

IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داری دعاوی

IRAN UNITED STATES CLAIMS TRIBUNAL	دادگاه داری دعاوی ایران - ایالات متحده
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CASE NO. 68
CHAMBER TWO
AWARD NO. 244 -68-2

HOWARD NEEDLES TAMMEN & BERGENDOFF,
Claimant,

and

THE GOVERNMENT OF THE ISLAMIC REPUBLIC
OF IRAN, MINISTRY OF ROADS AND
TRANSPORTATION, and BANK TEJARAT
(successor to International Bank of
Iran and Japan),

Respondents.

DUPLICATE
ORIGINAL

نسخه برابر اصل

CONCURRING OPINION OF GEORGE H. ALDRICH

I concur fully in the Award in this Case with one exception -- the denial of the Claim for uninvoiced overtime multipliers, which is discussed in paragraphs 104 through 106 of the Award. I believe the Claimant did not waive its contractual rights and therefore should prevail on that Claim.

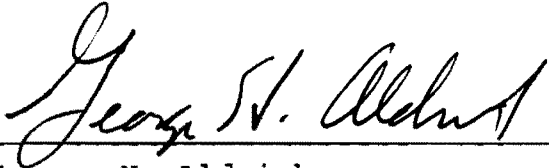
In late September and early October 1978, HNTB-Iran and MORT held intensive discussions concerning the questions

related to overtime on the motorway project. Pursuant to those discussions, HNTB-Iran sent MORT a letter dated 17 October 1978 which enclosed for MORT's "consideration and approval" a proposed Addendum No. 1 to the Contract. The Addendum would have, inter alia, limited the applicable overtime multiplier to 100 percent to cover general expenses and overhead, and would have been retroactive to 23 September 1978.

MORT did not sign the Addendum, continued not to pay invoices fully, and, in particular, paid a multiplier of only 50 percent on invoiced overtime amounts. On 3 December 1978, HNTB-Iran sent MORT a letter of protest in which it stated that "[w]e cannot accept a unilateral change to our Contract through simple instructions to the Development Budget Account Division to pay only a part of our invoices" The letter requested release for payment of funds withheld from certain invoices and approval of Addendum No. 1 which it termed "necessary to effect a change in the amount of the payment to the Consulting Engineer".

All subsequent invoices that included overtime were submitted, as the Award notes, with a cover letter stating that they were prepared in accordance with the letter of 17 October 1978. The majority considers that practice a "unilateral concession" amounting to a waiver of contract rights. I cannot agree. HNTB-Iran offered an amendment to its contract, not a unilateral concession. It made clear in the 3 December 1978 letter that any change required an amendment and that it could not accept unilateral action by MORT. HNTB-Iran's subsequent invoices referred back to the letter by which it had proposed the amendment. In my view, HNTB-Iran effectively reserved its contract rights but maintained its offer to work a mutual modification of the payment terms of the contract. Its conduct cannot fairly be construed as a waiver of those rights, which requires a showing of intent to waive. While the invoice cover letters

maintained the offer of a contract modification with retroactive effect, the letter of 3 December 1978 clearly shows that the Claimant did not intend to waive its contract rights. To so construe the Claimant's conduct gives MORT the benefit of a bargain it chose not to make.


George H. Aldrich