CASE NO. 158

CHAMBER ONE

AWARD NO. 238-158-1

193

AERONUTRONIC OVERSEAS SERVICES, INC.,

Claimant,

and

THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN, THE AIR FORCE OF THE ISLAMIC REPUBLIC OF IRAN,

Respondents.

DISSENTING OPINION OF JUDGE HOLTZMANN
WITH RESPECT TO RE-ENGINEERING AND DELAY CLAIMS

Aeronutronic[1] is a company that sells engineering and construction services to military customers throughout the world. The Iranian Air Force employed it to design and install cables in connection with a communication system at eleven air bases. While Aeronutronic contracted to provide the cable facilities, the Air Force itself was to furnish

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[1]The full name of the Claimant is Aeronutronic Overseas Services, Inc. The claim arises out of a contract originally entered into by Aeronutronic's predecessor, Philco Overseas Services, Inc., in 1970. At all material times, Aeronutronic has been wholly owned by Ford Motor Company.

other elements of the system. For example, the Air Force was to construct a number of buildings to which the cable was to run, and, of course, the cable could not be laid until the final location of those buildings was precisely known. The Air Force's decision to change building locations required re-engineering by Aeronutronic, and the Air Force's failure to complete its parts of the project on schedule caused costly delays for the contractor. Additionally, the Air Force's decision to change the scope and specifications of the project added to Aeronutronic's costs. These occurrences -- which are uncontroverted -- form the basis of a major part of Aeronutronic's claim in this Case. The Tribunal, however, refuses to compensate Aeronutronic for the extra costs caused by the re-engineering and delays. I cannot agree. I therefore respectfully dissent from this aspect of the Award, while joining in all other parts of it.

There is no doubt that Aeronutronic substantially fulfilled its contractual obligations, and the Tribunal so holds.[2] Nor can there be any doubt that it incurred significant costs as a result of the re-engineering and delays.[3] The Contract obligates the Air Force to pay Aeronutronic an "equitable adjustment for delays and costs incurred," and there is ample evidence in the record that such costs totalled $2,718,157. The Tribunal nevertheless denies this element of the claim on the ground that Aeronutronic waived its right to payment by settlement. Yet not one word in the documents before us expresses such a

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[2]Aeronutronic, however, admits that it left certain relatively small items unfinished, and the Tribunal accordingly deducts $28,980 from the Award on account of those items.

[3]As used in this Opinion, costs for re-engineering and delays also include the costs to Aeronutronic of re-testing certain equipment furnished by the Air Force.

settlement or waiver. On the contrary, the written evidence, read in context, shows that Aeronutronic carefully preserved its claim for these extra costs, and uncontradicted testimony proves that Aeronutronic vigorously pursued those claims. Moreover, there has been no showing of any reason whatsoever why Aeronutronic would, in the circumstances, have waived claims for over $2.7 million. In short, the Tribunal's inference is contradicted by the record.

The project involved in this Case was a long one. Originally signed in 1970, the governing Contract was amended thirteen times to reflect various changes desired by the Air Force. For the first five years, the project involved cable installations at eleven air bases, but in 1976 the Air Force decided to concentrate the installation at one base and to change the cable-laying specifications. The Parties negotiated extensively concerning the costs of these fundamental changes. At the time those negotiations began, Aeronutronic already had a large outstanding written claim for extra costs of re-engineering and delay caused by the Air Force. In the light of the new negotiations, however, Aeronutronic wrote to the Air Force in early September 1976 to point out that the Air Force's proposed changes "could influence [Aeronutronic's] request for reimbursement for added or rescheduled work." Accordingly, Aeronutronic temporarily withdrew its claims, making clear, however, that "[u]pon completion of its review [of the impact of the latest changes on its claims], [it would] resubmit its request for reimbursement for added and rescheduled work." Aeronutronic explained that it believed that the latest changes would bring an end to the continuing accumulation of re-engineering and delay costs so that it could calculate and submit a final and complete claim.

Minutes of a meeting between the Parties later in September 1976 show that they agreed in principle on the new

scope, specifications and costs of the project. These changes were eventually set forth in Amendment No. 13 to the Contract. Before the effective date of that Amendment, however, Aeronutronic was able to proceed with its review of the impact of the changes agreed upon at the September meeting on the amount of its claims for extra work. As soon as that review was completed, Aeronutronic resubmitted its claim for re-engineering and delay costs in a letter to the Air Force dated 1 November 1976. That letter states the re-calculated amount for those costs at $2,718,157. The letter notes that Aeronutronic "enclosed a booklet in tabular form to describe [the claimed amount] in detail," together with "costs back-up, in 5 volumes . . . for review and analysis by the Air Force." There is no indication that the Air Force has ever questioned those calculations.

