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IRAN - UNITED STATES CLAIMS TRIBUNAL

دادگاه داوری دعاوی ایران - ایالات متحده

DUPLICATE ORIGINAL

«نسخه برابر اصل»

CASE NO. 40

CHAMBER THREE

AWARD NO. 50 -40-3

IRAN UNITED STATES CLAIMS TRIBUNAL
دادگاه داوری دعاوی ایران - ایالات متحده

FILED - ثبت شد

Date ۱۳۶۲ /۳/ ۱۸ مورخ
8 JUN 1983

No. 40 ۴۰ شماره

R.N. POMEROY, K.S. POMEROY and R.M. POMEROY,

Claimants,

and

GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN,

Respondent.

[redacted]

AWARD

Appearances:

For Claimants: Mr. R.N. Pomeroy
Mr. F.H. Lane, Mr. T. Devitt,
Attorneys

For Respondent: Mr. M.K. Eshragh,
Deputy Agent of the
Islamic Republic of Iran
Mr. Ghaemi,
Legal Adviser to the Agent
Mr. M.A. Shamloo,
Attorney
Mr. Tajzadeh
Mr. Azadeh

Also present: Ms. Jamison Selby,
Deputy Agent of the United
States of America

I. THE PROCEEDINGS

Claimants R.N. POMEROY, K.S. POMEROY and R.M. POMEROY, owners of capital stock in Pomeroy Corporation, a Liberian corporation, filed their Statement of Claim against Respondent GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN on 16 November 1981. The Respondent, through the Ministry of Defence, filed its Statement of Defence on 14 April 1982 together with a Statement of Counterclaims; in those Statements the Navy of the Islamic Republic of Iran was named as Respondent and Counter-claimant. The Claimants filed a Reply to the Statement of Counterclaims on 3 June 1982.

On 3 August 1982, the Tribunal issued an Order scheduling a joint Hearing on all issues in the case and in the related Case No. 41, Pomeroy Corporation v. Government of the Islamic Republic of Iran, for 10 November 1982. The Order further required the Respondent to submit a Rejoinder to the Claimant's Reply by 17 September 1982 and set 30 October 1982 as the final date for the submission of documentary and other written evidence by all Parties along with any final written comments the Parties wished to make.

On 13 October 1982, Respondent filed its Rejoinder to the Claimants' Reply. A Supplemental Statement was filed by the Respondent on 25 October 1982, in which it restated some of its defences and raised a number of new defences.

On 29 October 1982, the Claimants filed a Supplemental Submission including sworn affidavits, an expert's opinion on Iranian law, a memorial discussing the legal issues presented by the case and certain other documents. On 2 November 1982 the Claimants filed a Second Supplemental Submission containing a supplemental affidavit and certain additional documents.

The Hearing was held on 10 November 1982 with all Parties present. The Parties agreed that evidence submitted in this case as well as in the companion Case No. 41 would be deemed to have been received in both cases. On the day of the Hearing, the Respondent filed a Statement requesting, inter alia, that this matter be consolidated with Case No. 432, Brown & Root, Inc., et al., v. the Iranian Navy et al., or that the two cases be heard jointly (see below at IV).

On 19 November 1982, after the Hearing was closed, the Tribunal issued an Order for post-hearing submissions under which the Respondent was permitted to file rebuttal evidence by 10 January 1983 and the Claimants were permitted to file surrebuttal evidence by 10 February 1983.

On 7 December 1982, the Respondent filed a Rejoinder which addressed the testimony given at the Hearing and contained in sworn affidavits of certain of the Claimants' witnesses. At the request of the Respondent, the Tribunal

ordered, on 11 January 1983, that deadlines for the further evidentiary submissions be extended to 1 February 1983 for the Respondent and to 4 March 1983 for the Claimants.

On 12 January 1983, the Respondent filed a Supplemental Submission consisting of a memorial on certain issues in the case. On 7 February 1983, the Claimants filed a Post-Hearing Submission including additional documentary evidence and stating that the Claimants intended to make no further submissions.

