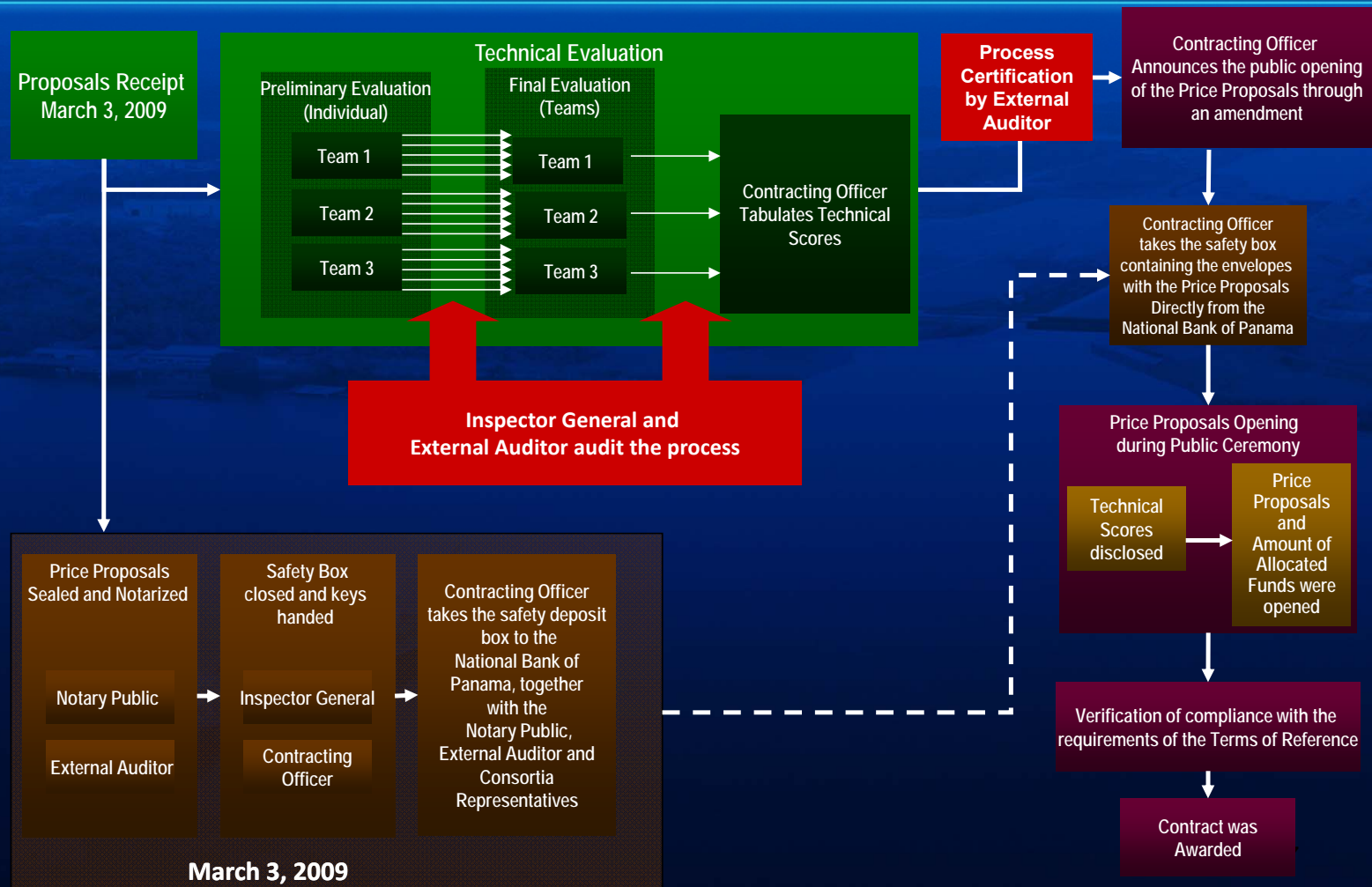
Consortia	Members	Designers	Gates manufacturers
C.A.N.A.L.	ACS Servicios, Comunicaciones y Energía, S.L. – Leader	 Sener Ingeniería y Sistemas	 ACS Servicios, Comunicaciones y Energía, S.L.
	Acciona Infraestructuras, S.A.	 Haskoning Nederland BV	
	Fomento de Construcciones y Contratas, S.A.	 Mott Macdonald Limited	
	Hochtief Construction AG	 Hochtief Consult	
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Bechtel, Taisei, Mitsubishi Corporation	Bechtel Internacional, Inc. – Leader		 Wuchang Shipyard
	Taisei Corporation	 Bechtel Internacional, Inc. – Leader	
	Mitsubishi Corporation		
Grupo Unidos por el Canal	Sacyr Vallehermoso S.A. – Leader	 Montg. Watson Harza (MWH) – Leader	 Heerema Fabrication Group
	Impregilo S.p.A.		
	Jan de Nul n.v.	 IV-Groep	
	Constructora Urbana, S.A.	 Tetra Tech	

