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S CLAIMS TRIBUNAL

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CASE NO. 769
CHAMBER ONE
AWARD NO. 249-769-1

LITTON SYSTEMS, INC. (THE GUIDANCE AND CONTROL SYSTEMS DIVISION),

Claimant,

and

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

Respondents.

AWARD

Appearances:

For the Claimant: Mr. Stewart A. Baker,
Mr. Edward J. Krauland,
Attorneys,
Mr. Raymond D. Deuschle,
Mr. Michael W. Mutek,
Representatives of Litton Systems, Inc.,

For the Respondents: Mr. Mohammad K. Eshragh,
Agent of the Government of the Islamic Republic of Iran,
Mr. Seyed Khalil Khalilian,

Legal Adviser to the Agent,
Mr. Mohsen Azadeh,
Assistant to the Agent,
Mr. Abdolhosein Fatemi,
Attorney for the Air Force,
Mr. Mahmoud Amini,
Mr. Hossein Mehrani,
Technical Respresentatives of the Air Force

Also present: Mr. Daniel M. Price,
Deputy Agent of the Government of the United States of America.

I. INTRODUCTION

A. The Proceedings

On 19 January 1982 a Statement of Claim was filed against The Islamic Republic of Iran, its Air Force and Bank Melli. The Claimant was described at that time as "the Guidance and Control Systems Division of Litton Systems, Incorporated". As expressed at the date of the hearing, the claim currently stands at $1,361,240.83 together with interest and costs, allegedly due in respect of contracts, orders and repair agreements entered into between the Guidance and Control Systems Division of Litton Systems, Incorporated and the Air Force of the Islamic Republic of Iran concerning aircraft navigation systems. A Statement of Defence and Counterclaim was filed by the Air Force of the Islamic Republic of Iran ("IAF") on 1 February 1983. After a further exchange of pleadings, a pre-hearing conference was held on 1 May 1985. The Tribunal subsequently ruled, in its Order of 31 May 1985, that the correctly designated Claimant was Litton Systems, Inc. ("Litton").

The claim against Bank Melli was withdrawn by the Claimant and the proceedings against it were terminated by Order of the Tribunal on 20 October 1985.

An oral hearing took place on 9 April 1986. Mr. Richard M. Mosk participated in the hearing and the award in this Case pursuant to Article 13, paragraph 2 (as amended), of the Tribunal Rules and pursuant to an agreement between the Governments of the Islamic Republic of Iran and the United States of America.

B. Facts and Contentions of the Parties

Litton is a manufacturer of aircraft navigation systems with a place of business in Woodland Hills, California. It claims to be a national of the United States of America within the meaning of Article VII, paragraph 1, of the Claims Settlement Declaration, though this is disputed by the Respondents. On 29 September 1973, Litton entered into a contract with the Imperial Iranian Air Force whereby it was to supply LN-33 inertial aircraft navigation systems, together with technical field support services, spares and ancillary equipment. That contract was performed in full and expired in 1976. Litton claims that, at the request of IAF, but without any new contract being executed, it continued thereafter to provide equipment and repairs on an ad hoc basis, and its invoices were duly paid. Between April 1976 and March 1977, when a Foreign Military Sales contract ("FMS contract") was entered into between IAF and the United States Government, Litton claims to have provided additional field engineering services to IAF on the basis of assurances that payment would be forthcoming. From March 1977, Litton was engaged as a contractor by the United States Government to continue providing field support services to IAF pursuant to the FMS contract.