II. CONTENTIONS OF THE PARTIES

The Claimants allege that they are all United States nationals by birth and that they have been the sole shareholders of Pomeroy Corporation since its formation in May 1976.

The Claimants seek compensation for amounts allegedly due, but not paid, under the terms of a contract under which Pomeroy Corporation agreed to provide planning, development and administration services to the Iranian Navy on two projects for the construction of naval facilities.

The Claimants contend that the contract in question was duly executed on 1 July 1978 by Pomeroy Corporation and

legally authorized representatives of the Iranian Navy (the "Contract"). The Contract covered the two year period ending on 30 June 1980 and required Pomeroy Corporation to provide its services by supplying "an organization of qualified and skilled experts". Under Article 7 of the Contract, Pomeroy Corporation undertook to "ensure that there are no defects in the works of the contractors and consulting engineers under contract to the Government on the project" and to "point out defects if any to the Government in the work of such contractors and consulting engineers"; Pomeroy Corporation would "have no responsibility or liability in this respect". Pomeroy Corporation was to be compensated according to stated rates based upon specified categories of employees supplied (Article 3 (a) and Schedule I). In addition, the Navy was required to pay an annual fee ("firm fee") in the amount of US $1,631,795 "for the Services of the Corporation, including corporate support offices", payable in equal monthly installments (Article 3 (b) and Schedule II). The fee was to be firm for two years from date of Notice to Proceed, and it was to "provide for the furnishing of 20 staff members and a maximum of 75". Pomeroy Corporation was required to submit monthly invoices and the Navy was required to audit these invoices within ten days after receipt and to pay verified invoices "immediately" (Article 2). The Contract also provided that 5.5% of all payments would be withheld and paid to government tax authorities (Article 3 (d)), and that if "any Iranian tax is

imposed on Contractor" in excess of the amount withheld, the Navy would reimburse Pomeroy by the amount of that excess (Article 10). Finally, provision was made for the settlement of all unresolved disputes arising between the parties by recourse to "arbitration according to Iranian Laws and Regulations" (Article 11).

By telex dated 10 March 1979 and received on 12 March 1979, the Navy notified Pomeroy Corporation that it was terminating the Contract and after this latter date Pomeroy allegedly ceased performing services under the Contract.

The Claimants contend that Pomeroy Corporation fully performed its obligations under the Contract until advised that the Contract was terminated. The Claimants allege that payments under the Contract were duly made through October 1978, but that the Government of Iran ordered that a cheque issued by the Navy as payment for the full amount due for November 1978 not be paid. Furthermore, they allege that invoices which were submitted for December 1978 and January and February 1979, and which were audited and approved by the Navy's appointed auditor, were not paid. Included among the amounts remaining unpaid are payments for employee services and monthly installments of the agreed-upon firm fee.

Claimants originally sought recovery in the amount of US $3,552,745 for both work performed and the balance of the

firm fee. During the course of the proceedings, the Claimants amended the amount of the claim to reflect a deduction for overhead costs, including Iranian taxes, which Pomeroy Corporation did not incur as a result of termination of the Contract. Therefore, the Claimants now seek US $2,927,163, plus interest at a reasonable rate, and their costs of arbitration.

In response, the Navy objects to the jurisdiction of the Tribunal over the claim. First, the Navy maintains that the Claimants may not assert the contract rights of Pomeroy Corporation because the latter is not a national of the United States, having been organized under the laws of Liberia. Second, it contends that exclusive jurisdiction over the claim lies with the courts of Iran on the basis of the Contract's arbitration provision, the Iranian nationality of the Respondent, the availability of a local remedy in Iran and the fact that the Contract was executed in Iran.

In its defence on the merits of the claims, the Navy asserts that the Contract is invalid on the grounds that it was executed without proper authority and in violation of Iranian law and that Pomeroy Corporation was not statutorily eligible to enter into the Contract. The Navy also alleges that the Contract is invalid because no Farsi language version of the contract instrument was ever executed.

