IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

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IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داوری دعاوی ایران - ایالات متحده

DUPLICATE ORIGINAL

«نسخه برابر اصل»

CASE NO. 60
CHAMBER THREE
AWARD NO. 485-60-3

DEVELOPMENT AND RESOURCES CORPORATION,
Claimant,

and

THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN,
THE KHUZESTAN WATER AND POWER AUTHORITY,
THE STATE ORGANIZATION FOR ADMINISTRATION AND EMPLOYMENT,
THE MINISTRY OF ENERGY,
THE MINISTRY OF AGRICULTURE,
THE NATIONAL IRANIAN OIL COMPANY,
THE MINISTRY OF ECONOMY, and
BANK MARKAZI,
Respondents.

AWARD

Appearances:

For the Claimant:	Mr. David C. Roseman, Mr. Millard F. Ohman, Jr., Attorneys for the Claimant; Mr. John Silveira, Representative of the Claimant.
For the Respondents:	Dr. Jafar Niaki, Representative of the Agent of the Government of the Islamic Republic of Iran; Dr. N. Mokhtari, Legal Advisor to the Agent; Mr. Hossein Piran, Assistant to the Agent; Mr. M. R. Fatemi, Mr. D. Gardizi, Mr. N. Vossoughi, Representatives of the Khuzestan Water and Power Authority; Mr. D. Ebadiani, Representative of the State Organization for Administration and Employment; Mr. A. Babaii, Mr. M. Moulaie, Mr. S. Behzadi, Representatives of the Ministry of Energy; Mr. A. Mouri, Representative of the National Iranian Oil Company; Mr. A. Asghar Sayani, Mr. M. Taghi Nejad Omran, Representatives of the Ministry of Economy; Mr. H. A. Farzad, Representative of Bank Markazi.
Also Present:	Mr. D.M. Price, Deputy Agent of the Government of the United States of America; Mr. D. Balton, Assistant to the Agent of the Government of the United States of America.

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I. PROCEEDINGS

A. GENERAL

1. The Claimant DEVELOPMENT AND RESOURCES CORPORATION ("D&R") filed its Statement of Claim on 17 November 1981, naming as Respondents THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN ("Iran"), THE KHUZESTAN WATER AND POWER AUTHORITY ("KWPA"), THE STATE ORGANIZATION FOR ADMINISTRATION AND EMPLOYMENT ("SOAE"), THE MINISTRY OF ENERGY, THE MINISTRY OF AGRICULTURE, THE NATIONAL IRANIAN OIL COMPANY ("NIOC"), as successor in interest to THE OIL SERVICES COMPANY OF IRAN ("OSCO"), THE MINISTRY OF ECONOMY and BANK MARKAZI.

2. The Parties have submitted pleadings on all issues in this Case. A Pre-Hearing Conference was held on 26 April 1984 and a Hearing was held on 27 and 28 February 1986.

B. UNSCHEDULED AND POST-HEARING SUBMISSIONS

3. The Parties have made various submissions and requests that raise several procedural questions. On 28 February 1986 the Claimant submitted a filing itemizing its claim for interest and costs of arbitration. The Respondents objected to this submission as untimely. At the Hearing, and after consideration of the Parties' contentions, the Tribunal accepted this filing. It is the Tribunal's practice to approve submission, at a late stage in the proceedings, of documents itemizing or evidencing arbitral costs, since such costs usually cannot be ascertained until such time. The Tribunal also granted the Respondents an opportunity to file written responses to the said submission, which the Respondents have since done.

4. On 14 November 1985 the Claimant filed a pre-Hearing motion to strike certain counterclaims and pleadings on the ground that they were untimely. The Respondents opposed the

motion. By Order dated 18 December 1985 the Tribunal deferred a ruling on this request.

5. The challenged counterclaims are (1) those raised by the Ministry of Agriculture in its submission filed 20 May 1985 seeking unpaid social insurance organization premiums; (2) the counterclaim of NIOC for payment of taxes allegedly owed, filed in its reply on 18 March 1985; (3) the counterclaim of the Ministry of Energy filed 14 March 1985 for allegedly unpaid social insurance organization premiums; and (4) certain components of KWPA's counterclaim "J" which were not raised until filed on 7 November 1984. The Tribunal notes that none of these counterclaims was included in the respective Statements of Defense. In addition, all but one of them were submitted after the Agent of the Government of the Islamic Republic of Iran indicated on 3 December 1984 that further extensions for the Respondents' affirmative briefs were not necessary since "the Respondents have submitted adequate explanations and evidence in connection with their counterclaims and their briefs filed recently." The Tribunal concludes that these counterclaims should be excluded under Article 19, paragraph 3, of the Tribunal Rules.

6. Iran has submitted three additional briefs, of a general character, for consideration in these proceedings. These are the Memorial Regarding Proof of United States Nationality, submitted in Case A20; the General Brief in Support of Claims on Unpaid Taxes, submitted on 10 October 1985; and the Memorial in Support of the Tribunal's Jurisdiction Over Claims Arising out of Non-Payment of Social Security Premiums. Although the Claimant argued in its submission of 14 November 1985 that at least the first two should be excluded from the record, the Tribunal accepts all three documents as part of the record in light of the broad nature of the submissions and the lack of any articulated prejudice.

7. The Claimant also argued that the Tribunal should exclude a submission filed 28 June 1985, which consists of attachments to the earlier filed affidavit of Mr. Darreh Cheshmi. This document is not prejudicial and is accepted as part of the record.

8. In the Respondents submission filed 22 November 1985, objecting to the Claimant's motion to strike, it is alleged that KWPA had gained access to additional documentary evidence that it wished to file. The Tribunal responded by Order of 18 December 1985, indicating that the request would be considered at the Hearing. However, immediately prior to the Hearing, on 21 February 1986, KWPA submitted a lengthy rebuttal memorial with evidentiary exhibits. Similarly, on 27 January 1986 the Ministry of Energy submitted, without prior request or authorization, two evidentiary affidavits. The Claimant objected to these late filings at the Hearing, asserting that its right to respond had been prejudiced. After considering the Respondents' comments, the Tribunal announced at the Hearing that these filings were unauthorized and would not be accepted as part of the record.

9. At the Hearing KWPA requested (1) the opportunity to make post-Hearing evidentiary submissions and (2) the appointment of an expert by the Tribunal to examine KWPA's purportedly relevant records. On 9 April 1986, in a submission described as KWPA's "Response and Objection to the Claimant's Brief on Arbitration Costs", KWPA filed a substantial brief addressing the merits of various claims and counterclaims. The Claimant had no opportunity to respond to the substance of this submission and objected to its admission into the record. Furthermore, on 5 February 1988 KWPA renewed its request for the appointment of an expert and also requested a "complementary hearing session". The Claimant has consistently objected to additional rounds of evidence from KWPA as well as to the other procedural requests raised by KWPA.

10. The Tribunal has reviewed the record, as submitted according to the authorized schedule, and finds that it adequately covers all issues. KWPA has given no convincing reason why either post-Hearing submissions, an independent expert or a complementary hearing would be desirable or necessary. Furthermore, KWPA has submitted no adequate explanation of why the documents or arguments it sought to advance after the final Hearing could not have been presented at or prior to the Hearing in accordance with the Tribunal's scheduling Orders. Consequently, KWPA's requests for the submission of additional material, for appointment of an expert and for a complementary hearing are denied. KWPA's submission of 9 April 1986 does not form part of the record insofar as it addresses matters not directly connected to the Claimant's request for costs of arbitration.

II. JURISDICTION

11. The Respondents have raised two main challenges to the Tribunal's jurisdiction over the claims in this Case. They contend, first, that the Claimant has not proved its claim of United States nationality and, second, that certain forum selection clauses in the relevant contracts bar the Tribunal's jurisdiction.

A. NATIONALITY OF THE CLAIMANT

12. The Claimant contends that at all relevant times it has been a duly incorporated Delaware corporation. From 1971 until 30 June 1980 all of the issued and outstanding voting common stock of D&R was allegedly held by International Basic Economy Corporation, a New York corporation. On 30 June 1980 International Basic Economy Corporation was merged into IBEC Inc. ("IBEC Inc."), another New York corporation. It is contended that IBEC Inc. held all of the issued and outstanding voting common shares of D&R from 30 June 1980 to

19 January 1981. Finally, the Claimant contends that from 1973 to 19 January 1981 descendants of John D. Rockefeller, Jr. and members of their families - all U.S. citizens since birth - directly or beneficially, through a trust or otherwise, owned a controlling interest in the stock of both International Basic Economy Corporation and IBEC Inc.

13. The Claimant has submitted documentary and testimonial evidence in support of its contentions. This evidence includes Certificates of Incorporation and of Good Standing of D&R, International Basic Economy Corporation and IBEC Inc., excerpts of proxy statements for the years from 1973 to 1979 issued by International Basic Economy Corporation, birth certificates of forty-three members of the Rockefeller family, allegedly the controlling shareholders of International Basic Economy Corporation and subsequently of IBEC Inc., as well as an affidavit of the Secretary Treasurer of D&R, Joseph B. Goeller, and a signed statement by the former secretary of International Basic Economy Corporation and present secretary of IBEC Inc., Arlen G. Loselle.

14. The Respondents raise objections to the evidence of nationality supplied by the Claimant. As further elaborated below, they allege that there are gaps in the evidence as to the continuous United States nationality of the Claimant.

15. As an initial matter, and based on the evidence on record in this Case, the Tribunal is satisfied that, at all relevant times, D&R, International Basic Economy Corporation and IBEC Inc. have been duly incorporated United States corporations, that up to 30 June 1980 D&R was a wholly owned subsidiary of International Basic Economy Corporation and that from 1973 to 30 June 1980 United States nationals, directly or beneficially, have held a controlling interest in International Basic Economy Corporation. The remaining issues will be considered in relation to the Respondents' arguments. Three periods are relevant to these arguments:

(1) prior to 1973; (2) from 30 June 1980 to 19 January 1981; and (3) after 19 January 1981.

1. Prior to 1973

16. The Respondents contend that there is no evidence as to D&R's nationality during the period before D&R was acquired by International Basic Economy Corporation, i.e., prior to 1971. They contend further that there is no clear evidence of ownership of International Basic Economy Corporation by the Rockefeller family between 1971 and the date of the first proxy statement submitted in evidence, 15 April 1973. Allegedly, some of D&R's claims arose during these periods.

17. The Tribunal finds that, prima facie, most of D&R's claims arose after 1973. However, as discussed below the Tribunal concludes that part of D&R's claim for revised estimated construction costs (see paras. 169-171, infra) and claims related to contracts GD-101 and GD-102 arose prior to 1973 (see para. 180, infra). The only evidence on record from which it could be inferred that D&R was a United States national prior to 15 April 1973, is the statement from the secretary of IBEC Inc., Mr. Loselle. This statement does not specifically address D&R's nationality prior to 1973; Mr. Loselle states that "from the time the D&R claim arose through and including January 19, 1981, U.S. citizens held, directly or indirectly, more than fifty percent (50%) of the voting stock of D&R." The Tribunal finds this evidence insufficient to establish D&R's United States' nationality prior to 15 April 1973 and consequently holds that the Tribunal lacks jurisdiction over any claims brought by D&R that arose prior to 15 April 1973.

2. From 30 June 1980 to 19 January 1981

18. As already noted, on 30 June 1980 International Basic Economy Corporation was allegedly merged into IBEC Inc.

There is no direct evidence on record that the merger was consummated. The evidence on record establishes, however, that the shareholders controlling International Basic Economy Corporation had entered into a pre-merger agreement engaging themselves to vote in favor of the merger. The Tribunal finds this evidence, together with a sworn statement by Mr. Goeller, Secretary-Treasurer of D&R, that the merger did occur on 30 June 1980, sufficient to establish that the merger was consummated as planned.

19. Upon the consummation of the merger, Rockefeller family interests owned 100% of the Class B Shares (a total number of 2,895,207 shares) and "Booker", an English company, held 100% of the Class A shares (2,382,797 shares). There is no direct evidence regarding the voting rights carried by Class B and Class A shares. However, according to an International Basic Economy Corporation proxy statement of June 1980, the merger would result in the ownership by the Rockefeller family of approximately 55 percent of the outstanding shares of IBEC Inc. and by Booker of approximately 45 percent. The Loselle statement confirms that the members of the Rockefeller family "continued to hold these IBEC shares [i.e., more than 50 percent of the outstanding shares of IBEC Inc.] through and including January 19, 1981."

20. The Respondents' main objections concern a loan of $8,150,000[1] extended by Booker to D&R which was used primarily to finance the buyout, necessitated by the merger, of the non-Rockefeller public shareholders. The Respondents note that although Booker owned only 45 percent of the shares after the merger, this shareholding, in combination with the loan to D&R, could have given Booker a controlling

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[1] All references to dollars in this Award are to United States dollars.

interest in IBEC Inc., especially if the loan were represented by a convertible note.

21. The Tribunal finds that the otherwise undisputed fact that Booker extended a loan to the Rockefeller family cannot, by itself, alter the voting and controlling rights that follow from the shareholding interests. The Tribunal further finds that the Respondents have failed to identify any circumstances surrounding this loan that would confer upon the lender an interest "equivalent" to shares of capital stock in any sense relevant to the Claims Settlement Declaration.

22. In conclusion, the Tribunal is satisfied that United States nationals continued to hold a controlling interest in IBEC Inc. from 30 June 1980 to 19 January 1981.

3. From 19 January 1981 onwards

23. The Respondents also argue that there is insufficient evidence of United States nationality after 19 January 1981. The Respondents note that at the Pre-Hearing Conference counsel for the Claimant stated that ownership of IBEC Inc. was partially transferred in 1983 to British interests (presumably Booker). The Respondents allege that at this time, if not earlier, Booker acquired a controlling interest in the Claimant.

24. The Respondents argue that Article VII, paragraph 1, of the Claims Settlement Declaration, defining "national" of the United States, has no reference to the date of 19 January 1981 and should be read to contain an implicit requirement of continuous nationality. The Respondents further invoke an alleged rule of international law, which they assert has been followed on occasion by international tribunals, that a bilaterally constituted tribunal should not issue an award to a claimant whose nationality changes

prior to the date of the award (i.e., from that of a state that was a party to the agreement establishing the tribunal to that of a third state).

25. The authorities relied upon by the Respondents do not construe or interpret the Claims Settlement Declaration, which is specific to this Tribunal and supersedes the purported rule of international law invoked by the Respondents.

26. In conformity with earlier Tribunal practice, the Tribunal finds in the Claims Settlement Declaration neither an explicit nor an implicit requirement of continuous nationality beyond 19 January 1981. See Sedco, Inc. and National Iranian Oil Co., et al., Interlocutory Award No. ITL 55-129-3, p. 8 (28 Oct. 1985), reprinted in 9 Iran-U.S. C.T.R. 248, 254; Gruen Associates, Inc. and Iran Housing Company, et al., Award No. 61-188-2, p. 12 (27 July 1983), reprinted in 3 Iran-U.S. C.T.R. 97, 103. The requirement of continuous ownership of the claim under Article VII, paragraph 2, of the Claims Settlement Declaration is satisfied, and the Tribunal has jurisdiction over the claim, as long as it was owned by a United States national from the time it arose to the date the agreement entered into force. A claim remains that of a United States national even when ownership by such a national is not continuous, as long as the discontinuity occurs after 19 January 1981. Consequently, any change of ownership after 19 January 1981 does not affect the jurisdiction of the Tribunal.

4. Conclusion

27. Based on the foregoing, the Tribunal finds that the Claimant has established that it was a United States national from 15 April 1973 through 19 January 1981. It is conceded that the Respondents are Iranian nationals pursuant

to Article VII, paragraph 3, of the Claims Settlement Declaration.

B. IRANIAN FORUM CLAUSES

28. Respondents argue that some of the contracts here at issue contain a clause effectively providing that any disputes thereunder shall be within the exclusive jurisdiction of the competent Iranian courts, thus allegedly divesting the Tribunal of jurisdiction pursuant to Article II, paragraph 1, of the Claims Settlement Declaration.

29. Three contracts are said to contain forum selection clauses that would divest the Tribunal of jurisdiction. These are Contract 401 with KWPA, (Articles 16 and 18); a contract with the Ministry of Energy dated 22 September 1973 (Articles 21 and 27); and a contract with the Ministry of Agriculture dated 20 May 1973 (Articles 21 and 27.)

30. Article II, paragraph 1, of the Claims Settlement Declaration excludes the Tribunal's jurisdiction when a claim arises under a "binding contract between the parties specifically providing that any disputes thereunder shall be within the sole jurisdiction of the competent Iranian courts . . . ."

31. Article 16 of Contract 401 between D&R and KWPA does not refer disputes to the jurisdiction of an Iranian court, but only to an arbitral tribunal. The Tribunal has previously held that such a clause does not divest the Tribunal of jurisdiction. See Gibbs & Hill, Inc. and Iran Power Generation and Transmission Company, et al., Interlocutory Award No. ITL 1-6-FT, pp. 5-7 (5 Nov. 1982), reprinted in 1 Iran-U.S. C.T.R. 236, 238-240.

32. The clauses in the remaining two contracts refer disputes only to "appropriate" courts, without specifying

that they be Iranian courts. In Howard Needles Tammen & Bergendoff and Government of the Islamic Republic of Iran, et al., Interlocutory Award No. ITL 3-68-FT, pp. 2-3 (5 Nov. 1982), reprinted in 1 Iran-U.S. C.T.R. 248, 249-250, the Tribunal held that a virtually identical clause does not divest the Tribunal of jurisdiction.

33. The Tribunal concludes that neither of these clauses affects the Tribunal's jurisdiction over claims arising from the challenged contracts.

C. CONCLUSION

34. Subject to the Tribunal's findings regarding claims that arose prior to April 1973 (see paras. 172 & 180 infra), the Tribunal's jurisdiction over the claims of D&R is established.

35. Jurisdiction over the counterclaims is discussed in connection with each counterclaim where the issue is disputed.

III. CLAIMS AND COUNTERCLAIMS INVOLVING THE KHUZESTAN WATER AND POWER AUTHORITY

36. D&R's work in Iran began in the late 1950s with KWPA's predecessor and continued with KWPA up to the time D&R left Iran at the beginning of 1979. Therefore, it is not surprising that the largest part of D&R's claims (amounting to approximately $1,433,815) relates to work done for KWPA. The largest counterclaims are also brought by KWPA against D&R (approximately $10,139,185).

A. CLAIMS AGAINST KWPA

37. D&R raises five separate claims against KWPA. Four of these arise out of the operative contract between the two parties. The fifth arises out of alleged confiscation of D&R's equipment after its departure.

1. Background

38. The Claimant's first consulting contract in Iran was effective as of 29 March 1956 and was made with the Plan Organization of Iran before KWPA was established. A second, successor contract with KWPA took effect on 22 September 1962 and continued with extensions until 20 March 1968. This contract and its extensions required D&R to provide consulting, engineering, economic, agricultural, geological and industrial studies and recommendations in connection with Iran's comprehensive plans for the development of the Khuzestan region of southwestern Iran.

39. These initial contracts between D&R and KWPA were followed by the principal contract now at issue, known as "Contract 401." Signed in January 1968, Contract 401 was subsequently submitted to the Ministry of Water and Power for approval. It became effective on 21 March 1968. Contract 401 largely continued different phases of work commenced under the earlier contracts.

a. Contract Provisions

40. The initial term of Contract 401 was from 21 March 1968 to 20 March 1973 (from 1347 to 1351, in the Persian or "Shamsi" calendar). The Parties subsequently agreed to two extensions of this contract: a Third Amendment to Contract 401 extended it from 21 March 1973 to 20 March 1976 and a Fourth Amendment extended it from 21 March 1976 to 20 March 1980.

41. Contract 401 stipulated that D&R was to provide specific types of consulting and engineering services on designated development projects undertaken by KWPA. These services included "field services," "engineering design services" and "project advisory services," as well as additional services as agreed by the Parties.

42. Field services were defined in Annex A to Contract 401. These included such activities as "field direction of all project engineering activities, supervision of all project construction . . ., supervision of all engineering aspects of the land preparation program, and general supervision of all project engineering investigations and surveys." Field services were to be performed on at least four projects: the Dez Irrigation Project, the Pahlavi Dam Hydro-Electric Plant, the Electrical Transmission System and the Electrical Distribution System. Contract 401 also established a scheduled period within which these services were to be rendered and the projects completed.

43. Annex C of Contract 401 defined engineering design services. Article 2, Section B of Contract 401 stated that engineering design services were to be provided for four different projects: Projects a and b, involving different aspects of the Pahlavi Dam Hydro-Electric Plant Expansion; Project c, expansion of KWPA's electrical transmission system; and Project d, the Dez Irrigation Project Water Delivery and Drainage System. The Contract provided a schedule for completion of these activities.

44. Project advisory services were defined in Annex D to the Contract. These included consulting and marketing services related to agribusiness projects, power program studies, power marketing, training and recruitment, loan negotiations, watershed protection and stabilization, farm drainage and other miscellaneous activities undertaken by

KWPA in connection with its development of the Khuzestan Region.

45. Contract 401 also contained detailed provisions stipulating the manner in which D&R was to be paid for its services. The contract entitled D&R to reimbursement of its costs plus a specified fee. Initially, the fee was set at $200,000 per year, payable in monthly installments, but subsequently the fee provision was amended by the Parties. During the last extension of the Contract the fee was defined as a percentage of chargeable items rather than as a fixed amount.

46. The mechanisms through which D&R was reimbursed for costs were expressed differently, depending on the type of service generating the cost. The costs incurred in performing field services were reimbursed in three major components: "a. The amount of salaries paid to field technician staff on the basis of the amount set forth in each staff member's employment agreement with [D&R][;] b. The amount of costs incurred by [D&R] for reporting and returning expenses and related travel allowances, including shipment and insurance of personal effects, . . . [as] set forth in Annex B . . . [and] c. An additional amount equivalent to one hundred twenty percent (120%) of field technician staff salaries reimbursed under subparagraph a. above." (See Contract 401, Article 2, Section A, para. 4a-c, as amended by the First Amendment, effective 21 March 1969).

47. The costs of project advisory services were also based on actual costs incurred. Subject to a specific monetary ceiling, these costs were reimbursed through the following components: "(i) The amount of costs incurred by [D&R] for salaries paid to its full and part-time personnel for time devoted to the performance of services hereunder . . . ."; "(ii) The amount of costs incurred by [D&R] for travel by its staff in connection with the performance of services

hereunder, including transportation and per diem allowance . . . ."; "(iii) The amount of actual invoiced costs incurred by [D&R] for ancillary services performed by third parties, . . ."; and "(iv) An additional amount equivalent to 90 percent of the amount reimbursed under subparagraph (i) above for salaries paid to full-time personnel and 45 percent of the amount so reimbursed for salaries paid to part-time personnel."