The Claim

Litton's claim falls into four main categories: spare parts; overhaul and repairs; technical field support services; and technical manuals.

i) the spare parts claim

The Claim in respect of spare parts is for $102,512.26. Litton claims that it manufactured a number of items in response to purchase orders issued by IAF on 26 January 1978, and that it duly inspected and shipped the goods on 9 February 1979 under reference 145 94 86 ULF-24 T/N 5-8114. The goods were invoiced on the basis of prices set forth in a draft Basic Ordering Agreement No. 918114-6. This draft, though never signed by IAF, had, according to Litton, been used to fix the prices of various items delivered previously, for which IAF had consistently paid up to the end of 1978. IAF has denied liability on the basis that there is insufficient evidence that the items in question were ever shipped.

ii) the overhaul and repairs claims

The overhaul and repairs claim can be broken down into two main parts. The first is for $160,248, claimed as the cost of repairs carried out by Litton to certain items of LN-33 inertial navigation equipment at the request of IAF, which were originally invoiced on 22 December 1978 and shipped back on 19 January 1979 under reference 1459480 AB 9480-01-1979 T/N 5-8114. Again, the repair charges were based on the same draft Basic Ordering Agreement which Litton claims both Parties relied upon in previous transactions of this nature. IAF disputes the evidence that the items in question were either repaired or returned.

The second part of this claim consists of two elements. The first is for $831,022.93 representing the cost of repairs

carried out to 91 LN-33 parts which Litton claims to have retained, despite having completed 90% of the repairs, because of IAF's failure to settle previous invoices. IAF asserts that Litton is not entitled to recover anything until the items in question are returned to it. The Parties agree to the return of the equipment; they do not agree, however, as to how it should be brought about and, in particular, who is responsible for obtaining a United States export licence.

As to the second element of this claim, Litton has sought leave of the Tribunal pursuant to Article 20 of the Tribunal Rules to amend its Statement of Claim to include warehousing charges in respect of these 91 items, which continue to accrue at the rate of $375 per month as long as the items remain in storage. By the same token, the total amount now claimed for overhaul and repairs reflects a reduction for costs not incurred on the contract price by virtue of IAF's breach. IAF objects that warehousing charges have arisen as the result of Litton's own wrongful detention of the goods, and that the claim in respect of them could not be said to have been outstanding at 19 January 1981, the date of the Claims Settlement Declaration.

iii) the technical field support services claim

The third claim is for $264,942.42 in respect of technical field support services Litton claims to have provided. Litton states that after the expiry of the original contract in March 1976, it received a verbal request from IAF for continued assistance from Litton's field support staff, and it provided continuing services until March 1977. Thereafter, the situation was governed by the FMS contract entered into between IAF and the United States Government whereby Litton provided services as a government contractor. Litton's present claim concerning the period intervening between the two contracts is for 39 man-months and 8 days; the amount invoiced was based on the same rates as those set forth in the FMS contract. IAF

denies the existence of a separate verbal agreement and contends, instead, that Litton should look to the United States Government for payment for any additional services that were provided.

iv) the technical manuals claim

The fourth part of Litton's claim concerns the cost of various technical manuals and illustrated parts breakdowns it supplied to IAF in response to a telephoned request. IAF initially disputed this claim, but now admits that the amount invoiced, $2,515.22, is payable.

The Counterclaims

IAF's counterclaims can be divided, broadly, into two categories: the first for damages for loss of operational capacity occasioned by the departure of Litton's experts; and the second for damages arising out of Litton's failure to return various items forwarded by IAF for repairs.

i) damages for loss of operational capacity

IAF argues that as a result of the abrupt departure of Litton's technical experts, it was unable to make the best use of its equipment owing to the lack of sufficiently qualified personnel. This in turn affected its operational capacity. No particulars are given of the principles to be applied in establishing the amount of damages; IAF claims to be seeking "equitable" compensation. Litton responds that by the time its experts left Iran it was no longer bound to IAF by any contractual nexus, but was working under contract with the United States Government pursuant to the FMS contract.

ii) damages arising out of Litton's failure to return various items

This counterclaim can be broken down into five separate heads.

a) damages of $150,000,000

IAF claims this amount in damages for loss of capacity caused by the skills of its pilots becoming outdated as a result of Litton's failure to return certain items of equipment. Litton denies any such liability.

b) the return of the 91 LN-33 parts

This claim relates to the items retained by Litton (see above). IAF has also indicated that it should be reimbursed for the cost of obtaining replacements which had to be procured from alternative sources. Litton agrees to the return of the parts on payment being made for the repairs carried out. It denies any liability for the cost of the replacements.

