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دیوان داوری دعاوی ایران - ایالات متحده

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IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

[redacted]

CASE NO. 61
CHAMBER ONE
AWARD NO. 213-61-1

WALTER W. ARENSBERG, et al.,
doing business as SKIDMORE,
OWINGS & MERRILL, a partnership,
Claimant,

and

THE MINISTRY OF HOUSING AND URBAN
DEVELOPMENT OF THE ISLAMIC REPUBLIC OF IRAN,
Respondent.

AWARD

Appearances:

For the Claimant:
Mr. Frank Cicero
Mr. Richard Godfrey
Attorneys, Kirkland & Ellis
Mr. James DeStefano
Partner, Skidmore Owings & Merrill

For the Respondent:
Mr. Asghar F. Kashan
Agent of the Islamic Republic of Iran
Mr. Mohammad K. Eshragh
Deputy Agent

Mr. Parviz Ansari Moin
Mr. Amir Araghi
Legal Advisers to the Agent
Mr. Golzarzadeh
Assistant to Legal Advisers
to the Agent
Mr. Yousef Mowlaie
Mr. Iraj Amiri
Representatives of the
Ministry of Housing

Also present:

Ms. Jamison M. Selby
Deputy Agent of the United
States of America
Ms. Lynn Aspley
Legal Adviser to the Agent

I. FACTS AND CONTENTIONS

i) Legal basis of the claim

On 17 November 1981, a Statement of Claim was filed with the Tribunal by the firm of Skidmore, Owings & Merrill ("Skidmore"), acting both in its own right and in the names of its individual partners. Skidmore is a partnership of architects, engineers and planners existing under the law of Illinois, with its principal office in Chicago, Illinois. The Respondent is the Ministry of Housing and Urban Development. The Ministry is the successor to the Khuzestan Urban Development Organization ("KUDO"), whose "functions, responsibilities, properties, assets and personnel" it assumed upon the dissolution of KUDO after the Islamic Revolution. See Statutory Bill for the Dissolution of

Khuzestan Urban Development Joint Stock Company (21 March 1981).

The Claimant first seeks $1,126,612, an amount representing the dollar equivalent of 78,862,640 Rials.[1] It alleges that this sum remains due under a Procès-Verbal of Settlement of Account (the "Settlement Agreement") between KUDO, on the one hand, and the Claimant and its Iranian co-venturer Mandala Collaborative ("Mandala"), on the other. The Settlement Agreement resolved certain disputes between the parties which had arisen from a series of three contracts for the provision of architectural, engineering and planning services. The Claimant also seeks $7,220, which it expended in extending a standby letter of credit obtained in relation to a performance guarantee. Pre-judgment interest and costs are also claimed.

ii) The factual background

In October 1974 Skidmore, in a joint venture with Mandala, entered into three contracts with KUDO in relation to the development of a new town, Ramshahr, in the province of Khuzestan. Skidmore and Mandala were collectively identified in the contracts as "Consulting Engineer". They opened a joint bank account at Iranians' Bank into which payments of

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[1] In fact, one of the sixteen invoices (No. 16), which in conjunction with the procès-verbal, make up the Settlement Agreement stated the amount owing in Dollars. For ease of computation in presenting the claim, the Claimant converted that amount, $57,000, to Rials at the rate prevailing at the time of the Settlement Agreement, 70 Rials to one Dollar. As will be seen below, the same charges were in any event included in another invoice (No. 1) in Rials.

contract fees were made. The individual Khuzestan contracts were:

i) Development Plan Contract No. 247, for the preparation of two successive five-year plans for the new town;

ii) Management Plan Contract No. 1186, for services related to the preparation of a management plan for implementing the development plans; and

iii) Consulting Engineers Services Contract No. 485, for architectural and engineering services in connection with the design and construction of the new town.

Skidmore claims to have completed work on the first two contracts and to have been continuing work on the third when KUDO gave notice terminating the Consulting Engineers Services Contract on or about 24 July 1976. Skidmore protested that the termination was unjustified and not in accordance with the contract. KUDO also refused to pay the balance claimed under the first two contracts. According to Skidmore, more than 150,000,000 Rials were then owed under the three contracts for services already performed.