CONTRACTOR SELECTION PROCESS FOR THE THIRD SET OF LOCKS

- ☆ All price proposals were kept sealed and stored in the vault of the National Bank of Panama until the opening.
- ☆ All technical proposals were moved to an ACP building, for its evaluation.



CONTRACTOR EVALUATION AND SELECTION PROCESS





Autoridad del Canal de Panamá
Contrato de Diseño y Construcción del Tercer Juego de Esclusas
Design and Construction of the Third Set of

Licitación RFP-76161

Fecha de
apertura de
sobres de
precio:

08-Jul-09

9:00 A.M.

Proponentes precalificados	55%	40%		5%		Total Propuesta de Precios	45%	100%	Orden de Mejor Valor
	Puntos Propuesta Técnica	Propuesta de Precio Base	Puntos Precio Base	Propuesta de Precio de Partida Provisional	Puntos Partida Provisional		Total Puntos Propuesta de Precios	Total de Puntos	
	Máx 5,500		Máx 4,000		Máx 500		Max 4,500	Máx 10,000	
Bechtel, Taisei, Mitsubishi Corporation	3,789.5	\$ 4,185,983,000.00	2,980.3	\$ 93,836,670.00	-	\$ 4,279,819,670.00	2,980.3	6,769.8	2
Consorcio C.A.N.A.L.	3,973.5	\$ 5,981,020,333.00	2,085.9	\$ -	500.0	\$ 5,981,020,333.00	2,585.9	6,559.4	3
Grupo Unidos por el Canal	4,088.5	\$ 3,118,880,001.00	4,000.0	\$ 102,751,383.00	-	\$ 3,221,631,384.00	4,000.0	8,088.5	1

Partida Asignada - ACP

\$ 3,481,000,000.00

☒ Calcular resultado

An aerial photograph of the Panama Canal, showing the waterway and surrounding land. A large cargo ship is visible in the lower left foreground. The image is overlaid with a dark blue gradient and a thin horizontal blue line near the top.

Contract Relevant Clauses

GENERAL CHARACTERISTICS OF THE THIRD SET OF LOCKS CONTRACT

- ☆ Conceptual pre-design
- ☆ ACP contracted physical model
- ☆ Design-Build Contract
- ☆ FIDIC standard contract (**based on Yellow Book**)
- ☆ Stipend of US\$15 Million divided equally between the unsuccessful Tenderers who submitted a fully compliant Tender
- ☆ Individual Meetings with the pre-qualified Consortia before the date for submission of tenders were held

MEETINGS WITH PRE-QUALIFIED CONSORTIA

	INDIVIDUAL MEETINGS	VISITS
BTM	16	29
C.A.N.A.L.	13	43
GUPC	8	20
CAPP	12	12
TOTAL	49	104

**Pre-Tenders Meetings
(Four Pre-Qualified Consortia)**

2



Changes in Regulations

- ✧ ACP made changes to the Regulations in order to be able to use **standard contract clauses and innovative and expeditious controversies resolution mechanism** for Megaprojects.



