334-80 ES CLAIMS TRIBUNAL

۳۳۴-۸۰

دیوان داوری دعاوی ایران - ایالات متحده

ORIGINAL DOCUMENTS IN SAFE

80

Case No. 334 Date of filing: 24Nov86

** AWARD - Type of Award Final

- Date of Award 24.Nov86

17 pages in English _____ pages in Farsi

** DECISION - Date of Decision _____

_____ pages in English _____ pages in Farsi

** CONCURRING OPINION of _____

- Date _____

_____ pages in English _____ pages in Farsi

** SEPARATE OPINION of _____

- Date _____

_____ pages in English _____ pages in Farsi

** DISSENTING OPINION of _____

- Date _____

_____ pages in English _____ pages in Farsi

** OTHER; Nature of document: _____

_____

- Date _____

_____ pages in English _____ pages in Farsi

R/12

IRAN UNITED STATES CLAIMS TRIBUNAL

DUPLICATE ORIGINAL

«نسخه برابر اصل»

دیوان داوری دعاوی ایران - ایالات متحده

80

CASE NO. 334
CHAMBER TWO
AWARD NO. 271-334-2

COSMOS ENGINEERING, INC.,

Claimant,

and

MINISTRY OF ROADS AND TRANSPORTATION,

Respondent.

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

FILED - ثبت شد

Date 24 NOV 1986
تاریخ ۱۳۶۵/۹/۳

No. 334
شماره

AWARD

Appearances:

For Claimant:

Mr. Raymond Castiglione, Counsel
Mr. Pierre Debbane, President

For Respondent:

Mr. Seifollah Mohammadi, Legal Advisor to the Agent of the Islamic Republic of Iran
Mr. Ali A. Assari
Mr. Habebollah Akbari, Representatives of the Respondent

Also present:

Mr. Michael F. Raboin, Deputy Agent of the United States of America
Dr. J. Niaki, Representative of the Agent of the Islamic Republic of Iran

I. The Claims

1. The Claimant, a Maryland corporation, concluded a contract with the Respondent Iranian Government Ministry in Tehran on 15 March 1973 for the performance of engineering services, the object of which was to assist the Respondent in procuring a high frequency ("HF") communication network in Iran. Work under the contract was to be divided into three phases, and the claims presented by the Claimant in this Case are for monies allegedly owed under the contract with respect to Phases One and Two and for certain termination costs. These claims total U.S. $315,759. The Respondent terminated the contract in late June 1975.

2. The Respondent has brought two counterclaims. One, for taxes allegedly owed by the Claimant to the Iranian Ministry of Finance, was asserted when the Respondent filed its brief and evidence on 20 January 1984. The other, for social security contributions allegedly owed to the Iranian Social Security Organization, was filed on 20 August 1986.

3. A Hearing was held in this Case on 26 September 1986.

II. Jurisdiction

4. The Claimant has satisfied the Tribunal that it is a national of the United States within the meaning of Article VII, paragraph 1, of the Claims Settlement Declaration. While the documentary evidence it filed in this Case was inadequate in several respects, statements by the Claimant's President and Counsel at the Hearing resolved the remaining uncertainties. The Claimant, a closely-held Maryland corporation, has owned the claims at issue continuously since they arose, and United States citizens have owned 50 percent or more of the stock of the Claimant from the time the claims arose until the date of the Claims

Settlement Declaration, 19 January 1981, and, indeed, until the present. The Respondent, as a Ministry of the Government of the Islamic Republic of Iran, clearly falls within the definition of "Iran" contained in Article VII, paragraph 3, of the Claims Settlement Declaration.

5. It is undisputed that the claims arise out of contract and were outstanding on 19 January 1981. The Respondent argues, however, that the dispute settlement clause in the contract provides that any disputes are within the sole jurisdiction of Iranian courts and, consequently, that claims based on the contract are excluded from the Tribunal's jurisdiction by virtue of Article II, paragraph 1, of the Claims Settlement Declaration. The Respondent cites CBA International Development Corp. and The Government of Iran, Award No. 115-928-3 (16 March 1984) in support of its argument. The Claimant, citing T.C.S.B., Inc. and Iran, Award No. ITL 5-140-FT (5 Nov. 1982), argues that the contract clause in question, by providing for arbitration, specifies an alternative to the jurisdiction of Iranian courts and, in any event, does not unambiguously restrict the Parties to the jurisdiction of Iranian courts.