Negotiations followed between Skidmore, Mandala and KUDO which resulted in the Settlement Agreement being signed on 12 October 1976 in relation to all three contracts. This Settlement Agreement takes the form of a procès-verbal dated 12 October 1976 of a meeting held on the previous day between the parties to the three contracts. The pleadings contain the original Farsi text, signed by representatives of Skidmore, Mandala and KUDO, and two slightly different translations into English of this document, which the Tribunal considers substantially identical in meaning. The

Settlement Agreement states that the invoices of the Consulting Engineer were examined, agreed to and signed by the three parties at the meeting, and that instructions would be issued for their payment. The text does not identify any particular amounts or invoices, or indicate how many invoices there were.

The Settlement Agreement goes on to provide that the Consulting Engineer's representative should follow up the payment instructions at the Comptroller's Office in order to receive payment. The Consulting Engineer was required to hand over to KUDO all documents, records and original drawings belonging to KUDO under the contracts before receiving payment. The two letters of guarantee for advance payments pursuant to the contract were to be released simultaneously with payment of the last invoice. The contracts were considered as discharged, the Consulting Engineer waived its claim for interest, and both Parties waived all claims against each other arising out of the contracts.

Skidmore has identified sixteen invoices as those approved for payment at the meeting. Several of them bear endorsements signed by KUDO's representative, Mr. Daraie, which will be discussed below. The total amount of the invoices comes to 101,820,107 Rials. Of this amount, 22,957,267 Rials was paid to Skidmore by the Iranian Ministry of Finance on or about 20 November 1976. There was no indication of the particular invoices to which this applied. No further payments were made. The bank guarantees were not released, and one expired. At the request of KUDO, Skidmore extended the standby letter of credit relating to the other bank guarantee to 11 May 1980, after which it, too, expired.

iii) Points in issue between the Parties

Skidmore asserts that payment of the full amount of the

invoices it has identified should have been made by mid-November 1976. It considers that the claim arose on about 20 November 1976, the date it received payment of 22,957,267 Rials instead of 101,820,107 Rials.

In its Statement of Defence and Counterclaim, the Respondent objected to the Tribunal's jurisdiction, first on the ground that because the Claimant was a registered Iranian company, it lacked locus standi; and secondly because the underlying contracts provided for the sole jurisdiction of the Iranian courts. Skidmore responded that its Iranian branch office, which was not a separate legal entity, signed both the original contracts and the Settlement Agreement. Although Skidmore had an Iranian subsidiary named "Skidmore Owings & Merrill Va Shoraka", that subsidiary was never involved in the contracts with KUDO. Skidmore further maintains that, since the claim is based on the Settlement Agreement, any choice of forum clause in the underlying contracts is immaterial.

The Respondent also contends that Skidmore is not entitled to claim independently of Mandala, because of the existence of its co-venture with Mandala. It points out that the two are named jointly in the contracts as Consulting Engineer, all payments were made to them jointly by KUDO, and Skidmore was never a party in its own right, either to the contracts or to the Settlement Agreement. At the least, according to the Respondent, Skidmore cannot claim the full amount due to the co-venturers jointly.

Skidmore maintains that while the co-venturers jointly entered the contracts with KUDO, they never formed a separate entity; instead, each preserved its independent legal personality throughout the period of cooperation. The joint bank account, Skidmore argues, was established as a matter of convenience: KUDO made contract payments to the account, and then Skidmore and Mandala allocated these

payments between themselves primarily on the basis of the amount of work each had performed. In the course of winding up its affairs in Iran after cessation of work under the contracts, Skidmore reached an agreement with Mandala dissolving all contractual relations between them. That agreement, dated 14 November 1976 (the "Memorandum of Understanding"), also provided, inter alia, that Mandala assigned to Skidmore all rights to receive fees remaining under the contracts and that Mandala would release to Skidmore all rights to their joint bank account. Thus, according to Skidmore, it obtained the exclusive right to pursue the co-venturers' claims against KUDO.

As to the Settlement Agreement itself, the Respondent's position is that the Consulting Engineers Services Contract had been terminated in July 1976 because "all drawings and projects... had serious faults and defects" and that the Consulting Engineers had been given detailed notice of these in writing. The Respondent contends that the Settlement Agreement describes a final settling of the contract accounts, and was not in any sense a compromise arrangement giving rise to independent rights and duties. In it, the parties waived all future claims based on the contracts, and there could thus be no outstanding dispute between them.

The Respondent claims that an overall calculation shows that the true amount owed to the Consulting Engineer based on the invoices submitted was 34,957,214 Rials, whereas 34,968,502 Rials had been paid as advances and payments on account. Its counterclaim includes an element of 11,288 Rials in respect of this alleged overpayment.