Joint and several liability and assignment

- ✧ All members of the Consortium are joint and severally liable to the ACP.
- ✧ In case of assignment of the contract, it shall be to a specific project company (SPC) for the purpose of executing the works.
- ✧ In order to protect the ACP's interest, the assignment of the contract to an SPC was subject to:
 - Consortium members are the only shareholders
 - Percentage of share capital of each member shall be the same interest in the consortium
 - The members after de assignment remain joint and severally liable to the ACP

Limitations of Liability

✧ \$600 Million LOL of the Contractor.

✧ Not limited to the LOL:

- Intellectual and industrial property rights
- Indemnities (personal injuries, properties, etc.)
- Employer equipment and free issue materials

✧ LOL does not apply in case of fraud, deliberate or intentional default and serious negligence of the contractor



MILESTONES

- ☆ The contract establishes milestones the Contractor shall comply with regarding certain stages of the Works, which if not complied with the ACP will retain certain amount from payment to the Contractor.
- ☆ The Contractor established in his proposal the dates when such milestones shall be accomplished



Cost Escalation



Price escalation

- Portland Cement
- Diesel fuel
- Reinforcing steel
- Structural shapes steel



Indexed to relevant standards

- “Platts Steel Markets Daily”, “Reinforcing Bar”, “ExWorks, US SE”, “Close/Midpoint”
- “Platts Latin American Wire”, “Gulf Diesel (No. 2 Oil)”



VALUE ENGINEERING

- ☆ Variations may be initiated by the Contractor under Sub-Clause 13.2 [Value Engineering] if, in the Contractor's opinion the Variation:
 - a. will accelerate completion,
 - b. will reduce the cost to the Employer,
 - c. will improve the efficiency or value, or
 - d. will, otherwise, be of benefit to the Employer.
- ☆ The Value Engineering proposal shall be prepared at the cost of the Contractor.
- ☆ The Employer's Representative may, in its absolute discretion, choose to accept or reject the Contractor's proposal.
- ☆ Any reductions to the Contract Price shall be shared 50/50 between the Employer and the Contractor.

★ PANAMA CANAL EXPANSION ★



2011-2016





Claims and Disputes Mechanism

CONTRACTOR'S CLAIMS

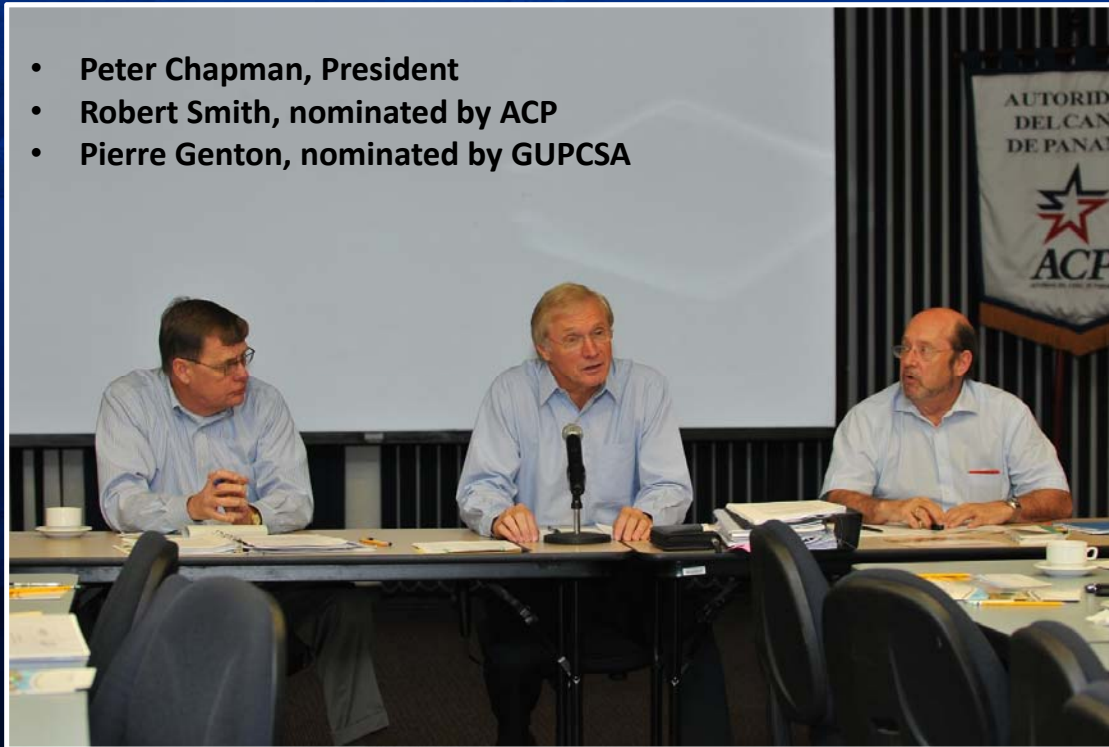
- ✧ Contractor has 28 days to give notice of a claim after became aware..... of the event.
- ✧ Contractor has 42 days to present a fully detailed claim to the ACP.
- ✧ The ACP has 42 days to respond after receiving the claim.
 - a. If the Employer's Representative approves the claim, a Contract variation should be issued.
 - b. If claim is disapproved the Contractor may refer the dispute to the Dispute Adjudication Board (DAB) for its decision. There is no timeframe to submit a dispute to the DAB.



