

DUPLICATE
ORIGINAL
«نسخه برابر اصل»

CASE NO. 97

CHAMBER TWO

AWARD NO. ITL 14-97-2

RICHARD D. HARZA, JOHN A. SCOVILLE
and GEORGE E. PABICH, TRUSTEES,

Claimant,

and

THE ISLAMIC REPUBLIC OF IRAN;
KHUZESTAN WATER AND POWER AUTHORITY;
SEA MAN PAK COMPANY;
S.G. SERVICES COMPANY,

Respondents.

IRAN UNITED STATES CLAIMS TRIBUNAL	دادگاه داری دعاری ایران - ایالات متحده	
FILED - ثبت شد		
Date	۱۳۶۱ / ۱۲ / ۴	تاریخ
23 FEB. 1983		
No.	97 97	شماره

INTERLOCUTORY AWARD

Appearances:

For the Claimant: Mr. Jerry Anker
Mr. Mark N. Bravin
Wald Harkrader & Ross
Attorneys

For the Respondents: Mr. Mohammed K. Eshragh, Deputy Agent
of the Islamic Republic of Iran;
Mr. A. Riazi, Legal Advisor to the
Agent of the Islamic Republic of
Iran;
Mr. A. Bahai
Mr. S. Almohammad
Mr. Nowbari
Mr. Alavi
Mr. F. Saidi

I. PROCEDURE AND CONTENTIONS OF THE PARTIES

On 17 November 1981, Richard D. Harza, John A. Scoville and George E. Pabich acting as assignees and trustees for nationals of the United States owning 97.35 percent of the stock of Harza Engineering Company International ("Harza International"), a Liberian company, filed a statement of claim against the Islamic Republic of Iran, said to include the Government of Iran, its Ministry of Energy, the Khuzestan Water and Power Authority, Sea-Man-Pack Co., Ltd. and S.G. Services Co.

This statement contains two claims. One claim relates to the alleged expropriation of some of Harza's employees' personal property entrusted to Sea-Man-Pack Co., and S.G. Services Co. to be shipped to the United States. It amounts to \$19,373.83. This claim is not addressed by this interlocutory award.

The second claim relates to the performance of a "Contract for Technico-Economic Studies and Engineering Services for the Multipurpose Water Development of Karun and Marun Projects" concluded on 30 September 1965, between Harza International and the Ministry of Water and Power, by now renamed the Ministry of Energy, which contract was later assigned by the Ministry to the Khuzestan Water and Power Authority. Under this contract, Harza International was to provide for both the Karun Dam Project and the Marun Dam Project, feasibility reports, the preparation of contract documents, assistance during tendering, the detailed construction drawings and engineering services during construction. These two Projects also encompassed work concerning the Gotvand, Jayzan, and Khalafabad Irrigation Projects. On 14 July 1980 Harza International terminated the contract on grounds of breach of contract and force

majeure, and submitted to KWPA its final statement of account of invoices in an aggregate amount of \$12,068,032 owing to Harza International as of 30 June 1980. This amount has remained unpaid. The relief sought by Harza International is the payment of this sum, plus interest from 30 June 1980, costs and fees.

The Ministry of Energy and KWPA filed a statement of defence on 17 May 1982, along with a counter-claim amounting to \$294,382,608.

Concerning the amount whose payment is sought by Harza International the Respondents argued that such amount is not due for numerous reasons including the lack of proper documentation supporting the invoices; the omission of accounts already paid; some refusals of payments already notified; the absence of KWPA's authorization for some works; disagreements as to the reimbursement of charges or the calculation of escalation payments; overlaps between invoices or between charges separately billed and charges comprised in the fixed percentages. The Respondents also added that the grounds of their counterclaim justified their refusal to pay the claimed fees.

With respect to the counterclaim, various defects of design or supervision of construction have been alleged concerning, inter alia:

- 1) Karun Dam
 - a) discovery of clay seams in the right abutment of the dam;
 - b) design and construction of the spillway;
 - c) leakage in diversion tunnel no. 1

- 2) Marun Dam:
 - a) design of the spillway;
 - b) design of the drainage system;
 - c) design of the diversion tunnel gate
- 3) Gotvand Diversion Dam:
 - a) design of the project;
 - b) supervision of construction.