The Respondent denies that the Settlement Agreement gave rise to an obligation simply to pay the amounts on the face of the invoices. No specific sum is mentioned in the text of the Settlement Agreement. The correct interpretation, it argues, is that all the invoices were subject to the

approval of, and the making of certain contractual deductions by, the Comptroller's Office of the Ministry of Finance. The first invoice stated that the balance would be paid "upon the receipt of approval of the project in the Commission of Article No. 5", a reference to an official town planning approval procedure described in the underlying contract. Other invoices included certain amounts which had originally been withheld as a good performance guarantee and were now repayable only upon approval by the KUDO General Assembly. Thus there could be no determination of a final figure until these procedures had been completed. The Respondent maintains that KUDO did what was required of it, and that it was, in any event, the responsibility of Skidmore and Mandala to "follow-up" the payments after the meeting.

Skidmore contends that it unsuccessfully sought payment of the amounts due under the Settlement Agreement from KUDO, the Comptroller's Office, and other Iranian entities, and that it fulfilled its only remaining obligation on 31 October 1976, when Mr. Thompson of its staff travelled to Ahwaz to deliver all original documents and drawings to Mr. Roshdieh of KUDO. At the hearing, the Claimant produced copies of these plans bearing Mr. Roshdieh's initials, which it said indicated receipt. The Respondent denies that the plans were received, and disputes the validity of the alleged initialling indicating receipt. Further, Skidmore argues, KUDO's purported justifications for the termination of the contract are irrelevant to this claim, which arises solely from the Settlement Agreement. For the same reason, Skidmore objects to the Respondent's attempt, on the basis of internal records, to recalculate the amounts owing under the various invoices "agreed to" at the settlement meeting. Skidmore argues that the only proper deductions from the invoices are those shown on the invoices themselves, which it has already taken into account in determining the amount of the claim.

The Respondent's counterclaim against Skidmore seeks to recover the overpayment of 11,288 Rials; 12,372,229 Rials repayable under the two letters of guarantee; approximately 6 million Rials in social security premiums; and, most significantly, taxes which, at the date of the hearing on 2 June 1983, were assessed at 76,556,210 Rials. These were stated to relate to the years 1354 to 1357 (corresponding to 1975 to 1978), and to include penalties for late payments and an amount in respect of tax payable on the dissolution of the Iranian subsidiary, "Skidmore, Owings & Merrill Va Shoraka".

In reply to the counterclaim, Skidmore denies either that any overpayment occurred or that it improperly permitted the letters of guarantee to expire. Skidmore also denies that it owes any taxes or social security payments. As to taxes, Skidmore first asserts that it has satisfied all tax obligations and that the invoices which form part of the Settlement Agreement reflect all appropriate tax deductions. Second, it points out that the taxes sought are claimed in part from Skidmore's Iranian subsidiary, which owes no taxes but over which the Tribunal in any event has no jurisdiction. Third, Skidmore contends that the tax assessment was based on KUDO's payments to the joint venture, without regard to allocations to Mandala or payments to subcontractors. Fourth, it argues that it has not previously received demands for amounts now claimed, so that the claim could not have been outstanding as of 19 January 1981. Fifth, Skidmore protests that the contracts explicitly protected it against legislation enacted after the date thereof, and that parts of the counterclaim are based on such legislation. Sixth, it argues that the asserted social security obligation in fact involves KUDO's failure to remit to appropriate authorities amounts deducted from payments to Skidmore. Finally, Skidmore contends that the Tribunal has no jurisdiction over the tax and social security counterclaims because the underlying delinquencies

do not arise from the contract, transaction or occurrence on which Skidmore's claim is based.

The Tribunal held a hearing on 2 and 3 June 1983 at which the written pleadings and evidence were supplemented by further documents and oral argument from both Parties.

II. REASONS FOR AWARD

i) Procedure

The Tribunal admits the documents submitted by both Parties during the course of the hearing as they were not such as to occasion any prejudice.

ii) Jurisdiction

a) The partnership as Claimant

As noted, the Claimant is a partnership organized under the law of Illinois, a State of the United States. In accord with Illinois law, it brings the claim in the names of its individual partners as well. Article VII, paragraph 1 of the Claims Settlement Declaration defines a "national" of Iran or the United States as, inter alia,

> "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."

In International Schools Services, Inc. and National Iranian Copper Industries Company, Interlocutary Award No. ITL 37-111-FT, p. 9 (6 April 1984), the Full Tribunal stated that this "most flexibl[e]" definition

> "extend[ed] the Tribunal's jurisdiction to all forms of corporations and other legal entities, regardless of whether they were organized for profit or whether they have issued capital stock."

