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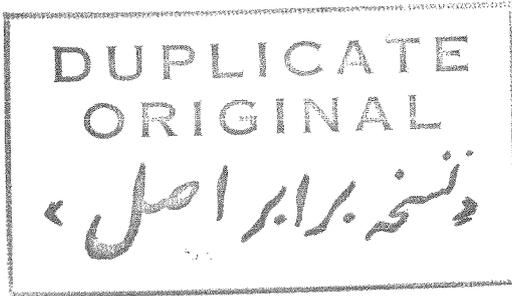
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IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعوی ایران - ایالات متحدہ



CASE NO. 10513

CHAMBER TWO

AWARD NO. 372-10513-2

LINEN, FORTINBERRY AND
ASSOCIATES, INC., a claim of
less than U.S.\$250,000
presented by
THE UNITED STATES OF AMERICA,
Claimant,

and

THE ISLAMIC REPUBLIC OF IRAN,
and THE MINISTRY OF CULTURE
AND ISLAMIC GUIDANCE (formerly
The Ministry of Information
and Tourism),

Respondents.

IRAN UNITED STATES CLAIMS TRIBUNAL	دادگاه داوری دعوی ایران - ایالات متحدہ
ثبت شد - FILED	
DATE	28 JUN 1988
	۱۳۶۷ / ۴ / ۷
No	10513

AWARDAppearances:

For Claimant:

Mr. Matthew H. Adler,
Attorney-Adviser
U.S. Department of State,
Mr. Michael F. Raboin,
Deputy Agent of the
United States of America,
Mr. C. Lane Fortinberry,
Representative of the
Claimant,
Mr. Philip R. McKnight,
Counsel to the Claimant.

For Respondent:

Mr. Mohammad K. Eshragh,
Agent of the Islamic
Republic of Iran,
Mr. Ali Hayrani Nobari,
Deputy to the Agent,
Mr. Akbar Shirazi,
Legal Adviser to the Agent,
Mr. Mohsen Azadeh,
Assistant to the Legal
Adviser.

Also present:

Mr. Timothy E. Ramish,
Agent of the United States
of America.

I. INTRODUCTION

1. On 19 January 1982, the United States of America filed a Statement of Claim which presented a claim of less than U.S.\$250,000, of LINEN FORTINBERRY AND ASSOCIATES INC. ("the Claimant"), against THE ISLAMIC REPUBLIC OF IRAN, and, in particular, The Ministry of Information and Tourism, now named THE MINISTRY OF CULTURE AND ISLAMIC GUIDANCE ("the Respondent" or "the Ministry"). The Claimant seeks damages of U.S.\$118,675.08¹ arising from the alleged breach of a contract between it and the Respondent under which the Claimant was to provide public relations services for the Government of Iran in the United States from May 1978 to April 1979. The Respondent alleges that the Claimant failed to fulfill its obligations under the contract and that, in any event, performance became impossible given the nature of the contract and its incompatibility with the policies of the new Revolutionary Government. In addition, the Respondent, also on the grounds of non-performance, filed a counterclaim seeking the return of U.S.\$140,000 allegedly paid to the Claimant.

2. A Hearing in this Case was held on 7 March 1988.

II. THE FACTS

A. The Claim

3. In 1978, the Claimant, Linen, Fortinberry and Associates Inc., a U.S. company, entered into a contract with the then Iranian Ministry of Information and Tourism to

¹The original Statement of Claim sought U.S.\$145,000 in damages which was increased to U.S.\$163,675.08 in the Claimant's subsequent pleadings. At the Hearing, the Claimant decreased the amount claimed to U.S.\$118,675.08. (See footnote 2, infra.)

develop a public relations campaign which would promote Iran in the United States and, in particular, educate the business and political community in the United States as to the accomplishments of the then Iranian Government and people.

4. The initial contact in October 1977, leading up to the formation of the contract, was between the Prime Minister of Iran, Jamshid Amouzegar, and James Linen, the sole owner of the Claimant, subsequent to which Mr. Linen wrote to the Prime Minister attaching a proposal for a media and communications program to enhance the image of Iran in the United States.

5. On 13 December 1977, the Prime Minister sent a favorable reply to Mr. Linen's October proposal and invited Mr. Linen to send a representative to Iran to discuss details of the agreement. Mr. C. Lane Fortinberry, the President of the Claimant, travelled to Iran in February 1978 to conduct the negotiations which ensued with the Prime Minister and officials from the Ministry. These negotiations led, in the Claimant's view, to two separate projects being commissioned: an analysis of U.S. press attitudes toward Iran; and, a media and communications program to be undertaken in the United States. The Respondent disputes the existence of a separate contract for the analysis of U.S. press attitudes and alleges that this project was encompassed by the communications program contract.