48. Engineering design service costs were computed on a different basis. Instead of reimbursement according to actual costs, reimbursement was given as a percentage of KWPA's estimated costs of constructing the various projects. The total "estimated construction costs" and the rate applied to those costs were both originally stipulated in Contract 401. These amounts and rates were provisional, however, and were to be adjusted by mutual agreement of the Parties when the actual construction costs were fixed and identified.

49. Article 4 of Contract 401 established the payment mechanisms. It obligated KWPA to set up a revolving fund on behalf of the Claimant, into which payments were made. The revolving fund contained balances in both rials and dollars. Article 4, Section A, Paragraph 3 governed the processing and verification of invoices:

> [D&R] shall submit to [KWPA] detailed monthly invoices, together with appropriate supporting documentation, requesting reimbursement for costs incurred against the revolving funds . . . . [KWPA] shall review each invoice and shall reimburse [D&R] therefor within thirty days after receipt of each such invoice. Such reimbursement shall constitute approval of the items so paid and shall serve to replenish the revolving funds. If [KWPA] believes that any specific payment item is not properly due and payable to [D&R] under the provisions of this Contract, it will so notify [D&R] at the time of making reimbursement for the approved items and concurrently therewith shall submit to [D&R] a written statement of exceptions setting forth the nature of its objection to any

> such items. Any item so questioned by [KWPA] shall be finally settled by mutual agreement of the parties within sixty days after receipt by [D&R] of [KWPA's] statement of exceptions. The sixty day time limit may be extended by mutual agreement.

50. Upon the conclusion of negotiations with D&R and the signature of the Managing Director of KWPA, several annexes were added to Contract 401. These annexes generally covered additional work between the Parties not encompassed by the original terms of the Contract.

b. Contract Performance

51. Until the latter half of 1978, work appears to have proceeded as generally contemplated by Contract 401. The Claimant contends that by the time of its departure from Iran at the end of January 1979 the engineering design services and field engineering services for the Pahlavi Dam Project and other contemplated operations were completed and that all required project advisory services were finished. It is further alleged that the entire Dez Irrigation System was functioning and operational and that the generating facility of the Pahlavi Dam was also in operation. In addition, it is submitted that much of the power distribution and transmission system was completed.

52. However, the conditions in Iran during the latter half of 1978 affected D&R's ability to perform pursuant to the Contract. By letter dated 3 January 1979, D&R formally notified KWPA that due to reasons of force majeure in Iran it was forced to withdraw its personnel and temporarily suspend operations under the Contract. Although both Parties at that time appear to have expected that performance of duties under Contract 401 eventually would resume, such resumption never occurred.

53. D&R now asserts claims for damages that it alleges it has suffered as a result of KWPA's failure to pay invoices or otherwise to fulfill its obligations. The claims are of five basic types: (1) payment for invoices submitted after August 1978; (2) payment for invoices submitted prior to August 1978; (3) payment for engineering design services invoiced on the basis of adjusted estimated construction costs; (4) release of good performance guarantee retentions; and (5) payment of compensation for office equipment confiscated by KWPA.

54. KWPA responds by denying liability for these claims and asserting at least 12 separate counterclaims, which span a period of contractual relations between the Parties extending as far back as 1962.

55. The Tribunal will examine the five types of claims, seriatim, below.

2. Post-August 1978 Claims

56. Supported by voluminous backup material, D&R claims approximately $793,616 arising out of unpaid salaries, fees and expenses invoiced after August 1978 ("Post-August 1978 Claims").

57. KWPA's objections fall into two categories: general objections and a series of detailed objections.

58. KWPA's most general objection to the payment of these invoices is that D&R breached Contract 401 by unilaterally terminating it and leaving Iran.

59. D&R does not dispute that the Contract terminated at some point in time but it argues that its performance ceased due to the force majeure conditions then prevailing in Iran

and that no fault can be attributed to D&R. The Tribunal will deal with these issues as an initial matter.

a. Force Majeure and Cessation of Performance

60. Under date of 3 January 1979 D&R sent a letter to KWPA entitled "Suspension of Consulting Services in Iran Due to Strikes and Civil Disorder" in which it stated, inter alia, that "D&R exercises the provisions of Article 9 of Contract 401 and suspends our obligations under Contract 401 until the strikes and civil disorder and their effects preventing per[f]ormance cease." D&R further undertook to "continue to perform its obligations to the extent possible and shall resume full performance whenever reasonably possible." This letter was accompanied by a proposed "Agreement", which set out specific procedures that the parties intended to follow during the force majeure period[2]. Following this formal notice, D&R officials transferred documents and items to KWPA, shut down their office in Iran, and finally left the country on 20 January 1979.

61. The Claimant invoked Article 9 of Contract 401, which governs suspension of performance and termination of Contract 401 under force majeure conditions. It states:

> The obligations of [KWPA] and [D&R] under this Contract shall be suspended during such times as, and to the extent that, performance hereunder is prevented, impaired or impeded by Acts of God, strikes, embargoes, war, civil disorder, or any other cause beyond the reasonable control of the party, and the party so prevented shall not be responsible for the delays in the services so caused, or for any loss or damage resulting therefrom. Notwithstanding any such suspension, payments to be made by [KWPA] to [D&R] under

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[2]There is no evidence in the record that KWPA ever signed this Agreement.

> Article 4 above shall continue during the period of suspension; provided, however, that such payments shall be adjusted according to the rate of [D&R's] actual expenditures during such period of suspension. When performance of the services is prevented by any of the foregoing circumstances, the party prevented shall notify the other in writing of the existence of the circumstances, and both parties shall make every reasonable effort to overcome, avoid or minimize the difficulties. The party affected shall in the meantime continue to perform its obligations to the extent possible, and shall resume full performance whenever reasonably possible. If suspension of [D&R's] services shall continue for a period of more than sixty (60) days, or if it should otherwise appear that the circumstances preventing performance cannot reasonably be expected to cease or become avoidable within a reasonable or foreseeable time, either party may thereafter, by giving sixty (60) days written notice to the other party while such suspension or circumstance prevails, terminate all or the affected part of the services under this Contract; and the provisions of paragraph A.1, of Article 8 shall apply with respect to payments on such termination.

62. KWPA disputes that the conditions in Iran at the time entitled D&R to invoke the force majeure provisions of the Contract and argues that D&R's departure amounted to a unilateral termination of Contract 401. KWPA further contends that, in any event, as of 11 February 1979 the conditions in Iran had returned to "normal" and that consequently D&R was under the obligation to resume work in Iran on that date. Its failure to do so allegedly amounted to a breach of contract. KWPA relies on a letter to D&R dated 27 August 1979 in which KWPA states that:

> From Feb. 11, 1979 (Date of Iranian Islamic Revolation [sic] Victory) we were waiting to see your experts back for execution of the al[l]ocated works but unfortunately have not received any information from you in this respect as yet.
>
> . . . [T]he reasoning you have made in your letter . . . dated Jan. 3rd 1979 for abandonment of the works has had no sense since Feb. 11, 1979 and from that date the setuation [sic] in Iran has been normal and the works were going on at a smooth way, all the foreign cantractors [sic] of

> the projects have been working so non-returning of your sraff [sic] means a violation to the contract principle[.]
>
> At any rate, please select your full authorized representative for negociation [sic] about the way of the settlement of this violation to the contract and advise the date that such a representative shall be in Iran.

63. The Tribunal considers it to be generally accepted that the conditions in Iran in early January 1979 amounted to force majeure conditions and that D&R thus was justified in suspending performance and leaving Iran at that time. The Tribunal further finds that D&R gave KWPA due notice as contractually required. Due to the nature of the work at issue, the Tribunal also finds that D&R could not reasonably be expected to perform any valuable services outside Iran.

64. Furthermore, the Tribunal is unconvinced by the evidence presented, and otherwise, that the conditions in Iran had returned to "normal" on 11 February 1979 and that it would have been reasonable for D&R to resume performance at such time.

65. As regards termination, it is clear that neither one of the Parties complied with the required formalities for terminating the Contract. The Tribunal finds that under the circumstances the most reasonable conclusion is that the Contract eventually expired due to continuing force majeure conditions beyond the control of either Party and through no fault on the part of either Party. Given this conclusion the Tribunal need not determine the specific date of termination.

66. Article 8 of the Contract governs recovery of costs associated with the termination. In conformity with the Tribunal's finding in the previous paragraph and bearing in mind the principles governing liability for termination of the contract that are set forth in Paragraphs 1 and 2,

Section A of Article 8, the Tribunal finds that KWPA is required to pay the cost of all work actually performed by D&R, including costs associated with the termination of work under the Contract.

b. Insufficient Backup Documentation

67. Another of KWPA's general objections to payment of the invoices at issue is that D&R has provided insufficient backup documentation. This applies particularly to the amounts invoiced for post-August 1978 field service salaries.

68. The documentation accompanying D&R's invoice claims consists mostly of the routine backup materials upon which KWPA previously disbursed amounts payable for such invoices. The cover letters to these invoices state that they were submitted "with full supporting documentation" and contain a summary of the services for which billing is rendered. In most cases, this backup documentation includes the time cards for each employee billed, which constituted a monthly accounting for time spent during each day of the month. For each day the time attributable to work, holiday, sick leave, travel, local leave, home leave or other activities was entered. These time cards were signed by D&R supervisors. Usually they were also countersigned by the KWPA project manager responsible for the work.

69. The Claimant also has included as backup material for these invoices, where relevant, copies of employment contracts, extensions of employment contracts and explanatory notes. Finally, each invoice is accompanied by a summary of the components of the invoice, salary rates, and a description of the underlying basis for the billing.

70. KWPA claims, however, that some time cards are not countersigned by KWPA supervisors, that some are missing,

and that salary would only be payable upon "satisfactory" performance properly "certified."

71. According to the documentary evidence before the Tribunal, all time cards bear the certification of the D&R supervisor and all time cards through November 1978 also bear the signatures of the KWPA project supervisor. None in December 1978 or thereafter bear the KWPA signature. Time cards were included for all of the employees during the eight months, with the exception of one month -- November 1978 -- in which four employees' time cards were not available.

72. Under the circumstances, the missing countersignatures and missing time cards are most probably due to the force majeure conditions. D&R has submitted as much documentation as was reasonably possible. KWPA has provided no credible evidence that the employees were not on the work site during these periods, and the Contract does not make provision of time cards an absolute prerequisite to payment. No contemporaneous objection was ever made. The Tribunal concludes that the invoices are valid.

c. Absence from Work Sites

73. KWPA argues that after August 1978 D&R billed for some services that were never rendered. D&R has countered by providing some backup material for each of the employees for whom such salary costs are claimed. Moreover, the record indicates that at the time D&R left Iran it provided KWPA with a status report on all contracts in progress for which D&R was responsible.

74. KWPA responds to this evidence with general allegations, claiming that some employees were not actually present, that "available records" indicate that a number of personnel were not working or that those who were present at

the job site performed no "tangible services." It argues that the failure of D&R to submit monthly progress reports confirms this.

75. None of these alleged "available records" of KWPA, however, has been submitted to the Tribunal. D&R supplied KWPA with status update reports when it left Iran. Based on the record before it, the Tribunal concludes that KWPA has not substantiated its contentions.

d. Remaining General Objections to the Post-August 1978 Claims

76. KWPA raises several other arguments that it claims should free it from any obligation to pay the invoices for services rendered. None of these has merit.

77. KWPA alleges that D&R failed to submit work progress or completion reports during the fall of 1978 and that this failure undermines its ability to assess the progress made or services rendered by D&R. However, this requirement was not a prerequisite to payment of invoices. See American Bell International, Inc. and Islamic Republic of Iran, et al., Award No. 255-48-3, para. 163 (19 Sept. 1986), reprinted in 12 Iran-U.S. C.T.R. 170, 219.

78. KWPA argues that D&R staff failed to work the requisite number of hours, took too much sick leave or were working for NIOC or OSCO but not KWPA. The Tribunal finds, however, that sick leave is a recognized component of salary under the employment contracts. It is therefore a reimbursable element under Contract 401. As such, it was part of the accepted fee arrangements at the time of the termination of the Contract. There is no indication in the documents submitted to the Tribunal that any employee took too much sick leave. Finally, there is no evidence substantiating KWPA's contention that D&R's employees were working for NIOC

or OSCO or that they failed to work a sufficient number of hours.

e. Detailed objections to the Post-August 1978 Claims

79. The Tribunal now turns to the detailed analysis of the Post-August 1978 Claims. In organizing their pleadings the Parties have broken down these claims into the following separate contract categories: (1) Field Technical Staff Salaries from August 1978 to early 1979; (2) 120 percent Salary Override; (3) Social Insurance Organization ("SIO") Contributions; (4) Housing and Maintenance Expenses; (5) Reporting and Returning Expenses; (6) Technical Staff Termination Pay including i) salaries and ii) 120 percent salary override; (7) other charges; and (8) consultant's fee. For ease of reference, the Tribunal retains this categorization.

1. Field Service Salaries

80. Article 2, Section A, paragraph 4 of Contract 401 required KWPA to pay salaries of engineers providing field services ("Field Service Salaries"): "[KWPA] shall pay to [D&R] amounts as follows: a. The amount of salaries paid to field technician staff on the basis of the amount set forth in each staff member's employment agreement with [D&R]." The Claimant has submitted to the Tribunal the invoices - including backup material - for such services rendered and based thereon it claims $156,912.28.

81. For the purposes of this Award, the Field Service Salaries claims may be divided into four categories. The first is for contract work performed in the ordinary course of business up to the time the force majeure provisions were invoked. The second category is for services rendered after the invocation of force majeure on 3 January 1979 but before

the employees returned to the United States. This includes both contractual services and the costs of shutting down D&R's offices in Iran, as well as preparing for the temporary transition of work to KWPA. The third category of billings for Field Service Salaries involves payment for "home leave" or "local leave" of the salaries, billed between January and March 1979. The fourth category concerns a D&R employee, Mr. A. Bakhtiari, who continued to perform services in Iran until March 1979. These four categories are considered in turn below.

82. The first period of services, i.e., those invoiced between August 1978 and January 1979, are for the actual field technical services required by Contract 401. Other than the general objections discussed above, KWPA has not made any specific objections to this first category of salary costs. Therefore, the Tribunal finds this first category of salary costs payable.

83. The second category of services were rendered to KWPA in early January 1979, after D&R had invoked force majeure. Under Article 8.B of the Contract, which is applicable to any termination, D&R was required to assist KWPA "in the reasonable and orderly supervision and implementation of termination procedures" and was entitled to be reimbursed for "any additional costs incurred in providing such termination assistance." The record establishes that most of the services in this second category involved such work. Since the Contract was not terminated in January 1979 but rather was suspended for reasons of force majeure, these provisions would not be strictly applicable. The Tribunal finds, however, that costs reimbursable under these termination provisions also should have been reimbursable in the analogous situation of a contract suspension that led ultimately to termination. The force majeure clause of Contract 401 required that KWPA's "payments shall be adjusted according to the rate of [D&R's] actual expenditures

during such a period of suspension." Consequently the actual salary costs incurred by D&R in January 1979 are reimbursable to D&R.

84. The third category of post-January 1979 salary costs includes billings for "home leave" and "local leave." Pursuant to the provisions of employment contracts, field technical staff earned local and home leave vacation pay as a component of their benefits. Local leave was earned at the rate of one work day per month of service. Local leave was to be "taken in the course of [the] period of employment consonant with the requirements of [the employee's] assignment," and unused local leave accrued at the end of the tour of duty was not to be compensated unless special permission was obtained. "Home leave" accrued at the rate of 1.75 days per month of service in Iran. Home leave could only be taken at the end of the tour of duty and the employee's salary for home leave was payable in a lump sum amount.

85. The Claimant contends that both home leave and local leave were considered components of salary under the employment contract. Contract 401, Article 2, Section A, Paragraph 4, Sub-paragraph a, entitles D&R to reimbursement of the amount of "salaries" paid to the field technician staff based on the terms set forth in each staff member's employment agreement. Since the local leave and home leave components of the salary were consistent with the employment agreements, the Tribunal concludes that these components of salary billed after August 1978 are contractually reimbursable by KWPA.

86. The Tribunal has reviewed the amounts claimed for home leave and local leave. As a general rule, it finds them to be consistent with the record insofar as it reflects the amount of time that these employees had previously accrued in Iran. KWPA has neither contemporaneously nor currently

objected to any of the specific claimed amounts as excessive or unaccrued. Consequently, the Tribunal finds them to be payable.[3]

87. The final category, for post-January 1979 salary payments, which is the only item claimed for actual field services performed after January 1979, involves invoices for January, February and March 1979 for the services of Mr. A. Bakhtiari. The timesheets of Mr. Bakhtiari show that he was billed as "present" to 31 March 1979 and that he took "travel time" between 1-3 April 1979 and home leave to 15 April 1979.

88. KWPA objects to payment for this time, arguing that it is inconsistent with D&R's invocation of force majeure and that no actual services could have been performed during this time. However, this employee's duties were not subject to the same conditions and prohibitions that prevented D&R from performing its services. According to his employment contract, Mr. Bakhtiari was employed as a "Customs Liaison Officer" in Khorramshahr, and was responsible to the Chief of the KWPA Supply Department. When the 3 January 1979 notice of force majeure was communicated to KWPA, D&R's proposed Agreement, which was attached to the notice, contemplated that Mr. Bakhtiari would continue under his present contract providing services in the "Ports Office." This is evidence that Mr. Bakhtiari's services were still capable of being performed despite the general situation of force majeure which otherwise affected D&R. KWPA never

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[3]While D&R seeks reimbursement for a large amount of home leave for two employees, i.e., 37 7/8 days for Mr. Larrabee between 14 January and 22 February 1979 as well as 61 days for Mr. Takagi during approximately the same period, this may be because their accrued lump sum home leave payments attributable to prior employment periods had been carried over to the end of final tours. Neither D&R nor KWPA has suggested otherwise.

objected to this statement or to Mr. Bakhtiari's continued performance of his duties. KWPA has not specifically alleged that these services were not performed.

89. The Tribunal notes that the last time card submitted by Mr. Bakhtiari, for April 1979, shows that Mr. Bakhtiari took a total of two days' travel time. KWPA alleges - unsupported by any evidence - that Mr. Bakhtiari did not leave the country. According to Article 4(a) of Mr. Bakhtiari's employment contract, however, payment for travel time was explicitly included as a component of his compensation. Article 6(b) of the contract provided that Mr. Bakhtiari would be paid for two "days' travel time for returning to . . . [his] point of origin." The Tribunal concludes that Mr. Bakhtiari is entitled to payment for that time. The Tribunal also finds that the home leave taken was reasonable. According to the time cards submitted, he took 12 days of home leave. Since he was working effectively for seven months, from August 1978 to March 1979, he was entitled to 12 days of home leave, which accrued at a rate of 1.75 days per month of service. The Tribunal concludes that the post-January 1979 services of Mr. Bakhtiari also are payable to D&R.

90. In summary, the Tribunal finds that the invoices and contemporaneous backup materials submitted were both consistent with that which had previously been furnished to KWPA and adequate under the circumstances. No objection was made to these invoices at any time prior to the filing of KWPA's Statement of Defense, even though Article 4, Section A, paragraph 3, requires KWPA to pay each invoice within 30 days of submission or to object within that time. The Tribunal concludes that D&R is entitled to the full amount claimed for Field Service Salaries, i.e., $156,912.28.

2. 120 Percent Salary Override

91. A second component of D&R's claim for invoices submitted after August 1978 is the 120 percent salary override provided for in Contract 401 as a means of recouping D&R's indirect costs. This override covered administration, overhead and other charges associated with the provision of services such as educational expenses of dependent children, home office supervision and various other benefits. D&R's invoices for this component amount to $188,294.71.

92. Article 2, Section A, paragraph 4, sub-paragraph c obligated KWPA to pay D&R: "An additional amount equivalent to one hundred twenty percent (120%)[4] of field technician staff salaries reimbursed under sub-paragraph a. above."

93. The Tribunal already has found that the field technician staff salaries include compensation rendered for home leave and local leave. Given such a finding, and the Tribunal's finding that the services were rendered and that, therefore the salaries are payable, it follows that the salary override also is due. This conclusion is reinforced by KWPA's failure to show that the costs that the 120 percent override was intended to cover would have been any less during the relevant period. The Tribunal awards D&R the claimed amount, $188,294.71.

3. Social Insurance Contributions

94. D&R claims $23,928.24 in reimbursement of social insurance contributions allegedly made to the Social Insurance Organization after August 1978. The contractual provision authorizing reimbursement of these monies is clear and undisputed. Article XIV of the Third Amendment to

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[4]The original terms provided for only a 100 percent override; this was increased to 120 percent by the First Amendment, effective 21 March 1969.

Contract 401 added a new paragraph to Article 10: "In addition, all amounts paid by [D&R] for insurance premiums assessed under Iranian social insurance laws on the salaries of [D&R's] employees . . . shall be reimbursed to [D&R] by [KWPA] upon submittal of appropriate documentation." KWPA objects to payment of these invoices on the ground that D&R has not proved that it has paid these premiums.

95. The following table summarizes the amounts claimed by D&R:

AMOUNT	MONTH	INVOICE DATE	SUBMITTAL DATE
$4924.25	Mordad (23 Jul - 22 Aug 78)	23 Sept 78	23 Sept 78
$4355.31	Shahrivar (23 Aug - 22 Sept 78)	23 Oct 78	23 Oct 78
$4575.86	Mehr (23 Sept - 22 Oct 78)	22 Nov 78	22 Dec 78
$4575.86	Aban (23 Oct - 21 Nov 78)	22 Dec 78	22 Dec 78
$4575.86	Azar (22 Nov - 21 Dec 78)	21 Jan 79	21 Jan 79
$460.55	Dey (22 Dec - 20 Jan 79)	20 Feb 79	20 Feb 79
$460.55	Bahman (21 Jan - 19 Feb 79)	21 Mar 79	21 Mar 79

96. The Tribunal has reviewed the backup documentation submitted in connection with the invoices for these amounts to determine whether such amounts were paid. The documents indicate that $4,924.25 was paid for the month of Mordad

(Shamsi calendar). The evidence includes a disbursement voucher complete with details of the number and date of the check, bank to which payment was made, and signature of the relevant D&R official, which is marked "stamped and received" by the receiving official. The Tribunal considers such evidence sufficient and concludes that this money was paid.

97. There is some evidence of payment of the amount for the month of Mehr. The backup information includes a disbursement voucher listing the check number and date, as well as the bank to which payment was made, and containing the authorizing signature of the D&R official. As there is no corresponding signature or approval from the receiving official, the Tribunal concludes that insufficient evidence was provided to establish that this amount was paid.

98. There is no evidence establishing payment for the months Shahrivar, Aban and Azar, although the contemporaneous submission of the invoices is evidenced. For the final two months, Dey and Bahman, there is nothing more than D&R's assertion that it paid these sums. On the basis of this record, D&R is not entitled to reimbursement of these amounts.

99. Of the total of $23,928.24 claimed for reimbursement of social insurance organization premiums, the Tribunal concludes that D&R is entitled to $4,924.25.