The phrase "other legal entity" in Article VII clearly encompasses partnerships, a common form of business organization which does not issue capital stock. The Tribunal has accordingly recognized the right of partnerships to file claims. See Touche Ross & Company and The Islamic Republic of Iran, Award No. 197-480-1, p. 11 (30 October 1985); Queens Office Tower Associates and Iran National Airlines Corp., Award No. 37-172-1, p. 2 (15 April 1983). The Claimant has adduced sufficient evidence in the form of affidavits and accompanying passports to establish that at all relevant times the partnership entirely comprised United States citizens. The Tribunal concludes that it has jurisdiction over the Claimant.

b) The forum selection clause

The Respondent contends that each of the underlying contracts, on which it alleges that the claim is really based, contained a forum selection clause, the same in each case, which would operate to exclude the claim from the Tribunal's jurisdiction by virtue of Article II, paragraph 1 of the Claims Settlement Declaration. The Claimant contends that this argument is irrelevant as the claim arises out of the Settlement Agreement.

Even were the forum selection clauses of the underlying contracts held to apply to the present claim, the Tribunal would still have jurisdiction. Article II, paragraph 1 excludes from the jurisdiction of the Tribunal "claims arising under a binding contract between the parties specifically providing that any disputes thereunder shall be within the sole jurisdiction of the competent Iranian courts in response to the Majlis position."

The relevant clause in each of the Khuzestan contracts provides as follows:

> "Article 22 - Settlement of Disputes:
>
> All disputes arising out of this Contract, or the interpretation and understanding of its provisions between the parties, which cannot be resolved and settled through amicable negotiations or correspondence, shall first be referred to a committee composed of three representatives of the Plan Organization, the Employer, and the Consulting Engineer. In case no agreement can be reached, or if one of the parties to the Contract does not submit to the judgement of the majority of the committee, the dispute will be settled according to the laws of Iran by reference to competent courts."

The Tribunal notes that this clause provides that all disputes arising out of the contract or its interpretation should, failing amicable settlement, be settled according to the laws of Iran by reference to "competent courts". It does not mention the courts of Iran, and therefore it cannot be said to provide specifically for their sole jurisdiction. See Gibbs and Hill, Inc. and Iran Power Generation and Transmission Company, Interlocutory Award No. ITL 1-6-FT, pp. 4-5 (5 November 1982), reprinted in 1 Iran-U.S. C.T.R. 236, 238.

c) Skidmore's locus standi

Skidmore claims that by operation of the Memorandum of Understanding into which it and Mandala entered on 14 November 1976, it is entitled to recover the entire amount due under the Settlement Agreement. The Memorandum of Understanding reveals a purpose to dissolve the co-venture and apportion the various outstanding obligations between the two partners as part of the cessation of Skidmore's business in Iran. Its final paragraph states that upon signature "all contractual relationships between [the] firms will be terminated with the exception of those issues related to the payment due to either party"; each party then

provides the other a general release. A separate paragraph details the apportionment of obligations. As relevant here, the Memorandum required Skidmore to pay Mandala a specified sum in connection with the Short Term Program of Contract No. 485; it required Mandala to release to Skidmore control over their joint bank account; and it granted to Skidmore the exclusive right to pursue the co-venturers' remaining claims for fees under the contracts. It is not disputed that Skidmore paid Mandala the amount due in connection with Contract No. 485, and Skidmore has produced Mandala's letter to the bank relinquishing control over the joint account. There is no evidence that the settlement contemplated by the Memorandum of Understanding did not take effect, and the Respondent does not so argue. The Tribunal further concludes that it took effect before the date when the present claim arose, which the Tribunal holds below to be 1 February 1977. Thus, Skidmore has standing to pursue a claim for sums still due under the Settlement Agreement.

The Memorandum of Understanding also established a mechanism by which Skidmore deposited with Iranians' Bank as fiduciary an undated check representing a portion of the fees the co-venture sought from KUDO pursuant to the Development Plan Contract. The check was to become payable to Mandala "only when Mandala has fulfilled its obligations [to take steps necessary to secure certain town planning approvals] and [Skidmore] has received a check for full payment under the Development Plan Contract No. 247 from [KUDO]." Because the Tribunal holds on the merits that the Respondent has no obligation to pay Invoice Nos. 1 and 16 under Development Plan Contract No. 247 (see below), there is no need to consider the effect of this arrangement on Skidmore's standing to pursue this portion of the claim.