6. The Claimant presented its detailed proposal for the communications program to the Minister of Information and Tourism, Mr. Hodayun, by a covering letter dated 25 April 1978 from Mr. Linen. It outlined a number of proposals concerning the handling of information about Iran, both to the U.S. media and business community and to U.S. residents in Iran, and included an outline for a television advertising

campaign. Accompanying this letter to the Minister was the completed analysis of U.S. press attitudes. On the same day, 25 April 1978, Mr. Linen, by a covering letter, presented the press analysis to Prime Minister Amouzegar.

7. On 6 May 1978, Prime Minister Amouzegar and Minister Hodayun together with Mr. Linen and Mr. Fortinberry continued their discussions in Tehran. On 10 May 1978, Mr. Linen sent two letters to Minister Hodayun. The first letter identified seven specific programs to be completed under the communications program. The second letter recorded the terms of the proposed agreement, apparently resulting from the discussions in Tehran on 6 May 1978.

8. The terms of the offer contained in the 10 May 1978 letter were that the contract was to run from 1 May 1978 through 30 April 1979, after which it was automatically renewable unless cancelled by either Party on 30 days notice. The Claimant was to receive a monthly retainer of U.S.\$15,000 payable quarterly in advance, with travel, telephone, telex and entertainment expenses to be invoiced for the previous quarter and not to exceed (without prior approval) U.S.\$75,000 per annum. At the bottom of the letter containing the offer was an appropriate space for the Minister to signify his acceptance of the offer.

9. Minister Hodayun, however, signified his acceptance by replying personally to Mr. Linen. In a letter dated 5 June 1978, he referred to the Claimant's 10 May 1978 letter and stated:

I am authorized to start our agreement and ask you to go on.

He also noted a correction to the Claimant's letter concerning the Parties' agreement about the publication of a booklet about Iran.

10. In the meantime, on or about 25 May 1978, the Claimant received payment of U.S.\$50,000 from the Ministry, which the Claimant states was payment for the analysis of U.S. press attitudes. The Respondent argues that the U.S.\$50,000 payment was the initial payment under the communications program contract.

11. Subsequent meetings were held in Tehran from 17 to 28 July 1978. The Claimant was represented by Mr. Fortinberry who prepared a report for Minister Hodayun which included a report on the Claimant's activities to date. This report noted the meetings held and scheduled with business, media, academic, and political figures in the United States, contact with the Iranian Embassy staff in Washington, and projects under consideration. A subsequent report was made by Mr. Fortinberry to Mr. Linen which recorded an encouraging reaction by the Minister to the Claimant's efforts to date and approval of its plans for the future. These included a plan to commission four position papers to be prepared by independent writers on Iran's military capability, education, petroleum policy and economic developments and health and welfare and to be included in a publication, "Profiles of Iran", with a planned print run of twenty to thirty thousand copies. Mr. Fortinberry held a subsequent meeting with a Dr. Saadat from the Ministry in September 1978 as a result of which Mr. Fortinberry prepared and presented a status report on the Claimant's progress under the contract dated 22 September 1978. This report noted the close liason between the Claimant and the Embassy staff in the United States.

12. The Claimant states that during the fall of 1978 the type of service it provided under the contract changed in that it began to receive daily requests for assistance from Iran's Ambassador in the United States, Mr. Zahedi, and from press officials at the Embassy as a result of heightened interest in and demand for information about Iran as the

Shah's government came increasingly under attack. In November 1978, the Claimant arranged a meeting in New York of prominent U.S. business people to be briefed on the current situation in Iran. Both Mr. Linen and Mr. Fortinberry received a note of thanks from the Iranian Embassy press officer. It appears that during this time the Claimant's efforts were exclusively directed towards providing day to day assistance to the Embassy rather than working on the long term projects originally envisaged by the contract.

13. The Claimant contends that it continued its work pursuant to the contract until 25 January 1979. On that date it received a cable from the new Minister, Mr. Sirus Amouzegar, addressed to Mr. Linen stating that the contract was:

 null and void due to the non-implementation of the contract during the past four months.