c) the return of 344 INS items

This claim relates to items which IAF claims to have shipped to Litton for repairs in three consignments; IAF states that they were never returned. Litton denies that it ever received any such items, which include some which Litton does not manufacture.

d) the return of 26 INS items

This claim, too, concerns items which IAF claims to have shipped to Litton for repairs. Litton denies that it ever received them, and points out that the list includes certain items it does not manufacture.

e) the return of 107 INS items

This claim relates to a further consignment of parts allegedly sent to Litton for repair and not returned. Litton denies having possession of them, and argues that the lists provided date from 1975 and 1976 and give no indication whether any repair work was ever done in the United States.

II REASONS FOR AWARD

A. Issues of Procedure

Litton has sought leave to amend its claim to include the costs of warehousing of the 91 retained LN-33 items of equipment. In the view of the Tribunal, no prejudice would be occasioned to the Respondents by the admission of this amendment, and it is therefore allowed in accordance with Article 20 of the Tribunal Rules.

A further issue was raised by the attempts of both Parties to submit late filings of documents. At the hearing, Litton submitted a document consisting of an update of its claim for legal costs and attorney's fees. By virtue of the nature of this type of information, it has been the practice of the Tribunal in the past to accept such documents for filing, and there is no reason not to do so here. The same applies to three pages of documentation introduced by IAF to illustrate the type of transactions on which the claims were based and referred to in a previous filing.

Different considerations, however, apply to two other documents introduced by IAF. The first of these was a volume of evidence filed on 19 March 1986 in support of IAF's counterclaims. This was followed on 8 April 1986 by a document containing translations of two of its exhibits. The

time for filing of such evidence had been extended by the Tribunal to 12 December 1985, with an indication that no further extension would be granted in view of the scheduled hearing date. This was done with the intention of protecting the opposing party from the prejudice that would result from the filing of a substantial volume of evidence too close to the hearing date for a considered reply to be feasible. Accordingly, the documents in question cannot now be admitted.

In accordance with Tribunal practice Litton's various claims may be aggregated so as to reach $250,000, so that they can be presented under Article III, paragraph 3, of the Claims Settlement Declaration.

B. Jurisdiction

The only jurisdictional issues raised by the present Case are whether Litton has satisfied the Tribunal that it is a national of the United States within the meaning of Article VII, paragraph 1 of the Claims Settlement Declaration; and whether there is jurisdiction over certain storage charge claims. Evidence has been submitted that establishes that at all relevant times Litton is and has been a wholly-owned subsidiary of Litton Industries Inc., which is a Delaware corporation and that more than 50% of the stock of Litton Industries, Inc. has been owned by United States citizens. IAF expressed doubts during the course of the proceedings as to the completeness and authenticity of certain corporate certificates submitted by Litton. In response to an Order of the Tribunal, Litton made the originals of these documents available at the hearing for verification by IAF, but the Respondents declined to examine them. The Tribunal itself is satisfied on the basis of the uncontroverted evidence submitted by Litton that it is a national of the United States.

In view of the Tribunal's conclusions as to the storage charge claims, there is no need to determine the jurisdictional issues they present.

C. The Merits

i) the spare parts claim

Litton has submitted purchase orders which establish that the parts in question were ordered by IAF; IAF has not denied this, nor has it disputed the prices charged by Litton. The only question raised by IAF concerns the adequacy of the evidence Litton has adduced to show that the goods were shipped. Having reviewed the bills of lading, which establish that the items were delivered to Behring International, Inc., IAF's forwarding agents, and the affidavits of employees of both Litton and Behring which confirm this, the Tribunal does not share these doubts. Similarly, Litton has produced evidence that the goods were invoiced, and that the invoices were followed up by written demands for payment which were not protested at the time by IAF. In view of the foregoing, Litton is entitled to recover the amount of $102,512.26. The Tribunal considers that Litton is entitled to interest on this amount from a date three months after the invoices were sent, i.e. 9 April 1979, which interval appears to represent the average payment period drawn from the practice of the parties.