The Navy does not deny that it failed to make payments required by the Contract, but maintains that such failure is excused on four grounds. First, it alleges that the invoices submitted by Pomeroy Corporation were not audited and approved in the manner required by the Contract. Second, it argues that the Contract's remuneration provisions are exorbitant in relation to both the services performed by Pomeroy Corporation and compensation customarily paid to other consulting firms. Third, the Navy alleges that Pomeroy Corporation breached the Contract by failing either to supply qualified personnel or to perform its duties adequately. Finally, it contends that it is not liable for the portion of the agreed-upon firm fee falling due after the date of termination because (a) the Contract not being valid in the first place, its "termination" in March 1979 could not give rise to any liability for the Navy, and (b) in any event the Contract includes no provision for the indemnification of losses resulting from termination.

The Navy has also presented six counterclaims which are based upon alleged liabilities of Pomeroy Corporation which the Navy alleges are attributable to the Claimants as officers of Pomeroy or as "partners" of the corporation. First, the Navy seeks the return of US $5,107,814.28 in payments made to Pomeroy Corporation on the basis of the alleged invalidity of the Contract and its allegedly excessive remuneration provisions. Second, the Navy seeks an

unspecified amount for losses incurred as a consequence of Pomeroy Corporation's alleged contract breaches, particularly, its purported failure to report alleged defects in the work of other contractors on the project. Third, the Navy claims a refund of US $2,640,012.24 in payments made to Pomeroy Corporation under contracts entered into prior to the 1978 Contract. Fourth, the Navy asserts that Pomeroy Corporation owes US $1,734,511.17 in payments due to the Social Security Organization and, fifth, that it owes US $91,727.04 in unpaid company taxes. Sixth, the Navy claims US $12,074 allegedly owed to the Communications Company of Iran for telephone services. The Navy also claims interest on the above amounts and its costs of arbitration.

In response to the counterclaims, the Claimants maintain generally that the shareholders of a corporation are not liable for the corporation's debts and that, therefore, as a matter of law, the Claimants are not liable under any of the six counterclaims. The Claimants assert the legal validity of the Contract and the reasonableness of its remuneration terms and therefore deny any duty to return past payments as sought in the first counterclaim. With regard to the second counterclaim, they maintain that Pomeroy Corporation fully performed its obligations and that, in any event, the Contract exculpates them from liability for defects in the performance of other contractors.

The Claimants contend that the Tribunal lacks jurisdiction over the remaining counterclaims on the ground that they do not arise out of the same contract which is the subject matter of the claim. They further argue that Pomeroy Corporation has paid all social security and company taxes due and that, in any event, Pomeroy Corporation is protected from liability by the Contract's provision requiring indemnification by the Navy for all taxes in excess of the 5.5% of payments withheld. Similarly, they deny that Pomeroy Corporation is liable to the Communications Company of Iran on the ground that the Contract specifically required the Navy to provide all telephone and telex services.

III. JURISDICTION OF THE TRIBUNAL

The primary basis of the Tribunal's jurisdiction is found in Article II, paragraph 1, of the Declaration of the Government of the Democratic and Popular Republic of Algiers Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran of 19 January 1981 ("Claims Settlement Declaration"), which establishes the Tribunal for, among other purposes,

> the purpose of deciding claims of nationals of the United States against Iran ... and any counterclaim which arises out of the same contract, transaction or occurrence that constitutes the subject matter of that national's claim, if such claims and counterclaims ... arise out of...

> contracts ... excluding claims arising under a binding contract between the parties specifically providing that any dispute thereunder shall be within the sole jurisdiction of the competent Iranian courts ....