d) KUDO's status

It is not disputed that prior to its dissolution KUDO was an

agency, instrumentality or entity controlled by the Government of Iran within the meaning of Article VII, paragraph 3 of the Claims Settlement Declaration. As noted, the present Respondent, the Ministry of Housing and Urban Development, has since assumed KUDO's functions.

iii) The merits

a) The Settlement Agreement

As paragraphs 5 and 7 make clear, the Settlement Agreement superseded the contracts between the co-venturers and KUDO and created in their stead a new set of reciprocal, contractual obligations. At the same time, these obligations, and particularly the qualifications to them reflected in Mr. Daraie's endorsements, must be read against the background of the underlying contracts and the parties' practice.

The pertinent provisions of the Settlement Agreement read:

> "1. The invoices of Consulting Engineers, on the basis of the items which were investigated in the meeting be calculated, and the instruction of payment be issued in regard to them, and the representatives of Consulting Engineers should follow-up the payment instructions throughout the [Comptroller's Office] to receive the amounts thereof.
>
> 2. All the invoices were investigated and were agreed to, and were signed by the Parties, and action will be initiated on the basis of these documents.
>
> 3. The Consulting Engineers suppose to turnover all the documents and records and the original copies of the drawings which according to the contracts belong to KUDO, to this Organization's office before receiving their receivables, and to obtain receipts for items turned-over.
>
> 4. The guarantees of advance payments of the contracts concluded with the Consulting Engineers will be released concurrent with the payment of the last invoice."

Skidmore carried out its obligation to deliver the documents, records and drawings described in paragraph 3 on 31 October 1976, when Mr. Thompson visited KUDO and met with Mr. Roshdieh, KUDO's associate director. According to Mr. Thompson's affidavit, he handed the required documents to Mr. Roshdieh together with a covering letter from Mr. Muschenheim of Skidmore, a copy of which is also before the Tribunal. Mr. Thompson relates that Mr. Roshdieh indicated his receipt by initialling the copies which Skidmore would retain. These initialled copies were shown to the Tribunal during the hearing, and the Tribunal accepts Mr. Thompson's account of these events.

The remaining obligations are those of KUDO to pay the invoiced amounts agreed to at the settlement meeting. There is no dispute that the sixteen invoices identified by Skidmore are those which, in conjunction with the procès-verbal, form the Settlement Agreement. Nor is there any dispute that the Claimant accepted Mr. Daraie's endorsements and is bound by them. The Respondent maintains, however, that the provision of paragraph 1 of the Settlement Agreement that the Consulting Engineers should "follow-up" payment instructions through the Comptroller's Office had the effect of reserving to that Office the authority to make additional deductions from the invoiced amounts in order to determine the final amount due. Having made these calculations, according to the Respondent, the Comptroller's Office fully discharged the payment obligation by remitting on or about 20 November 1976 the amount of 22,957,267 Rials. Skidmore objects that this argument ignores the terms of the Settlement Agreement. It points out that upon entering the negotiations which led to the Settlement Agreement, it claimed some 150 million Rials for work already performed. Under the Settlement Agreement, by contrast, it could collect at most about 100 million Rials. Thus, it argues, the amount at which it decided to compromise could not be

subject to additional, unilateral deductions by the Comptroller's Office.

Considering all the circumstances, the Tribunal concludes that the parties to the Settlement Agreement contemplated that, where appropriate, the Comptroller's Office might make ministerial, essentially clerical corrections to the invoices before final payment. Moreover, as will be discussed more fully below in connection with individual invoices, the parties also recognized that payment of certain amounts was contingent on approval procedures specified in Mr. Daraie's endorsements. The Respondent's argument, however, presupposes a wide-ranging authority on the part of the Comptroller to make extensive deductions beyond those stated on the face of the invoices. No reasonable businessperson would agree to a settlement which afforded the other party the unilateral discretion to reduce by four-fifths the amount owed. Nor do either the procès-verbal or the individual invoices in any way suggest that the parties intended to permit the Comptroller effectively to rewrite their Agreement.

The Tribunal therefore concludes that the only proper deductions from the face amounts of the invoices are those to which Mr. Daraie's endorsements refer. Thus, KUDO's payment in November 1976 only partially satisfied its liability to Skidmore. Allowing a reasonable time for the Comptroller to process the invoices, Skidmore could reasonably have expected payment of the balance by 1 February 1977. Thus, the Tribunal further concludes that the claim arose on that date.

It remains to examine the individual invoices.