14. The Claimant states that it responded to this cable by calling the press officer at the Iranian Embassy in Washington, with whom the Claimant had been working during the preceding months, and that he and Ambassador Zahedi instructed the Claimant to ignore the cable. The Claimant contends that it then continued to perform the contract. At the Hearing, Mr. Fortinberry stated that, after January 1979, this performance amounted primarily to answering numerous calls from the press. Mr. Fortinberry also stated that after early February the Iranian Embassy, with its new staff installed by the Revolutionary Government, sought no further assistance from the Claimant. Moreover, the Claimant received a letter from the Embassy dated 11 April 1979, in which it was once again informed that the agreement had "been declared null and void ..."

15. The Claimant seeks the fees due for the remainder of the one year fixed term of the contract, pointing out that

it was not terminable prior to 30 April 1979. Under the contract the Claimant was entitled to payment of U.S.\$45,000 per quarter payable in advance. Invoices dated 8 June, 1 August, 1 November 1978, and 1 February 1979, were sent to the Respondent and two payments of U.S.\$45,000 were received on 30 August and 1 September 1979, respectively.² The Claimant is consequently seeking U.S.\$90,000 under the contract for the two invoices on which no payment was made.

16. The Respondent does not dispute that some contractual arrangement existed between the Parties. It states that it made payments of U.S.\$140,000 under the communications program contract rather than the U.S.\$90,000 admitted by the Claimant. It arrives at the higher figure by claiming that the U.S.\$50,000 paid to the Claimant in May 1978 was made pursuant to the communications program contract. It bases its defense (and its counterclaim to recover payments made, see paragraph 18, infra) on its view that the Claimant failed to perform the "principal undertakings" of the contract. The Claimant's non-performance was also given as a reason for the termination by the Minister by his cable of 25 January 1979. The Respondent, while relying on its assertion of non-performance, also argues that given the nature of the contract, and the policies of the new regime it was impossible for the contract to continue after the Revolution.

17. The Claimant also claims U.S.\$28,675.08 for expenses for which it states it has not been reimbursed. The Respondent denies that it is liable for the expenses claimed or that it ever approved them.

²Payment of this second invoice was notified to the Tribunal at the Hearing and resulted in a reduction of the amount claimed. (See footnote 1, supra.)

B. The Counterclaim

18. The Respondent states that the contract between the Parties included, along with general public relations activities, assistance in the publication of a promotional magazine with a run of twenty to thirty thousand copies. The Respondent further alleges that it advanced U.S.\$140,000 to the Claimant for these purposes but as a result of the non-performance by the Claimant of its obligations it terminated the contract by its cable of 25 January 1979. The Respondent claims the re-payment of U.S.\$140,000 on the basis of non-performance. Because the Respondent's defense to the claim, and its counterclaim are both similarly based on its view that the Claimant failed to perform its contractual duties, the Tribunal will deal with the merits of the counterclaim in its discussion of the merits of the claim. (See paragraphs 25-29, infra.)

III. PROCEDURAL ISSUES

19. On 27 February 1984, the Claimant filed a Request for Interim Measures stating that it had received a summons from the Iranian authorities to appear before the Tehran Public Court on 4 March 1984 to answer a claim of the Ministry of Culture and Islamic Guidance for damages and payment of social security premia relating to the contract at issue in this Case. After an exchange of views by the Parties, the Tribunal issued Interim Award No. ITM 48-10513-2 (10 April 1985) requesting the Government of Iran to ensure that the proceedings pending before the Public Court of Tehran against the Claimant be stayed pending the Tribunal's final resolution of the proceedings in this Case. By virtue of the Tribunal's assumption of jurisdiction over the claim and counterclaim in this Case (See paragraphs 25 and 26, infra), they are, as of the date of their filing with the Tribunal, considered to be excluded from the jurisdiction of any other court including the Tehran Public Court and therefore, any

continuance of the proceedings before the Tehran Court is without legal effect. See Article VII, paragraph 2, of the Claims Settlement Declaration.

IV. REASONS FOR THE AWARD

A. Jurisdiction

20. On the basis of the evidence submitted, the Tribunal is satisfied that the Claimant was at all relevant times a United States company incorporated under the laws of the State of Connecticut and that its stock was owned totally by James A. Linen, a United States national as is evidenced by a copy of the relevant page of his passport.

21. The Respondent clearly falls within the definition of Iran, contained in Article VII, paragraph 3, of the Claims Settlement Declaration.

22. The Tribunal is satisfied that the claim was "outstanding" and "owned continuously" as required by the Claims Settlement Declaration.

23. The claim arises out of an alleged breach of contract and therefore satisfies the jurisdictional requirements as to subject matter. Accordingly, the Tribunal is satisfied that it has jurisdiction over the claim.