Whether a claim is a "claim of a national" of the United States is governed by the definitions set forth in Article VII of the Claims Settlement Declaration, which provides:

> 1. A "national" of Iran or of the United States, as the case may be, means (a) a natural person who is a citizen of Iran or the United States; and (b) a corporation or other legal entity which is organized under the laws of Iran or the United States or any of its states or territories, the District of Columbia or the Commonwealth of Puerto Rico, if, collectively, natural persons who are citizens of such country hold, directly or indirectly, an interest in such corporation or entity equivalent to fifty per cent or more of its capital stock.
>
> 2. "Claims of nationals" of Iran or the United States, as the case may be, means claims owned continuously, from the date on which the claim arose to the date on which this Agreement enters into force, by nationals of that state, including claims that are owned indirectly by such nationals through ownership of capital stock or other proprietary interests in juridical persons, provided that the ownership interests of such nationals, collectively, were sufficient at the time the claim arose to control the corporation or other entity, and provided, further, that the corporation or other entity is not itself entitled to bring a claim under the terms of this Agreement.

The Claimants have submitted passport and birth registration documents to demonstrate that they are all United States citizens by birth. Furthermore, they have produced stock certificates and other evidence showing that all of

the 830 outstanding shares of Pomeroy Corporation are owned by them. Finally, both these documents and a certificate of the Government of Liberia demonstrate that Pomeroy Corporation was organized under the laws of that nation and could not, therefore, itself present claims to the Tribunal.

While offering no evidence to contest the Claimants' proofs, the Respondent argues that the claims themselves lack United States nationality. This argument must be rejected. As the sole owners of Pomeroy Corporation, the Claimants' collective ownership interest is clearly sufficient to control Pomeroy Corporation. Therefore, indirectly, the Claimants also own the claims of this corporation and are proper parties to assert them before the Tribunal under Article VII, paragraph 2 of the Claims Settlement Declaration.

The remaining jurisdictional issue raised by the Respondent is whether the claim is excluded from the Tribunal's jurisdiction by virtue of any clause in the Contract referring disputes to be settled exclusively by Iranian courts.

The Contract provides, in Article 11, for disputes to be settled "through arbitration according to Iranian Laws and Regulations".

The Tribunal has held that such a clause is not one "specifically providing that any disputes [under the contract] shall be within the sole jurisdiction of the competent Iranian courts...", so as to divest the Tribunal of jurisdiction over the claim under Article II, paragraph 1 of the Claims Settlement Declaration. See Gibbs & Hill Inc. and TAVENIR, et al., Case No. 6, Interlocutory Award No.1-6-FT.

In view of the foregoing, the Tribunal determines that it has jurisdiction over the Claimants' claims.

Article II, paragraph 1 of the Claims Settlement Declaration establishes two tests for determing whether a counterclaim comes within the Tribunal's jurisdiction; it must be directed against the claimant, and not against a third party, and it must arise out of the same "contract, transaction or occurrence that constitutes the subject matter" as does the claim. The Claimants have argued that they are not, as a matter of law, liable under the counterclaims according to the universally recognized general principle of law that shareholders of a corporation are not liable for the obligations of the corporation. The Respondent argues that the Claims Settlement Declaration does not contain any language which supports the Claimants' position. The Tribunal need not now determine this issue in view of the holdings in this award with regard to the counterclaims. Whether or not this principle is applicable, it does not bear on the Tribunal's jurisdiction.

The first counterclaim, based upon the alleged invalidity of the Contract and its allegedly excessive remuneration provisions, and the second counterclaim, based upon alleged breaches of the Contract, are both directed against the Claimants and clearly arise out of the same required subject matter as does the claim. Therefore, the Tribunal has jurisdiction over these counterclaims.

The third counterclaim, however, is of a different nature. This counterclaim, seeking the recovery of payments made under previous contracts between the parties, is not within the Tribunal's jurisdiction since it does not arise out of the same subject matter as the claim.