Invoice No. 1

The first invoice, dated 9 October 1976, sought fees for preparation of the report under Development Plan Contract, No. 247, for the construction of the new town of Ramshahr. After deductions for the contractor's tax, training fund payments and previous advances, the invoice shows a net amount payable of Rials 31,240,000. The gross amount of the invoice includes Rials 3,990,000 to cover the cost of a subcontract "for the study of regional traffic and transportation plan."

This invoice bears an endorsement by Mr. Daraie dated 11 October 1976, reading: "The balance of remaining fee will be paid upon the receipt of approval of the payment in the Commission of Article No. 5." In turn, Article 5 of the Development Plan Contract makes ratification of the Plan contingent "upon the approval by [the Commission] set up under Article 5 of the Act of the High Council of Town Planning and Architecture of Iran." Whether Mr. Daraie was referring to Article 5 of the contract or Article 5 of the Act of the High Council, it is clear that his endorsement made payment of this invoice subject to a condition precedent, i.e. approval by the town planning Commission. It is equally clear that the Claimant recognized the contingency. First, in a letter of 5 October 1976 to Mr. Daraie, which summarized settlement discussions in anticipation of the final meeting, Skidmore's representative Mr. DeStefano acknowledged that the Development Plan fees would be paid "on obtaining the approval mentioned in Article 5 of the Contract." Second, the Memorandum of Understanding by which Skidmore and Mandala later dissolved their relationship required Mandala, in apparent reference to the Article 5 Commission, to "assume full responsibility and take any immediate steps deemed necessary to secure all required approvals from the necessary authorities of the Development Plan Contract No. 247."

As the Respondent points out in its Statement of Defence, the Claimant has provided no evidence that the Commission ever gave the required approval. In its Reply, the Claimant argues that Article 5 is irrelevant because the Settlement Agreement discharged the underlying contract. That argument ignores the explicit incorporation of the Commission approval mechanism into the Settlement Agreement by virtue of Mr. Daraie's endorsement. Further, as noted, Skidmore's former co-venturer Mandala had the responsibility of taking the necessary steps to secure Commission approval, and thus Skidmore would have had access to written evidence of approval had it been given. Moreover, the events involved here occurred long before the Islamic Revolution, at a time when there were no difficulties in communication between the United States and Iran. Yet the Claimant presents no evidence of the Commission approval upon which it had agreed as condition precedent to payment of Invoice No. 1. The Tribunal therefore denies the claim for the amount requested in this invoice.

Invoice Nos. 2-5 and 7-12

Invoice No. 2 bears an endorsement by Mr. Daraie dated 11 October 1976 and reading: "Payment instructions will be issued immediately; however, the recovery of 10 percents will be payable after the approval of General Assembly." Invoice Nos. 3-5 and 7-12 bear substantially identical endorsements to the same effect. The "10 percents" to which the endorsements refer are amounts deductible as good performance guarantees. While the form of the invoices and endorsements vary, it is possible to identify from each the amount of the "10 percents", which frequently are not based upon the face amount of the particular invoice. The General Assembly to which the endorsements refer is that of KUDO.

As with Invoice No. 1, it is clear that the endorsements make payment of the sums to which they refer subject to a

condition precedent, and it is equally clear that the Claimant understood the contingent character of its right under the Settlement Agreement to the "10 percents". The letter of 5 October 1976 from Mr. DeStefano to Mr. Daraie states in pertinent part:

> "The release of the . . . retentions will require a resolution of the General [Assembly] of KUDO. It is understood that you will use your best endeavors to obtain such a release as part of an amicable settlement, as discussed in our meeting."

Also as with Invoice No. 1, the Claimant has not produced sufficient evidence to prove that the KUDO General Assembly ever gave such approval. The Claimant relies on a KUDO internal memorandum dated 5 January 1977, which records resolutions adopted at a meeting of the KUDO General Assembly. The pertinent part states:

> "KUDO's letter [of 28 October 1976] concerning the decision to repay the 10% retainer of Mandala/ [Skidmore] Consultant Engineers, whose contract is considered as terminated, was discussed. . . . Since the Consultant Engineers have failed to perform their obligations in a satisfactory manner, the assembly is for deduction of the 10% good performance of the Consultant Engineers."

Skidmore argues that this memorandum reflects the rescission of a decision already taken to approve payment of the retainage. Because the obligation to pay arose upon approval, Sidmore continues, any attempt to rescind should have had no effect, and it should recover these amounts.