4. Housing and Maintenance Expenses

100. D&R seeks reimbursement for certain housing expenditures, as invoiced to KWPA in a statement of 19 November 1978. According to the invoice and backup materials, the expenditures totalled 2,483,163 rials. D&R's contemporaneous request for payment, however, was only for 2,299,648 rials. The Tribunal finds that D&R cannot now claim payment

of any higher amount than it claimed at the relevant time. The amounts billed are based on actual expenditures arising out of housing and office costs at Golestan, payable under Annex F to Contract 401. Five separate types of costs are invoiced: (1) housing and property rentals; (2) power division office rental; (3) security; (4) hotel costs prior to house assignments; and (5) utilities. As backup documentation, D&R has submitted copies of dated disbursement vouchers signed by the payee, with check numbers and descriptions of the transactions; copies of invoices for hotel and utility bills; petty cash vouchers; and other contemporaneous records of the expenditures.

101. KWPA objects to the housing expenditures generally on the ground that insufficient backup evidence has been provided. In particular, it alleges that copies of rental agreements, deeds and other documents are not provided, that a resolution of the Board of Directors of KWPA authorizing use of housing is not submitted, that the names of the employees using the houses are not provided and that insufficient evidence has been provided to establish that the alleged payments were actually made. The Contract does not require such backup documents. There is no record of any contemporaneous objection to the invoice when it was submitted. Backup material, similar to what has been included here, was routinely submitted to KWPA and reimbursement was granted thereon. The Tribunal finds these objections to be without merit.

102. A second general objection made by KWPA to the housing expenditures is that D&R had initiated such payments without having obtained the necessary consent by KWPA. This argument is based on Article 4 of Annex F to Contract 401, which reads:

> If or to the extent that [KWPA] does not furnish any facility or service which is provided for herein and which is required for purposes of

> [D&R's] services under this Contract, [D&R] may, by agreement with [KWPA] and to the extent reasonably possible, directly secure, maintain, or operate such facility or service and be paid by [KWPA] the costs thereby incurred or, alternatively, [D&R's] service obligations hereunder shall be reduced accordingly.

The Tribunal finds that Contract 401 clearly contemplates that KWPA shall pay for housing, whether provided by KWPA or by D&R. The requirement that KWPA consent when D&R provides housing is merely intended to safeguard KWPA against unreasonable claims for reimbursement under this Article. Where the reimbursement sought seems reasonable and no contemporaneous objection was made, agreement by KWPA may be inferred. The Tribunal therefore rejects this defense.

103. KWPA also specifically opposes the claim attributable to rental of D&R's office in Ahwaz. KWPA alleges that the cost of this should have been borne out of the 120 percent salary override rather than as a direct reimbursable expense. This argument is contradicted by the specific terms of the Contract. Article 5 of Contract 401 states that "[KWPA] will at its expense furnish support facilities and services to [D&R] . . . as specified in Annex F." (Emphasis added.) Annex F states: "[KWPA] at its expense will furnish to [D&R] its requirements for housing and office space for use in connection with [D&R's] work in Iran . . . ." (Emphasis added.) This amount is reimbursable to D&R.

104. KWPA objects to other components of this housing claim, including rental amounts paid to employees Messrs. Larrabee and Adham, and to the amount expended to provide hotel accommodation for D&R employees pending availability of housing. In addition, KWPA argues that a guest house was available. Since no contemporaneous objections were made and since there is evidence of expenditure, the Tribunal concludes that these invoices are payable.

105. Finally, KWPA challenges "miscellaneous items" among the invoiced housing expenses. However, neither the specific items nor the reasons for which they allegedly are not payable are set out in KWPA's memorial. Consequently, the Tribunal cannot evaluate them. Based on the documentation and evidence of payment submitted by the Claimant, the Tribunal holds that the housing invoices as submitted to KWPA are payable in the total amount for which D&R contemporaneously requested payment. Converted to dollars D&R is entitled to payment of $32,688.67.[5]

5. Reporting and Returning Expenses

106. As an additional component of its post-August 1978 expenses, the Claimant seeks reimbursement of $75,181.51 in costs associated with travel by technical staff members from Iran to their point of origin and the return of their personal effects.

107. Reimbursement of these costs is covered under Article 2, Section A, paragraph 4(b) of Contract 401. In the routine course of affairs, KWPA would be required to reimburse D&R for the "amount of costs incurred by [D&R] for reporting and returning expenses and related travel allowances, including shipment and insurance of personal effects," of its returning and reporting field technical staff, as specified in Annex B.

108. D&R submitted three quarterly invoices that included documentation of its reporting and returning expenses. Costs in the amount of $49,564.67 were incurred and billed prior to the force majeure departure. Of the balance,

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[5]The claimed rate of exchange is 70.35 rials/U.S. dollar. The Tribunal finds no reason not to employ this rate of exchange.

$6,816 was billed on 21 March 1979 and $18,800.84 on 15 May 1979.

109. The Tribunal is satisfied with the backup materials submitted. The documentation of the charges includes photocopies of original invoices, internal vouchers, checks, freight bills and other contemporaneous receipts. In the face of this evidence, KWPA argues that particular types of "minute" backup are not tendered. In its Statement of Defense KWPA argues that "supporting evidence such as cancelled air travel tickets, certificates of air travel and transportation agencies stating receipt of payment" should have been provided.

110. It may be true that not all minute information of the type demanded by KWPA has been submitted. However, such documentation would not be necessary even under ideal circumstances. There is no allegation that such backup was ever required prior to the time the invoice was submitted. There is no suggestion that the total amounts invoiced are extraordinarily high. The Tribunal thus concludes that these invoices are payable in full, in the amount of $75,181.51.

6. Technical Staff Termination Pay

111. D&R seeks a total of $99,623.35 as (1) two months' termination salaries paid to its field service employees ($45,283.34) plus (2) a 120 percent salary override thereon ($54,340.01). D&R submitted invoices for these costs to KWPA as of 1 April 1979. These invoices include requests for reimbursement for the "suspension of services" salaries of eight employees: five in the "Power Division" (Ernesto H. Delizo, Harold B. Hayden, Feroz I. Kahn, Donald R. Larrabee, and David M. Takagi), two in the "Northern Irrigation Area" (Robert W. Apperson and Gregory T. Stach) and one in Central Services (Alfred A. Bakhtiari).

112. KWPA argues that there was no agreement to pay either the termination salaries or the 120 percent override under the terms of Contract 401.

i. Termination Salaries

113. Article 8 of Contract 401 provides that D&R is to be reimbursed for additional costs incurred because of termination of the Contract. Section A, paragraph 1 of Article 8 seems to indicate that salary termination costs of field technician staff must be deemed included in such additional costs, and are to be reimbursed by KWPA. Given the minimum 60-day notice provisions prior to termination, which appear throughout Articles 8 and 9 of Contract 401, it is implicit that these "salary termination costs" include two months' termination salary. This is confirmed by Article 2, Section A, paragraph 4, sub-paragraph b, which requires KWPA to reimburse D&R's employees for their salary costs, as provided in the employees' employment agreements. The record shows that employment agreements concluded by D&R contain provisions for payment of two months' salary if the contracts are terminated for reasons beyond the control of the employees at a time when there are at least two months remaining on the original employment periods. In the event that less than two months remain, the employees were not to receive more severance salary than they would otherwise have received as salary if the contract had continued uninterrupted.

114. Based on these provisions, the Tribunal holds that KWPA is obligated to reimburse D&R for up to two months' salary termination costs to the terminated employees. The only remaining issue is the factual matter of whether D&R is entitled to reimbursement for the full two-month period for each of the eight employees.

115. In its written memorials D&R did not focus on the contractual limitation of termination salaries prohibiting an employee from receiving more termination salary payments than the employee would have received if the natural course of the employment contract had been followed. Consequently, the record is somewhat sparse as to the dates on which the employees' contracts would otherwise have terminated.

116. However, based on the Tribunal's review of the employment contracts actually submitted, as well as the notes and other documents attached to the post-August 1978 invoices, it is possible to assess the validity of these claims for suspension salary costs. Each employee is considered in turn.

117. The employment contract under which Mr. Bakhtiari was engaged is submitted as part of the record. This states that his tour of duty was from 30 August 1978 to 29 August 1980. His termination occurred more than two months before the end of this period. Consequently, Mr. Bakhtiari's termination salary costs are reimbursable to D&R.

118. There also is evidence in the record as to the commencement date of Robert B. Apperson. Notes made on the summary of Invoice 1357-6, dated 23 September 1978, indicate that Mr. Apperson took home leave in September 1978. From this it may be inferred that a contract for either one or two years was renewed or extended at that time. It is apparent from the record that as a general rule employment contracts were initially granted for two years and extended for periods of approximately one year. Thus, Mr. Apperson had more than two months remaining on his contract. His salary termination costs are reimbursable.

119. The record also contains some evidence as to Mr. Larrabee's term of service. Mr. Larrabee's employment contract was renewed for a period of "nine months" from the

termination date of his previous employment agreement. That termination date is not in the record, but the employment extension agreement was signed by Mr. Larrabee as of 1 July 1978 and it may be presumed that the nine month period ran from this date, i.e., to 1 April 1979. The record does not disclose when Mr. Larrabee's employment extension contract was terminated after D&R's withdrawal from Iran. However, it is reasonable to presume that this employee's contract was terminated within 30 days of his return home. Since Mr. Larrabee's time cards indicate he returned home on approximately 15 January 1979, a termination date 30 days after his arrival in the United States would be approximately 15 February 1979. This is only six weeks prior to the end of his scheduled nine-month tour. D&R thus is not entitled to claim for the last two weeks of Mr. Larrabee's termination salary since that salary would not have been billable under the initial contract.

120. This nonreimbursable sum represents 25 percent of the $5,666.67 termination salary claimed for Mr. Larrabee, i.e., $1,416.67. Consequently, $1,416.67 is not recoverable by D&R.

121. The contracts and termination dates for Mr. Kahn and Mr. Delizo, on the other hand, confirm D&R's entitlement to reimbursement for a full two months salary for each of these employees. It may be assumed, as with Mr. Larrabee, that each contract was terminated within thirty days of the employee's return to the United States. Time cards show Mr. Kahn returned by 19 January 1979 and Mr. Delizo by 16 January 1979.

122. Mr. Kahn had previously concluded an employment contract for a period of 20 months, commencing 12 April 1978. The record also contains documents indicating that KWPA approved Mr. Delizo's further employment for one year beginning approximately May 1978. The terms of the

contracts for both of these employees thus continued for more than two months beyond their assumed termination dates. Consequently, there is no question as to D&R's entitlement to reimbursement for suspension salaries paid to Mr. Kahn and Mr. Delizo.

123. For the three remaining employees, Messrs. Stach, Hayden and Takagi, there is no direct evidence in the record as to the date they commenced their terms of employment. However, this may be inferred from their time cards.

124. The time cards of Mr. Stach and Mr. Hayden for January, February and March 1979 show they each took only approximately nine days home leave after their return from Iran. Since these employees acquired home leave at the rate of 1.75 days per month of service it may be inferred that they had only performed approximately six months service at the time of their termination. Consequently, D&R would be entitled to seek the full two months' salary costs on their termination.

125. Similarly, D&R appears to be entitled to claim the termination salary in respect of Mr. Takagi, although there is no evidence as to the date he commenced employment. Based on the number of home leave days listed on his time card it was apparent that he was approximately halfway through the first extension of his contract. Thus, full termination costs are payable based on salary termination costs paid to Mr. Takagi.

126. In conclusion, the Tribunal determines that D&R is entitled to reimbursement of all claimed termination salary costs, with the exception of $1,416.67 attributable to Mr. Larrabee's severance. The total amount to be awarded is $43,866.67.

ii. Termination Salary Override

127. KWPA objects to D&R's claim for $54,340.01 as a 120 percent override on the termination salaries, arguing that it never agreed to pay an override on termination salaries. It asserts that the provisions of Article 4, Section B, do not authorize this.

128. The override is phrased in Contract 401 as a function of the salary as defined in the employment agreement. Termination salary clearly is part of the salary component as described in the employment agreements. It also is evident from the very nature of the term that termination compensation is a component of salary. There are administrative and overhead costs associated with employees in the final weeks of employment. Indeed, necessary supplemental assistance during this extraordinary termination phase could increase the employer's costs. Consequently, the underlying contractual reasons for this cost reimbursement provision are fulfilled.

129. The Tribunal concludes that this 120 percent override is payable on the $43,866.67 salary termination awarded, i.e., $52,640.

7. Other Charges

130. D&R claims $179,335.84 arising out of several post-August 1978 invoices and categories of costs said to be recoverable under the Contract. Claimant's Memorial provides no specific legal argument in support of these invoices.

131. Two invoices of the Claimant, "Annex QQ Delay IR-84 V - c/4" and "Annex QQ Delay IR-84 Y - c/5," were forwarded to Claimant on 2 November 1978 and 23 April 1979 respectively,

and include charges of $34,804.12[6] for services rendered between April 1978 and March 1979.

132. Payment is claimed on the basis of Annex QQ. This Annex permits billing for engineering design services rendered after the initial fixed payments for such services are exhausted. Such additional billing is only permitted when, through no fault of D&R's, the construction work necessitating the continued engineering design services continues beyond its anticipated ending date. The Tribunal finds that the relevant contractual provision places a burden of proof on D&R to establish that it did not cause the delay for which payment is claimed. There is nothing in the record - not even an express assertion - to that effect. On the basis of this record the Tribunal concludes that D&R has not made a prima facie showing of entitlement to this part of its claim, which is therefore rejected.

133. In an invoice of 30 April 1979 D&R also claims payment for other charges caused by delay, in the amount of $74,004.60.[7] In support, D&R relies on a procès verbal associated with Annex XX-51 of Contract 401. The invoice includes copies of the relevant annex and procès verbal, as well as a letter describing the work performed and the underlying construction contracts with which it was associated.

134. The procès verbal contains a specific provision stating that an agreement had been reached to compensate D&R for costs caused by delay. No specific rebuttal to these costs has been advanced by KWPA. The Tribunal concludes that D&R

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[6]This figure is net of the D&R fee, good performance retentions and tax withholdings, all of which are discussed elsewhere in this Award.

[7]See footnote 6.

has evidenced its entitlement to these charges in the amounts claimed.

135. The remaining amount claimed under this heading is the sum of $70,527.12 relating to engineering design services and short term field services performed by specialists. This sum was billed to KWPA pursuant to Annex XX and Invoice No. 1357-8/1. This invoice is consistent with the contractual provision cited for payment. Consequently, the Tribunal concludes that the claimed amount is payable. The total amount awarded in this item is $144,531.72.

8. Consultant's Fee

136. The fee provisions of Contract 401 effective during the relevant period stated that D&R was entitled to 11 percent of the amounts reimbursable under the Contract:

> "[KWPA] shall pay to [D&R] a fee equal to eleven percent (11%) of total reimbursable amounts billed for all services performed under this Contract on behalf of [KWPA]. The fee amount shall be calculated for each of the monthly invoices and shall be included for payment in such invoices."

Pursuant to this provision, D&R's post-August 1978 invoices sought payment of fees totalling $79,560.32. D&R now claims this amount.

137. This sum represents 11 percent of the post-August 1978 invoices, excluding an invoice for $32,688.67 for housing and maintenance costs for which no fee claim was ever stated. It was invoiced in the ordinary course of business and accompanied by substantial, adequate documentation. It is thus prima facie payable, except for that portion of the fee attributable to amounts disallowed by the Tribunal herein.

138. KWPA alleges that some reimbursable amounts upon which the fee was based were inappropriate. While D&R focuses on the fact that the 11 percent fee was to be based on "total reimbursable amounts", KWPA argues that the fee was to be calculated from the "monthly invoices" and is tied to amounts billed for "services performed." The contractual reference to monthly invoicing for fees supports KWPA's position that only monthly invoices for services, as opposed to other reimbursable amounts such as reporting and returning expenses and termination pay were included in the base on which the fee was computed. Consequently, fees claimed in quarterly invoices and fees not based on amounts billed for services rendered should not be awarded.

139. The Tribunal finds that D&R is entitled to fees over all amounts awarded on its post-August 1978 invoices, with the exception of the amounts awarded based on quarterly invoices and for termination pay. The Tribunal concludes that D&R is entitled to 11 percent of $494,662.96[8], i.e. $54,412.93.

f. Tax and Good Performance Deductions

140. The invoices upon which D&R's post-August 1978 invoice claim is based show deductions from the gross amounts billed of 5.5 percent of the D&R fee as a tax and 5 percent of the total invoices for services as a temporary good performance retention. The total deducted for tax is $4,375.82.

141. Since the Tribunal has disallowed $25,147.40 in fees, D&R would not be obligated to pay tax on this amount, i.e., $1,383.11. Consequently, the tax deductions made on the

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[8] I.e., the total amount of $699,039.81 awarded in this section, less the invoices for housing costs ($32,688.67), reporting and returning expenses ($75,181.51) and termination pay ($43,866.67 plus $52,640).

invoices upon which D&R's post-August 1978 invoice claim is based are reduced to $2,992.71.

142. The good performance retentions on the claimed invoices (excluding the invoice for housing and maintenance costs) amount to $40,141.80. However, the good performance retentions on those invoices that the Tribunal has actually awarded would be only $36,038.20. While D&R acknowledges that the good performance retentions were properly deductible when the costs and fee were invoiced, it now argues that these monies should be returned to it. Whether D&R is entitled to the repayment of good performance deductions for post-August 1978 invoices is considered in connection with D&R's claim for return of good performance retentions previously withheld. (See paras. 184 et seq., infra.)

g. Conclusion

143. In Part III.A.2.a-e, supra, the Tribunal has concluded that D&R is entitled to payment of a total of $753,452.74. Deduction of the total tax and good performance retentions of $39,030.91 results in a net award to D&R for its post-August 1978 invoices of $714,421.83.

3. Pre-August 1978 Invoice Claims

144. D&R claims a total of $59,150.43 arising out of miscellaneous unpaid amounts invoiced prior to August 1978. The claims are referred to in this discussion by the tabbed reference letter assigned to them by D&R: (A) unpaid balance of Invoice No. 2536-11; (B) remaining unpaid balance on Housing Invoice No. 1 for the Imperial year 2536 (Shamsi year 1356, i.e., 21 March 1977 to 20 March 1978); (C) remaining unpaid amounts on Housing Invoice No. 2 for year

2536; (D) miscellaneous unpaid fees; (E) miscellaneous unpaid invoices for Shamsi year 1353 (i.e., the year beginning 21 March 1974); (F) unpaid invoices for Shamsi year 1352 (i.e., the year beginning 21 March 1973); and (G) miscellaneous accrued items prior to Shamsi 1352 (i.e., prior to 21 March 1973).

a. Claim A

145. D&R claims $200 as the amount of an unpaid balance outstanding from Invoice No. 2536-11. In support of this claim, D&R has submitted summaries of its relevant statements and backup documentation. These contain contemporaneous notes reflecting telephone discussions regarding nonpayment of this bill. One of these notes states that Mr. Motamedi, the Head of the Power Division Accounting Section at KWPA, agreed KWPA would pay the remaining $200 balance. Other items originally protested on that same invoice had previously been paid by KWPA.

146. KWPA has not provided any evidence as to why this invoice should not be paid. Based on the record of its previous agreement to pay, the Tribunal concludes that this amount of $200 is due.

b. Claim B

147. D&R claims an additional $790.78 as the remaining balance on its Housing Invoice No. 1, issued during the Shamsi year 1356 (21 March 1977 to 20 March 1978). According to D&R, KWPA protested certain items on this invoice but eventually agreed to pay the amount now sought here.

148. Evidence of this agreement consists of a letter dated 11 February 1978 and prior correspondence submitted to the Tribunal. The "billable summary" submitted to the Tribunal states that the amount was "under review." A memorandum

dated 5 February 1978 states that the agreement should have been given and that the amount was payable. Copies of original receipts, disbursement vouchers and other contemporaneous documents indicate that the amounts were both expended and reimbursable under Contract 401.

149. KWPA has not given any specific reason why the amount should not be paid. In light of the substantial evidence supplied by D&R, the Tribunal holds that this constitutes a valid claim. An amount of $790.78 should be awarded.

c. Claim C

150. D&R submits that it is entitled to $2,363.64 for additional housing costs billed in the year 1356 as submitted in its Housing Invoice No. 2. These costs include hotel accommodation and associated expenses for two of its employees.

151. A memorandum dated 10 July 1978 discusses the two rial payments that underlie this claim. One of these payments, for 80,000 rials, was made upon the verbal authorization of one of KWPA's agents.

152. KWPA denies any responsibility for payment, based on the alleged lack of authority of the person who gave the verbal approval. There is no evidence on the record that such alleged lack of authority of the person giving the oral approval was known or should have been known to D&R at the time such oral approval was given. Contract 401 does not specifically require written authorization and, on the basis of the evidence provided, it is evident that the costs claimed were indeed incurred. Absent any evidence to the contrary, the Tribunal finds that D&R was justified in relying on the oral approval at the time it incurred the costs claimed and is entitled to reimbursement.

153. Consequently the Tribunal finds that the total amount claimed by D&R is payable, i.e., $2,363.64.

d. Claim D

154. D&R also seeks various unpaid fees totalling $4,024.79 invoiced during the year 1356, payable by the Power, Engineering, Operations and Maintenance, "NIA", and Central Services Divisions of KWPA. The documentation submitted by D&R in support of this claim is only partially legible.

155. KWPA rejects this claim on the ground that the unpaid fees in question are attributable to the inclusion by D&R of its tax payments, social security premiums and travel expenses in the category of "reimbursable charges" upon which D&R's fee was computed. The Tribunal has already accepted KWPA's argument that the consultant's fee did not apply to "reimbursable charges" that were included on D&R's quarterly, rather than monthly, invoices. (See paras. 138-39, supra.) Of the fee amount D&R seeks in Claim D, $3,421.30 is based on quarterly invoices while only $603.49 is based on monthly invoices. Therefore, the Tribunal awards the latter amount.

e. Claim E

156. D&R claims $27,151.44 arising out of unpaid invoices that were rendered, and protested, in the year 1353 (21 March 1974 to 20 March 1975). Because these invoices were originally challenged by KWPA, D&R bears a burden to overcome those objections at this time.

157. In support of its claim, D&R alleges that Mr. Ghanbari of the Accounting Division of KWPA agreed to pay a significant portion of the amounts now claimed. However, as evidence of this agreement, D&R submits only an internal memorandum dated 28 June 1977 evidencing that there was

considerable confusion about the payment of these items. This memorandum, exchanged among D&R accounting staff, attempted to identify the reason for nonpayment of these monies. It indicated that the staff was a "little confused" as to how to apply the various fees. A memorandum dated 13 July 1977, purportedly reflecting the results of a discussion with Mr. Ghanbari, did not indicate any concession or agreement. Handwritten notes of this meeting, appended to the memorandum, state that Ghanbari "accepted" $10,327.70 of these charges and rejected $5,713, and that no agreement on the source of, or obligation to pay a further $2,486.84 was reached. However, the cover memorandum of 13 July 1977 stated that "KWPA still contends that the majority of this is not payable, with the exception of $3,226.96, which in turn is described in the notes as "rejected/under review." Ghanbari left the meeting "empathizing" with D&R's position yet was "visibly as confused as D&R is."

