IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

ORIGINAL DOCUMENTS IN SAFE

845-85

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DUPLICATE ORIGINAL

«نسخه برابر اصل»

CASE NO. 845
CHAMBER ONE
AWARD NO. 406-845-1

NEAR EAST TECHNOLOGICAL SERVICES U.S.A., INC.,
Claimant,

and

ISLAMIC REPUBLIC OF IRAN AIR FORCE, LOGISTICS SUPPORT COMMAND,
Respondent.

IRAN UNITED STATES CLAIMS TRIBUNAL
دادگاه داوری دعاوی ایران ـ ایالات متحده
FILED - ثبت شد
Date 9 JAN 1989
تاریخ ۱۹ /۱۰/ ۱۳۶۷

AWARD

Appearances:

For the Claimant: Mr. Alain Henri Markon,
Attorney.

For the Respondent: Mr. Mohammad K. Eshragh,
Agent of the Government of the Islamic Republic of Iran,
Mr. Ali N. Heyrani,
Deputy Agent,
Mr. Ali Akbar Riyazi,
Legal Representative of the Respondent.

Also present: Mr. Michael F. Raboin,
Deputy Agent of the Government of the United States of America.

A. PROCEDURAL HISTORY

1. On 19 January 1982 the Claimant, NEAR EAST TECHNOLOGICAL SERVICES USA, INC. ("NETS") filed a Statement of Claim in which it sought to recover US $631,000 and US $1,442,170 against THE ISLAMIC REPUBLIC OF IRAN AIR FORCE, LOGISTICS SUPPORT COMMAND ("the Air Force"). These amounts were allegedly owed to NETS under contracts for the repair of LTN-51 inertial navigation systems and the supply of related equipment for use by the Air Force in its military aircraft.

2. The Air Force filed a Statement of Defence and Counterclaim on 9 February 1983, including a request for costs of arbitration. The Claimant filed a Reply on 17 August 1983, in which it sought to amend the amount claimed. The Air Force filed its Rejoinder on 31 October 1984.

3. After further exchanges of pleadings and documents the Tribunal held an oral hearing on 14 April 1988.

B. FACTS AND CONTENTIONS OF THE PARTIES

4. The Claimant describes itself as a corporation organised under the laws of the State of California. It appears from its pleadings to be engaged, inter alia, in the supply and procurement of inertial navigation systems for use in military aircraft.

5. The claim of NETS is divided into two parts. In the first, it seeks to recover amounts allegedly due in respect of repair services it performed on 28 LTN-51 systems of inertial navigation equipment, pursuant to an order issued by the Air Force to "Near East Technological Services Ltd." dated 36.11.12 in the Iranian calendar (which corresponds to 1 February 1978). It alleges that all the 28 systems were repaired, that 20 of them were returned to the Air Force and 8 remained undelivered. NETS initially stated that it was owed US $631,000 but later, in its Reply,

revised its claim, without explanation, to US $164,052. At the Hearing NETS reduced this claim to US $138,052, allegedly representing repair costs of eight undelivered systems.

6. The second part of the claim was originally for US $1,442,170 in respect of equipment ordered by the Air Force under 15 purchase orders bearing dates between 31 August 1977 and 26 September 1978. The amount originally sought comprised the allegedly unpaid purchase price together with storage charges and interest of $480,620. At the hearing the claim for storage charges was withdrawn.

7. The Air Force denies liability in respect of both claims. As to the items sent for repair, it contends that they were covered by an Equipment Maintenance Agreement entered into by the Parties on 24 January 1978 for a term of one year. Pursuant to this agreement NETS was to repair any items of inertial navigation equipment in the Air Force's inventory at 1 November 1977. It is not disputed that the single amount payable under that agreement, US $750,000, was paid by the Air Force to NETS in four installments as provided. NETS maintains, however, that the 28 items to which its claim relates were the subject of a separate contract and thus were not covered by those payments.

8. The items ordered in the 15 purchase orders giving rise to the second claim were never delivered. The Air Force denies that any payment obligation arose in respect of them.