6. Unlike in CBA International, supra, the contract in this Case is in both English and Farsi. It states that "[t]he Farsi text shall prevail regarding legal interpretation." The provision regarding dispute settlement reads as follows in the English text:

> Article 20
>
> Settlement of Disputes and Arbitration
>
> If any dispute shall arise between the parties hereto in connection with or arising out of the Contract or the alterations and interpretations hereof, and if it cannot be settled in an amicable manner, through correspondence and/or negotiations, it shall be settled first by a committee of three members, representing the Plan Organization, Ministry of Roads, and the Consulting Engineer.

> If the dispute cannot be settled by this committee, because the minority is not willing to submit to the majority, it shall be regulated by the Iranian Law and, if necessary, by arbitration through the competent Iranian Court.

7. The Farsi text of the last sentence differs significantly from the English text. It provides:

> If necessary, the dispute shall then be settled and resolved through arbitration or by recourse to competent courts in Iran.

8. The Respondent argues that the contract was drafted in English and was translated into Farsi only after agreement had been reached between the Parties and that, with respect to the Farsi translation, a typographical error was made by using the word "or" instead of the word "with".

9. The Tribunal notes that Article 20 includes the word "arbitration" both in the title and in the last sentence. This usage suggests that "arbitration", which is an alternative to judicial settlement, was clearly intended. On the other hand, the phrase "through the competent Iranian Court" seems inconsistent with a recourse to arbitration and makes the English text of the article ambiguous.

10. The Farsi text seems clearly to provide a choice of dispute settlement mechanisms -- either arbitration or Iranian courts.[1] Even if the Respondent is correct in its

---

[1] The Farsi text is virtually identical (except for the specification of "Iranian" rather than merely "competent" courts) to the Farsi text involved in Part II of the T.C.S.B. Award, supra, suggesting that the word "or" was used in at least some other dispute settlement clauses in Iranian Government contracts. Moreover, the use of the word "with" in the clause involved in the present Case would render the meaning less clear than would use of the word "or".

assertion that the word "or" was a typographical error and should have been "with" (a question the Tribunal need not decide), the Farsi text differs from the English text, in that "with" and "through" are scarcely synonymous. Thus, neither the English text nor the Farsi text of Article 20 of the contract can be said clearly and unambiguously to restrict the Parties to Iranian courts, and the Article therefore does not fall within the scope of the forum clause exclusion contained in Article II, paragraph 1, of the Claims Settlement Declaration. Consequently, this Article does not exclude the Tribunal from jurisdiction over claims based on the same contract.

11. With respect to the Respondent's counterclaims for taxes allegedly owed to the Iranian Government for the years 1974 and 1975, the Tribunal notes that these counterclaims are clearly based on the taxation laws of Iran, not on the contract which merely identified which Party was responsible for the payment of taxes. As previous decisions of the Tribunal have made clear, the Tribunal has no jurisdiction over such counterclaims. T.C.S.B., Inc. and Iran, Award No. 114-140-2, p. 24 (16 Mar. 1984); International Technical Products Corp., et al. and The Government of the Islamic Republic of Iran, Award No. 186-302-3, p. 29 (19 Aug. 1985); and Computer Sciences Corporation and The Government of the Islamic Republic of Iran, et al., Award No. 221-65-1. (16 Apr. 1986).

12. On 20 August 1986 the Respondent filed a counterclaim for social security premiums allegedly owed by the Claimant. By Order of 16 September 1986, the Tribunal refused to accept that counterclaim, noting that it was asserted for the first time only five weeks before the Hearing. Therefore, that counterclaim is not before the Tribunal in the present Case.

13. For the foregoing reasons, the Tribunal holds that it has jurisdiction over the claims filed by the Claimant in this Case and that it has no jurisdiction over the counter-claims filed by the Respondent in this Case.