158. There is nothing in the record after the date of this memorandum to support the request for payment. The evidence submitted fails to demonstrate the obligation to pay the underlying charges. Thus, the Tribunal concludes that the burden of proof has not been met by D&R for these amounts. This claim is rejected.

f. Claim F

159. In Claim F D&R seeks $13,865.53 in miscellaneous items billed, but unpaid, dating from the year 1352 (i.e., 21 March 1973 to 20 March 1974).

160. The only supporting evidence is an internal memorandum, dated 29 June 1977, plus an accompanying sequence of attachments to that memorandum that are largely unintelligible and have not been explained by D&R. The last sentence of this internal memorandum states that one should "approach the whole project as if it were fun detective work." Such

advice may describe the manner in which D&R accountants undertook to identify and substantiate the costs and claims of D&R; however, it falls far short of the degree of proof required by the Tribunal to find an amount payable to D&R. The Tribunal rejects this claim.

g. Claim G

161. D&R seeks $10,754 as the "net amounts outstanding" that were billed and unpaid prior to 1352 (21 March 1973 to 20 March 1974). However, D&R has not supplied evidence in support of its claim. There is no statement as to how these claims arose, whether they were protested, and why they are unpaid. D&R's brief states that the fact that some of this supporting evidence may have been left behind in Iran should not deprive D&R of payment. However, Receivables Summary No. 4, which lists the amounts claimed and was prepared by the United States offices of D&R as of 31 July 1979, gives no explanation of the missing documents nor of the source of the figures. Consequently, Claim G is denied for lack of sufficient documentation.

h. Summary

162. Based on the Tribunal's findings, D&R is entitled to an award of $3,957.91 on its pre-August 1978 invoice claims.

4. Adjustments to Estimated Construction Costs

163. D&R's third major claim is for final, full reimbursement for its costs of providing engineering design services, including those services originally required by Article 2, Section B, of Contract 401. D&R claims it has not yet been

fully reimbursed and seeks $515,838.08 additional reimbursement due to it, subdivided as follows:

I.	For Contract 401,	Project b	$102,630.00
		Project c	$ 85,836.19
		Project d	$143,247.36
II.	For Contracts GD-101 and GD-102		$184,124.53
	Total		$515,838.08

164. As originally executed, Contract 401 contemplated that D&R would provide engineering design services for four projects: Project a, the Pahlavi Dam Hydro-Electric Power Plant expansion, plus electrical generating units 3 & 4; Project b, Pahlavi Dam electrical generating units 5, 6, 7 & 8; Project c, the expansion of KWPA's electrical transmission system; and Project d, the Dez Irrigation Project Water Delivery and Drainage System.

165. Contract 401 stipulated separate reimbursement provisions for each of these projects. With the exception of Project a, for which a lump sum payment was provided, the contract provided that D&R's costs were to be reimbursed indirectly, as a percentage of KWPA's estimated construction costs ("ECC") associated with Projects b-d. For each separate project, the contract spelled out the Parties' negotiated amount of KWPA's estimated construction costs. According to the evidence before the Tribunal, ECC's were computed by estimating the value of third-party supply and erection contracts entered into by KWPA for the facilities to be constructed, plus the value of all labor, materials and equipment that KWPA supplied directly for those facilities (the so-called "force account" work). The Contract also stipulated the percentage of those amounts that would be recoverable as D&R's reimbursement for its costs.

166. A schedule in the contract set forth the dates on which these reimbursement payments for engineering design services

were to be made; these were tailored to reflect the amount of work under the Contract. However, there was no direct correlation between the actual time the cost was incurred and the date of the reimbursement.

167. The Contract provided that both the stipulated amount of ECC for each project and the percentage of each ECC payable to D&R were only provisional. Upon award of the actual construction contracts for the project facilities involved, the provisional ECC was to be adjusted, and final ECC costs and percentages were to be agreed upon by the Parties.

a. Projects b and c

168. D&R submitted to KWPA the first calculations for the revised ECC for Projects b and c on 3 April 1970, claiming payment for a total of $180,562.70 to be paid in equal installments during 1349 (21 March 1970 to 20 March 1971). Objections to these figures were made by KWPA, and periodic discussions and recalculations ensued over the course of the next several years as KWPA asserted various objections to any upward adjustment to the ECC. The result of these discussions was a report submitted by D&R to KWPA in early 1977, upon which D&R now bases its claim. The record shows no evidence of further negotiations between the parties as to the amount claimed. After receipt of D&R's 1977 calculations, KWPA prepared its own calculations.

169. Pursuant to Article VII, paragraph 2 of the Claims Settlement Declaration, D&R is required to prove that each claim was continuously owned by a United States national from the date such claim arose until the date of the Claims Settlement Declaration. In order to establish whether this requirement has been met by D&R with respect to the claims for a revision of the ECC for Projects b and c, the Tribunal must first determine whether the claims in question arose: (i) in 1964, as alleged by KWPA; or (ii) in 1970, when

calculations were first submitted to KWPA; or (iii) after February 1977, when negotiations on the exact amount seem to have been discontinued.

170. In accordance with Tribunal precedent, the general tendency is to view a claim as arising once it is "ripe," that is "when a cause of action exists." See Mobil Oil Iran Inc., et al. and Government of The Islamic Republic of Iran, et al., Award No. 311-74/76/81/150-3, para. 46 (14 July 1987) reprinted in 16 Iran-U.S. C.T.R. 3, 17; Electronic Systems International, Inc. and Ministry of Defense of The Islamic Republic of Iran, et al., Award No. 430-814-1, para. 51 (28 July 1989) (citing a number of precedents). In the present Case, the Tribunal considers that D&R's claim for payment based on a revised ECC was "ripe" when D&R's right to an adjustment of the initial ECC first arose. Article 3 (e), Section B of Contract 401 provides that such a right arises when "Contracts are awarded or executed for the project facilities involved, at which time [D&R] will prepare and submit to [KWPA] a revised ECC for the particular project reflecting actual contract prices . . . ." For jurisdictional purposes, therefore, D&R's right to payments based on a revised ECC may be said to have arisen as soon as the contracts for the given project had been awarded.

171. The last contract awarded under Projects b and c was executed in May 1968, and D&R submitted to KWPA its calculations for a revised ECC for Projects b and c in April 1970. Contract 401 provides that such calculations are subject to approval by KWPA, and, failing such approval, the Contract requires the parties to agree on the correct amount for the revised ECC in subsequent negotiations. However, these negotiations merely serve to determine the exact amount of D&R's claims for Projects b and c; as noted above, D&R's claims arose prior to the submission of the first calculations in 1970.

172. As determined in Section II of this Award, D&R has not established its United States nationality prior to 15 April 1973. In accordance with its findings in paragraph 15 above, the Tribunal therefore rejects D&R's claims in connection with the revised ECC's for Projects b and c for lack of jurisdiction.

b. Project d

173. The Claimant also seeks reimbursement for the revised ECC relating to Project d in the amount of $143,247.36. D&R submitted its claim for revised construction costs calculations for Project d to KWPA in February 1977. KWPA's receipt of this claim is confirmed in an internal KWPA report dated 12 August 1978.

174. This claim is based on the same contractual right as D&R's claims regarding Projects b and c (see paras. 168-172 supra), i.e., the right to an adjustment of the ECC. However, the right to an adjustment relating to Project d arose at a later date. The record shows that the date of the last contract awarded in relation to Project d was September 1973. Consequently, this claim arose in September 1973. In accordance with Section II of this Award, the Tribunal therefore has jurisdiction over this claim.

175. KWPA has submitted a counterclaim relating to the revised ECC's for Projects b, c and d. The general merits of this counterclaim are discussed at a later point. (See paras. 225-241 infra.) However, insofar as this counterclaim may affect the calculation of the amount claimed by D&R for Project d, it is discussed in the following paragraphs.

176. The record shows no explicit approval by KWPA of D&R's calculation of the revised ECC for Project d. However, in the internal KWPA report of August 1978, referred to above,

a review of D&R's claims was made by one of KWPA's financial officials, Mr. D. Gardizi. The report confirms (1) the total figure of $1,395,344 credited by D&R for payments received from KWPA in the years 1347, 1348 and 1349; (2) the final construction cost figure for Project d of $43,488,760 as calculated by D&R; and (3) the total fee of $1,674,317, as calculated by D&R, for Project d. However, the KWPA report also notes a discrepancy in the Parties' calculations regarding the credit due to KWPA for payments that it made for Project d in the year 1346 (i.e., from 21 March 1967 to 20 March 1968). It is this dispute over the amount of the credit for year 1346 that has since become the subject of KWPA's counterclaim. D&R credited KWPA with $128,426.22, allegedly being the amounts received after 1 July 1967, while KWPA claims that it should be credited with $324,900, being the payments allegedly made by it for the entire year 1346. Adding the latter figure to the amounts that it paid in the years 1347 through 1349, KWPA concludes that it has already paid D&R $58,228 more than was owed for Project d. However, neither the KWPA report nor any other document on the record contains any evidence of the alleged payments by KWPA, and no explanation of the allocation of such amounts to Project d is given.

177. KWPA also submitted in evidence a further report by Mr. Gardizi, which was prepared for use in the present Case. This report appears to accept D&R's credit of $128,426 as correct for Project d, but disputes the final construction costs figure of $43,488,760, using a figure of $39,535,236 instead.

178. Thus, the two disputed issues with respect to the revised ECC for Project d are (i) the final construction costs and (ii) the amount of the credit for 1346. D&R has submitted in evidence a detailed breakdown of its calculations of the final construction cost. It is apparent from such breakdown that the difference between the D&R figure

and the final KWPA figure is exactly the amount of the 10 percent add-on, which was to be included in each revised ECC (pursuant to Article 2, Section B, para. 3 (e) of Contract 401) to provide for contingencies. Given the contractual justification for this additional amount and KWPA's previous acknowledgement of the higher construction cost figure, the Tribunal concludes that the figure of $43,488,760 is correct. KWPA has failed to submit sufficient evidence to show that it would be entitled to credit for payments in year 1346 of $324,900 instead of the $128,426.22 that D&R has conceded. KWPA therefore fails in its counterclaim. The Tribunal finds D&R's claim to be valid.

c. Contracts GD-101 and GD-102

179. D&R has also raised a claim for compensation for engineering design services allegedly related to two contracts numbered GD-101 and GD-102. The amount claimed totals $184,124.53.

180. This claim relates to work done by D&R prior to the execution of Contract 401, on the Dez Irrigation Project. This claim arose from work performed prior to 1973. In accordance with Tribunal precedent and the concept already described in respect of Projects b and c (see paras. 168-172 supra) the Tribunal has no jurisdiction over this claim. Therefore, this claim is rejected.

d. Amount due

181. The Tribunal's finding that the amount claimed by D&R in relation to Project d is reimbursable does not end the inquiry. The Tribunal must give effect to the provisions of Contract 401 requiring that there be "mutual agreement" as to payments made on the basis of the revised ECC. Having ruled on the proper revised ECC, the Tribunal must consider whether a lower reimbursement rate should have been

negotiated. Article 2, Section B, paragraph 3f of Contract 401 authorized "an adjustment in the percentage rate of reimbursement to [D&R]" for any project on which the revised ECC differs by more than 15% of the initial ECC, with the rate to be modified "by mutual agreement upon the request of either party."

182. Based on the Tribunal's calculations, it appears that the revised ECC for Project d exceeded the original ECC by more than 15 percent. Because the ECC exceeded the contract threshold, KWPA was entitled to seek agreement on a lower rate of ECC payments. Apparently no lower rate was ever sought because KWPA objected initially to the claim for increased ECC payments. Therefore the Tribunal must determine a rate on which it would have been reasonable for the Parties to agree.

183. There is little evidence before the Tribunal to indicate what such a reasonable rate might be. The record contains an interoffice memorandum from an official of D&R, dated 1 November 1977, suggesting that D&R should propose a settlement under which KWPA would accept a higher ECC in exchange for negotiated lower recovery percentages, yielding $300,000 in payment for the higher costs on Projects b, c and d. This $300,000 proposal reflects an approximate ten percent reduction in the construction cost claim, excluding work done on Contracts GD-101 and GD-102. In the absence of anything else in the record, and given the Parties' failure to identify a more reasonable figure at the Hearing, the Tribunal concludes that a net reduction of the claim under Project d of 10 percent is a reasonable resolution, consistent with the intent of Contract 401, resulting in an award of $128,922.60 in relation to Project d.

5. Return of Good Performance Guarantee Retentions

184. In the fourth major component of its claim, D&R seeks the return of $514,210.60 in performance guarantee retentions that were deducted from D&R's invoices after the commencement of the Third Amendment on 21 March 1973. Under the terms of the Third and Fourth Amendments to Contract 401 KWPA retained five percent of each payment under D&R's invoices. Such retentions were to be "returned to [D&R] at the end of the Contract," "[s]ubject to satisfactory performance" by D&R.

185. The Fourth Amendment (Article XI) provided for the return of some of these funds:

> Upon signature of Amendment No. 4 certain portions of the Performance Guarantee amounts retained by [KWPA] up to and including the effective date of the Amendment shall be returned to [D&R] subject to formal certification by [KWPA] that [D&R's] services have been satisfactorily performed. Specifically, [KWPA] shall return to [D&R] one hundred percent (100%) of all amounts retained during the year 1352, 1353 and 1354 relative to services performed under Article II and Article VII of Amendment No. 3. The balance of the total Amounts retained by [KWPA] shall be returned to [D&R] at the end of the Contract but may be earlier returned to [D&R] by [KWPA] upon presentation by [D&R] of a Bank Guarantee covering the amounts so returned.

186. On 15 June 1979 and 9 August 1979 D&R submitted invoices to KWPA requesting the release of $514,210.60 of these retentions. D&R states that it never received payment on these invoices.

187. KWPA's defenses to this claim fall into two categories. First, it claims that the proper signatures and certifications were not received from KWPA project directors. Second, KWPA argues that D&R's performance was defective and caused damage, thus entitling KWPA to retain the good performance guarantees as an offset.

a. Formal KWPA Certification

188. As to the first contention, the Tribunal does not agree that the Contract should be read as broadly as KWPA asserts. Certification by project directors obviously was intended to assure that the purpose of the retentions, i.e., to guarantee D&R's good performance and to provide an automatic offset in the event of default, would be fulfilled during the period of actual contractual performance, while providing D&R with an opportunity for the early return of its funds. Certification was not required after the conclusion of work under the Contract: "The balance of the total Amounts retained by [KWPA] shall be returned to [D&R] at the end of the Contract . . . ." Once the Contract has terminated, the only conceivable rationale for withholding the funds would be a meritorious allegation of breach of contract.

189. KWPA alleges in these proceedings that the performance guarantees should be retained by it as an offset due to such defective performance. The Tribunal notes that the record reflects no contemporaneous allegations of such defects, nor has any specific offset against the retentions ever been identified. Instead, KWPA has made certain allegations of deficient performance in its counterclaims, which are considered in detail below.

b. Technical Misperformance

190. KWPA alleges that it suffered damages as a result of five separate breaches: (1) failure to achieve successful development of the Khuzestan region; (2) failure to employ qualified personnel; (3) the acquisition of D&R by International Basic Economy Corporation; (4) certain power transmission problems identified in a 1981 report; and (5) miscellaneous other defects. These alleged breaches are the subject of a separate KWPA counterclaim, denominated "Counterclaim D." For ease of reference, the merits of Counterclaim D will be examined in this section, rather than in the

section dealing with counterclaims generally. Under Counterclaim D, KWPA seeks total damages exceeding $737,000.

i. Defective Development of Khuzestan Region

191. KWPA claims that, as a result of D&R's defective developmental concepts and technical performance, the anticipated development of the Khuzestan region failed to materialize. KWPA's allegations rely on an internal report prepared by the International Bank for Reconstruction and Development ("World Bank") criticizing the World Bank's handling of the loan to Iran that financed much of the Pahlavi hydroelectric dam project for which D&R rendered engineering services.

192. The Tribunal has reviewed this report and concludes that it confirms, rather than undercuts, the high quality of D&R's performance. The report notes that the project "works were built to high standards." It praises D&R's supervision of construction, calling it "commendable" and noting that D&R's designs were "generally acceptable." Finally, the report concludes that as a result of D&R's work "all the elements for a successful regional development" were in place in Khuzestan.

193. The only criticism contained in the report concerns the supposed failure of the agricultural and agro-industrial development to occur as KWPA and Iran originally had planned. It seems, however, that it was Iran and KWPA (and not solely D&R, as KWPA now appears to suggest) that selected and pushed for this development strategy. Moreover, the World Bank itself acquiesced in this development philosophy when the project was being carried out. The report admits that it is only in hindsight that the adverse consequences became clear. In conclusion, the Tribunal does not find any evidence of technical malfeasance based on this report.

ii. Failure to Employ Qualified Personnel

194. KWPA claims to have suffered damage as a result of the allegedly inferior staff employed by D&R. KWPA relies on a few internal memoranda that allegedly reflect criticisms of personnel. In one memorandum it appears that D&R investigated the complaints and found them to be unjustified:

> [C]riticisms made by KWPA Management are not entirely fair. These men had their work delayed by circumstances beyond their control, including such things as inadequacy of Iranian support personnel, transportation, timely arrival of supplies and equipment, the involved administrative and fiscal procedures, timely arrival of seed, insecticides, herbicides, chemicals, etc., a lack of a definitive program and approval for action. These situations were very frustrating even when D&R had operational responsibilities. They are even more frustrating now that we have retired to a consulting and advisory position. These circumstances can be documented, but it avails nothing to do so. . . . In other words, a scapegoat is needed and the foreign nationals become the subject.

195. KWPA also cites internal disputes within D&R, but these appear to be largely routine personnel adjustments and minor management problems. There is neither evidence of any adverse impact on performance, nor any evidence of a connection between any of these alleged disputes and the damages claimed. There is no evidence of any contemporaneous complaint regarding such disputes.

iii. Acquisition of D&R by International Basic Economy Corporation

196. KWPA contends that the acquisition of D&R by the International Basic Economy Corporation in 1971 violated Article 17 of Contract 401, which stated in relevant part: "[D&R] shall have no right to assign or transfer this Contract or any part thereof to any person, firm or company without the written consent of [KWPA]."

197. This provision, a typical nonassignment clause, was included in the Contract to assure that KWPA obtained the benefit of its contractual bargain throughout the performance period. KWPA intended that D&R, not some other company selected by D&R, carry out the work that it had contracted to perform.

198. KWPA did receive this protection. The same company, with the same personnel, performed Contract 401 before and after the merger. There was no change in the day-to-day operations of D&R.

199. Moreover, after 1971 the Contract was extended twice and several additional annexes were implemented. Thus, even if there had been a change in the company, its personnel or its incentive to perform -- and there was not -- any objection has long since been waived. This allegation of technical breach has no merit and cannot justify the forfeiture of performance guarantee retentions.

iv. Technical Defects in Power Transmission Projects

200. KWPA's fourth alleged defect involves supposedly negligent performance in the consulting services rendered on various power transmission projects. The only support for this allegation is found in a report, dated 8 October 1981, entitled: "Compensation Claims Arising from [D&R's] failure and errors in relation with study, design and supervisory services in respect to projects for establishment of stations and transmission lines for Khuzistan [sic] Power."

201. The Tribunal finds this report to be of very limited probative value. It is tentative in nature, as well as brief in relation to the size of the damages claimed (in excess of $780,000). It contains no documentary evidence of any sort, no associated correspondence and no reference to

any technical specifications or defects. It consists solely of alleged occurrences said to be attributable to D&R. Although prepared by KWPA's Manager for Engineering Affairs and Supervision of Transmission Projects, the report gives no indication of the author's personal familiarity with the alleged circumstances. Finally, there is no evidence that any of these complaints was raised contemporaneously, although most of the purported defects were patent and not hidden. Because there is no evidence that this report was contemporaneously transmitted to D&R for its response, or that these allegations were otherwise presented to D&R prior to these proceedings, the Tribunal concludes that they must be disregarded.

v. Miscellaneous Other Alleged Problems Under Counterclaim D

202. KWPA cites a few other instances that it alleges demonstrate technical malfeasance on the part of D&R. It notes that several power transmission towers collapsed during a storm in the mid-1970s. However, a D&R study concluded that these power lines failed due to gale force winds far exceeding the maximum planned wind load, and that no fault could be attributed either to KWPA or to D&R.

203. KWPA also refers to a 1977 television broadcast that contained one or two remarks implying that D&R's performance was technically substandard. However, evidence submitted by KWPA indicates that there was uncertainty as to the reliability and source of the adverse comments. Subsequent investigation by D&R seems to indicate that either the allegations were false or the challenged action by D&R had been taken as a result of other contractors' design modifications. There is no record of any charges being raised against D&R by KWPA as a result of this adverse publicity.

204. In addition, KWPA alleges that during negotiations to extend Contract 401, it agreed to increase the rates of certain salary overrides as an incentive for improving D&R's performance. KWPA also alleges that it demanded the addition of Article 11, paragraph D, in Amendment No. 1, which recognized that the services performed by D&R "must be satisfactory to [KWPA]." D&R's acceptance of these changes is said to be an implicit recognition of its substandard performance.

205. The Tribunal is not convinced by this argument. A contractor whose consultant has a history of substandard performance, which KWPA now alleges was the case with D&R, is not likely to increase the compensation paid to the alleged malfeasor. The requirement of satisfactory performance merely underscored what had always been an implicit term in the Contract. Given the long history of contractual relations between the Parties, the numerous contract extensions and the several annexes specifically negotiated between the Parties, KWPA cannot convincingly argue that these were all entered into while D&R was routinely performing substandard work under the contract. The Tribunal concludes that KWPA has failed to substantiate its contentions in this respect.

vi. Conclusion

206. KWPA has failed to establish any technical malfeasance or other justification for the continued withholding of the performance guarantees. Consequently, the Tribunal holds that D&R is entitled to return of the retained monies.

207. According to D&R's invoices and substantiating documentation appended thereto, KWPA owes a total of $514,210.60 in performance guarantees for the period between 21 March 1973 and the time at which the contractual relationship ceased. Most of this amount was actually

withheld by KWPA from payments made. However, $40,141.80 of this total represents performance guarantees that D&R deducted from amounts on invoices that were never paid. The Tribunal has already reduced this $40,141.80 to $36,038.20 in order to reflect the fact that not all unpaid invoices have been awarded to D&R. (See para. 142, supra.) Therefore, the overall amount of the good performance guarantees claimed by D&R should be reduced by a comparable amount, and the Tribunal awards D&R retention monies in the amount of $510,107.