The fourth and fifth counterclaims arise out of alleged obligations for unpaid social security premiums and company taxes for the period from March 1976 to March 1979. To the extent that these counterclaims are based on events prior to July 1978, they do not arise out of the same required subject matter as the claim and are, therefore, outside the jurisdiction of the Tribunal. It has been argued that these counterclaims are outside the jurisdiction of the Tribunal even to the extent that they are related to the performance of the 1978 Contract, because the obligation to pay social insurance premiums and company taxes is created by law and not by any contractual provisions, and the counterclaims may

thus be said not to arise out of the same subject matter out of which the claim arises. There may also be arguments to support the opposite view. In the present case the Tribunal does not have to reach this jurisdictional issue for reasons stated below at V (3).

The sixth counterclaim, finally, is based on Pomeroy Corporation's alleged duty under Article 4 of the Contract to reimburse the Navy for certain telephone charges. Thus this counterclaim arises out of the same contract as does the claim, and, consequently, the Tribunal has jurisdiction over it.

IV. RESPONDENT'S REQUEST AS TO PROCEDURE

The Navy contends that the case should have been consolidated with another case before the Tribunal, No. 432, involving a claim by one of the contractors on the project because an expected counterclaim in that case would show that Pomeroy Corporation failed to perform its obligations. That motion to consolidate was not made until the Hearing itself. At that time, and even today, the Respondent in the other case had filed no Statement of Defence and no counterclaim. Nothing precluded the Navy from submitting evidence at the Hearing or after the Hearing concerning allegations relating to Pomeroy's performance. The Tribunal granted the Navy an opportunity to submit material after the Hearing. Accordingly, the Navy was given ample opportunity

to present its evidence and arguments. For the foregoing reasons, the Tribunal has not found sufficient reasons to grant the request for consolidation.

V. MERITS OF THE CLAIM AND COUNTERCLAIMS

1. The claim

There is no dispute that payments were made as required for both personnel supplied and for the monthly installments of the firm fee, for the first four months of the Contract. Furthermore, the Claimants have submitted invoices and other documents demonstrating that the net amount of US$848,233.39 due for personnel services supplied in November and December 1978 and January and February 1979 was not paid as required and that no further payments have been made for the firm fee. The Navy has not contested this evidence, nor has it denied the Claimants' allegations in this regard. Consideration must turn, then, to the Navy's asserted justifications for non-payment - invalidity of the Contract; non-compliance with the Contract's auditing requirements; exorbitant remuneration provisions; and failure of performance.

The Navy contends that the Contract is invalid on the asserted grounds that the Navy official who signed it lacked authority to do so, that Pomeroy Corporation was not an eligible contractor approved by the Council of Ministers as

required by statutory law and that no Farsi language version of the Contract was executed.

Even if the Navy's assertions of the invalidity of the Contract were correct, the Navy conducted itself in a manner which indicates that it considered the contract to be valid, by making substantial payments under the Contract, by making facilities available to Pomeroy Corporation and by accepting services from it.

It is both a general principle of law and a principle embodied in Articles 247 and 248 of the Civil Code of Iran, that a party may not deny the validity of a contract entered into on its behalf by another if, by its conduct, it later consents to the contract. As such, the Navy's conduct constitutes a ratification of the Contract, whether or not the Navy's signatories lacked proper authority. Furthermore, the Claimants have presented uncontradicted written testimony from the two principal Navy officers involved that the Contract was specifically approved by the then commander-in-chief of the Navy and that the signatory had fully delegated powers to execute the Contract. Regarding the eligibility of Pomeroy Corporation under the statute authorizing one of the two Navy projects referred to in the Contract, the requirement of approval by the Council of Ministers contained in the statute relates only to contractors engaged in the construction of the project and not

to contractors assisting the Navy in performing its own role. Finally, the Tribunal finds no basis in the Contract for the Respondent's contention that the signing of a Farsi language version of the Contract was a condition to validity. Therefore, even if the Tribunal had not determined that the Navy had ratified it, the Contract could not be held to be invalid on the ground that it had been signed by the parties in English only.