III. Merits

14. The claims in this Case can be divided into five groups: (a) claims relating to Phase One work; (b) a claim relating to an interim period following submission of the Phase One report and preceding a decision to prepare an addendum to that report; (c) a claim relating to Phase Two work; (d) a claim for reimbursement of income taxes allegedly paid to Iran on behalf of non-Iranian employees of the Claimant; and (e) claims for certain termination charges. The relevant contractual provisions and facts will be discussed in connection with each group of claims.

A. Phase One

15. The Respondent acknowledged that it approved the revised Phase One report by letter of 17 May 1975 and that the Claimant was entitled to the final Phase One payment of 20 percent of its Phase One fee as of that date.[2] The amount involved is also agreed -- 956,816 Iranian rials. The Tribunal therefore awards this amount.

16. The Respondent also acknowledged that the Claimant was entitled to a refund of the good performance retentions relating to Phase One in the amount of 351,750 Iranian

---

[2]Under the contract this entitlement may have arisen in February 1974, thirty days after the original Phase One report had been submitted. The Tribunal need not decide this question, however, as it would only be relevant to the date on which interest should begin and, as discussed in Section IV below, the Claimant requests interest only from 10 February 1977.

rials. Apparently, the failure of the Parties to arrange for the payment of these amounts agreed to be owing to the Claimant was a consequence of their substantial disagreements over other elements of the claims. Pursuant to the contract, these retentions were due one-half upon approval of the Phase Two report and one-half upon approval of the report of the last contract phase, whichever that might be. In view of the fact that the Respondent terminated the contract in the summer of 1975 (discussed below in connection with the Phase Two Claims), the Tribunal determines that refund of the 351,750 rials in Phase One retentions was due as of the date of contract termination.

B. Interim Work

17. The Claimant submitted its Phase One report in January 1974. That report evidently precipitated a prolonged re-evaluation within the interested Iranian agencies of the nature and scope of the project. Finally, in a letter dated 10 September 1974, the Respondent informed the Claimant of the disagreement with the proposed system by the Ministry of Post, Telegraph, and Telephone and by the Plan and Budget Organization and stated that an "H.F. System is not found suitable for the requirements of this Ministry."

18. The Claimant responded in a letter dated 9 October 1974 stating that, while it believed it had fulfilled its contractual obligation, it was willing to prepare an addendum to its Phase One report "at no additional charge to the Ministry." The addendum, which reflected the desired change in emphasis to a very high frequency ("VHF") system, was submitted on 11 February 1975 under the title "Phase I Final Report (Revised)".

19. The present claim relates, not to the preparation of the addendum, but to the interim period from February

1974 to September 1974 while work under the contract was delayed. The contractual basis for this claim is Article 10.4, which provides:

> If for reasons beyond the fault of the Consulting Engineer, the period of completion of Phase One, Two or Three lasts longer than the time specified at the time of agreement, the remuneration of the Consulting Engineer for the approved extensions shall be paid proportionately according to the number of months added to the time limits on the basis of the 75% of the average monthly remunerations of the relevant phase for Phases One and Two and for Phase Three in accordance with the negotiated agreement with due consideration to prices detailed in Appendix II.

20. The Claimant argued that Phase One was extended seven months by the Respondent before it requested the Claimant to do the addendum to its report, that this extension resulted from indecisions within the Iranian Government rather than from any fault of the Claimant, and that the Claimant is therefore entitled to be paid 75 percent of its average monthly rate for Phase One for seven months, or a total of 6,278,105 Iranian rials. The Respondent argued that the delay was attributable to inadequacies in the first Phase One report and that the Claimant waived any claim to reimbursement for this interim period, during which it asserted the Claimant performed no work.

21. The Tribunal agrees that the Claimant waived its rights to claim compensation under Article 10.4 for this seven-month period. The evidence indicates that the Claimant first raised this claim with the Respondent in February of 1977. Midway through the interim period, in June 1974, the Claimant wrote the Respondent, urging approval of the Phase One report, pointing out that its staff was waiting to begin Phase Two, and noting that "salaries and office expenses are still incurred every month, casuing [sic] a heavy burden on our operation."