6. Confiscated Equipment

208. The final element of D&R's claim against KWPA is for property left in Iran, allegedly worth $51,000. D&R asserts that this property was confiscated by KWPA. The evidence regarding this claim is to be found in the statements and affidavits of D&R officials, and in the correspondence and affidavit of one of KWPA's former employees.

209. There seems to be no dispute between the Parties that D&R did leave some equipment in Iran when it departed. According to D&R's former executive vice-president (subsequently named as president and chief executive officer), the equipment left behind includes "two vehicles, typewriters, telex machines, photocopiers and other office furniture and supplies." KWPA has submitted the affidavit of Hassan Darreh Cheshmi, whom D&R initially suggested might watch over this equipment after it left Iran. Mr. Darreh Cheshmi's affidavit confirms that he looked after the property for a time and then consigned it to KWPA and received a receipt therefor.

210. D&R alleges that KWPA confiscated this equipment and that it was prevented from selling the equipment in Iran. There is no evidence either of an express confiscation or of KWPA's alleged thwarting of D&R's efforts to sell the

property. The record does suggest that D&R may have made some attempts to dispose of the property. In a telex dated 19 September 1979 to Mr. Darreh Cheshmi D&R stated: "We are making arrangements for an individual from DRI [D&R's partially-owned subsidiary] in Tehran to proceed to Ahwaz and assist you in all matters of concern." However, whether this individual ever made this trip and, if so, was prevented from disposing of the property is uncertain. A letter dated 7 July 1980 from Mr. Darreh Cheshmi states that "Unfortunately no D&R official from Teheran showed up at all, . . ." Mr. Darreh Cheshmi's affidavit states inconsistently that this person "did not visit Ahwaz until the end of February 1980." D&R has not provided any further evidence of whether such an individual actually attempted to sell or dispose of the property and, if so, how KWPA prevented or hindered those efforts.

211. Even if D&R could show that KWPA had effectively confiscated the equipment and was asserting title over it, there is little probative evidence as to the value of the equipment, alleged to be $51,000. In rebutting KWPA's counterclaims D&R submitted the affidavit of its resident vice president in Iran from 1977 through 1979, Mr. Jack Vaughn. Mr. Vaughn asserts that, based on his personal knowledge, his "estimate of the value, after having personally gone over the inventory in the field in October of 1978, would be closer to $100,000. Replacement value would be over double that. The $51,000 valuation is merely depreciated book value."

212. This is some evidence, but there is no further statement as to the specific property accounted for in D&R's estimate. Moreover, the communications between D&R and Mr. Darreh Cheshmi indicate that certain of the materials D&R left behind either were subject to outstanding liens, or were incurring continuing charges, which D&R may not have made arrangements to satisfy. Thus, Mr. Darreh Cheshmi

noted "D&R has two Zerox [sic] machines still in our p[o]ssession in the warehouse. We are being billed monthly for same." A telex sent to D&R refers to four automobiles, but notes that one of the automobiles was "with the mechanic in the garage. We have not paid the mehchanic [sic] and the account of the garage outstanding tyhe [sic] last 18 months." Similarly, Mr. Darreh Cheshmi's affidavit submitted to this Tribunal notes that the value of the office equipment was virtually negligible.

213. At the Hearing D&R did not submit any additional evidence clarifying the circumstances of the alleged confiscation. Nor did it demonstrate the actual net value of its office equipment or explain how any potentially outstanding liens were discharged. Given the lack of specific evidence as to the current value of the equipment, the Tribunal concludes that D&R has not met its burden of proof in this claim.

7. Conclusion as to Total Claims Against KWPA

214. In the preceding sections the Tribunal has found that D&R is entitled to payment of $1,357,409.34 for its claims against KWPA. Pursuant to Contract 401 KWPA paid its invoices by replenishing a revolving fund having a value of $450,000. D&R concedes that it held this revolving fund at the conclusion of the Contract, and reduces its claim accordingly. As noted below in para. 296 D&R has credited KWPA for an additional $23,400.00, and D&R's claim is therefore further reduced accordingly. Consequently, the Tribunal awards to D&R a total of $884,009.34 in respect of its claims against KWPA.

B. COUNTERCLAIMS OF KWPA

215. KWPA has filed a wide spectrum of counterclaims seeking damages for alleged breaches of contract by D&R. These

counterclaims concern twelve distinct issues: (A) refund requests and protested reimbursements dating from the 1962 Contract period; (B) alleged double billing for engineering design services on the Dez Irrigation Project during the first year of Contract 401; (C) a request for a revision of the rate for engineering design services; (D) damages for alleged technical malfeasance (discussed in Section III.A.5.b., supra); (E) alleged improper computation of the base for the 120 percent salary override; (F) alleged double billing of KWPA through the misallocation of engineering design costs to the "field services" portions of Contract 401; (G) claims that shipments of personal belongings were improperly reimbursed; (H) claimed overbilling for services rendered by part-time specialist staff members; (I) miscalculation of fees during the Fourth Amendment contract period; (J) miscellaneous claims involving salary arrears, interest on revolving funds, unpaid surtax reimbursements and other outstanding issues between the Parties; (K) a request that D&R be ordered to pay alleged deficiencies in social insurance organization premiums and outstanding taxes; and finally, (L) a request to audit D&R's books for the 1962 Contract period.

1. Counterclaim A: Protested Items under the 1962 Contract

216. KWPA's first counterclaim seeks recovery of certain amounts for which D&R allegedly was improperly reimbursed during the term of the 1962 Contract. These protested items total $5,310,602.

a. Nature of the Counterclaim

217. Prior to the execution of Contract 401, KWPA and D&R operated under the 1962 Contract, which began as of 16 December 1962 and continued to 20 March 1968. Under this Contract, D&R was entitled to obtain reimbursement for its

costs for providing contractual services, plus a specified fee. The 1962 Contract required D&R to submit proposed budgets, as well as to authenticate and to certify its expenditures. At the conclusion of the contract term KWPA audited D&R's books and asserted that it had been improperly billed $5,310,602 for costs that never were formally certified by KWPA. D&R denied this assertion and contended that the amounts represented actual costs that had been properly expended and reimbursed under the Contract. The matter apparently lapsed between the Parties until it was reasserted in this proceeding.

b. Jurisdiction over the Counterclaim

218. D&R's first defense against this counterclaim is lack of jurisdiction. Under Article II, paragraph 1, of the Claims Settlement Declaration the Tribunal is vested with jurisdiction over a counterclaim "which arises out of the same contract, transaction or occurrence that constitutes the subject matter of" the claim. Whether the Tribunal can properly exercise jurisdiction over KWPA's claim for protested items under the 1962 Contract depends on whether it rests on the same "contract, transaction or occurrence" that constitutes the subject matter of D&R's claim.

219. It is apparent from the face of the counterclaim that it is based on the 1962 Contract, not Contract 401. It cannot be said that any part of D&R's claim arises out of the 1962 Contract.

220. The second issue is whether KWPA's counterclaim arises out of the same "transaction or occurrence" as that in its claim. KWPA argues that even if Contract 401 is technically distinct from the 1962 Contract, they both related to the same underlying developmental work and thus constitute the same transaction or occurrence. KWPA argues that both contracts were the major, central documents through which

D&R acted as consultant on the various projects that KWPA was undertaking in its development work in the Khuzestan area. Citing American Bell International Inc. and Government of the Islamic Republic of Iran, et al., Interlocutory Award No. ITL 41-48-3 (11 June 1984), reprinted in 6 Iran-U.S. C.T.R. 74, KWPA claims that a series of contracts can form a single transaction for the purposes of the Tribunal's jurisdiction. See also Westinghouse Electric Corporation and Islamic Republic of Iran, et al, Interlocutory Award No. ITL 67-389-2 (12 Feb. 1987), reprinted in 14 Iran-U.S. C.T.R. 104. In light of its views on the merits of this counterclaim, the Tribunal need not resolve this issue.

c. Merits of the Counterclaim

221. This counterclaim has a long history. At the conclusion of the 1962 Contract the Parties agreed to keep the financial books open for three years. At the end of this period, on 27 February 1970, D&R submitted to KWPA a final accounting statement justifying its expenditures under the 1962 Contract. Shortly thereafter KWPA raised objections regarding certain expenditures, claiming that certain yearly budgets never had been formally approved and that the earlier billing procedure proposed in 1964 regarding overhead reimbursement never had been formally accepted by KWPA. In light of these potential issues KWPA requested two extensions of the period during which the books would remain open for audit. At the conclusion of this extended period, in May and June 1971, KWPA officials audited D&R's financial records for the contract period. The auditors' report stated that they "carried out audits of all D&R Statements of Expenditure during the fiscal period from 22nd September 1963 through 20th March 1968 . . . ." As a result of this audit KWPA objected to $5,310,602, on the grounds that the auditors did not find evidence of formal KWPA approval of budgets and disbursements.

222. In February 1972 D&R submitted its response to this report, denying that the sums were subject to repayment and contending that proper procedures had been followed. A series of meetings followed during which these contentions were discussed and negotiated, and in which negotiations D&R offered a settlement amount of $20,000. The record shows no evidence of acceptance by KWPA of D&R's settlement offer prior to the deadline set in such letter; consequently, such offer must be considered lapsed. Internal memoranda of D&R indicate that KWPA officials informally withdrew their objections, but that for political reasons no KWPA official was willing to close the matter formally. Eventually it was referred to KWPA's supervisory agency, the Ministry of Water and Power, whose Minister requested that D&R prepare a formal document outlining the controversy and D&R's position. This formal report was submitted on 15 October 1974. After a period of inaction, the Minister formed a committee to recommend a solution to the dispute. According to contemporaneous memoranda reflecting statements made to D&R by members of this committee, in February 1975 the committee presented three alternative solutions to the Minister of Water and Power:

> (a) Proceed to arbitration, as provided for in the terms of the contract.
>
> (b) Compare costs incurred under D&R's contract with costs incurred under other similar contracts in force during the 1962-68 period.
>
> (c) Accept the principles under which D&R billed KWPA (e.g. letter D&R-187, Coopers-Lybrand audits, etc.).

Initially, the committee did not recommend which alternative should be adopted. The Minister returned the report with a request that a specific alternative be suggested. The committee, over the objections of one of its members, recommended that alternative "c" be accepted and noted that the final decision rested with the Minister.

223. The Minister never made a final recommendation or formal decision. After 1975 the matter was not pursued by KWPA.

224. In light of this history, it is fair to conclude that KWPA allowed the matter to drop. The Tribunal also finds that KWPA has failed to submit sufficient evidence in support of this counterclaim and concludes that no award can be made in KWPA's favor on this issue.

2. Counterclaim B: Credits for Engineering Design Services Rendered During Year 1346

225. As has been noted above (see paras. 163-183 supra), in lieu of actual cost reimbursement KWPA agreed in Contract 401 to pay a percentage of estimated construction costs to compensate D&R for engineering design costs incurred on Projects b, c, and d. Since some of this engineering design work was underway even as the Parties commenced negotiations on the reimbursement provisions of the contract, the Parties agreed that some of the money paid during the year 1346 (the final year of the 1962 Contract and the year in which Contract 401 was negotiated) would be credited against the amounts invoiced during 1348 and 1349 to avoid double billing. This agreement is reflected in Article 2, Section B, of Contract 401, which provides that the balances due on Projects b, c, and d would be paid "taking into account actual 1346 billings" for engineering design services.

226. D&R received the contractually stipulated ECC percentages as reimbursement for the cost of services provided under Projects b, c, and d. However, KWPA subsequently charged that D&R had not given sufficient credit for work done during the year 1346. The issue presently before the Tribunal is the meaning of the phrase "taking into account actual 1346 billings" in Contract 401, Article 2, Section B, paragraphs 3b-d.

227. KWPA argues that this phrase must be interpreted to mean that all engineering design services invoiced during 1346 should have been deducted from the scheduled engineering design payments for the years 1348 and 1349. It claims damages of between $500,000 and $1,000,000. D&R argues that only billings for engineering design work directly applicable to the projects as finally built, i.e., work done in 1346 that did not thereafter need to be duplicated, should be credited. D&R denies any further obligation.

228. The dispute arises out of the fact that D&R was required to make substantial changes in its initial engineering design work due to KWPA's decision in 1346 (which it does not now dispute) to amend the nature of the contractual specifications for Projects b and c.

229. In April 1967 KWPA received a loan from German sources to assist in the construction of the Pahlavi dam. As a result of this loan, KWPA amended certain technical specifications of the project to accommodate German suppliers. These alterations required D&R to adjust the engineering design on Project b. Technical negotiations between KWPA, D&R and the new German suppliers were held between July 1967 and October 1967. D&R contends that as a consequence most of the design work had to be redone commencing in October. Allegedly much additional time was spent overseeing the conformity with the technical specifications and assuring that the project as revised by KWPA would be consistent with the overall plans.

230. D&R states that the designs for Project c also had to be reworked, since KWPA amended the specifications in a similar manner during the summer and early fall of 1967. D&R argues that its cost of the design work done prior to this time would not be reimbursable under KWPA's interpretation of Contract 401.

231. The Parties' renegotiated specifications did not affect work on Project d. However, D&R claims that work did not begin on this project until approximately July 1967, when the Dez Irrigation Project design group was formed at D&R's home office in Sacramento, California. Consequently no engineering design work was performed prior to this time and no credits were due for engineering design services on Project d prior to July 1967.

232. After assessing the cost of redoing engineering design work during the year 1346, D&R credited KWPA with the billings for engineering design services on Projects b and c beginning only in mid September 1967. On Project d KWPA was credited for design work only from July 1967. D&R argues that it was only work done after these dates that could be considered work or services already performed on the projects that were billed in 1347 through 1349. Thus, only credits from these periods should be "taken into account" within the meaning of Contract 401.

233. KWPA takes the contrary position, arguing that all invoices for engineering design services rendered during 1346 were to be credited against balances due during 1347 through 1349 because the projected percentage of ECC was intended to cover all of D&R's costs during 1346.

234. After fully examining the record, the Tribunal finds that the evidence is inconclusive and that KWPA has not met its burden of proof. The bulk of the evidence favors D&R's position. The specific contractual language, the general dealings of the Parties during 1967 and thereafter, as well as the general cost reimbursement policies inherent in Contract 401, favor reimbursement of these costs.

235. The specific language of Contract 401 is the starting point. The Contract states: "The foregoing Engineering Design Services <u>have been partially completed</u> with respect

to the projects listed above, and the schedule and reimbursement provisions . . . take account of this fact." (Contract 401 at p. 5, emphasis added.) This language emphasized that the work credits were tied to work already "completed." Thus, the subsequent clause in the reimbursement section of Contract 401, "taking into account actual 1346 billings," must be interpreted to mean billings for work already completed regarding the projects as they were to be built. The word "actual" appears to be a qualifier intended to underscore this meaning. Preliminary design work that was no longer relevant to any project because of the unilateral changes necessitated by KWPA's selection of other suppliers could not be considered to be partial completion of engineering design services within the meaning of Article 2, Section B, para. 1.

236. Nothing in the record concerning the Contract 401 negotiations between the Parties explicitly supports KWPA's position that the words "taking into account actual 1346 billings" required reimbursement of all billings for engineering design services during 1346. KWPA's own exhibits undercut its position. In a letter dated 8 June 1967 that mentioned engineering design assignments, D&R listed both of the work assignments that were later designated as Projects b and c and noted that: "Work on each of these assignments is in progress." The letter then discussed specific engineering design services that already had been performed. These included: (1) "Planning discussions with KWPA regarding the nature and scope of proposed new facilities as they relate to KWPA's needs"; (2) "Review of all available information and data pertaining to the proposed facilities"; and (3) "Preparation of preliminary engineering studies, cost estimates and schedules as required to permit a decision to proceed with the proposed facilities." The letter then noted that: "These foregoing three steps have been completed for all of the above assignments," with one exception not relevant here. These three steps appear to

have been the same steps that later had to be reworked due to KWPA's decision to change the technical specifications.

237. Final negotiations on the new contract took place in December 1967. The contract was apparently signed in January 1968. The decision to make reimbursement for design engineering services costs on the basis of a percentage of estimated construction costs rather than reimbursement for actual costs was not accepted by D&R before approximately April 1967. Since prior to this time D&R had operated under the assumption that its actual costs would be reimbursed, and the underlying philosophy of the "percentage of the estimated construction costs" formula was to meet D&R's actual costs, it may be presumed that D&R intended to negotiate a contract that would cover its basic costs during the year 1346. Thus it is reasonable to interpret the phrase "taking into account" to require payments that would cover actual costs but not result in any duplication of charges to KWPA.

238. The conclusion that the Parties intended the phrase "taking into account actual 1346 billings" only to require credit for prior work that did not have to be duplicated is confirmed implicitly by the fact that D&R did not subsequently negotiate an increase in the percentage of the estimated construction costs constituting its reimbursement, even after it knew that the extra costs had been incurred. The rates D&R requested in June 1967, when it assumed that certain design work had been done and that it would bear no further costs for this work, were identical to those eventually agreed upon in Contract 401. KWPA thus has failed to demonstrate that the 1346 credits were intended to cover all invoiced amounts during that year.

239. KWPA has not established that D&R did not actually incur substantial additional costs as a result of KWPA's unilateral decision to change the designs. It seems reasonable to the Tribunal that KWPA should be required to bear the cost of the work that was required.

240. Moreover, the circumstances in which the 1346 credit issue was originally raised do not support the contention that KWPA adequately objected to this practice. Although D&R did make earlier adjustments in the revised ECC that it had submitted for Project b, according to testimony of D&R officials, KWPA did not raise the issue of undercrediting for the year 1346 until three years after the final credits were due, in 1973 (Shamsi year 1351). There is no indication that the credits were challenged when D&R initially submitted the invoices, which pursuant to Article 4, Section A, paragraph 3, of Contract 401, would have listed the credits.

241. The Tribunal has discussed KWPA's challenges to the credits relating to Project d in Section A (4). (See paras. 176-178 supra.) It is concluded that KWPA has failed to convince the Tribunal of the merits of its claims relating to Project d. The Tribunal has also reviewed the other contentions of KWPA raised in connection with this counterclaim, and concludes that they are without merit. In view of these findings Counterclaim B is denied.

3. Counterclaim C: Reduced Rate for Engineering Design Services

242. KWPA raises several arguments which it claims entitle it to a lower rate for engineering design services than that stipulated in Contract 401. The Tribunal already has reviewed one of these arguments and concluded that, in light of a revision in an ECC total exceeding 15 percent, KWPA is entitled to a rate that would reduce the total amount payable to D&R. (See paras. 181-183, supra.)

243. KWPA submits several additional arguments, which it claims justify a further reduction in the rate applicable to engineering design services. KWPA first asserts that D&R artificially inflated its costs, and thereby inflated its cost recovery, by failing to provide all engineering design

services on site in Iran. The only evidence for this proposition is D&R internal correspondence that acknowledges the possibility of performing engineering services in Iran. But this correspondence recognized that the feasibility of providing engineering design services on site in Iran was dependent upon KWPA's providing adequate backup engineering staff: "Our expatriate staffing requirements will be contingent upon KWPA's ability to provide capable Iranian Engineers -- this fact must be spelled out." It seems likely that D&R was unable to transfer all engineering design services to Iran because KWPA suffered severe staffing losses that greatly hampered its ability to provide adequate engineering backup on site.

244. Moreover, it is unclear how KWPA's argument, if proven, could affect the rate charged, since there is no suggestion that the rate of reimbursement for design engineering services was tied to the number of the staff in Iran as opposed to the United States. Nor was there any contemporaneous objection to the performance of design work in the United States. This contention is therefore rejected.

245. KWPA's second theory is that it was overcharged by D&R through the addition of subsequent annexes containing additional compensation provisions. However, Contract 401 expressly permitted the execution of annexes. Article 2, Section B, paragraph 2, state:

> The design service completion schedules specified above are subject to modification in the event that any major change in construction program occurs in any of these projects. In such event the specific schedule modification, and any appropriate adjustment in reimbursement warranted thereby, will be specified by mutual written agreement between [KWPA] and [D&R].

246. Article 2, Section D, confirms that additional work to be performed by D&R for KWPA could be negotiated and set

forth in annexes:

> [KWPA] and [D&R] may from time to time by written agreement provide for additional services, beyond those provided for in Sections A, B and C above, to be performed by [D&R]. Such written agreements will be in the form of additional Annexes to this Contract and shall be governed by the applicable provisions hereof. They will define the services to be performed by [D&R], . . .; specify the method of reimbursement of [D&R's] costs; provide for any increased fee . . . that may be warranted; and include such additional arrangements as the two parties may deem appropriate.

247. In light of the specific contractual authorizations, the Tribunal concludes there is nothing untoward in the Parties' negotiation of subsequent annexes. There was no contemporaneous objection regarding any of these annexes. Each was signed by the Managing Director of KWPA who, it must be presumed, was fully conversant with KWPA's affairs at the time the annexes were approved. Although KWPA alleges that certain regulations of an unspecified character and origin subsequently restricted KWPA's freedom to enter into the annexes, no proof has been furnished showing that any of the annexes was illegal or unenforceable at the time it was signed.

4. Counterclaim E[9]: Inclusion of Improper Amounts in Salary Override Base for Field Services Work

248. Article 2, Section A, paragraph 4(c), of Contract 401 obligated KWPA to reimburse D&R for: "An additional amount equivalent to one hundred twenty percent (120%) of field

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[9]Counterclaim D is discussed elsewhere in the Award. See paras. 191-205, supra.

technician staff salaries" payable under the Contract. The issue before the Tribunal is the proper definition of "field technician staff salaries" in Contract 401. D&R claims that this term includes home leave salary and termination salary tendered to its technical staff and that it always included these amounts in the base on which the salary override was computed. KWPA argues that home leave salaries and severance pay are not to be included in this base. It seeks $500,000 in damages for this alleged breach of contract.

249. Contract 401 does not specify which components of the field technician staff salaries properly constituted elements of the salary override base. However, the dealings of the Parties, and the general intent of the Contract, are more consistent with D&R's position.

250. The record shows that D&R routinely included these amounts in the salary base on which it computed the 120 percent override. D&R's justification for this position is that it's underlying employment contracts with field technical staff required it to pay the employees' home leave salary and severance pay. Article 2, Section A, paragraph 4c defined the 120 percent override as based on field technician staff salaries as set out ("reimbursed") under sub-paragraph "a". Sub-paragraph a, in turn, described the reimbursement of "salaries" as the amount "set forth in each staff member's employment agreement with [D&R]."

251. The employment agreements that D&R executed with its field technical staff entitled the staff to home leave salary and severance salary. In a sample employment contract submitted to the Tribunal the salary staff provisions under paragraph 4, "Compensation", state, inter alia: "Salary compensation as stated above, . . . will be paid for

services performed (including authorized holidays and authorized sick and vacation leave) during your stated tour of duty in Iran." (Emphasis added.) The employment agreement did not contain a section entitled "Vacation", but did include an article entitled: "Local Leave, Home Leave and Sick Leave." This provision (Article 8) entitled employees to a lump sum "home leave" salary to be paid at the end of the tour of duty. Similarly, severance salary benefits were also payable (Article 9). Consequently, according to the express language of Contract 401 it was proper for D&R to include these components in the base for the salary override.