In addition, Respondents contended that Harza International failed to submit computation documents and the final report on Phase II of the Behbahan Irrigation Project and that its report with regard to the Jaezan and Khalafabad Irrigation Projects was incomplete.

A pre-hearing conference was held on 26 May 1982.

Later, in a second statement of defence and of counterclaim filed on 21 October 1982, the Counterclaimants brought as a new counterclaim that the seismology of the sites of the Karun and Marun Dams had not been taken into due consideration by Harza International, and that such failure causes a potential danger, especially for the Ahwaz region.

On 23 November 1982 Mr. S. Thouvenot, acting pursuant to a request of the Tribunal, submitted a Preliminary Report on expertise.

At a conference held on 30 November 1982, the Parties, to whom the Preliminary Report of 23 November 1982 had been transmitted, expressed their views on the appointment of experts, the fields of expertise required, and the terms of reference to be given to them. The Parties elaborated on their views in later written submissions in January 1983.

II. REASONS FOR AWARD

The Claimant and Respondent agree that the Tribunal should appoint experts but they disagree both as to the desirable number of experts and the scope of their tasks.

The Claimant contends that the expertise should be limited to the hydraulics and geology questions raised by the counterclaim, and that there is no need for experts' opinions concerning the claim and concerning all aspects of the counterclaim which do not raise technical issues of hydraulics or of geology. Further, the Claimant contends that the counterclaim based on the alleged disregard by Harza of the seismological constraints of the country made on 21 October 1982 was late and should be dismissed pursuant to Article 19(3) of the Provisionally Adopted Tribunal Rules.

The Respondent stated at and subsequent to the conference held on 30 November 1982 that the opinion of experts should be sought on all aspects of the claim and of the counterclaim. It has suggested a panel of six experts to cover all factual and technical aspects of its defence and of its counterclaim.

From the pleadings, the voluminous documentary evidence and the written or oral explanations submitted by the Parties, it appears that the case raises certain complex factual and technical issues which require either clarification or a technical opinion in order to allow the Tribunal properly to adjudicate this case.

Despite the fact, stressed by the Claimant, that the claim for payment of fees due does not raise strictly technical issues, it appears from the pleadings and the substantiating evidence submitted by both Parties that the reasons

for the disagreement between the Parties need to be clarified to the Tribunal by an expert familiar with the business practices and administration of important consulting engineering contracts such as the 1965 contract concluded between Harza International and the Ministry of Energy.

Concerning the counterclaim the Tribunal cannot decide the liability issues raised by the various alleged defects of site selection, engineers' drawings, and actual construction of major dams and related irrigation networks without a proper technical description of the alleged defects and of the causes from which they arose. This will require opinions to be sought at least from two experts, one experienced in the field of geology and rock mechanics and the other in hydraulics, both of whom are also experienced in the building of major dams.

No experts will be appointed to study the counterclaims relating to seismology, insofar as those counterclaims were presented too late within the terms of Article 19(3), and our own Order of June, 1982 scheduling the proceedings. The use of our discretion under 19(3) to admit the late filing would be inappropriate in view of the uncertain and speculative nature of the alleged damages.

Moreover, it does not appear at this stage of the proceedings that the appointed experts should address the issue of evaluation of damages. Such investigation should be made later and only insofar as liability is found by the Tribunal.

III. TERMS OF REFERENCE AND APPOINTMENT OF EXPERTS

The Tribunal accordingly sets forth the following as the terms of reference of three experts:

Expert No. 1

After familiarizing himself with the Preliminary Report of 23 November 1982 submitted by Mr. Thouvenot and with the documents filed by the Parties and necessary to the performance of his task, shall give his opinion on the following:

1) which services performed by Harza International were to be compensated on the basis of the contract's lump-sum payment schedule and which services were to be compensated on the basis of the man-month formula provided in the 1971 amendment?