Neither in October 1974, when the Claimant offered to prepare an addendum at no additional cost to the Respondent, nor in February 1975, when it submitted that addendum, did the Claimant indicate that it had any claim to compensation relating to Phase One beyond the fixed amounts in the contract. Doubtless the Claimant had reason to believe that it could recoup its stand-by costs in 1974 from the greatly increased compensation anticipated in 1975 as a result of the change from an HF to a VHF system, and that prospect may explain why it waived any right to additional compensation for its work on the addendum to the Phase One report (explicitly) and with respect to the seven-month interim period (implicitly).

C. Phase Two

22. As noted above, the Respondent approved the revised Phase One report in writing by its letter of 17 May 1975, and the Claimant asserted that Phase Two therefore began on that date. The Claimant relied on Paragraph 4 of Appendix I to the contract, which states, in part, as follows:

> The duration of the execution of the various phases is given as follows:
>
> PHASE ONE. Four months from the date of receiving instructions (in accordance with Article 3).
>
> PHASE TWO. Six months after the approval of Phase One report through a written communique.

The Claimant further alleged that it began work on Phase Two and that, when it subsequently received notice of contract termination, the termination was effective only two months later, pursuant to Article 14.2 of the contract. The Claimant therefore claims compensation for three and two-thirds months of work on Phase Two.

23. The Respondent denied that Phase Two began, that the Claimant performed any work under Phase Two, or that any notice prior to termination was required by the contract. The Respondent points to several communications between the Parties as evidence of their recognition that the contractually-envisaged automatic start of Phase Two upon written approval of the Phase One report could not occur in the absence of agreement to contract modifications concerning the scope, timing, and price of work on Phase Two.

24. Certainly it is true that both Parties recognized that Phase Two of work on the revised VHF network would be far more costly than Phase Two as set forth in the contract. The Claimant recognized in its letter of 9 October 1974, in which it agreed to do the addendum without charge, that changes would subsequently be required in the scope of work of Phase Two. The Respondent, when approving the Phase One report on 17 May 1975, asked the Claimant to transmit an analysis of the fee it requested for the Phase Two studies and to separate that analysis by two geographical areas of higher and lower priority. In its response dated 27 May 1975, the Claimant did so.[3] Moreover, in a letter to the Respondent dated 18 June 1975, the Claimant referred to "the proposal submitted for carrying out Phase Two" and said:

> In light of the heavy costs and expenses incurred by this Company up to now for preparing to execute Phase Two, you are requested to instruct that the necessary alterations in the aforementioned Contract be made as soon as possible in order that prompt action may be taken to implement the communications system under priorities One and Two and the closed-circuit TV network.

---

[3]The Tribunal notes that the contract price for Phase Two of the original HF system was 2,719,037 Iranian rials (or slightly less than U.S. $39,000), whereas the proposed price for Priorities One and Two of Phase Two of the revised VHF system was U.S. $1,351,577.

25. By letter dated 28 June 1975, the Respondent informed the Claimant that the proposed remuneration was not acceptable. The letter stated:

> [W]hereas MORT intends utilizing the technical services of the Government Company, Iran Electronic Industries, for carrying out the services of Phase Two of the said project, therefore the subject-matter of utilization of your technical services for studies of the subsequent phases of the said project is exhausted. Kindly call at this Ministry for settling the account of services rendered in Phase One . . . .

26. The Respondent argued that its decision of 28 June 1975 was not a contract termination under the contract provision that permitted it to terminate the contract at any time for the reason that it was not obligated in any event to give the Phase Two work to the Claimant. The Tribunal cannot agree. Phase Three was stated by the contract to be optional, not Phase Two. Once the Phase One report was approved, the Claimant had a right to proceed with the work of Phase Two. In addition, the Tribunal notes that the contract required a 30 percent downpayment to be made in advance of contract services, which downpayment included 30 percent of the Phase Two fee. The evidence indicates that this downpayment was received and the corresponding bank guarantee was eventually released. While the evidence shows that both Parties recognized that the substantial changes made by the Respondent in the scope of the project required amendment of the contract provisions dealing with the scope, duration, and price of Phase Two, those changes did not relieve either Party of its obligations to negotiate the necessary contract changes in good faith and to carry out Phase Two. The relevant contractual provision is found in Article 2.2:

> The Employer shall have the right at all times to change the required services to a reasonable extent and omit or add to, some of the engineering

> services. In such an event the duration of the contract and the remunerations of the consulting Engineer shall be increased or decreased to a suitable extent, in accordance with the work done, expenditure and commitments fulfilled as agreed by both parties.