252. This is consistent with general practice in the engineering design field. For instance, a copy of the "Consulting Engineering" manual of the American Society of Civil Engineers provided to the Tribunal, dated as of the time Contract 401 entered into effect, states that when costs are reimbursed through a salary multiplier:

> Salary cost is defined as the cost of salaries (including sick leave, vacation, and holiday pay applicable thereto) of engineers . . . ; plus unemployment, excise, and payroll taxes; and contributions for social security, employment compensation insurance, retirement benefits, and medical insurance benefits. (emphasis in original; footnote omitted)

253. KWPA claims to find evidence of a contrary position in two contemporaneous memoranda submitted to the Tribunal. KWPA cites first a copy of typewritten notes between two D&R employees discussing negotiations for the impending Contract 401, dated 25 January 1968. These notes state that:

> Salaries means the amount set forth in employment agreements, but KWPA will pay for leave time, sick time, travel time and possibly home leave, but not severance pay. Severance pay is the amount paid if D&R severs an employment contract and has to give 2 months salary. No override on severance pay.

KWPA alleges further that a dispute arose between the Parties during the first three months of billing under Contract 401 as to whether vacation pay would be paid by KWPA and, if so, whether it would be included in the override base. It cites a handwritten note by a KWPA official on a D&R letter to KWPA discussing the problem, which states that vacation pay would be reimbursed but would also remain outside the override.

254. However, these notes are at odds with the understanding and intent of the Parties, as reflected in their consistent subsequent dealings. The notes cited by KWPA do not reflect an official D&R position but merely reflect KWPA's proposed interpretation during the contract negotiations. Inclusion of the word "possibly" indicates that further negotiation, discussion and adjustment was expected and necessary. The two statements do not necessarily constitute the authors' interpretation of the proposed revisions and, in any event, were not viewed as binding by D&R, as is evidenced by the dispute that arose regarding payment of leave during initial months of the Contract.

255. It is not clear that the handwritten KWPA notation reflects the Parties' settlement of the dispute. Quite likely it reflects only KWPA's position. There is nothing in the record to indicate that D&R ever agreed with that position.

256. Significantly, D&R has alleged that KWPA consistently failed to dispute the amounts used in the invoices to compute the 120 percent salary override. KWPA has not provided any evidence of a contemporaneous objection to these invoices made within 30 days as required by the Contract. Payment of the invoices is thus final.

257. Moreover, including home leave and severance pay in the override base is not inconsistent with the purpose of an

override. KWPA argues that no overhead or similar costs, such as welfare, benefits, supervision and administrative costs, are associated with an employee at the end of a tour of duty or on vacation. It also claims that no income tax accrued on the payment. However, this is irrelevant. The costs that an override is used to defray need not be directly related to the component base. That a particular salary item does not trigger the costs to be reimbursed by a salary override does not mean that the item cannot be used as a means to recover those costs.

258. KWPA argues that the 120 percent salary override is not payable since it was only an interim measure and was only intended to cover actual costs. KWPA also claims that an audit must be performed over the entire contractual period to determine whether actual costs incurred were in fact less than the 120 percent override recovered by D&R.

259. Whatever the general merits of this position, which is based on the theory that Contract 401 was to provide reimbursement only for actual, historically documented costs plus the fixed fee, the Contract does not state that payments made thereunder were provisional and subject to KWPA's final accounting. Article 2, Section A, paragraph 4 stated that the override payment provisions were to be made "[i]n full satisfaction of [KWPA's] obligation to provide reimbursement."

260. KWPA next argues that it reimbursed D&R for too high a percentage of D&R's administrative and home office costs. KWPA cites an alleged agreement by the founders of D&R that only 25 percent of the home office costs would be billed as costs to KWPA. KWPA alleges that, contrary to this agreement, 75 percent of D&R's home office costs have been billed and recovered under D&R's contract with KWPA. Even aside from this purported agreement, KWPA alleges that the rate of recovery of the overhead should have been reduced as D&R

entered into development contracts in other parts of the world so that each contract shared a pro rata proportion of the costs. Finally, KWPA notes that some of the home office costs were attributable to engineering design services and should have been charged to the reimbursement provisions for those services.

261. Each of these arguments fails for lack of substantiation. Any agreement made by the founders of D&R would apply only to the initial contract entered into by D&R with the Plan Organization, or, at most, to the period during which the 1962 Contract with KWPA was applicable. When Contract 401 was negotiated and concluded it superseded any such prior arrangement.

262. Moreover, when selecting rates, the Parties examined costs and conducted extensive negotiations. There has been no allegation that any fraud occurred. Having determined the rates and thereby allocated the risks associated with potentially varying costs, the Parties are now barred from arguing that the cost recovery provisions should be different from those expressly set out in the Contract.

263. KWPA's contention that the rates should have been lowered to compensate for other, newer, contracts fails for similar reasons. Moreover, there is no evidence of any significant economies of scale; the conclusion of other development contracts and assumption of other business may have required commensurate additions to D&R's home staff, since presumably at the time Contract 401 was negotiated D&R did not maintain significant excess staff or idle administrative capacity.

264. KWPA's final argument against the salary override is that D&R representatives would be receiving the equivalent of 17.5 percent of this 120 percent to cover the cost of income taxes accrued on staff salaries, which amounted to

only 10-11 percent of the salary override. This contention is not substantiated by any documentary evidence as to the percentages of taxes paid or not paid.

265. For these reasons, KWPA's contentions are dismissed.

5. Counterclaim F: Misallocation of Engineering Design Service Costs

266. KWPA alleges that D&R performed engineering design services with its field engineering staff. Since the cost of the former was covered by the fixed ECC reimbursement provision, but the cost of the latter was reimbursed based on actual salaries plus an override, the effect of such a practice would be to permit D&R to recover twice for some of its services. KWPA also alleges that D&R used KWPA's engineering staff to perform D&R's own engineering design responsibilities without properly crediting KWPA's accounts. It seeks $400,000 in damages.

267. Although Contract 401 defines the types of work constituting "field services" and "engineering design services", the proper allocation of engineering time between these two categories of engineering services is one of the more ambiguous areas of the record. The few relevant memoranda and documents in the record indicate that the Parties were also uncertain about the proper allocation of time during the initial months of Contract 401.

268. KWPA's evidence concerns primarily the engineering services rendered by Messrs. Bright, Dixon, Welton and Amsbry. KWPA cites a personnel list of 20 April 1967 in which Mr. Bright was designated as "Senior Irrigation Design Engineer," while the others were called "Irrigation Design Engineers." These titles indicated that prior to the commencement of Contract 401, that is, at a time when field service and engineering design costs were recovered on the

same basis, rendering time allocations less necessary, those engineers were performing engineering design services. However, in the proposed field staffing plan that D&R was required to submit for KWPA's review and approval immediately prior to the commencement of Contract 401, three of these same employees were listed as performing field services, not engineering design services. Specifically, Messrs. Dixon and Amsbry were listed as "Location Engineers," while Mr. Bright (whose tour expired at approximately the time Contract 401 was to commence) apparently was designated as a "Senior Office Engineer."

269. KWPA cites this as evidence that D&R "tricked" it by allocating design engineers to field services for billing purposes only. Although KWPA has not so argued, an earlier field staffing plan proposed by D&R in May 1967, might appear initially to support this allegation. This plan specifically noted: "Three Irrigation design positions are not included in field staff since costs are recovered under payment arrangements for engineering design. These are: A.P. Bright, J. Welton and R. Amsbry." However, this document did list the positions of "office engineer" and "location engineer" as field service jobs.

270. KWPA's arguments are disproven by other evidence before the Tribunal. Although D&R originally intended to use these specific engineers to perform design work in Iran, subsequent events required a shift in job assignments. In order to alleviate problems caused during the summer of 1967 by defective performance of the third-party contractor on Contract GD-102, and to expedite data collection on other contracts, D&R decided to perform all engineering design services at D&R's offices in the United States. Messrs. Amsbry, Welton and Dixon were reassigned to help gather field data necessary for the design phases of those other contracts. A contemporaneous internal D&R memorandum of 25 April 1968 described these events and concluded:

> Their work in the field . . . was not in the category of design as defined in our contract nor as understood at the time. . . .
>
> Therefore, when allocating charges for past efforts the hours of Mr. Amsbry and Mr. Welton charged for the indicated period consists entirely of field services and is a direct reimbursable charge to KWPA. None of their time should be entered as design time and allocated against the percent ECC amount.
>
> The misunderstanding that is feared stems from the designation of the group, Design Staff, made at the time of its formation several years ago. These later agreements in the summer and fall of 1967 and the type of work carried out by these people, however, is field work.

271. This memorandum demonstrates that the work of these engineers shifted primarily to field services prior to the commencement of Contract 401, and that henceforth "no further design [work] would be completed in the field." It is persuasive evidence that the activities of these individuals in the capacity of location engineer or office engineer also were properly allocated to field services work.

272. The only evidence of any contemporaneous objection raised by KWPA over the issue of misallocation of design service time is a D&R memorandum dated 13 April 1968, discussing a question raised by KWPA's Managing Director on 10 April 1968, when the 29 February 1968 formal staffing proposal for Contract 401 was reviewed. The Managing Director noted that the listed duties of the "Office Engineer" included the preparation of "detailed field construction drawings" showing nine specified engineering features; he questioned whether those duties should be considered engineering design services under Annex C, Item 8, "Preparation of construction drawings and detailed specifications."

273. At the time this question was raised D&R officials investigated the issue thoroughly. It was concluded that the duties of an Office Engineer were not in the nature of engineering design but that "the Office Engineer is needed to do the work and that he should properly be employed as a member of the field staff." That conclusion was consistent with D&R's representation in May 1967 that the position of Office Engineer was one attributable to field service engineering.

274. The testimony of knowledgeable D&R officials confirms that the duties of location engineers, as well as of the Office Engineer, are consistent with field services. Under Annex A, field services generally included "field direction of all project engineering activities, supervision of all project construction . . . supervision of all engineering aspects of the land preparation program, and general supervision of all project engineering investigations and surveys". (Emphasis added). Annex C defined engineering design services as including, inter alia,: "Preparation of construction drawings and detailed specifications"; "Preparation of revisions or supplements to the construction drawings and specifications as required during the course of construction"; and "Preparation, as required, of as-built drawings."

275. According to D&R officials, in practice this meant that the design engineers prepared the basic drawings and engineering analyses, while the field service engineers performed "constructability" checks by examining the feasibility of building the facilities as designed in light of field conditions, by verifying the location of the physical features on the designs, and by indicating any necessary changes to the designs. The design engineers executed the necessary changes. After commencement of construction, field service engineers would make minor on-the-spot revisions to accommodate isolated construction or installation

difficulties. Normally, no review was ever required by the design staff. Field engineers would also prepare the initial red-line drawings of any deviations from the original designs so that the final "as built" drawings could be completed by the design engineers.

276. These descriptions of D&R engineers' activities are fully consistent with those set out in the contract annexes. The only design or drawing functions performed by the field staff were minor changes, corrections or notations well within the scope of the field engineers' duties as the supervisors of all project construction. The final "as built" drawings were not prepared by the field engineering staff but by the engineering design personnel. Contemporaneous memoranda prepared by D&R engineers confirm that they considered the duties of a location engineer to be within the province of field services rather than design engineering.

277. Subsequently executed amendments to Contract 401 indicate that the Parties resolved their differences and that the duties KWPA now asserts to be engineering design functions were contemporaneously determined to be field technical services. The Third Amendment, effective 21 March 1973, amended Annex A and redefined field services to state: "Listed below are Field Services currently being provided by [D&R] under the terms and conditions of Contract 401." Third Amendment, Art. XV (emphasis added). The engineering activities thus designated as field services included, inter alia, the "review and approval of field construction drawings, modification of contract drawings to meet changed field conditions, preparation of change orders, general supervision of construction surveys, . . . [and] preparation of as built drawings . . . ." The Fourth Amendment contained similar provisions, confirming that there was no dispute about the nature of these services.

278. A final contention of KWPA is that D&R engineers utilized KWPA staff for engineering design functions without properly crediting KWPA. Yet KWPA admits that D&R credited KWPA for this time after it brought the matter to D&R's attention. Although KWPA now disputes the sufficiency of the adjustment, it cites no record of any contemporaneous objection.

279. The bulk of KWPA's other allegations pertaining to this counterclaim are based on exhibits that contain, at most, inconclusive evidence. Significantly, KWPA submits no evidence of further disagreement over billing after the summer of 1968, when the initial matters regarding billing practices under the Contract were being sorted out. Since KWPA was aware of this issue, and also cognizant of the contractual thirty-day time period for raising complaints, its failure to raise any further objections undermines the credibility of its purported claims. In light of the contractual confirmation in the Third and Fourth Amendments that the types of services KWPA now alleges to be in the nature of engineering design were agreed to be field services, the Tribunal dismisses the counterclaim.

6. Counterclaim G: Overbilling of Costs of Personal Shipments

280. KWPA alleges that D&R improperly permitted its employees to ship personal belongings from Iran to the United States at the end of the employees' interim contractual periods of employment, even when they entered into new employment contracts and, therefore, did not at that time move back to the United States. KWPA claims $200,000 in damages.

281. This counterclaim raises the issue whether Article 2, Section A, paragraph 4b of Contract 401 obligates KWPA to reimburse all expenses incurred by D&R employees, each time

they "return" to the United States and "report" back to Iran at the end of a contractual period. KWPA contends that expenses for shipment of personal effects are only reimbursable in connection with an employee's (and family's) moving to Iran, upon accepting employment, and moving back to the home country upon termination of the employment in Iran.

282. The contractual language, while not explicit, does not suggest that all travel expenses would be reimbursed. Article 2, Section A, paragraph 4b, obligated KWPA to reimburse:

> The amount of costs incurred by [D&R] for reporting and returning expenses and related travel allowances, including shipment and insurance of personal effects, for [D&R's] field technician staff and their dependents in accordance with the schedule of allowable expenses set forth in Annex B. . . . [emphasis added]

Annex B describes the weight limits applicable to reporting and returning shipments and suggests that KWPA may have been required to reimburse only one returning shipment per family for personal effects. Article 5 of this Annex, for example, establishes weight limits for "[r]eporting shipments of personal effects (one shipment per family)."

283. While the Tribunal believes that KWPA's reading of the relevant provisions of Contract 401 is plausible, KWPA has neither provided the Tribunal with evidence of the amounts of reimbursements that were made in contravention of such provisions, if any, nor provided evidence that such amounts have been charged to, and paid for, by KWPA. The Tribunal rejects Counterclaim G for lack of evidence.

7. Counterclaim H: Salary Override Charged for Part-Time Specialist Staff

284. KWPA claims $450,000 based on D&R's alleged overbilling of the salary override for part-time specialist staff who

rendered project advisory services. KWPA claims that a maximum of six or seven percent should have been charged as override on these employees' salaries and that the balance must be returned to KWPA.

285. Contract 401 expressly rejects the position asserted by KWPA. Article 2, Section C, Paragraph 3.a.iv states that KWPA was obligated to reimburse:

> An additional amount equivalent to one hundred percent (100%) of the amount reimbursed under subparagraph (i) above for salaries paid to full-time personnel and fifty percent (50%) of the amount so reimbursed for salaries paid to part-time personnel. This amount is to cover personnel welfare costs and all other direct costs incurred by [D&R] in connection with the performance of services under this Section (not covered by subparagraphs (i), (ii), and (iii) above), and [D&R's] overhead allocable to Project Advisory Services performed under this Section.

The "amount reimbursed under subparagraph (i)" is "the amount of costs incurred by [D&R] for salaries paid to its full and part-time personnel for time devoted to the performance of services" under the Contract.

286. Thus, the Contract clearly contemplated only two categories of personnel -- part-time and full-time -- and set specific salary multipliers applicable to each. Consequently, and as KWPA has tendered no evidence in support of its contention, this counterclaim is rejected.

8. Counterclaim I: Overpayment of Fees During the Period of the Fourth Amendment

287. As of 21 March 1976, in the Fourth Amendment, KWPA and D&R altered the mechanism through which D&R's fee was computed. Instead of a specified lump-sum fee, D&R was entitled to a percentage of reimbursable amounts invoiced to KWPA. Although there was some confusion among the D&R staff

as to whether or not the fee should be based on quarterly invoiced amounts as well as on monthly amounts, D&R computed the fee based on both monthly and quarterly invoices to KWPA. One KWPA division (the Power Division) accepted this billing and routinely paid all of the fees, while other KWPA divisions resisted payment of fees based on the quarterly invoices.

288. KWPA argues that the percentage fee was only to be computed on invoices for services, as billed in monthly statements by D&R to KWPA. It claims that amounts on the quarterly invoices, attributable to social insurance premiums, taxes and reporting and returning or travel expenses, were not subject to the D&R fee percentage. KWPA claims it has suffered $200,000 in damages.

289. D&R argues in defense that it was entitled to compute its fee based on total amount of reimbursement invoiced to KWPA, whether monthly or quarterly invoiced.

290. As noted above the Tribunal finds that KWPA's reading of the Contract probably is the correct interpretation of the provisions concerned. (See paras. 138-39, supra.) However, KWPA has failed to provide the Tribunal with any evidence in support of its contention that $200,000.00 or any other specific amount in damages were suffered. Therefore, this counterclaim is rejected for lack of evidence.

9. Counterclaim J: Miscellaneous Items

291. KWPA brings four separate counterclaims, which are described as miscellaneous. These involve a claim for salary arrears allegedly owed to former D&R employees, a claim for interest purportedly earned by D&R on the revolving fund extended by KWPA, a claim for unpaid surtax reimbursements and a claim for an employee's purported share of medical insurance premiums.

a. Salary Arrears and Payments for Club Facilities

292. KWPA first contends that D&R is liable to pay certain amounts allegedly owed as salary arrears for former employees, as well as two bills relating to the Development Club facilities. The amounts claimed are:

(i) housing, rental telephone bills and salary of Mr. Mohammad Ali Dalvanid, former employee of D&R: $7,653.93

(ii) salary and allowances of Mr. Hassanali Darreh Cheshmi, former employee of D&R : $22,666.67

(iii) D&R's dues to Central Unit's accounts for rental of housing, offices, telephone, water and energy bills and Development Club facilities: $20,460.16

(iv) D&R's dues in respect of Development Club facilities: $61.81

The aggregate amount of this claim is $50,842.59.

293. The Tribunal has no jurisdiction over the first and second items listed above. They are by their nature personal claims belonging to Iranian individuals. Under Article II, paragraph 1, of the Claims Settlement Declaration the Tribunal does not have jurisdiction over claims by Iranian nationals against United States nationals. Moreover, neither Mr. Dalvanid nor Mr. Darreh Cheshmi can bring his claim here as a counterclaim since there is no claim against him in this proceeding. Owens-Corning Fiberglass Corp. and Government of Iran, et al., Interlocutory Award No. ITL

18-113-2, p. 4 (13 May 1983), reprinted in 2 Iran-U.S. C.T.R. 322, 324; see also American Bell International Inc. and Government of the Islamic Republic of Iran, et al., Interlocutory Award No. ITL 41-48-3, p. 15 (11 June 1984), reprinted in 6 Iran-U.S. C.T.R. 74, 83. As for the third and fourth items listed above, KWPA has given no explanation for these parts of the counterclaim, nor has it furnished any supporting evidence. Thus all four items must be dismissed.

b. Interest on Revolving Fund

294. Pursuant to Contract 401, Article 4, Sections A and B, KWPA maintained a revolving fund through which dollar and rial payments were advanced to D&R. KWPA argues that D&R must reimburse it for at least $200,000 in interest that D&R allegedly earned on this revolving fund. This counterclaim has been rejected as being filed out of time. (See para. 5, supra.)

c. Unpaid Surtax Reimbursements

295. KWPA claims $80,000 in unpaid retroactive surtax reimbursements which allegedly are due to KWPA under a side agreement between the Parties. This counterclaim has been rejected as being filed out of time. (See para. 5, supra.) However, the Tribunal notes that D&R acknowledges in its "Detailed Response to Respondents' Counterclaim, Volume I" that it agreed to reimburse KWPA for certain surtaxes in exchange for increasing its fee amount to 11 percent under the Fourth Amendment to Contract 401. Thus, KWPA's claim for these surtaxes could be regarded as an affirmative defense to D&R's fee claims, which the Tribunal has already awarded. (See paras. 136-139, supra.) D&R further states that it has not reimbursed KWPA because KWPA has never submitted an invoice with supporting documentation,

indicating the amount of the surtaxes at issue. Based on its own records, however, D&R estimates the reimbursable surtaxes as amounting to $23,400 and offers to credit KWPA with that amount.

296. Taking into consideration the specific circumstances of this case, the Tribunal deems that the aggregate amount claimed by D&R from KWPA should be reduced by an amount of $23,400, and finds that the amount awarded to D&R by this Award on the basis of D&R's claims against KWPA should be lowered accordingly.

d. Field Technical Staff Share of Medical Insurance Premium

297. KWPA counterclaims for $38,916 based on the alleged obligation of D&R's employees to bear part of the cost of their medical insurance premiums. The counterclaim is grounded on an exchange of letters dating from 1974.

298. The Tribunal already has found that this counterclaim is inadmissible. (See para. 5, supra). The counterclaim was not raised in the Statement of Defense and its submission in the subsequent memorial was neither timely nor justified within the terms of Article 19, paragraph 3, of the Tribunal Rules.

10. Counterclaim K: Unpaid Taxes and Social Insurance Premiums

299. KWPA requests the Tribunal to order D&R to obtain clearance certificates from the Ministry of Economic Affairs and Finance and from the Social Insurance Organization confirming full payment of taxes and social insurance premiums. The import of this counterclaim is that D&R has not paid its taxes or social insurance premiums to the extent required by Iranian law. No evidence has been submitted

indicating that any such sums were outstanding prior to 19 January 1981. Furthermore, the Tribunal already has held that it lacks jurisdiction over such counterclaims for unpaid social insurance premiums or taxes. See Houston Contracting Company and National Iranian Oil Company, et al., Award No. 378-173-3, paras. 115-120 (22 Jul. 1988), reprinted in 20 Iran-U.S. C.T.R. 3, 36-38.

11. Counterclaim L: Audit Request

300. In its final counterclaim KWPA seeks an order requiring D&R to open its books for the period of the 1962 Contract, from 1962 through 1968.

301. The Tribunal notes that KWPA requested, and received in 1971, the opportunity to audit fully D&R's books in the United States for this period. KWPA prepared a contemporaneous report based on that audit.