9. The Air Force raised four counterclaims during the course of its pleadings. The Air Force's first counterclaim was for delivery of 37 technical systems and 20 inertial navigation systems ordered under a sales contract of 15 July 1978. The price, totalling US $4,634,816, was paid through a letter of credit. The Air Force also alleged that the failure to deliver these goods had made a large number of aircraft inoperable and it sought US $75,000,000 in damages

for the resulting loss of pilot skills. This counterclaim was later abandoned in the Air Force's Rebuttal. In the second counterclaim, it seeks the return of the 28 units sent for repair, which are the subject of NETS's first claim, or, alternatively, damages of US $500,000 per system. The third counterclaim is for the return of a further 53 systems sent for repair, or damages in the alternative of US $50,000,000. In the fourth, it seeks delivery of the items listed in the 15 purchase orders which are the subject of NETS's second claim. As an alternative, it asks for damages of US $900,000 representing the difference between the contract price and the current price for such items. All counterclaims are denied by NETS.

C. REASONS FOR AWARD

I. Procedural Issues

10. NETS filed a folder of correspondence with the Tribunal on 14 March 1988, less than one month before the Hearing. On 30 March 1988 the Respondent filed an objection to the admission of that document on the ground that its submission contravened the Tribunal's Order of 21 October 1987, which stated that,

> "No new documents may be introduced in evidence prior to the Hearing unless the Tribunal so permits and unless such documents are filed not later than two months before the Hearing."

At the Hearing, the Tribunal reserved its decision on the admissibility of that document.

11. The principles applied by the Tribunal in deciding whether a late-filed document is admissible are set out at length in Harris International Telecommunications, Inc. and Islamic Republic of Iran, Partial Award No. 323-409-1, pp. 22-31 (2 Nov. 1987). The primary considerations underlying both that Award and the Order of 21 October in the present

case are the equality of the Parties, the avoidance of prejudice, and the orderly conduct of proceedings.

12. In view of these considerations, and taking account of arguments raised by the Parties, the Tribunal finds no exceptional circumstances in this Case which would justify a departure from its usual practice. The material filed by NETS on 14 March 1988 is therefore not admitted as part of the record.

II. Jurisdiction

13. In each Case before it, the Tribunal's first responsibility is to satisfy itself, on the basis of evidence introduced by the Claimant, that the requirements of the Claims Settlement Declaration have been met and that both the Claimant and the claim are within its jurisdiction.

14. A Claimant must prove, first of all, that it is a "national" of Iran or of the United States. In the case of a corporate entity, this means, in the words of Article VII, paragraph 1 of the Claims Settlement Declaration, "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."

15. The Tribunal has accepted different forms of evidence to establish nationality, provided they are reliable and objective. Each Claimant bears the burden of proof. As stated by the Full Tribunal in Case No. A20, Decision No. DEC 45-A20-FT, p. 7 (10 July 1986), reprinted in 11 Iran-U.S. C.T.R., 271, 275, the Chambers "have adopted no general rule as to the evidence required for a corporation to prove its nationality, but have approached the question flexibly and pragmatically." This Chamber

frequently bases its findings as to the nationality of a corporate Claimant on the types of documentary evidence solicited in the Order of 15 December 1982 in Case No. 36, Flexi-Van Leasing Inc. and Islamic Republic of Iran, reprinted in 1 Iran-U.S. C.T.R. 455 ("the Flexi-Van Order") or the Order of 18 January 1983 in Case No. 94, General Motors Corporation and Islamic Republic of Iran reprinted in 3 Iran-U.S. C.T.R. 1 ("the General Motors Order"). In the present Case, the Claimant was required by Order of 10 March 1983 to submit "evidence in support of its alleged nationality in conformity with the guidelines set forth in the annexed [General Motors] Order".

16. NETS addressed the question of its nationality in its Reply filed on 17 August 1983. It attached to that pleading a Certificate of Incorporation and Good Standing issued by the Secretary of State of the State of California, stating that a corporation named "Near East Technological Services, Ltd." had been incorporated on 26 April 1976 and continued to subsist at the date of the certificate, 28 September 1976. As its second exhibit, NETS submitted a copy of a letter addressed to "George C. Drivas, Secretary" by an official of the Franchise Tax Board of Sacramento, California, dated 5 August 1983, describing "Near East Technological Services, Ltd." as "an active entity" at that date. Significantly, neither document contains any reference to the entity named in the Statement of Claim, "Near East Technological Services U.S.A., Inc." The third exhibit was an unsworn statement of George C. Drivas, signed in his capacity as secretary of a company called "Near East Technological Services Inc.," in which he stated that Near East Technological Services Ltd. was "also known as Near East Technological Services Inc. and conducts business under such name."