24. Furthermore, the Tribunal is satisfied that the counterclaim, which seeks refund of monies allegedly paid under the same contract as that on which the claim is based, is within its jurisdiction.

B. The Merits

a. The Invoices

25. As a preliminary matter, the Tribunal must decide whether the analysis of U.S. press attitudes toward Iran was part of the communications program project, as the Respondent claims, or a separate project commissioned by the Prime Minister and completed before the commencement of the communications program contract.

26. The Tribunal notes that the contract for the communications program project was initiated by the offer of the Claimant contained in its letter of 25 April 1978. This offer was accepted by the letter of the Minister of 6 June 1978 (although the contract as concluded, provided for a commencement date of 1 May 1978). On the same day on which the Claimant sent its offer, i.e., 25 April 1978, the completed analysis of U.S. press attitudes was presented to Prime Minister Amouzegar and Minister Homayun. In addition, the date of the payment of the U.S.\$50,000, as shown by evidence submitted by the Respondent, was 25 May 1978, i.e., before the communications program contract was concluded on 6 June 1978. These facts and the express reference to the analysis of U.S. press attitudes as a discrete project in the correspondence in evidence in this Case, is sufficient to persuade the Tribunal that the analysis was completed pursuant to a separate agreement and commissioned by the Prime Minister, although possibly as a precursor to the communications program project. Further evidence that the payment of U.S.\$50,000 was related to another project is that the Claimant's first invoice under the communications project contract is dated 8 June 1978, nearly two weeks after the payment of U.S.\$50,000 was made by the Ministry to the Claimant. If, as the Respondent contends, the U.S.\$50,000 was on account of the first quarterly payment due under the communications project contract, it has failed

to give any explanation as to why it raised no objection to the issuance of the first invoice, or to the second invoice issued by the Claimant on 1 August 1978 which clearly stated, both in the invoice and the covering letter, that it related to the second quarter, i.e., the period 1 August 1978 through 30 October 1978. Also, the Respondent has not provided any explanation in its pleadings or at the Hearing as to why, if the payment of U.S.\$50,000 was related to the communications program contract, it was for that amount rather than the contractually stipulated U.S.\$45,000 quarterly payment.

27. The Tribunal must next determine whether the Respondent has substantiated its allegations as to non-performance so as to justify non-payment of the invoices submitted by the Claimant pursuant to the contract and, in the context of consideration of the counterclaim, whether the Respondent is entitled to the return of the amounts paid by it to the Claimant. The Respondent's position with respect to both its defense on the merits to the claim and its counterclaim is based on its view of the failure of the Claimant to conclude various specific tasks outlined in the correspondence between the Parties in April and May 1978. The Tribunal notes that the individual projects were the subject of ongoing discussions between the Parties subsequent to the conclusion of the contract, as is evidenced by the report on the July meetings in Tehran and the report to Dr. Saadat in September 1978. There is no question that the nature of services provided by the Claimant changed as, in the latter part of 1978, the revolutionary events in Iran gained momentum. After the September visit to Tehran, where the Claimant's representative met with and reported to the Ministry on its progress to date, the Claimant appears to have dealt exclusively with Iranian officials in the United States, with the focus of the contract changing from the long term projects to providing day to day advice and assistance to the Embassy in Washington. The Tribunal notes

the obvious impracticability of proceeding with longer term projects as originally envisaged under the contract in the uncertain times of late 1978 and early 1979. A further factor which is indicative of the Parties' intent that the contract between them would be capable of encompassing a variety of services, is shown by the existence of the retainer arrangement rather than the provision of a set fee for a particular project. The Tribunal is satisfied that, despite the change of focus, the services performed were within the scope of the contract and the Claimant is entitled to be paid according to the terms of the contract.

28. The next question is whether the Claimant is entitled to payment up to the conclusion of the initial one year contract period or whether supervening events caused the contract to end earlier. The Tribunal notes that the express terms of the contract did not provide for early termination of the contract before the one year period had elapsed. However, it is clear that, in the circumstances of this particular Case, given the nature of the services to be rendered by the Claimant which were inextricably linked to the promotion of the public image in the United States of the Iran of the Pahlavi Dynasty, the success of the Islamic Revolution frustrated the original purpose of the contract. The Tribunal believes the contract should be considered to have terminated on or about 31 January 1979, which is mid way between the departure of the Shah from Iran and the installation of the Islamic Republic. Therefore, the Claimant is entitled to payment until that date, which amounts to payment for three months, totalling U.S.\$45,000 (the period covered by the third quarterly invoice), which amount the Tribunal awards accordingly.