ii) the overhaul and repairs claim

The first part of this claim concerns invoices amounting to $160,248 in respect of certain LN-33 parts repaired by Litton and returned to IAF. Again, Litton has provided detailed documentation to show that the parts were repaired and shipped back to IAF; that the invoiced prices conformed with the previous course of dealings between the parties; and that invoices and documents for payment were not protested at the time by IAF. IAF's defence to this claim is of a very general

nature, and unsupported by any evidence which might tend to rebut the documents presented by Litton. The Tribunal therefore awards Litton the amount of its claim in this respect. Again, interest on this amount is awarded from 22 March 1979, on the same basis as in section II c(i) above.

The claim for $831,022.93 concerns repairs carried out to the 91 parts which Litton retained[1], and the costs of warehousing these items. The "interim procedures" the parties had agreed upon with respect to repairs were outlined in a letter from Mr. Raymond Deuschle, Litton's Mid-East Programs Manager, to Mr. Khatami on 7 January 1977, which contemplated payment "on a prompt basis". The practice had developed whereby Litton repaired items forwarded by IAF, returned the items to IAF and invoiced IAF's New York Purchasing Mission, whereupon IAF would pay within 30 days of delivery. Delays in payment began to occur during 1978.

Payments were brought up to date after a visit by Mr. Deuschle to IAF's purchasing office on 8 January 1979. On that occasion, Mr. Deuschle states, he hand-delivered an invoice relating to a shipment made on 5 January, and explained to Colonel Khatami that the next shipment of repaired items would be conditional upon payment being received promptly. IAF was thus on notice that Litton intended to alter its pattern of shipments in response to the changing situation.

On 8 January 1979, at which point IAF had no overdue debts for repaired items, the most urgently needed of the repaired parts in Litton's possession were shipped. Although by that time

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[1]Both Parties have referred to 91 items in connection with this part of the claim. However, it appears from documents submitted by Litton that a further 6 items were delivered by IAF for repairs. Litton worked on these items, retained them along with the original 91, and has included them in the calculation of its claim in respect of repair costs.

Litton had completed work on about two-thirds of the items, worth some $617,520, it took a commercial decision not to ship the rest in order to protect itself against what it perceived as the risk of non-payment. If payment had been made by 9 February 1979, that is, within the usual thirty-day period, the Tribunal was informed, the balance of the goods would have been shipped. No payment was received within thirty days, although no objection was raised by IAF to the invoice.

In the absence of a formal written contract, the mutual obligations of the parties have to be determined largely by reference to their past course of dealings. This inevitably implies a certain margin of flexibility, especially at a time when the normal pattern of transactions had been disrupted or altered in some way. Given the flexible nature of the parties' practice, and the background of revolutionary upheaval against which these transactions were being conducted, the Tribunal does not consider that IAF was in breach of its obligations by not making payment in February 1979. Nor does it construe Litton's decision to make only a partial shipment in January 1979 as a breach. Rather, that decision appears to have been a reasonable and proportionate response to the situation that had developed, and it was a policy the essence of which had been communicated to IAF. Litton was entitled, in the circumstances, to assurances of future payments before shipping the goods.

On 6 July 1979, Litton sent an invoice in respect of the repaired items with an offer to ship 50% of the items if payment was forthcoming, but this did not elicit any response. The Tribunal notes that if payment had been made upon receipt of this invoice, and Litton had duly shipped the items in question to Behring, it is unlikely that problems would have arisen in obtaining an export licence, a step which invariably was undertaken by IAF itself. Later problems in that respect could not therefore be ascribed to Litton.