2) which items of expense incurred by Harza International were to be reimbursed by KWPA in addition to the lump-sum and man-month payments provided in the contract?

3) whether taxes and social security contributions paid by Harza International in Iran were to be reimbursed by KWPA?

4) what documentation Harza International was required to submit to KWPA to support its billings?

5) whether KWPA was obligated under the contract to pay interest for late payments, and at what rate?

6) whether Harza International's invoices were accurately computed?

7) whether the written observations made by KWPA, about certain of the invoices on the basis of which payment of these invoices was refused, were justified?

8) whether Harza International's invoices include items which KWPA is not required to pay?

9) whether the invoices were supported by the required documentation?

10) whether Harza International carried out its duties with respect to the estimation of the cost of the Gotvand Irrigation Project and the alleged transmission by Harza International to KWPA of irregular invoices for payment using its best technical knowledge and according to the best accepted professional standards?

11) in liaison with Expert No. 3, whether Harza International submitted the computation documents and final reports of the Behbahan irrigation network, and whether the preliminary report on Phase I of the Jayzan and Khalajabad irrigation projects submitted by Harza was adequate and in conformity with its best technical knowledge and the best accepted professional standards?

The Tribunal appoints Mr. S. Thouvenot, 74, Rue Raynouard, 75016 Paris to act as Expert No. 1. In the course of performing his duties, Mr. Thouvenot may seek permission from the Tribunal to call upon the services of an accountant, or an irrigation expert giving specific reference to those portions of his task which are unable to be resolved without such expertise.

Expert No. 2

After familiarizing himself with the Preliminary Report of 23 November 1982 submitted by Mr. Thouvenot and with the documents provided by the Parties and necessary to the performance of his task, shall give his opinion on the following:

1) whether the information available to Harza International prior to commencement of construction of the Karun Dam revealed the presence of a large clay seam in the right abutment of the Dam?

2) whether Harza International's program for foundation investigation at the Karun Dam site, (including, but not limited to, core borings, soil samplings, soil analysis, geological surveys, assistance to the Ministry in connection with the surveys and tests to be carried out by the Ministry,

and supervision of the carrying out of such surveys and tests), was carried out using its best technical knowledge and according to the best accepted professional standards as they existed at the time of that investigation?

3) whether and to what extent the geological discoveries made in the course of construction of the Karun Dam made necessary the works undertaken in order to ensure the stability and the security of the dam, and especially of its right abutment?

4) whether Harza International was responsible for undue delays, if any, in the design and the execution of the works made necessary by the composition of the soil?

5) whether Harza International's design of the Marun Dam drainage system was carried out using its best technical knowledge and according to the best accepted professional standards as they existed at the time when the design was completed?

6) whether Harza International carried out its duties using its best technical knowledge and according to the best professional standards with respect to the submission of properly executed detailed drawings and to the completion and supervision of the works of the Gotvand Irrigation Project, especially concerning the alleged disregard by contractors of the technical specifications, which allegedly resulted in the inadequate thickness of the linings of the canals, the existence of deep pits of stagnant water close to the canals and roadways and the endangering of various constructions (bridge 16 + 052 and culverts).

The Tribunal appoints Mr. Jean Lehuerou Kerisel, 28 avenue d'Eylau, 75016 Paris, France, to act as Expert No. 2.

Expert No. 3

After familiarizing himself with the Preliminary Report of 23 November 1982 submitted by Mr. Thouvenot and with the

documents provided by the Parties and necessary to the performance of his task, shall give his opinion on the following:

1) whether the cavitation phenomenon in the Karun Dam Spillway was caused by the design of the spillway or by deficiencies in the construction work?

2) whether Harza International's design of the Karun Dam spillway and its provision of engineering services during the construction were carried out using its best technical knowledge and according to the best accepted professional standards as they existed at the time the design was completed and the supervision carried out and, if not, whether any such design or supervision defects contributed to the damage which occurred to the spillway in late 1977?

3) whether Harza International's responsibilities with respect to remedying the damages which occurred to the spillway in late 1977 were carried out using its best technical knowledge and according to the best accepted professional standards?