29. For the reasons outlined in paragraph 27, the Tribunal is satisfied that the Respondent's counterclaim, based on the Claimant's alleged non-performance, should be dismissed.

b. The Expenses

30. The contract provided that the Claimant was to be reimbursed for "out-of-pocket expenses such as travel, telephone, telex and entertainment." These expenses were to be invoiced quarterly but, unlike the retainer invoices, were to be submitted retroactively for the previous quarter and were not to exceed U.S.\$75,000 per annum without the prior approval of the Respondent.

31. The Claimant seeks reimbursement of U.S.\$12,637.64 for travel and related expenses and U.S.\$16,037.44 for the hiring of outside consultants, comprising a total of U.S.\$28,675.08.

32. As to the expenses for the hiring of outside consultants, the Claimant has failed to satisfy the Tribunal that the express terms of the contract encompassed expenditure to hire independent professional services for research and creative writing. The Tribunal considers that this expenditure related to services to be rendered under the contract for which the Claimant received the retainer and was not a reimbursable expense. Therefore, this part of the claim is denied.

33. As to the travel related expenses, the Tribunal notes the Claimant admits that an amount of U.S.\$2,601.89, out of the U.S.\$12,637.64 claimed, was incurred prior to the conclusion of the contract, i.e., between April and the beginning of June 1978. The Tribunal finds that these pre-contract expenses, despite the fact that the contract term was retroactive to 1 May 1978, may have been incurred in the course of securing the contract but they are clearly not reimbursable as expenses incurred while performing the contract, and this part of the Claimant's claim is denied accordingly.

34. However, the remaining amount of travel related expenses claimed, i.e., U.S.\$10,035.75 which covers travel and other allowable expenses from mid June 1978 to the end of November 1978, the Tribunal finds to be adequately substantiated by the expense notes submitted by the Claimant. These documents evidence more than ten trips to Washington and two to Tehran. As these expenses claimed are reasonable on their face, have not, on this basis, been challenged by the Respondent, and are well below the U.S.\$75,000 per annum maximum, the Tribunal is satisfied that they are properly claimed and awards the amount of U.S.\$10,035.75 accordingly.

V. INTEREST

35. The Tribunal finds that the Claimant is entitled to interest on the sum of U.S.\$45,000 at an annual rate of 10.5 per cent from 1 December 1978, one month subsequent to the date of issuance of the invoice which the Tribunal has found to be outstanding. (See paragraph 28, supra.) As to the expenses, the Tribunal notes that it is not disputed that the Claimant failed to submit its expense invoices prior to the filing of the present Claim; therefore the Tribunal awards interest on the sum awarded of U.S.\$10,035.75 at an annual rate of 9 per cent from 19 January 1982, when the claim was filed with the Tribunal.

VI. COSTS

36. Each of the Parties shall bear its own costs of arbitration.

VII. AWARD

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37. For the foregoing reasons,

THE TRIBUNAL AWARDS AS FOLLOWS:

- a) The Respondent, THE MINISTRY OF CULTURE AND ISLAMIC GUIDANCE, is obligated to pay the Claimant, LINEN, FORTINBERRY AND ASSOCIATES, INC., the sum of fifty five thousand and thirty five United States dollars and seventy five cents (U.S.\$55,035.75) plus simple interest on the amount of U.S.\$45,000 at the rate of 10.5 per cent per annum (365-day basis) calculated from 1 December 1978, and, on the amount of U.S.\$10,035.75 at the rate of 9 per cent per annum (365-day basis) calculated from 19 January 1982, up to and including the date on which the Escrow Agent instructs the Depository Bank to effect payment out of the Security Account.
- b) This obligation shall be satisfied by payment out of the Security Account established pursuant to Paragraph 7 of the Declaration of the Government of the Democratic and Popular Government of Algeria of 19 January 1981.
- c) The counterclaim of the Respondent is dismissed.
- d) Each of the Parties shall bear its own costs of arbitration.

- e) This Award is hereby submitted to the President of the Tribunal for the purpose of notification to the Escrow Agent.

Dated, The Hague
28 June 1988

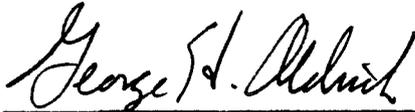


Robert Briner
Chairman
Cahmber Two

In the Name of God



Seyed K. Khalilian
Dissenting Opinion



George H. Aldrich