302. The passage of time has substantially increased the difficulty of obtaining accurate records for this period. Performing yet another audit of these accounts, when more than ten years have passed since the original review, may now be impossible. Furthermore, although KWPA alleges that it formally requested that the books remain open, due to its outstanding protest as to certain items, its failure to pursue the matter over the past ten years would have led a reasonable party to believe the claim had been abandoned. Because KWPA's own conduct shows that there has been no need for any further audit, this claim is dismissed.

IV. CLAIMS AND COUNTERCLAIMS INVOLVING THE STATE ORGANIZATION FOR ADMINISTRATION AND EMPLOYMENT

303. In addition to its claims against KWPA, D&R seeks payment for services rendered to other government agencies

and controlled entities of Iran. One of these claims arises out of a series of contracts to provide consulting services to the State Organization for Administration and Employment ("SOAE"). SOAE denies liability and asserts counterclaims based on the same contracts.

A. CLAIMS AND COUNTERCLAIMS RELATING TO THE PUBLIC SECTOR MANAGEMENT PROJECT

1. Background

304. In 1974 D&R was asked to assist Iran in a major project evaluating public administration and management in Iran. D&R was requested to make an assessment of the general functioning of Iran's public administration, to plan potential reforms and improvements, and to implement those improvements. This series of consulting assignments became known as the Public Sector Management ("PSM") Project.

305. By a letter of understanding concluded between D&R and SOAE in November 1974 D&R undertook Phase I, the first of three phases, intended to diagnose potential problems and suggest areas in which reform should be undertaken. The work was duly carried out, and D&R submitted its Phase I Report in May 1975 and received timely payment in full.

306. Shortly after the conclusion of Phase I, the Parties agreed to continue with Phase II. Phase II involved the implementation of recommendations made at the conclusion of Phase I. A supplemental Memorandum of Understanding ("MoU") to that effect was signed on 21 June 1975. For budgetary reasons, however, this Phase was divided into three stages. The 21 May 1975 MoU fixed D&R's compensation only for stage one. Pursuant to a first amendment thereto, dated 2 June 1976, the Parties agreed on D&R's compensation for stage two. Finally, pursuant to a second amendment, the Parties agreed on D&R's compensation for stage three to cover the

last calendar year of the MoU, from 21 March 1977 to 20 March 1978. This second amendment provided that the last payment was to be made by 21 April 1978. Work was finished as planned in March 1978, and again D&R received timely payment in full.

307. Negotiations for a renewed contractual framework to cover Phase III were apparently undertaken at the conclusion of the Phase II contract, and an additional MoU was signed on 22 April 1978,[10] providing for payments as from 21 March 1978. According to that MoU D&R was required:

> 1. To provide consulting services similar to those in Phase II for a period of three years, 1978-81 (2537-39).
>
> 2. To make available for these services in Iran [the same number of experts] previously assigned during Phases I and II . . . .
>
> 3. To undertake new consulting tasks, upon request of the Secretary General [of SOAE] and appropriate Ministers, within the broad scope of the Government's administrative reform objectives and in pursuit of improved public sector performance.
>
> 4. To continue consulting tasks initiated but not completed in Phase II.

For its work D&R was entitled to receive a yearly compensation of $1,000,000 in the three year period "from 1 Farvardin 2537 to 29 Esfand 2539 (March 21, 1978 to March 20, 1981)." SOAE was to effect quarterly payments to D&R one month after completion of work for each quarter, i.e., on 21 April, 23 July, 23 October and 21 January of each of the three years of the contract.

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[10] The Parties appear to have agreed on the terms of the new agreement by February 1978; on record is an unsigned copy of a draft agreement purportedly identical in content to the signed agreement.

308. D&R started the Phase III related work and continued to perform work in Iran until the end of the calendar year 1978. During this period it prepared 33 advisory papers and submitted monthly activity reports to SOAE detailing progress being made on the Phase III work. It is undisputed that D&R received payment for the first two quarters of Phase III.

309. During the latter half of 1978 it appears that the changing conditions in Iran affected the work on the PSM project. Finally, at the end of December 1978 SOAE decided to terminate the project. By letter to D&R, dated 20 December 1978, SOAE stated: "Pursuant to discussions held, the continuation of the advisory services contract between this Organization and D&R has been deemed as unnecessary for which reasons you are hereby notified of the termination of the referenced contract taking effect as of 29th Esfand 1357 [20 March 1979]."[11]

310. D&R continued to perform its services in Iran until 20 December 1978 at which time it departed Iran, due to prevailing conditions.

2. Analysis of the Parties' Contentions

311. D&R contends that it performed its obligations pursuant to the MoU with SOAE until 20 December 1978 and that it is entitled to payment by SOAE of the quarterly installment of $250,000 allegedly due as of the end of December 1978.

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[11] The record is not wholly unambiguous regarding the effective date of termination. D&R has submitted one Persian and two English texts of the termination letter from SOAE dated 20 December 1978. The Persian text conforms with one of the English texts, stating that the effective date of termination was 29 Esfahand 1357 (20 March 1979). In the other English text, however, the Persian date has been

(Footnote Continued)

312. SOAE defends its non payment by contending that D&R did not fulfill, its contractual responsibilities. It alleges that it is not required to pay the $250,000 and, moreover, asserts counterclaims seeking return of all amounts previously paid to D&R under the agreements for Phases I and II ($6,400,000), plus an additional $2 million for damages allegedly caused by D&R's nonfulfillment of its contractual obligations.

313. The Tribunal finds that SOAE has failed to substantiate its contention that D&R's work on the PSM project was substandard. There is no record of any contemporaneous allegation of breach of contract or lack of performance raised by SOAE. On the contrary, a memorandum dated 24 April 1978 detailed the comments of Dr. Amin Alimard, Secretary General of SOAE, in which Dr. Alimard "reiterated a number of times his gratitude to PSM [i.e., D&R] for their part in advancing administrative reform . . . ." Furthermore, invoices were paid regularly and routinely throughout the life of the project and the contractual framework was renewed on at least two occasions. D&R also has placed on record the reports and other documents it submitted to SOAE as part of its performance. The Tribunal notes that according to D&R's Report of Phase III only 13 people worked on the project, instead of "more than thirty" as required by Article 2 of the MOU. However, this reduction may be due, as the Report states it was, to conditions prevailing in Iran. Finally, the termination notice SOAE issued to D&R does not evidence any dissatisfaction with D&R's performance. This notice merely stated that continued performance was no longer necessary. On the basis of the foregoing, the

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(Footnote Continued)
converted (or translated) as 20 December 1978. This latter date appears to be erroneous.

Tribunal is satisfied that D&R's services were adequately performed pursuant to the contract.

314. SOAE also asserts that the effective date of termination of the contract was 20 March 1979 and that D&R was required to continue performance until that date. To the extent that D&R's undisputed nonperformance after 20 December 1978 is not excused for reasons of force majeure, the Tribunal finds that, in any event, SOAE has failed to substantiate that it suffered any damage as a result of D&R's nonperformance during that period.

315. D&R acknowledges that it has been paid for services performed during two quarters, i.e., six months, and it is undisputed that D&R ceased performance on 20 December 1978. SOAE contends that as the contract was signed on 22 April 1978 the life of the contract was only eight months, and therefore that D&R is only entitled to payment for the remaining two months. The Tribunal disagrees. This contention appears to contradict the specific language of the MoU. Article 5a of the MoU provides for D&R to receive an annual fee of $1,000,000 for each of the three years covered by the MoU, beginning 21 March 1978. The MoU further provides that quarterly payments be made on 21 April, 23 July, 23 October and 21 January of each year.

316. The invoice submitted by D&R is for the period from 23 September to 21 December 1978. Work reports and time cards for this period have been submitted in evidence to the Tribunal. The Tribunal notes that, while D&R in its Statement of Claim states that only eight months of work had been performed, contemporaneous evidence shows that nine months of work had been done.

317. On the basis of the foregoing the Tribunal finds that D&R is entitled to payment for the third quarter and awards $250,000, due and payable as of 23 October 1978, and the

Tribunal rejects SOAE's counterclaims for breach of contract and damages.

B. COUNTERCLAIMS FOR UNPAID TAXES AND SOCIAL SECURITY PREMIUMS

318. Together with its Statement of Defense SOAE filed a counterclaim seeking Rls. 16,003,542 in unpaid taxes and fines. It also seeks Rls. 107,181,151 in outstanding social insurance premiums and penalties for delay. In a document filed on 22 October 1984 SOAE asserted that the unpaid social insurance premiums are subject to an ongoing penalty of Rls. 26,193 per day from 5 February 1982. At a conversion rate of 70.5 rials/dollar, these counterclaims amount to over $3.1 million.

319. For the reasons elaborated above (see para. 299, supra) the Tribunal lacks jurisdiction over these counterclaims and they are hereby rejected.

V. CLAIMS AND COUNTERCLAIMS INVOLVING THE MINISTRY OF ENERGY

A. FACTS AND CONTENTIONS

320. On 22 September 1973, D&R entered into a contract with the Ministry of Energy (formerly the "Ministry of Water and Power") for the provision of engineering consulting services related to the development of a National Water Plan ("NWP") for Iran ("Contract"). D&R was "intended to establish a concept for a long-term (10-30 thirty years) [NWP], and to prepare a comprehensive plan for the management of water resources in conformity with the concept."

321. The work on the NWP was divided into two phases. None of the claims or counterclaims, however, is based on the

first phase of the Contract. During the second phase of the Contract D&R was to establish:

> [The] definition of existing water resource policies, definition of the concept of the [NWP], determination of the objectives of the plan, definition and initiation of a continuing program of basic data collection[,] social and economic studies and projections, the definition of environmental quality objectives, determination of objectives by water-use categories, definition of procedures to establish criteria for formulation of the [NWP], definition of criteria for decisions, definition of project alternatives, evaluation of alternative projects and determination of water resource allocations, determination of the means of management, preparation for the requirements for implementation of the plan, and compilation and publication of the [NWP].

322. The time period initially contemplated for the completion of the NWP was 50 months from the effective date of the Contract, i.e., from 22 September 1973 to November 1977, but could be extended by agreement between the Parties. Such an agreement was reached at some time after October 1976 and the completion date was then extended by approximately four months to 20 March 1978, or the end of that Persian year. It has not been alleged that D&R ever sought any further extension of time.

323. The NWP was not ready, however, on 20 March 1978. The Ministry of Energy ceased paying D&R's invoices as of that date. D&R allegedly continued work, however, and invoiced the Ministry of Energy accordingly until 21 August 1978. The invoices for services rendered in the period 21 March through 21 August 1978 form the basis of D&R's invoice claim.

324. By the end of September 1978 D&R submitted Volumes I-VIII of the NWP to the Ministry of Energy. Two volumes, including the summary of the NWP, remained to be completed.

325. On 4 November 1978 Mr. Firouzian, the Director of the General Bureau of Water Planning, of the Ministry of Energy, sent D&R a letter complaining, inter alia, of D&R's untimely performance and contending that "what is being done now by [D&R] in the context of [the NWP] is far from what they were supposed to do according to the terms [of] reference spelled out in the contract."

326. During the latter half of 1978 the mounting civil unrest in Iran allegedly rendered D&R's work in Iran increasingly difficult, and in January 1979 D&R's staff working on the NWP left Iran. Not long thereafter, D&R's staff appears to have finished the two remaining volumes of the NWP. According to D&R, however, due to the conditions in Iran, those volumes could not be transmitted to the Ministry of Energy in Iran until May 1979.

327. Pursuant to the Contract D&R was to be paid monthly, based on invoices for services rendered and expenses incurred, and the Ministry of Energy was entitled to withhold a ten percent good performance retention from all monies paid to D&R. This retention was repayable "upon approval" of the two phases of the NWP. Part of the retention was repaid to D&R upon the completion of the first phase. The Contract set out in detail the procedure for approval of D&R's work. Article 5 of the Contract stated:

> 1. [The Ministry] shall declare [its] comments in writing on the draft report of each phase within two (2) months of the receipt by [it] of such report.
>
> 2. If the [Ministry] does not, within two (2) months, declare [its] views on these reports including any specific discrepancies between the work actually performed by [D&R] and the services to be performed by [D&R] as stipulated in this Contract, then the report and documents shall be considered to be approved and shall constitute the basis for subsequent studies and actions. If such views are make [sic] known within the period of two (2) months, then [D&R] shall make appropriate

> amendments to the draft reports and shall prepare the final reports in the light of the comments from the [Ministry].

328. The Ministry of Energy was entitled to terminate the Contract for convenience as well as through the fault of D&R. In the former case, the terms were more favorable to D&R. In the latter case, the Contract detailed three categories of possible breaches on the part of D&R. These included: (a) failure on the part of D&R to provide the "technical, scientific and organizational elements required for the fulfillment of [D&R's] functions" under the Contract; (b) failure to exercise "the degree of care reasonably expected from [D&R] in the performance of [its] functions and services"; and (c) situations in which the Ministry of Energy decided that "the work concerned has been delayed through the negligence or fault of [D&R] for a period exceeding one fourth (1/4) of the anticipated execution period." Such period would thus end in the first half of May 1979. In each of these three instances the Ministry of Energy had "the right to give [D&R] due notice to remove deficiencies and faults in [its] work . . ." whereupon D&R had to remedy such defects within a specified time limit. If the deficiencies were not corrected on expiration of this time limit, the Ministry of Energy had the right to terminate the Contract.

329. D&R now claims that it completed performance pursuant to the Contract, that invoices submitted during 1978 and one final invoice submitted in 1979 for work performed, in the total amount of $50,314.63, remain due, and that it is entitled to the return of a remaining amount of $210,668.95 withheld by the Ministry of Energy as a good performance guarantee.

330. The Ministry of Energy defends itself against both parts of the claim, on the grounds that D&R forfeited the good performance guarantees by submitting an untimely and

technically deficient NWP to the Ministry and that the services invoiced were performed after 20 March 1978, i.e., after the agreed completion date of the NWP. Based on its contentions regarding the technical deficiencies of the NWP, the Ministry of Energy also counterclaims for at least $700,000 in damages. For this counterclaim the Ministry relies on two expert reports, neither of which appears to predate the present proceedings. With respect to the invoice claim, the Ministry specifically disputes that the invoices are payable on the ground that services were performed and the expenses were incurred.

B. THE TRIBUNAL'S FINDINGS

1. Untimeliness

331. It is undisputed that the Parties agreed to extend the original time-limit for delivery of the NWP from 22 November 1977 to 20 March 1978, and that the bulk of the NWP was delivered in September of 1978 but that final delivery did not occur until May 1979, i.e., 14 months later than finally scheduled and the same month that marked the final deadline for breach of contract through delays after extension. The only evidence that the Ministry of Energy ever complained to D&R of the delay in delivery of the NWP is the letter of 4 November 1978. The Tribunal finds that, although this letter evidences that the Ministry of Energy was dissatisfied with the delays incurred, the letter did not imply that NWP held D&R in delay pursuant to the Contract. Applying the time allowed in the original schedule for completion, i.e., 50 months, the Ministry of Energy could have terminated the contract for reason of delay on the part of D&R only if D&R failed to submit all parts of the NWP by early December 1978 (i.e., 50 months, plus one-fourth of such term). The time limit was extended, however, and the Tribunal finds that total execution time for the purposes of this provision thereby became 54 months. The scheduled time

of delivery is therefore 22 March 1978, while the final deadline for breach of contract through delays runs to early May 1979 (i.e., scheduled time of 54 months, plus one-fourth of such term).

2. Claims of D&R

a. Invoices for Services and Expenses

332. The amount of the allegedly unpaid invoices, $50,314.63, is not in dispute between the Parties. Nor is it disputed that the invoices pertain to services and expenses incurred in relation to D&R's work on the NWP.

333. The Tribunal finds that contractually D&R is implicitly entitled to payment for the services rendered even after the scheduled completion date. The execution of the Contract spanned a considerable period of time; its second phase covered a period of more than four years. Time appears not to have been of the essence, as the Ministry was not entitled to terminate the Contract for undue delay before more than a year had passed beyond the scheduled completion date beyond March 1978. Nothing in the record suggests that the Ministry ever raised, in accordance with the relevant provisions in the Contract, any contemporaneous objection to payment of these invoices on the ground that the final work on the NWP was performed after the scheduled completion due. The Tribunal concludes that the invoices are due and payable in the full amount claimed, i.e., $50,314.63.

b. Good Performance Retention

334. D&R claims that a net total of $210,668.95 remained to be repaid from the amounts withheld as good performance guarantee. This dollar amount is based on a contemporaneous schedule, submitted by D&R to the Ministry of Energy, of net rials remaining unreimbursed, computed at the conversion

rate applicable at the date of the original invoice and retention. According to this schedule the net balance due was Rls. 14,675,784. The Ministry of Energy asserts that the retentions were less than this amount by some Rls. 247,436 (or $3,517.21 at a 70.35 conversion rate). D&R's figure is, however, based on a contemporaneous document and therefore is more persuasive.

335. On the basis of the foregoing, and absent any contemporaneous objection against the invoice submitted by D&R, the Tribunal finds that D&R is entitled to repayment of the good performance retention in the amount claimed.

3. COUNTERCLAIM OF THE MINISTRY OF ENERGY

a. Breach of Contract

336. The Ministry of Energy alleges defects in almost every major aspect of the NWP submitted by D&R. Contractually, however, the Ministry was required to submit any complaints it may have had relating to the NWP within 60 days following the submission thereof.

337. The Ministry does not allege that it complied with these contractual requirements. It contends, however, that its failure to submit any counterclaims or objections within the 60-day period was excused because D&R was late in submitting the NWP. However, the Tribunal finds that D&R's delay cannot be construed to relieve the Ministry of its obligation to review and assess the NWP within the contractually provided 60 days time period from submission.

338. The Ministry of Energy argues implicitly that the force majeure conditions prevailing in Iran - invoked to justify D&R's delay in submitting the NWP from January until May 1979 - would also excuse the Ministry's failure to analyze and comment upon the matter. The Tribunal disagrees. Force majeure operates to suspend contractual obligations, not to extinguish them. On this ground the Ministry could have

sought to justify a delay in submission of its complaints. The Ministry does not allege, however, that it sought to submit to D&R any of the complaints it now raises at any time prior to these proceedings.

339. The only objection received by D&R prior to these proceedings is the letter dated 4 November 1978. In this letter, the Ministry of Energy protested the delayed submission of the final report, and generally noted a number of facets of the volumes already submitted that were allegedly inconsistent with the Contract. The Ministry of Energy has not asserted that this letter constitutes an objection within the meaning of the Contract, and the Tribunal finds that the letter lacked specific details.

340. On the basis of the foregoing, the Tribunal concludes that, as a result of its failure to raise any timely objections, the Ministry of Energy is now contractually precluded from raising the same objections in these proceedings. Consequently, the Tribunal need not reach the merits of any of the other general deficiencies asserted by the Ministry of Energy in its counterclaim.

b. Allegedly Unpaid Taxes

341. The Ministry of Energy filed a request for an order obligating D&R to pay Rls. 23,266,418 in "tax dues" for the Persian years 1355 and 1356. For the reasons outlined above (see paras. 5 and 299, supra), this counterclaim is not only inadmissible because untimely filed but is also outside the Tribunal's jurisdiction.

VI. CLAIM AND COUNTERCLAIMS INVOLVING THE MINISTRY OF AGRICULTURE

342. D&R seeks $91,155.35 in outstanding performance guarantees allegedly remaining on a contract entered into on 20

May 1973 with the Ministry of Agriculture. This Ministry counterclaims for allegedly unpaid social insurance premiums.

A. CLAIM OF D&R

343. On 20 May 1973 D&R entered into a contract with the Ministry of Agriculture. According to Article 1: "The subject matter of the Contract is the performance of consulting services for the implementation of the Master Plan for Agricultural Research in Iran . . . ." The nature of the consulting services was defined in Appendix II, which specified eight separate categories of activities that D&R was to perform in connection with the organization and management of the Ministry's agricultural research programs. Appendix II required the submission of periodic reports describing and summarizing D&R's progress in meeting the contract objectives. The contract extended to the end of the Persian year 1356, or 20 March 1978.

344. The Claimant received payment for all invoices submitted under the contract, and it alleges that it satisfactorily completed its performance thereunder. It now seeks return of the good performance guarantees that were withheld and have not yet been returned.

345. As evidence for this claim, D&R submits the testimony of one of its executives that in 1978 Ministry of Agriculture officials had promised to pay D&R in the amount now sought before the Tribunal. In June 1979 D&R sent an invoice to the Ministry of Agriculture for return of the performance guarantees in the amount of $91,155.53. That invoice referred to the Ministry's prior agreement to remit these funds. However, no payment was ever made.

346. Article 14 of the contract stipulated that all amounts withheld as good performance guarantees were to be "returned to D&R upon approval of the final report stipulated in paragraph 3(c) of Appendix III." Appendix III, paragraph 3(c), required D&R to submit: "On the conclusion of the Contract period a general report describing [D&R's] activities from the start to the finish of the work, and submitting [its] recommendations concerning all matters relevant to the effective operation of continuing agricultural research programs in Iran."

347. As evidence of the "completion of its work" D&R notes that, long before its evacuation from Iran, it submitted a "three volume progress report" to the Ministry of Agriculture. Although the only reports submitted to the Tribunal appear to be interim documents and not in the nature of a final report, the Ministry of Agriculture has not complained that the final report was never received or that D&R's work was otherwise deficient. The Tribunal therefore concludes that the contractual requirement was satisfied.

348. The Ministry of Agriculture has not disputed the total amount of performance guarantees withheld. The only defense raised by the Ministry of Agriculture is that D&R failed to obtain a clearance certificate from the Social Insurance Organization attesting to the full payment of all social insurance premiums. However, this appears not to be a contractual prerequisite to the release of the good performance guarantee retentions. Thus the Tribunal concludes that these retentions must be released to D&R.

B. COUNTERCLAIM OF THE MINISTRY OF AGRICULTURE

349. The Ministry of Agriculture alleges that social insurance premiums in the amount of Rls. 33,964,373 are unpaid. This counterclaim is not supported by any evidence. D&R

contends, supported by affidavit testimony, that such premiums were, as a rule, paid in a timely fashion.

350. The Tribunal finds this counterclaim insufficiently substantiated. In addition, for reasons outlined above (see paras. 5 and 299, supra), this counterclaim is inadmissible and beyond the Tribunal's jurisdiction, and it is hereby dismissed.

VII. CLAIM AND COUNTERCLAIM INVOLVING THE NATIONAL IRANIAN OIL COMPANY

351. In the Statement of Claim, D&R names both OSCO and NIOC as respondent parties to the present Claim. It is clear from the record that the contract from which the present claim arises involves OSCO and not NIOC. The Tribunal notes, however, that it previously has held that NIOC is the de facto successor to OSCO's rights and obligations and that the task of determining the extent of NIOC's liability is to be determined separately in each individual case. See Oil Field of Texas, Inc. and Government of the Islamic Republic of Iran, et al., Interlocutory Award No. ITL 10-43-FT (9 Dec. 1982), reprinted in 1 Iran-U.S. C.T.R. 347.