Therefore, the Tribunal holds that the 28 June 1975 letter constituted a contract termination pursuant to the terms of Article 14.2. Pursuant to that Article, the contract terminated two months after notification was given to the Claimant, i.e., two months from the date (7 July 1975) on which it received the letter of 28 June. Consequently, the contract was terminated effective 7 September 1975. In this connection, the Tribunal notes that the contract provided that the fee for Phase Two was a lump sum (2,719,037 rials), and the duration of Phase Two was six months from written approval of the Phase One report. Given the fact that the Claimant presented some evidence that it began work on Phase Two and given the evident purposes of such a termination provision to allow demobilization and reassignment of staff and the closing out of a project without undue financial loss, the Claimant is entitled to compensation for the period from 17 May to 7 September 1975.

27. The Claimant argued that it should be compensated for this period, not at the price of Phase Two specified in the contract, but at the new price proposed in its letter of 27 May 1975. The Tribunal cannot agree, however, that such a unilateral proposal, by itself, can be considered to have supplanted the contractual provision and the Tribunal notes that it would, in any event, not be possible to determine the proper duration of the revised Phase Two. If the Claimant had, in fact, performed considerable work on an expanded Phase Two in the anticipation of an appropriate fee modification pursuant to Article 2.2, which modification did not occur, then it might be incumbent on the Tribunal to construct such a fee and apply it to that Phase Two work. In the present Case, however, the evidence indicates that

little Phase Two work was done. The Claimant's letter of 18 June 1975 does not indicate that work was then underway on Phase Two; on the contrary, it contains a declaration of willingness to carry out orders and a request for "necessary alterations" in the Contract "in order that prompt action may be taken to implement the communications system." At the Hearing, the Claimant's President stated that certain, unidentified Phase Two work had begun in its offices in Bethesda, Maryland. In these circumstances, the Tribunal holds that the Claimant is entitled to be compensated at a rate of 3.67 times the average monthly price of Phase Two as stated in the contract. Therefore, the fee to which the Claimant was entitled with respect to Phase Two of the contract amounts to 3.67 times 453,173 rials (the average monthly Phase Two contract price) or 1,663,144 Iranian rials. However, as noted above in paragraph 26, a downpayment including 30 percent of the Phase Two fee was paid at the beginning of contract services. The portion of the downpayment related to the Phase Two fee, made 50 percent in dollars and 50 percent in rials, amounted to 815,711 rials. The portion of the Phase Two fee to which the Claimant is entitled due to termination of the contract must be reduced by this previously paid amount, as provided in Article 14.2 of the contract. Consequently, the Claimant is entitled to Phase Two fees in the total amount of 847,433 Iranian rials.

D. Income Tax Reimbursement

28. Appendix Two of the contract contains the following details of remuneration of Phases One and Two:

> The total Contract price for Phases 1 and 2 is 7,909,117 Rials of which 406,000 Rials are the estimated amount for foreign employees' individual income tax.
>
> The remuneration for the various phases shall be as follows:

(a) Phase One:
4,784,080 Rials as a lump sum.

(b) Phase Two:
2,719,037 Rials as a lump sum.

(c) Individual Income Tax for foreign employees

406,000 Rials estimated amont [sic] covering foreign employees' individual income tax during Phase One and Two. Reimbursements shall be made to the Consulting Engineer upon presentation of actual receipts for payments made by the Consulting Engineer or his subcontractors for the above. The reimbursements shall be made independently from payments for Phase One and Two.

The Claimant claims 1,126,138 Iranian rials as the actual amount of taxes it says it paid on behalf of its non-Iranian employees and argues that it is entitled by the above-quoted provisions to the entire amount, not merely the lower "estimate" contained in Appendix Two. The Tribunal notes, however, that the Claimant has failed to present in evidence the receipts called for by the provision or, indeed, any alternative form of proof of payment of such taxes. Consequently, the claim is rejected for lack of proof.