The question arises as to what amount Litton should now be awarded with respect to the repairs it carried out to the 91 retained items. Having established that there was no breach of contract on either side, the calculation should be based on reasonable remuneration for work actually performed rather than any formula derived from the total repair price less unincurred costs, which would only be appropriate as a measure of damages. Thus, in the Tribunal's estimation, Litton is entitled to receive $617,520 representing the completed repairs. As to the remaining items, Litton continued to work on the repairs until mid-May. It is doubtful whether it was reasonable for Litton to have done so, however, given that no payment was made by 9 February, and it would have been more consistent with the logic underlying its chosen policy of retention if work had ceased at that date. The Tribunal thus prefers to award Litton an amount calculated on a pro rata basis to represent work carried out up to 9 February 1979. Having deducted the $617,520 attributable to completed repairs, the balance claimed is $213,502.93. This comprises $121,690.93 as the cost of labour and materials used up to 15 May 1979, the date of cessation of work, and $91,812 as the profit, calculated as 25% of the invoiced price, that Litton would have earned if it had completed the repairs on items of equipment which were in the repair cycle when Litton stopped work on them. On a pro rata basis, (32/127), the cost of labour and materials attributable to the period from 9 January to 9 February 1979, together with the profit accruing thereon, is $40,882.86. Thus the total awarded for this claim is $658,402.86. Since the first formal demand for payment for the full repair price was made in Litton's letter of 11 November 1980, interest is awarded from that date.

Similarly, in view of the Tribunal's findings that IAF was not in breach at the time Litton made the decision to retain the goods, IAF cannot now be held liable for warehousing costs. It was only after non-payment of the July 1979 invoice that IAF could be said to have been in breach with regard to the

actual items retained. This part of Litton's claim is thus dismissed.

The award of $658,402.86 in respect of these items is conditional upon their return by Litton to IAF, a result which both Parties have stated their willingness to bring about. It is the Tribunal's understanding that, as at the date of this Award, Litton is in possession of a valid Treasury Department licence to transfer the 97 items of equipment to the warehouse of Victory Van Corporation in Sterling, Virginia, United States, this being the facility currently used by IAF. Notification to the Escrow Agent of payment of this part of the Award is therefore made conditional upon receipt by the Tribunal of confirmation of delivery by Litton of the 97 items to that, or some other appropriate location. Litton will thus have discharged its obligations in this regard. Thereafter, the responsibility for obtaining the necessary export licences rests with IAF, as was the case during the previous dealings between the parties.

iii) the technical field support services claim

Litton's claim in this respect is arrived at by subtracting the 36 man-months of technical support by its field service representatives required by, and provided under, its original contract with IAF, from the total services it claims to have provided up to 21 March 1977, the commencement date of the FMS contract entered into between IAF and the United States Government, which superseded it. The balance remaining is 39 man-months and 8 days, for which Litton claims $264,942.42. Although IAF evidently knew these services were being performed by Litton, the basis on which it had agreed to do the work remains unclear. There is no indication that IAF agreed to compensate Litton for such additional work at the rates subsequently applied under the new FMS contract. On the contrary, it appears that Litton expected that the price of

this work would be recouped under the FMS contract to be concluded between IAF and the United States Government.

The absence of any mention of a claim for these services in subsequent correspondence between Litton and IAF, in particular in the letter written on 11 November 1980 to IAF setting out all accounts outstanding, tends to support this view. The FMS contract, once it was signed in September 1977, contained no provision for retroactive payment. Thus Litton remained unpaid, but it evidently did not seek at the time to have the account settled directly by IAF.

It thus appears to the Tribunal that the common intention of the parties was that any such additional services required by IAF in the period intervening between the two contracts would be provided by Litton on a promotional basis, on the understanding that the cost would in some way be recouped under the supervening FMS contract. Whatever the uncertainties inherent in such an arrangement, it seems, on balance, that payment by IAF did not form any part of it.

Accordingly, the Tribunal does not consider that IAF should now be held liable for the cost of such services, and the claim relating to them is dismissed.

iv) the technical manuals claim

Litton's claim for $2,515.22 is admitted by IAF, and accordingly this amount is included in the total of the award, together with interest accruing from 29 October 1979, three months after the first invoice was sent.