A. FACTUAL BACKGROUND

352. In 1977 OSCO engaged D&R to provide consulting services for the construction of a 132 kilovolt housing area power station which was to be connected to the KWPA Ahwaz Loop System. Under date of 21 June 1977 D&R submitted a proposal to OSCO to which OSCO responded by letter dated 23 July 1977, stating as follows: "We are pleased to inform you that we intend to prepare an agreement with you based on your proposal dated 21st June, 1977 at lump sum rate of U.S. Dollar 125,000 for phase I and II of subject services in accordance with appendix I and 2 attached hereto."

353. Appendix I, entitled "Scope of Work," described the three phases of work and detailed the activities D&R was required to perform. Of relevance here is Phase I, which comprised six separate activities. D&R was required to prepare diagrams of the general arrangement and physical layout of the substation (Activity 1), as well as fault level analysis and cost estimates (Activity 2). D&R also was required to "secure full concurrence on basic design between O.S.C.O. and KWPA prior to proceeding with preparation of contract documents" (Activity 3), after which it was charged with, inter alia, preparing "basic drawings, contract item schedule, general and special conditions . . . and making ready to the degree required to obtain firm quotation from installation Contractor" (Activity 5).

354. Appendix 2 established a "Schedule of Payments." The "Gross Amount Prior To Retention" payable to D&R under Phase I and II was to be $125,000. The schedule specified that upon completion of Activities 1, 2 and 3, Phase I, $20,000 was payable; upon completion of Activities 4, 5 and 6, Phase I, and Activity 1, Phase II, $50,000 was payable; and upon completion of Activity 2, Phase II, a further $10,000 was payable. The balance was payable in six quarterly installments during the period of performance of the remaining work.

355. However, OSCO was in urgent need of D&R's services and by the same letter of 23 July 1977 it authorized D&R to "commence services immediately" pending the preparation of a formal agreement. OSCO detailed the conditions for this early start up as follows:

> The initial fund of $50,000 is available for subject services, should the budget not be extended by the time activity 4 of phase I is completed you shall stop the work on item 5 of phase I and proceed only after receiving authorization from us. Should the delay be greater than 3 months, you should deliver all materials up through activity 4 of phase I and invoice the

Company for $45,000 and the Contract would be terminated.

356. Negotiations continued and apparently a meeting to discuss this project was held on 7 August 1977. By letter of 9 August 1977 OSCO confirmed to D&R that the proposal dated 21 June was accepted, that "a Letter of Intent requesting you to proceed with the work is in course of preparation" and that D&R was authorized "to commence work on the basis of [D&R's] quotation up to a limit of $50,000," while the Letter of Intent was being prepared.

357. By letter dated 15 August 1977 D&R acknowledged receipt of the 9 August 1977 letter from OSCO, confirmed its agreement to start the work and proceeded to do so.

358. Neither Party has explained why two letters of intent were exchanged between the Parties and why no formal contract was executed by them. In the present proceedings, however, both Parties rely on the 23 July 1977 letter of intent, with attachments, as embodying the contract.

359. It appears that during the course of the performance of the work a disagreement occurred between the Parties regarding the type of specifications on which the project documents were to be based. Apparently this issue concerned the compatibility of the substation with existing KWPA facilities (Activity 3).

360. There is nothing in the record as to the dealings between the Parties from August 1977 to June 1978. Work apparently proceeded, however, beyond Activity 3 and in the summer of 1978 the Parties entered into discussions of the suitability of the specifications in relation to manufacturers. This would indicate that D&R had completed Activity 4. This assumption is corroborated by an undated report in the file that refers to the items described under Activity 4. A telex from IROS, the NIOC subsidiary in London, to

OSCO dated 12 July 1978 stated that "the specs as they stand are not suitable for IROS to obtain proper competitive offers for the items of equipment concerned." The Parties apparently agreed, however, that work required for subsequent changes and revisions would not be covered by the contractual agreement reflected in the 23 July 1977 letter. In a letter dated 10 July 1978, headed "Revised Scope of Consultant Services," D&R states that: "Attached is a revised scope of services and construction schedule based upon our preliminary draft dated June 21, 1978 . . . ."

361. These negotiations continued until 15 November 1978, at which time D&R sent a letter to OSCO headed "Detailed allocation of Costing for Design Services OSCO Housing Distribution Substation." This letter contained a breakdown of hourly rates, hours required and total amounts for design activities. Phase I still comprised six activities and Phase II eight activities (Activity 1 deleted and Activity 3A added). In addition, there was a provision for a ten percent fee and an allowance of 5.5 percent for contractor's tax. Activities 1 to 4 of Phase I were quoted at a net price of $34,342 (or $39,665.01 including fee and contractor's tax). The grand total was $161,000.

362. It is undisputed that only parts of the work covered by the 23 July 1977 letter were performed by D&R and that eventually another contractor was hired to complete the work.

B. THE PARTIES' CONTENTIONS

363. D&R claims that it is entitled to an additional $31,000 (plus interest and costs) from NIOC, as successor to OSCO, as compensation for the performance of Activities 1 to 4 of Phase I of the project. D&R submitted a first invoice for services rendered in the amount of $20,000. OSCO paid $19,000. D&R contends that the balance of $1,000 was

retained as a good performance guarantee. A second invoice was submitted on 2 April 1979 in which D&R requested payment of $30,000 for "the remainder of Phase I, Activities 1 through 4," of the contract, together with a contract summary showing $1,000 from the earlier invoice as unpaid.

364. NIOC defends the nonpayment of this invoice on the ground that the work was not performed according to required specifications. It alleges that initially the work was performed in conformity with KWPA's specifications and not those of OSCO. NIOC alleges that OSCO had to request that the work be redone, that the revised work was still deficient and that it eventually was forced to hire another contractor. NIOC further asserts that the $1,000 retention was a tax or insurance withholding that should be treated as an offset to the claim.

365. D&R responds by alleging that the work it performed for the first activities under Phase I initially was prepared to be compatible with the KWPA Ahwaz Electrical Loop Subsystem, since the planned electrical substation was to be linked to the KWPA power transmission facilities. It argues that OSCO's standard specifications were not suited to the proposal. It was not until after D&R had prepared the initial set of "contract documents" that OSCO objected that the substation work should comply with OSCO contract procedures. D&R claims that after it redesigned its work in conformity with OSCO's objections OSCO reversed its position and requested that D&R conform its designs to D&R's original proposals. These changes caused additional work by requiring D&R to revise work already performed.

C. THE TRIBUNAL'S FINDINGS

366. The Tribunal finds it established that D&R was engaged to perform certain services according to an agreement evidenced, inter alia, by the 23 July 1977 letter. Although

D&R also contends that it did in fact perform services on the project "beyond Phase II", it has not alleged that OSCO provided the required authorization to proceed beyond Activity 4 of Phase I. In any event, the invoices on which the claim is based cover only services related to Activities 1 to 4 of Phase I. The Tribunal concludes that the present claim is limited to payment for these services.

367. The Tribunal is not satisfied, however, that the parties had agreed that the price for these services was $50,000 as D&R contends. Pursuant to the terms of the 23 July 1977 letter the sum of $50,000 was an "initial budget" for the "subject services" of D&R's "proposal dated 21 June 1977." This letter also provided that, in the event that D&R did not receive authorization to proceed beyond Activity 4 within three months, OSCO should be invoiced for the sum of $45,000. Although the Parties clearly continued negotiations, the Tribunal finds that the 23 July 1977 letter limited the price for services rendered pursuant to activities 1 through 4 to $45,000. The Tribunal finds that the amounts quoted in D&R's letter dated November 15, 1978, addressed to Mr. Salimi of OSCO are quoted with regard to the negotiation on a Contract for the whole project, including Phase I (Activity 1-6) and Phase II. (Activity 1-8.) These quotes would only have applied had the entire project been awarded to D&R and had such quotes been accepted by OSCO within 90 days from the date of such letter, in accordance with the last paragraph of such letter. There is no evidence on the record that the conditions set forth in such letter, including the quotes, were accepted. Therefore, the provisions of the 23 July 1977 letter apply and D&R is entitled to $45,000. It is agreed that D&R invoiced OSCO for $20,000 of the price for the services rendered. The Tribunal concludes that D&R is entitled to claim payment of an additional $25,000.

368. NIOC's defenses are all based on the proposition that D&R's performance was defective. In support of this contention, NIOC chiefly relies on the IROS telex and the D&R letter of July 1978 (see para. 360, supra), discussing needed revisions in the initial work. However, this correspondence appears to demonstrate only that there was confusion about the proper specifications. It does not establish that D&R was negligent or in breach. Nor is there any evidence of a contemporaneous objection by NIOC, after it received D&R's invoice of April 1979, that the work for which it was billed was defective.

369. D&R also claims return of the $1,000 allegedly withheld as a good performance retention. The only reference to a good performance retention is contained in the Schedule of Payments appended to the letter of 23 July 1977, which provided that: "We suggest a schedule of payment with ten percent (10%) retained until completion of the construction." The Claimant has not, however, provided any explanation why the amount retained in this case is only 5 percent of the invoiced payment. On balance, the Tribunal finds that the Claimant has not substantiated its claim that this retention was a good performance retention. Consequently, the Tribunal does not reach the issue of the evaluation of D&R's performance under the contract.

370. NIOC's implied request for a deduction of a contractor's tax of 5.5 percent from any sums awarded D&R amounts to a set-off or a counterclaim and may therefore be entertained only if the jurisdictional requirements for counterclaims and set-offs are fulfilled. It has been established in Tribunal precedent that a counterclaim or set-off must arise out of the same contract, transaction or occurrence as the claim. See Computer Sciences Corporation and Government of the Islamic Republic of Iran, et al., Award No. 221-65-1, pp. 18, 19 and 47-56 (16 April 1986), reprinted in 10 Iran-U.S. C.T.R. 269, 283, 306-313. The present claim is

based on the 23 July 1977 letter, in which no reference whatsoever to taxes is made. It seems that if the 5.5 percent tax would apply, this would be pursuant to the Iranian Direct Taxation Act, rather than any contract or understanding between NIOC and D&R. The Tribunal denies NIOC's request for a set-off or counterclaim for lack of jurisdiction.

371. In conclusion, the Tribunal awards the Claimant $25,000 as compensation for the services rendered under the contract with OSCO.

D. COUNTERCLAIM OF NIOC

372. NIOC seeks the return of $2,021 which D&R allegedly received from NIOC's London subsidiary IROS as reimbursement for travel expenses. The Tribunal notes that apart from any possible jurisdictional infirmities here present, NIOC has submitted no evidence in support of this counterclaim. Therefore this counterclaim is rejected.

VIII. CLAIMS AND COUNTERCLAIMS INVOLVING THE MINISTRY OF ECONOMY AND FINANCE, BANK MARKAZI AND THE GOVERNMENT OF IRAN

A. CLAIMS OF D&R

373. D&R seeks $91,114 from Bank Markazi, the Government of Iran and the Ministry of Economy and Finance as its share in the accumulated earnings of its affiliate Development and Resources Iran, Inc., in which it owned a 40 percent interest.

374. In support of this claim, D&R has submitted the following evidence: (1) an excerpt of the Official Gazette of Iran (21 December 1974 [30 Azar 1353]) announcing the

establishment under Iranian law of Development and Resources Iran, Inc. ("DRI") with D&R as one of its incorporators; (2) a letter dated 22 December 1974 from D&R to the Minister of Water and Power in which the Vice President of D&R advised the Minister that DRI was duly registered under Iranian law and had been assigned Registration No. 20295; (3) a D&R internal memorandum dated 20 July 1977 executed by Mr. A.H.A. Pampanini, one of the directors of DRI, stating that Mr. Pampanini had taken physical possession of 40 percent of the share certificates of DRI to be held by D&R, that the transaction was recorded in the shareholders' ledger of DRI and that they were returned to the Tehran office safe in exchange for formal receipts attached to the memorandum; (4) a copy of a DRI shareholders agreement executed 30 November 1974 [9 Azar 1353], stating that D&R owned 40 percent of DRI; and (5) copies of both a DRI Trial Balance for the Persian month Mehr 1357 [23 September to 22 October 1978], evidencing an account payable to D&R of Rls. 5,978,954, and an account receivable analysis of D&R dated 30 June 1980, evidencing an account payable to D&R of $91,114.

375. At the Hearing, in response to questions from the Tribunal, D&R asserted that the accumulated earnings represented the annual dividend declared by DRI in the latter part of 1978. D&R's witness Mr. Silveira also asserted at the Hearing that ordinarily D&R would have used the rial dividends from DRI to cover its own local rial costs but that due to deteriorating conditions no transfer was made from DRI to D&R.

376. Claimant asserts that the funds never were transferred to D&R because of exchange control restrictions imposed or administered by the Ministry of Economy and Finance, Bank Markazi and Iran. D&R argues that these restrictions amount to an illegal, unjustified confiscation of its funds.

377. Despite these arguments, D&R has admitted that it did not attempt to comply with the regulations, which, it is conceded, require a request to be filed with responsible officials for the repatriation, in dollars, of dividends paid in rials. Neither has D&R provided proof that DRI made such a demand or that D&R ever subsequently demanded that DRI transfer the funds to it or to its local account in rials.

378. D&R argues that such a demand would have been futile, since it inevitably would have been denied. But it has provided no proof of this alleged futility. At the Pre-Hearing Conference Bank Markazi argued that it was possible to obtain approvals upon submission of an appropriate request. D&R has not established that these assertions are incorrect. D&R has not argued that merely submitting a request for repatriation would be illegal or unjustifiable. Consequently, given the lack of proof of futility and the conceded failure to submit a request, the Tribunal need not reach the question of the validity of the regulations.

379. In view of these arguments, D&R's claim is dismissed.

B. COUNTERCLAIMS OF THE MINISTRY OF ECONOMIC AFFAIRS AND FINANCE

380. The Ministry of Economic Affairs and Finance (the "Ministry") has filed counterclaims for unpaid taxes and penalty for late payment of such taxes. In the Ministry's first response to D&R's Statement of Claim, the counterclaims for unpaid taxes totalled 36,673,849 rials. However, in subsequent filings these counterclaims were amended and restated. In its most recent filings, the Ministry formulates two counterclaims for unpaid taxes, one in the amount of 58,258,057 rials and one for 904,927 rials. The Ministry also claims a penalty for late payment of taxes and interest accrued on the unpaid amount.

381. As noted above, in paragraph 370, a counterclaim may be entertained only if the jurisdictional requirements for such counterclaim are fulfilled. Tribunal precedents hold that a counterclaim must arise out of the same contract, transaction or occurrence as the claim. See Computer Sciences Corporation and Government of the Islamic Republic of Iran, et al., Award No. 221-65-1, pp. 18, 19 and 47-56 (16 Apr. 1986), reprinted in 10 Iran-U.S. C.T.R. 269, 283, 306-313. As is stated by the Ministry, the counterclaims are based on the Iranian Direct Taxation Act, rather than any contract or understanding between the Ministry and D&R. The Tribunal denies the Ministry's counterclaims for lack of jurisdiction.

IX. INTEREST

382. The Claimant seeks interest at the simple rate of 12 percent from the date its claims arose, with the exception of the amounts due from the Ministry of Energy, for which it seeks only the six percent contractual rate of interest. The Respondents object to the payment of interest on the claims.

383. Based on the reasoning outlined in McCollough & Company, Inc. and The Ministry of Post, Telegraph and Telephone, et al., Award No. 225-89-3, paras. 97-104 (22 Apr. 1986), reprinted in 11 Iran-U.S. C.T.R. 3, 28-31, the Tribunal finds that the Claimant is entitled to 10 percent simple interest per annum from the date on which its claims arose to the date when payment is effected on all claims other than those asserted against the Ministry of Energy. Interest on the amount due from the Ministry of Energy is held to accrue at the rate of six percent per annum from the date the claim arose. (See id. at para. 100.)

384. D&R has not identified precisely the dates on which each of its successful claims arose. The dates of the invoices upon which the claims are based provide a general indication of the time from which interest becomes payable. The Tribunal notes that Contract 401 between D&R and KWPA provides that invoices are payable within 30 days from the date they were received. For the sake of convenience, and also because the Parties have neither argued for a more precise method of calculation nor demonstrated that interest was paid on invoices during the period they may have been under protest or review, the Tribunal decides to choose the approximate dates of the end of the periods in which the bulk of the invoices were submitted. For claims against KWPA other than for the return of the good performance guarantees, this date would be 1 May 1979; for claims against KWPA for the return of good performance guarantees, to which the contractual grace period does not apply, the Tribunal finds that interest is due as of the date of the respective invoices, i.e. 15 June 1979 with respect to the claim for $188,687.44 which has been awarded in full, and 9 August 1979 with respect to the claim for $325,523.16, of which $321,419.55 was awarded. In accordance with the considerations set forth above, for D&R's claim against SOAE, interest is due as of 1 April 1979, for claims against the Ministry of Energy interest is due as of 1 September 1979; for claims against the Ministry of Agriculture, 15 June 1979; and for claims against NIOC, 1 July 1979. The date of the payment obligation did not depend upon an invoice but rather was established by the contract as 23 October 1978. Taking into account a grace period of thirty days, interest is due from 22 November 1978.

X. COSTS

385. D&R has submitted affidavits and documentary evidence showing it incurred $425,992 in attorneys' fees up to the date of the Hearing. An additional $91,247.66 has been incurred for costs of translation, travel expenses, expert

assistance and shipping fees. Thus D&R seeks a total award of $517,239.66 for arbitration costs.

386. With reference to Articles 38 and 40 the Tribunal Rules and in accordance with Tribunal precedent, the Tribunal may award reasonable costs of arbitration and, where applicable, make a reasonable apportionment of other costs. (See Rockwell International Systems, Inc. and Government of the Islamic Republic of Iran, Award No. 438-430-1, paras. 250-51 (5 Sept. 1989); Houston Contracting Company and National Iranian Oil Company, et al., Award No. 378-173-3, paras. 478-79 (22 July 1988) reprinted in 20 Iran-U.S. C.T.R. 3, 128; Sylvania Technical Systems, Inc. and Government of the Islamic Republic of Iran, Award No. 180-64-1, pp. 35-38 (27 June 1985), reprinted in 8 Iran-U.S. C.T.R. 298, 323-24; Electronic Systems International, Inc. and Ministry of Defense of the Islamic Republic of Iran, Award No. 430-814-1, para. 63 (28 July 1989). Taking into account that D&R prevailed in all claims, while none of the counter-claims was successful, the Tribunal finds that costs should be awarded to D&R in the amount of $45,000.

XII. AWARD

387. For the foregoing reasons,

THE TRIBUNAL AWARDS AS FOLLOWS:

(a) The Respondent THE KHUZESTAN WATER AND POWER AUTHORITY is obligated to pay to the Claimant DEVELOPMENT AND RESOURCES CORPORATION the sum of Three hundred seventy-three thousand nine hundred and two United States Dollars and Thirty-five Cents (U.S.$373,902.35), plus simple interest at the rate of 10 percent per annum (365-day basis) from 1 May 1979 up to and including the date on which the Escrow Agent instructs the Depositary Bank to effect payment out of the

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Security Account; the sum of One hundred eighty-eight thousand six hundred eighty-seven United States Dollars and Forty-four Cents (U.S.$188,687.44), plus simple interest at the rate of 10 percent per annum (365-day basis) from 15 June 1979 up to and including the date on which the Escrow Agent instructs the Depositary Bank to effect payment out of the Security Account; and the sum of Three hundred twenty-one thousand four hundred nineteen United States Dollars and Fifty-five Cents (U.S.$321,419.55), plus simple interest at the rate of 10 percent per annum (365-day basis) from 9 August 1979 up to and including the date on which the Escrow Agent instructs the Depositary Bank to effect payment out of the Security Account;

(b) The Respondent THE STATE ORGANIZATION FOR ADMINISTRATION AND EMPLOYMENT is obligated to pay to the Claimant DEVELOPMENT AND RESOURCES CORPORATION the sum of Two hundred fifty thousand United States Dollars (U.S.$250,000), plus simple interest at the rate of 10 percent per annum (365-day basis) from 1 April 1979 up to and including the date on which the Escrow Agent instructs the Depositary Bank to effect payment out of the Security Account;

(c) The Respondent THE MINISTRY OF ENERGY is obligated to pay to the Claimant DEVELOPMENT AND RESOURCES CORPORATION the sum of Two hundred sixty thousand nine hundred eighty-three United States Dollars and Fifty-eight Cents (U.S.$260,983.58), plus simple interest at the rate of six percent per annum (365-day basis) from 1 September 1979 up to and including the date on which the Escrow Agent instructs the Depositary Bank to effect payment out of the Security Account;

(d) The Respondent THE MINISTRY OF AGRICULTURE is obligated to pay to the Claimant DEVELOPMENT AND RESOURCES CORPORATION the sum of Ninety-one thousand one hundred fifty-five United States Dollars and Thirty-five Cents (U.S.$91,155.35), plus

simple interest at the rate of 10 percent per annum (365-day basis) from 15 June 1979 up to and including the date on which the Escrow Agent instructs the Depositary Bank to effect payment out of the Security Account;

(e) The Respondent THE NATIONAL IRANIAN OIL COMPANY is obligated to pay to the Claimant DEVELOPMENT AND RESOURCES CORPORATION the sum of Twenty-five thousand United States Dollars (U.S.$25,000), plus simple interest at the rate of 10 percent per annum (365-day basis) from 1 July 1979 up to and including the date on which the Escrow Agent instructs the Depositary Bank to effect payment out of the Security Account;

(f) The Respondents THE KHUZESTAN WATER AND POWER AUTHORITY, THE STATE ORGANIZATION FOR ADMINISTRATION AND EMPLOYMENT, THE MINISTRY OF ENERGY, THE MINISTRY OF AGRICULTURE and THE NATIONAL IRANIAN OIL COMPANY are obligated to pay to the Claimant DEVELOPMENT AND RESOURCES CORPORATION the aggregate sum of Forty-five thousand United States Dollars (U.S.$45,000);

(g) The Escrow Agent is requested to calculate the amounts due under this Award and to instruct the Depositary Bank to make payment out of the Security Account of the amount due to DEVELOPMENT AND RESOURCES CORPORATION;

(h) The above obligations 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;

(i) All counterclaims of the Respondents THE KHUZESTAN WATER AND POWER AUTHORITY, THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN, THE STATE ORGANIZATION FOR ADMINISTRATION AND EMPLOYMENT, THE MINISTRY OF ENERGY, THE MINISTRY OF

AGRICULTURE, THE NATIONAL IRANIAN OIL COMPANY, THE MINISTRY OF ECONOMY, AND THE BANK MARKAZI are dismissed.

388. This Award is hereby submitted to the President for notification to the Escrow Agent.

Dated, The Hague
25 June 1990

Gaetano Arangio-Ruiz
Chairman
Chamber Three

In the name of God

Charles N. Brower

Parviz Ansari Moin

Dissenting in part
Concurring in part