E. Termination Charges

29. The Claimant seeks reimbursement of various costs allegedly arising from the termination of the contract and reimbursable pursuant to Article 14.2. While some of these costs clearly are of the types to which the Claimant is entitled to reimbursement under that Article, the Claimant has submitted no documentary proof of any of the costs or of its contractual obligations to have paid those based on related agreements. At the Hearing, the Claimant offered to submit such documents within several weeks, but considerations of fairness, orderliness, and possible prejudice to the Respondent compel the Tribunal to refuse such an offer. The Claimant had been ordered to file "all documentary evidence" by 10 June 1983, and it made

substantial filings then and later in 1984 when it submitted its rebuttal. The Tribunal finds no justifiable excuse for its request to file such evidence, which presumably was at all times available to it, subsequent to the Hearing.

30. At the Hearing the Claimant's President gave further explanations with respect to one element of its termination claims -- two months' termination pay, return travel, and shipment of household effects of the Claimant's manager in Iran. The Tribunal is satisfied by that testimony that the claimed amounts were in fact paid by the Claimant and that it was obligated by its contract with the manager to make such payments. With respect to the payment of two months' salary, however, the Claimant conceded at the Hearing that, to the extent compensation is awarded for the two months of Phase Two after notice of termination, the claim is duplicative. Consequently, the Tribunal holds that the Claimant is only entitled to compensation from the Respondent pursuant to Article 14.2 of the contract in the amount of U.S. $6,400 for travel and moving expenses. The remainder of the claims for termination costs are dismissed for lack of proof.

F. Currency Conversion

31. The amounts payable under the contract were stated in Iranian rials. The contract provided that payments were to be made 50 percent in rials and 50 percent in U.S. dollars "computed using the official rate of exchange (Bank Markazi) at the time of payment." The average rate in September 1975 when the contract was terminated was 68.158 rials to the dollar. As the Claimant closed its office in Iran after the contract at issue in the present Case was terminated, it seems probable that the Claimant would have converted its excess rials to dollars at that time. Therefore, the Tribunal also uses the rate of 68.158 to convert the rial amounts owing to the Claimant into dollars

for purposes of this Award. Accordingly, the Claimant is entitled to be compensated by the Respondent in the following amounts:

(a) Phase One Final payment -- 956,816 Iranian rials, which is converted to U.S. $14,038.21;
(b) Phase One Retentions -- 351,750 Iranian rials, which is converted to U.S. $5,160.80;
(c) Phase Two fees -- 847,433 Iranian rials, which is converted to U.S. $12,433.36; and
(d) Termination Costs -- U.S. $6,400.

Total -- U.S. $38,032.37

IV. Interest

32. In order to compensate the Claimant for the damages it has suffered due to delayed payments, the Tribunal would be prepared to award interest from the date each payment was due. However, the Claimant requested interest only from 10 February 1977 when it presented its claim to the Respondent, and the Tribunal therefore awards interest at the fair rate of 10.50 percent from that date.

V. Costs

33. Each of the Parties shall bear its own costs of arbitrating this Claim.

VI. AWARD

34. For the foregoing reasons,

THE TRIBUNAL AWARDS AS FOLLOWS:

(a) The Respondent THE MINISTRY OF ROADS AND TRANSPORTATION is obligated to pay the Claimant COSMOS ENGINEERS, INC. the sum of Thirty-Eight Thousand

Thirty-Two United States Dollars and Thirty-Seven Cents (U.S. $38,032.37), plus simple interest at the rate of 10.50 percent per annum (365-day year), calculated from 10 February 1977 up to and including the date on which the Escrow Agent instructs the Depositary Bank to effect payment out of the Security Account.

(b) This obligation shall be satisfied by payment out of the Security Account established pursuant to Paragraph 7 of the Declaration of the Democratic and Popular Republic of Algeria of 19 January 1981.

(c) The counterclaims are dismissed for lack of jurisdiction.

(d) All other claims are dismissed.

(e) Each of the Parties shall bear its own costs of arbitration.

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

Dated, The Hague
24 November 1986

Robert Briner
Chairman

In the Name of God

George H. Aldrich

Hamid Bahrami-Ahmadi