Neither party produced the 28 October letter to which this memorandum refers. Skidmore argues that its action in turning over the drawings on 31 October, three days after the letter, in fulfillment of its own obligation under the Settlement Agreement, suggests that it thought the necessary approval had been issued. But the Settlement Agreement does not link Skidmore's obligation to General Assembly approval, either by timing or otherwise. Moreover, the text of the

KUDO memorandum is at best ambiguous. Its first sentence is as easily read to refer either to a request to the Assembly to render a decision or to Mr. Daraie's conditional willingness to repay the retainage, as it is to a General Assembly decision to give approval. Because these events occurred before the Islamic Revolution, the Claimant can point to no circumstances which would have hampered efforts to monitor and obtain proof of any approval given. The Tribunal concludes that the Claimant has not demonstrated fulfillment of the condition precedent to payment of the retainage. Rather, the only evidence in the record indicates that the General Assembly affirmatively favored retaining the 10% deduction. Accordingly, the Tribunal will deduct the appropriate amounts from the invoices bearing these endorsements.

Invoice No. 6

Invoice No. 6 is acknowledged by both Parties to represent a credit of 9,878,704 Rials in favour of KUDO in respect of street construction under a separate contract. Mr. Daraie's endorsement indicates, accordingly, that, "[i]n the course of payment of invoice, it will be calculated and deducted."

Invoice Nos. 13 and 15

These invoices bear no endorsement; nor is there any indication of any retention to be made. The Tribunal therefore accepts that the respective net amounts stated are payable.

Invoice No. 14

Invoice No. 14 relates to the final revised request of the Consulting Engineer for price escalation payments due under Contract No. 485. The record is confused and contradictory as to the amount of the invoice, and the question was not clarified at the hearing. The English version states the

figure as "the net amount of 7,518,209 Rials". The Farsi text refers to 8,004,638 Rials, and it is this amount that the Claimant seeks. The Farsi text bears the date 5 October 1976, and the English text, 9 October 1976. The Claimant has failed to explain the discrepancy; nor has the Respondent offered any alternative calculation. The endorsement of Mr. Daraie reads,

> "It is agreed that all the payment instructions from the date 1 Tir, 2535 (22 June 1976) onwards will be calculated and the Bank Markazi escalation coefficient will be calculated in regard to them, and be paid out."

The difference in the figures appears to the Tribunal to correspond, broadly speaking, to the 5.5% tax and 0.2% training fund deductions to which the other invoices were routinely subject. This being so, the Tribunal considers it reasonable to conclude that it was the lower and later figure which should have been paid.

Invoice No. 16

As has been seen, Invoice No. 1 related to the Consulting Engineer's service fee for preparation of the report under the Development Plan Contract, No. 247. It is based on a gross amount of 61,027,500 Rials. This is broken down into 57,037,500 Rials for the services of the Consulting Engineer, and 3,990,000 Rials due to a subcontractor who prepared a traffic study. The Tribunal has found that Invoice No. 1 is not payable for the reasons given above.

Invoice No. 16 is a clear duplication of the part of Invoice No. 1 relating to the subcontract. The amount claimed by Skidmore, 3,990,000 Rials, is identical, and Invoice No. 16 expressly refers to Invoice No. 1. While this duplication was noted by the Respondent, no specific explanation has been offered by Skidmore as to why this amount should be separately awarded. It would have been a legitimate exercise of the functions of the Comptroller's Office to

object to the duplication. The Tribunal cannot therefore allow the claim in respect of it.

Calculation

An application of the above conclusions to the sixteen invoices in question, using the evidence in the record, gives the following results:

Invoice	Amount claimed	Amount disallowed	Amount due
1. Development Plan Contract	31,240,000	31,240,000	-
2. Management Plan Contract	11,538,818	1,583,550	9,955,268
3. Contract 164	30,973,508	11,283,444	19,690,064
4. Contracts 2518/ 2968	6,701,254	1,232,670	5,468,584
5. Contracts 1344/ 2992	3,761,921	1,754,160	2,007,761
6. Contract 2515			(credit 9,878,704)
7. Relocation work	282,689	11,100	271,589
8. Sidewalk work	424,604	163,880	260,724
9. Water tower	1,881,285	199,500	1,681,785
10. Nursery and landscaping	702,346	74,480	627,866
11. Community facilities	946,170	946,170	-
12. Civil works	7,042,118	746,778	6,295,340
13. Geotechnical studies	609,060	-	609,060
14. Escalation fees	8,004,638	486,329	7,518,209
15. Demobilisation costs	3,600,000	-	3,600,000
16. Traffic plan	3,990,000	3,990,000	-