The Navy contends that its non-payment is excused because the invoices presented to it by Pomeroy Corporation were not audited as required by the Contract. The Contract provides that the Navy "is bound to audit the invoice within ten (10) days after receiving it and in case of verification of the services performed, pay the sum to the Contractor immediately." The Contract also specifies that the "Contractor's time records, and other supporting documents of category billing shall be subject to audit by the Project Auditors Whinney-Murray Company". The Claimants have submitted copies of the audit reports of Whinney Murray & Co., an international accounting and auditing firm, for the November and December 1978 invoices, and in both cases the auditor recommended payment. Furthermore, the Claimants introduced a copy of a letter from the Navy's representative in the United States indicating approval of an attached audit report by the accounting firm of Ernst & Ernst, affiliates of Whinney Murray & Co., for the January and

February 1979 invoices. The Claimants submitted a copy of this audit report as well. The Navy has neither specifically contested these audit reports nor produced any evidence of non-compliance with the Contract's auditing requirements. Indeed, the Navy has failed to specify any respect in which those requirements were not fulfilled. The Tribunal must therefore conclude that the Contract was fully complied with in this regard.

The Navy has also asserted that the Contract's remuneration provisions are exorbitant and should not therefore be fully enforced. Even assuming that the Tribunal can inquire into the alleged fairness of the remuneration under the Contract, the only evidence on the point produced by the Navy was an excerpt from a contract with the consulting firm of Stanwick International Inc., which provided for compensation at rates lower than those of the contract in issue here. No evidence of the nature of Stanwick's duties or qualifications was presented, and, more importantly, there was no attempt to show customary commercial practice on rates of compensation for work such as that performed by Pomeroy Corporation. It is apparent that, at the time it contracted with Pomeroy Corporation, the Navy was in a position to be fully aware of rates of compensation paid for comparable services and, as the employer under the Stanwick contract, was particularly familiar with the rates paid thereunder. Having validly entered into the Contract, the

Navy cannot be heard to complain now that its terms were disadvantageous. Moreover, the Claimants produced some evidence indicating that the rates set forth in the Contract were specifically approved as being reasonable by a deputy prime minister in charge of reviewing the construction projects. In view of the above, the Tribunal holds that this defence must be rejected.

Finally, the Navy has not produced any evidence in support of its contention that Pomeroy Corporation breached its duties under the Contract by failing to supply qualified personnel or failing to point out defects in the work of other contractors. By failing to establish even a prima facie case for contract breach, the Navy has not met its burden of proof on this defence, and it must be rejected.

The uncontroverted evidence shows that the Navy failed, without justification, to make payments for the supply of personnel under approved invoices as required by the Contract in the following amounts, after deducting the 5.5% withholding for taxes: US $306,089.28 under the invoice of 1 December 1978; US $243,120.15 under the invoice of 1 January 1979; US $254,394.00 under the invoice of 1 February 1979; and US $44,629.96 under the invoice of 5 March 1979.

Furthermore, the evidence shows that the Navy failed to pay the balance of the firm fee in accordance with the

Contract. In calculating the amount of this balance, the Claimants state that a total of US $815,897.00 was invoiced during the first six months of the Contract "on account of the corporate overhead and the fee". This amount includes US $128,503.85 of the firm fee invoiced on 1 December 1978 for the month of November and US $128,503.85 of the fee invoiced on 1 January 1979 for the month of December, neither of which amounts has been paid. The Tribunal finds that the Navy has shown no valid reasons why the firm fee for November and December 1978 should not be paid. Therefore the Claimants should be awarded such fee amounting to a total of US $257,007.70.

The Claimants originally claimed for the gross amount of the uninvoiced balance, which they calculated at US $2,447,504.00. During the course of the proceedings, the Claimants reduced the principal amount of their claim by deducting 26.5% of the asserted gross uninvoiced balance to reflect that portion of the firm fee attributable to overhead costs which they did not incur as a result of the termination of the Contract, including a 9 % deduction for taxes. After such deductions, the claim for the remaining portion of the firm fee now amounts to US $1,821,922.