Because the $2,718,157 claimed was calculated on the assumption that the agreed changes in the project would be set forth in a formal contract amendment, the 1 November 1976 letter states:

> The contents of this submission have been based on agreements reached concerning this subject and assumes that appropriate contractual documents reflecting these changes will be issued.

In July 1977, the formal document contemplated in the 1 November 1976 letter was issued as Amendment No. 13 to the Contract. It makes no mention whatsoever of the claims for re-engineering and delay.

The Tribunal finds that the absence of an express reservation of these claims in Amendment No. 13 means that they were settled and waived. Of course, this rationale could equally support the opposite conclusion. Moreover, the claims in question amounted to over $2.7 million, while the price of Amendment No. 13 was less than $500,000. Given that disparity, it is simply inconceivable that the Parties

settled those claims without making any reference to them. Silence cannot cry so loudly. The only fair inference to be drawn from the Parties' failure to mention the claims is that they never intended Amendment No. 13 to cover the claims for extra costs. Such separate treatment would be entirely consistent with the practice of the Parties, for earlier amendments were similarly silent as to claims for extra costs, yet it has never been asserted that such silence extinguished the claims.

The Tribunal seeks to bolster its conclusion that silence in Amendment No. 13 constituted a settlement by linking the Amendment to the 1 November 1976 letter. In view of the context of the negotiations between the Parties, the sole link between that letter and Amendment No. 13 is that the amount claimed was calculated on the assumption that an amendment would follow. The obvious purpose of the link was to reserve Aeronutronic's right to recalculate the $2,718,157 amount claimed if no amendment ensued -- surely a reasonable precaution in view of the Air Force's history of vacillation on the project.

The Tribunal also dwells on Aeronutronic's failure to make written demands for its $2.7 million claim after agreement on Amendment No. 13. However, there was no legal or practical reason for Aeronutronic to repeat its demand when it had never been withdrawn. Moreover, there is uncontradicted evidence that Aeronutronic considered that the most effective way to pursue its claims was by direct discussions at the level of the Air Force General Staff, and that its Vice President attended conferences for that purpose after the date of Amendment No. 13.

The Tribunal relies as well on Aeronutronic's failure to refer to the claim for re-engineering and delay costs in three communications concerning the project written in April, August and October 1978. Again, the Tribunal

unconvincingly makes silence speak. Those communications focused on operational matters and on related tax problems then in the hands of Aeronutronic's local project manager in Iran. It is quite understandable that they did not refer to the $2.7 million claim, which Aeronutronic's Vice President was pursuing, at a quite different level, in discussions with his counterparts at the Air Force General Staff.

Moreover, the practice of the Parties confirm that whenever Aeronutronic withdrew claims for re-engineering and delay costs, it did so expressly and formally. Thus, in 1974, at a time when such claims were much smaller, Aeronutronic withdrew them in consideration of a letter of intent for a new $194 million contract. When the Air Force changed its mind and decided not to enter into the new contract, Aeronutronic wrote to reinstate the claim. The same pattern was followed in September 1976 when, as described above, Aeronutronic withdrew its claim so as to recalculate it in the light of the negotiations which led to Amendment No. 13. There, too, Aeronutronic sent a letter of withdrawal to the Air Force, and later resubmitted the claims in its letter of 1 November 1976. This demonstrates that whenever Aeronutronic withdrew a claim it did so formally, explicitly and in writing.

Finally, the Tribunal resorts to sheer speculation in an attempt to explain why Aeronutronic would have agreed to drop its $2.7 million claim. The Award hypothesizes that Aeronutronic "may have foregone this claim for reasons not directly related to this Contract or Amendment No. 13." The Tribunal cannot point to any such reason, for there is not even the slightest suggestion of one in the record.

In sum, the Award strains credulity. It is impossible to believe that the Air Force bargained for Amendment No. 13 to extinguish claims of over $2.7 million without insisting on including words to that effect. It is also impossible to

believe that Aeronutronic abandoned claims of over $2.7 million in exchange for an amendment which provided payments of less than $500,000 and required it to do substantial work to earn that amount. To accept those two propositions, as the Tribunal does, requires one to assume that both Parties acted in total disregard of common sense.

For the foregoing reasons, I would have awarded $2,718,157 to Aeronutronic for its claim for the costs it incurred due to re-engineering and delays, plus interest calculated in accordance with the methods laid down in Sylvania Technical Systems, Inc. and The Government of the Islamic Republic of Iran, Award No. 180-164-1 (27 June 1985), and costs of arbitration determined in accordance with my Separate Opinion in Sylvania.

Dated, The Hague
20 June 1986

Howard M. Holtzmann