Dispute Adjudication Board Composition

- Contract establishes that disputes shall be adjudicated by the DAB.
- The DAB is composed by three (3) members.

- Peter Chapman, President
- Robert Smith, nominated by ACP
- Pierre Genton, nominated by GUPCSA



Obligations of the DAB's member in locks contract

The Member shall:

- ✧ Be impartial and independent
- ✧ Have no financial interest or otherwise
- ✧ Not previously employed by any Party
- ✧ Not give advice
- ✧ Ensure availability for all site visits and hearings
- ✧ Confidentiality, among others



Dispute Adjudication Board decisions

- ✧ Dispute may be referred to the DAB for its decision, with copies to the other Party.
- ✧ Parties shall make available to the DAB all information, access to the Site, etc., as the DAB may require.
- ✧ The DAB's members are not arbitrators.
- ✧ Within 84 days (or the period agreed by the Parties), the DAB shall give its reasoned decision
- ✧ DAB's decision shall be binding unless and until it is revised in an amicable settlement or by an arbitral award.



Notice of Dissatisfaction

- ✧ Dissatisfied Party may within 28 days after receiving the DAB's decision may give notice of dissatisfaction (NOD).
- ✧ DAB's decision shall be final and binding unless a NOD.
- ✧ The NOD shall set out the matter in dispute and the reasons for dissatisfaction.
- ✧ Neither Party shall be entitled to commence arbitration of a dispute unless a NOD has been given,
 - Exceptions, failure to comply the DAB's Decision and expiry of DAB's appointment.



International Arbitration

- ✧ Arbitration can not be invoked without previous DAB process.
- ✧ The Rules of Arbitration of the International Chamber of Commerce (ICC) shall apply.
- ✧ The International Bar Association Rules on the Taking of Evidence shall apply.
- ✧ The dispute shall be settled by three arbitrators who shall be lawyers.
- ✧ The arbitration shall be decided in law (within the meaning of Panamanian law) and shall be conducted in English.
- ✧ The venue of the arbitration shall be Miami, Florida – USA.

ARBITRATORS' POWERS AND PARTIES' LIMITS

- ☆ The arbitrators shall have full power to open up, review and revise any instruction, opinion or determination of the Employer's Representative, and any decision of the DAB, relevant to the dispute.
- ☆ Nothing shall disqualify the Employer's Representative from being called as a witness and giving evidence before the arbitrators on any matter whatsoever relevant to the dispute.
- ☆ Neither Party shall be limited in the proceedings before the arbitrators to the evidence or arguments previously put before the DAB
- ☆ Any decision of the DAB shall be admissible in evidence in the arbitration



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October 2, 2018

Thank you!!!