4) whether Harza International's design of the valves in Tunnel No. 1 at the Karun Dam and its provision of engineering services during construction were carried out using its best technical knowledge and according to the best accepted professional standards as they existed at the time the design was completed and the supervision carried out and, if not, whether any such design or supervision defects contributed to the leakage of one of these valves?

5) whether Harza International's design of the Marun Dam spillway and the later proposed modification to that design were carried out using its best technical knowledge and according to the best accepted professional standards as they existed at the times the design was completed and the modification proposed?

6) whether Harza International's design of the Marun Dam diversion tunnel gate was carried out using its best tech-

nical knowledge and according to the best accepted professional standards as they existed at the time the design was completed;

7) what were the causes of the excessive retention of water which in 1980 led to the flooding of the Gotvand irrigation system?

8) whether Harza International carried out its duties with respect to the design of the Gotvand Irrigation Dam, the supervision of its construction and the transmission of instructions concerning its operation, using its best technical knowledge and according to the best accepted professional standards?

9) in liaison with Expert No. 1, whether Harza International submitted the computation documents and final reports of the Behbahan irrigation network, and whether the preliminary report on Phase I of the Jayzan and Khalajabad irrigation projects submitted by Harza was adequate and in conformity with its best technical knowledge and the best professional standards?

The Tribunal appoints Prof. Knauss, Dr. Ingen. Versuchsanstalt für Wasserbau der Technische Universität, 8111 Oberrach Walchensee, Federal Republic of Germany, to act as Expert No. 3. In the course of performing his duties, Prof. Knauss may seek permission from the Tribunal to call upon the services of Expert No. 2 identifying specifically those portions of his mandate which are incapable of resolution without such expertise.

The appointed Experts shall be entitled to hear any person with knowledge of the Karun and Marun Projects, in the presence of the Parties or the Parties having been duly invited to attend such meeting.

The appointed experts shall also be entitled to obtain from any Party all documents which they deem necessary for their investigations. Each Party shall without delay provide the other Party with a copy of any documents which it communicates to the Experts.

In case of any difficulty arising in the course of their investigation, the Experts shall be allowed to refer to the Tribunal for clarification or resolution.

In the event that it should prove necessary, the Experts shall be allowed to visit the site if circumstances permit.

Not later than 6 months after deposit by the Parties of the advances for the costs of expert advice, the Experts shall distribute their proposed reports to the Parties and allow them to make any comments within one month. The final reports may incorporate the Experts' observations on these comments.

The final reports shall be submitted to the Tribunal by the Experts individually not later than 2 months after the proposed reports have been distributed to the Parties.

In order to ensure coordination and eliminate duplication of investigations, the Experts shall carry out their work in liaison with Mr. Thouvenot, who shall have the freedom for that purpose to meet with the other Experts individually or together, and to organize any general meeting with the Parties.

The Tribunal further decides, in accordance with Provisionally Adopted Tribunal Rule 41 (2), that Harza International and Khuzestan Water & Power Authority shall each deposit within two months from the date of this Award the sum of Twenty-Five Thousand United States Dollars (US \$25,000) into account number 24.58.28.583 at Pierson, Heldring and Pierson, Korte Vijverberg 2, 2513 AB The Hague, in the name of the Secreatry-General of the Iran-United States Claims Tribunal (Account No. II), as advances for the

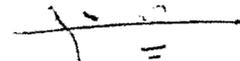
costs of expert advice. The account shall be administered by the Secretary-General of the Tribunal, who shall consult with the Tribunal. The Tribunal further retains jurisdiction to request from the arbitrating parties such other amounts as may be required from time to time in connection with the expert's work, or to decide any disputes which may arise in connection with that work.

Dated, The Hague
17 February 1983

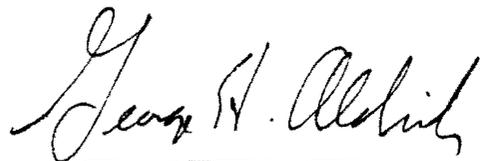


Pierre Bellet
Chairman
Chamber Three

In the Name of God



Shafie Shafeiei



George H. Aldrich