The Respondent contends that it is not liable for the uninvoiced balance of the firm fee, arguing that the 12 March 1979 notice cannot be regarded as a notice of termination since no valid contract was ever entered into. The

Tribunal has, however, found the Contract to be valid and binding and therefore cannot accept this argument. Moreover, although - as stated below - Pomeroy Corporation reduced its staff in Iran from December 1978, as a result of the events in Iran, there is no evidence that Pomeroy Corporation or the Navy regarded the Contract as terminated prior to the notice of 12 March 1979; on the contrary, on several occasions in the correspondence between the contracting parties in December 1978 and the following months, the possibility of resuming full contract performance was mentioned. The Tribunal's conclusion is therefore that, although its performance may have been suspended for some indefinite period of time, the Contract was in force and valid until Pomeroy Corporation received the notice of termination on 12 March 1979.

The Navy having terminated the Contract for no fault of Pomeroy Corporation, the Tribunal finds that the Claimants are entitled to compensation for their losses caused by the termination. The Claimants seek US $1,821,922 which represents the outstanding portion of the firm fee provided for under the Contract, less deductions for overhead costs and taxes. This claim is based on the argument that the remaining firm fee amount equals the profits Pomeroy Corporation lost through the Contract being terminated.

In determining the measure of compensation due to the Claimants in this respect, the Tribunal notes that there is

an indication that due to events surrounding the Revolution and other factors, Pomeroy Corporation's net profits would have been less than Claimants assert. There is also correspondence from one of the principals of Pomeroy Corporation suggesting that the company's actual costs had been higher than provided for in the contract price. For this reason, it cannot be held that the lost profit damages should be awarded in the full amount sought.

Moreover, under the Contract the firm fee was to provide for a minimum staff of 20 persons. By a letter of 13 December 1978 to the Navy, Pomeroy Corporation proposed a reduction of its staff from 21 to 15 or 16 persons, stating that such a reduction could be made "without affecting our support activities". In that same letter it was further stated that "we would propose to build up again sometime around Now Ruz at which time it is believed that the project and related elements may be more clearly delineated". This proposal to reduce staff was accepted by the Navy in a letter of 19 December 1978, in which the Navy stated that "[a]rrangements regarding staff rebuild up by you requires pre-authorization from ... [the Navy]". In a letter dated 28 January 1979, Pomeroy Corporation proposed a further Tehran staff reduction to 3 engineers; whether this proposal was actually approved is not clear from the evidence submitted. In a letter to the Navy of 16 February 1979, Pomeroy stated that during January 1979 its staff had fallen

"below the Contract minimum of 20 persons", and in view of this Pomeroy Corporation proposed to invoice for all technicians as from 1 January 1979 at the rate of US $20,000 per man month for staff employees resident in Iran. This letter refers to a proposal purported to have been made in a letter of 28 December 1977, which letter, however, is not available to the Tribunal. In its reply letter dated 1 March 1979, the Navy did not comment on Pomeroy Corporation's proposal concerning staff rates. In its invoices for January and February 1979, Pomeroy Corporation however charged $20,000 per man month, and no additional firm fee amount. In light of this, it appears that for at least a period of time the firm fee would not be charged but that, instead, the man month charge would be raised so as to include a profit part of the remuneration due to Pomeroy Corporation. It can also be concluded that this situation was intended to be effective until full performance was resumed - something which required the Navy's authorization. Since Pomeroy Corporation's obligations under the Contract were thus reduced, at least for a period of time, there is a further reason not to regard the remaining firm fee portion as an adequate measure of the damage incurred to Claimants. It is noted in this connection that the Contract contains some provisions with regard to force majeure but that neither party invoked these provisions.

Because of the gaps in the evidence and the difficulties in quantifying the actual amount of damages in this

respect with any precision, the Tribunal is justified in estimating such amount. Recognizing the difficulties parties have in producing all of the evidence, the Tribunal notes that when there are unexplained gaps in the evidence the Tribunal has no choice but to rely on inferences it can make from the known circumstances.