Total	48,107,546
Less deduction of partial payment	22,957,267
Total due to Skidmore	25,150,279

b) The Claim for extension of the letter of credit

Skidmore has claimed an additional U.S.$7,220 as its costs of extending, at the request of KUDO, the standby letter of credit in support of its bank guarantee. However, Skidmore has not borne its burden of sufficiently explaining and proving this element of the claim, and it leaves unclear the relationship of this claim to the provisions of the Settlement Agreement relating to the bank guarantees. Accordingly, the Tribunal cannot, on the basis of the record before it, grant this portion of the claim.

c) The counterclaims

Insofar as the counterclaims involve "Skidmore Owings & Merrill Va Shoraka", a separate entity not involved with KUDO, they cannot be said to arise out of of the same "contract, transaction or occurrence that constitutes the subject matter of [the] claim", as required by Article II, paragraph 1 of the Claims Settlement Declaration. They are therefore not admissible.

The remaining contractual counterclaims, all of which relate to Skidmore, must be taken to have been disposed of by the Settlement Agreement. There can be no possibility of reopening the contractual relations between the Parties so as to take these counterclaims into account. The counterclaims must therefore be dismissed.

The remaining counterclaims for taxes and social security, which are of a public law character, are dismissed as unsubstantiated and insufficiently explained. Thus, as in Touche Ross & Company and The Islamic Republic of Iran, Award No. 197-480-1, p. 21 (30 October 1985), the Tribunal holds that there is no need to address the jurisdictional questions of whether the claim arose out of the contract itself or by operation of Iranian municipal law; or whether, indeed, a claim was "outstanding" at all as at 19 January 1981, the date prescribed by the Claims Settlement Declaration.

d) The date of currency conversion

The claim has been expressed by Skidmore in U.S. Dollars in its pleadings before the Tribunal, using a conversion rate of 70 Rials to the Dollar. No discussion has taken place, either in the written pleadings or at the hearing, concerning the question of which date should legally be chosen for the conversion of the Rial amount into Dollars. The Tribunal therefore accepts the Claimant's suggested rate of conversion in this Case, as it did in INA Corporation and The Government of the Islamic Republic of Iran, Award No. 184-161-1, p. 15 (13 August 1985). The equivalent of 25,150,279 Rials at the suggested rate is U.S. $359,289.70.

e) Interest

Although the Settlement Agreement provides that no interest shall be payable under it, it cannot reasonably be read to preclude the award of interest on damages for its breach. The Tribunal considers that it is reasonable to award interest at the rate of 10% on the amount of the Award from 1 February 1977, the date the Tribunal holds that the claim arose. The Claimant requested interest up to the date of the Award, and interest is therefore granted only up to that date.

f) Costs

The Tribunal considers that the Respondent should be obligated to pay the Claimant reasonable costs in the amount of U.S.$12,000.

III. AWARD

For the foregoing reasons,

THE TRIBUNAL AWARDS AS FOLLOWS:

The Respondent, THE MINISTRY OF HOUSING AND URBAN DEVELOPMENT OF THE ISLAMIC REPUBLIC OF IRAN is obligated to pay the Claimant, SKIDMORE, OWINGS & MERRILL the amount of Three Hundred and Fifty Nine Thousand Two Hundred and Eighty Nine United States Dollars and Seventy Cents (U.S. $359,289.70) plus simple interest thereon at the rate of ten percent per annum (365-day basis) from 1 February 1977 up to and including the date of this Award; plus costs of arbitration in the amount of U.S. $12,000.

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.

The counterclaims of the MINISTRY OF HOUSING AND URBAN DEVELOPMENT OF THE ISLAMIC REPUBLIC OF IRAN are dismissed.

This Award is submitted to the President of the Tribunal for

notification to the Escrow Agent.

Dated, The Hague
27 February 1986

Gunnar Lagergren
Chairman
Chamber One

In the name of God

Koorosh-Hossein Ameli
Concurring in part, dissenting in part (see Separate Opinion)

Howard M. Holtzmann
Joining fully in the Award, except joining solely in order to form a majority as to (1) the award of only 10% interest, see my Separate Opinion in International Schools Services, Inc. and National Iranian Copper Industries Company, Award No. 194-111-1, pp. 3-4 (10 October 1985), and (2) the award of only $12,000 in costs, see my Separate Opinion in Sylvania Technical Systems, Inc. and The Government of the Islamic Republic of Iran, Award No. 180-64-1 (27 June 1985).