17. The Tribunal notes that the Claimant has identified itself in its pleadings by three corporate names at different times and for different purposes. The only legal entity which the Tribunal is able to identify from the

evidence is Near East Technological Services Ltd, the corporation organized under the laws of California on 26 April 1976. At the Hearing, the Claimant's attorney confirmed, in response to an arbitrator's question, that any award should be made in favor of, or against, that corporation, and that, likewise, the payment of any award of costs was the obligation of that corporation. That entity is not the named Claimant; the claim was filed and prosecuted in the name of "Near East Technological Services U.S.A., Inc." The record contains no evidence that this entity exists. Another corporation, apparently also named Near East Technological Services, Ltd., was, the Tribunal was told at the Hearing, incorporated in the Bahamas and maintained offices in Athens and Tehran through which it allegedly transacted business with the Air Force.

18. If the Claimant had satisfactorily established that the claims were owned by a corporation bearing any of the names variously used, the Tribunal would have been confronted with issues of admissibility and jurisdiction of the type discussed in St. Regis Paper Company and Islamic Republic of Iran, Award No. 291-10706-1 (29 Jan. 1987). This is unnecessary in the present Case because, whichever name is used to describe NETS, there is insufficient evidence that United States citizens hold, directly or indirectly, "an interest in such corporation or entity equivalent to fifty per cent or more of its capital stock" as required by Article VII, paragraph 1, of the Claims Settlement Declaration.

19. The only evidence of nationality is an unsworn written statement by Mr. George Drivas, who signs as "Secretary" of "Near East Technological Services, Inc." -- a name that does not include "USA" -- stating that 100% of the stock of that corporation was owned by an individual with an address in California during the fiscal year that ended 31 March 1981. This statement, however, does not disclose the name of that individual. Later, counsel for the Claimant submitted a copy of a passport of Mr. Drivas demonstrating

his United States nationality, but there is no evidence, written or oral, that Mr. Drivas is the unnamed stockholder referred to in his written statement. As to that, the Tribunal has only a statement of counsel -- who acknowledged at the Hearing that he had not examined the basic corporate records -- that Mr. Drivas was the sole stockholder of "Near East Technological Services USA Inc." Counsel makes no reference to "Near East Technological Services, Inc.," the name used in Mr. Drivas' written statement. This patchwork of information is obviously insufficient to show the ownership of the stock of either "Near East Technological Services USA, Inc." or "Near East Technological Services, Inc." As to "Near East Technological Services, Ltd.," the California corporation for which the Claimant submitted evidence of incorporation, there is no indication whatsoever of stock ownership. Neither Mr. Drivas nor any other officer or executive of any of these companies appeared at the Hearing to offer any information or explanation.

20. It is thus beyond dispute that the Claimant has failed to bear the burden of proving that the claims in this Case are those of a national of the United States, as defined in the Claims Settlement Declaration and as required for the Tribunal to assume jurisdiction. The claims must therefore be dismissed.

21. As a consequence of its conclusion that it has no jurisdiction over the Claimant, and thus none over the claim, it follows in accordance with established Tribunal practice that the counterclaims of the Air Force must likewise be dismissed. See, e.g., Reliance Group, Inc. and National Iranian Oil Company, Award No. 15-96-2 (8 Dec. 1982), reprinted in 1 Iran-U.S. C.T.R. 384.

III. Costs

22. The Tribunal is mindful of the fact that the Respondent's task of preparing pleadings and evidence was made more difficult by the lack of coherence in the

Claimant's written presentation of its case. This is reflected in the Tribunal's conclusions as to jurisdiction. It appears appropriate in the circumstances to award costs of $5,000 to the Respondent in accordance with Article 40 of the Tribunal Rules, and to make such award against the named United States legal entity, Near East Technological Services Ltd.

D. AWARD

For the foregoing reasons,

THE TRIBUNAL AWARDS AS FOLLOWS:

i) The claims of NEAR EAST TECHNOLOGICAL SERVICES U.S.A., INC. are dismissed for lack of jurisdiction;

ii) The counterclaims of THE ISLAMIC REPUBLIC OF IRAN AIR FORCE are dismissed for lack of jurisdiction;

(iii) NEAR EAST TECHNOLOGICAL SERVICES, LTD., a California corporation, is obligated to pay THE ISLAMIC REPUBLIC OF IRAN AIR FORCE the sum of five thousand United States Dollars and no cents.

Dated, The Hague
15 December 1988

Karl-Heinz Böckstiegel
Chairman
Chamber One

In the name of God

Assadollah Noori

Howard M. Holtzmann