The Tribunal holds that Claimants should be awarded damages in this respect in an estimated amount of US $1,000,000.

2. Total principal amount due to the Claimants

Thus, the Tribunal holds that the Claimants are entitled to US $848,233.39 for invoiced payments due for the provision of personnel, US $257,007.70 for the invoiced portion of the firm fee and US $1,000,000 in damages for lost profits, which amount to a total principal sum of US $2,105,241.09.

3. The counterclaims

The first two counterclaims over which the Tribunal has accepted jurisdiction are based upon the same legal grounds as the Navy's defences of breach of contract and contract invalidity. In order to prevail on these counterclaims, the Navy necessarily had to prevail on these defences as

well. Because the Tribunal has been unable to sustain the Navy's position on the defences, it must likewise hold against the Navy with respect to these counterclaims. These counterclaims are therefore dismissed.

As for the counterclaim for social security premiums, the Respondent submitted as evidence a letter to the Iranian Navy from the Social Insurance Organization dated 7 March 1982. The letter shows an amount of 122,456,489 Rials in insurance premiums and damages due in connection with the contract at issue in this case and the contract at issue in the above-mentioned companion Case No. 41. This letter cannot eo ipso be regarded as sufficient evidence of Pomeroy Corporation's liability for any social insurance premiums. In this regard it is noted that the letter, which is not accompanied by any supporting material, in no satisfactory way explains the basis for the calculation made. In view of this, and the counter-evidence presented by the Claimants with regard to the counterclaim for social insurance premiums - inter alia testimony of a chartered accountant who had general supervision over all the work pertaining to taxes which was done for Pomeroy Corporation during the period of its operation in Iran - the Tribunal does not find sufficient proof that any such premiums are owing. This counterclaim must therefore be rejected.

With regard to the counterclaim for taxes, the Respondent relies solely on a letter to the Iranian Navy from the

General Department of Taxes in Iran dated 16 March 1982. According to this letter the outstanding tax debts of Pomeroy Corporation amount to 6,475,813 Rials. The Tribunal finds that, as in the case of the counterclaim for social insurance premiums and in view of the counter-evidence presented, this letter does not constitute sufficient proof that there are any taxes owing from Pomeroy Corporation. The Tribunal therefore rejects this counterclaim.

With respect to the remaining counterclaim for telephone charges, the Tribunal notes that Article 4 of the Contract states that the Navy would provide Pomeroy with, inter alia, offices and office equipment including telephone and telex services. The Tribunal finds that this must be understood to mean that the costs for such services would be borne by the Navy. This counterclaim therefore cannot be granted.

4. Interest on amounts due

The Claimants have sought interest damages for delay in payment of the above amounts at a reasonable rate as determined by the Tribunal.

The Tribunal holds that the Claimants are entitled to compensation for the Respondent's failure to pay the monies owing and determines the damages in this respect to be US $850,000.

5. Costs of arbitration

The Claimants have requested an award for costs in the amount of $218,130. The Tribunal holds that, in the circumstances of this case, the Claimants are entitled to costs of arbitration under Articles 38 and 40 of the Tribunal Rules in the amount of US $25,000.

VI. AWARD

THE TRIBUNAL AWARDS AS FOLLOWS:

The Counterclaims of the Respondent THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN are hereby dismissed.

The Respondent THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN is obligated to pay and shall pay to the Claimants R.N. POMEROY, K.S. POMEROY and R.M. POMEROY, jointly, the sum of Two Million Nine Hundred and Eighty Thousand Two Hundred Forty One and 09/100 United States Dollars (US $2,980,241.09). Such payment shall be made 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.

This Award is hereby submitted to the President of the Tribunal for notification to the Escrow Agent.

Dated, The Hague,
8 June 1983

Nils Mangård
Chairman
Chamber Three

In the name of God,

Richard M. Mosk
Concurring Opinion

M. Jahangir Sani
Dissenting Opinion