The Counterclaims

i) damages for loss of operating capacity

IAF has failed to adduce sufficient evidence either as to liability on the part of Litton, or as to any losses it suffered, in order to sustain this counterclaim. It is accordingly dismissed.

ii) damages arising out of Litton's failure to return items sent for repair

As to the 91 LN-33 items which are the subject of the overhaul and repairs claim by Litton, the Tribunal has found that Litton was justified in the circumstances in retaining these items until it was assured of payment (see above). Had IAF made payment within a reasonable period after receipt of the invoice of 3 July 1979, it is unlikely that it would have encountered any difficulty in obtaining an export licence at that time. Litton can thus not be held accountable for subsequent increases in the level of restrictions imposed in this respect, or for the cost of obtaining replacement parts.

As to the three other consignments in respect of which IAF has raised counterclaims, of 344 items, 26 items and 107 items respectively, there is insufficient evidence that such equipment was ever sent to Litton for repairs. Accordingly, this counterclaim, too, must be dismissed.

D. Interest

The Tribunal applies the current rate of interest determined in accordance with the principles laid down in Sylvania Technical Systems, Inc. and The Government of the Islamic Republic of Iran, Award No. 180-64-1 (27 June 1985). As at the date of this Award, the rate to be applied is 11% per annum.

E. Costs

Litton has requested a total of $168,496.10 as costs of the arbitration. In view of the fact that Litton has been only partially successful in its claim, and in the light of the principle of reasonableness adopted by this Chamber in the case of Sylvania Technical Systems, Inc. and The Government of the Islamic Republic of Iran, supra. and applied in subsequent cases, the Tribunal considers it appropriate to award costs of $30,000.

III AWARD

For the foregoing reasons,

THE TRIBUNAL AWARDS AS FOLLOWS:

(i) The Respondent THE ISLAMIC REPUBLIC OF IRAN AIR FORCE is obligated to pay the Claimant LITTON SYSTEMS, INC.(THE GUIDANCE AND CONTROL SYSTEMS DIVISION) the sum of nine hundred and twenty three thousand six hundred and seventy eight United States Dollars and thirty four cents (US $923,678.34) plus simple interest at the rate of 11% per annum (365-day basis) on $102,512.26 from 9 April 1979; on $160,248.00 from 22 March 1979; and on $2,515.22 from 29 October 1979 up to and including the date on which the Escrow Agent instructs the Depositary Bank to effect payment out of the Security Account; plus simple interest at the rate of 11% per annum (365-day basis) on $658,402.86 from 11 November 1980 up to and including the date of this Award; plus costs of arbitration of $30,000. 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 Republic of Algeria dated 19 January 1981.

(ii) The Claimant LITTON SYSTEMS, INC. (THE GUIDANCE AND CONTROL SYSTEMS DIVISION) is directed to deliver to the

warehouse facility of Victory Van Corporation in Sterling, Virginia, or any other warehouse authorised for use by THE ISLAMIC REPUBLIC OF IRAN, the 97 items of LN-33 inertial navigation equipment belonging to THE ISLAMIC REPUBLIC OF IRAN AIR FORCE currently in the Claimant's possession listed for purposes of identification in Attachment A to the letter dated 11 November 1980 written by the Claimant to the Respondent and including the six additional items listed in Exhibit 2 to the Affidavit of Sharon Train filed in this Case on 20 August 1985.

(iii) The remainder of the claims and of the counterclaims of the ISLAMIC REPUBLIC OF IRAN AIR FORCE are dismissed.

(iv) This Award is submitted to the President of the Tribunal for notification to the Escrow Agent in respect of US $265,275.48. Notification in respect of the remaining US $658,402.86 will take place upon receipt by the Tribunal of confirmation from either party of the delivery of the items referred to in paragraph (ii) above.

Dated, The Hague
22 August 1986

Karl-Heinz Böckstiegel
Chairman
Chamber One

In the Name of God

Mohsen Mostafavi
Concurring in part,
Dissenting in part.

Richard M. Mosk
Concurring.
Although I do not necessarily agree with all of the theories and figures, I concur in the Award in order to form a majority.