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** CONCURRING OPINION of _____

- Date _____

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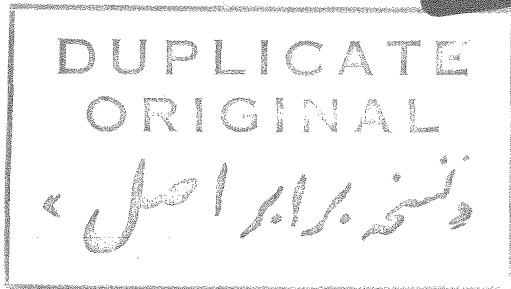
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CASE NO. 120

CHAMBER TWO

AWARD NO. 239 -120-2

CHAS T. MAIN INTERNATIONAL, INC.,
Claimant,

and

KHUZESTAN WATER AND POWER AUTHORITY
and THE MINISTRY OF ENERGY OF THE
ISLAMIC REPUBLIC OF IRAN,

Respondents.

IRAN UNITED STATES CLAIMS TRIBUNAL		دادگاه دآوری دعاوی ایران - ایالات متحده	
ثبت شد - FILED			
Date	20 JUN 1986	تاریخ	
	۱۳۶۵ / ۲ / ۲۰		
No.	120	شماره	

AWARD

Appearances:

For Claimant:

Ms. Carol Goodman
Mr. Dennis Harkawik,
Attorneys for
Claimant
Mr. R.W. Kwiatkowski,
Vice President
Mr. C.P. Benziger
Mr. G.A. Kiersch
Mr. H. Kreuzer,
Witnesses

For Respondents:

Mr. Mohammad K. Eshragh,
Agent of the Islamic
Republic of Iran
Mr. Akbar Shirazi,
Legal Advisor to the
Agent
Mr. Bahman Jazayeri
Mr. Esmail S. Nobari,
Technical Represen-
tives of KWPA
Mr. Sadegh Ale Mohammad,
Attorney for KWPA
Mr. Mohammad H. Shiravi,
Representative of
KWPA

Also Present:

Mr. John Crook,
Agent of the United
States of America
Mr. O. Rambert
Mr. J.P. van Rossem,
Appointed Experts

I. THE PROCEEDINGS

1. This Case involves Claims by a consulting engineer for payment for preparatory work performed for the planned construction of a second powerhouse at the Karun River Dam, a project called RSK II. An earlier stage of the proceedings in this Case resulted in Interlocutory Award No. ITL 23-120-2 of 27 July 1983. That Award found jurisdiction and held that the Respondent KHUZESTAN WATER AND POWER AUTHORITY ("KWPA") was in breach of contract by refusing to pay for work performed by CHAS T. MAIN INTERNATIONAL, INC. ("the Claimant"), that was within the scope of the contract between the Parties, a contract the Tribunal found to be based upon the combination of a letter issued to the Claimant by KWPA in July 1978 and later ratification by KWPA of services provided by the Claimant beyond the scope of that letter. The Parties had negotiated a draft final contract that was never signed by KWPA.

2. The Award also determined that two experts were to be appointed. Expert No. 1 was to give his opinion on:

1. the items of work performed by the Claimant which, according to standards of good engineering practice, were both necessary for the performance of consulting engineering services on RSK II and were performed adequately and accurately, . . .

2. the amount of time and category of employee which, according to the standards of good engineering practice, would have been necessary to complete such work given the nature of the work and the conditions under which it had to be performed.

Expert No. 2 was to give his opinion on:

1. the fees to which the Claimant is entitled for such work. Such fees shall be arrived at by applying, to the amount of time and category of employee claimed by the Claimant, limited as required by the findings of Expert No. 1, the payment rates contained in Sections 1(a), 1(d) and

1(g) of Appendix III of the draft contract between the Claimant and KWPA....

3. The Parties failed to come to agreement on the choice of the two experts, so the Tribunal, by Interlocutory Award No. ITL 35-120-2 of 16 March 1984, appointed Mr. O. Rambert of Switzerland as Expert No. 1 and Mr. J.P. van Rossem of the Netherlands as Expert No. 2.

4. The two Experts examined the relevant documents and held meetings with representatives of both the Claimant and KWPA in The Hague (19 July 1984) and Boston (23-25 July 1984). The Report of the Experts was filed on 19 November 1984. The Claimant's comments on that Report were filed on 15 April 1985 and KWPA's comments were filed on 21 June 1985, with addenda filed on 23 and 29 July 1985. A Hearing, in which the Claimant, KWPA, and the two Experts participated, was held on 7 and 8 April 1986.

II. THE ISSUE

5. As noted in Interlocutory Award No. ITL 23-120-2 of 27 July 1983, the Claimant submitted invoices for its work in the total amount of U.S.\$2,134,032. Those invoices covered the period from the letter of authorization (17 July 1978) to the date of receipt of a telex ordering cessation of work (14 May 1979) and subsequent "pack-up" work in the summer of 1979. During the period from 17 July 1978 to 12 December 1978, the Claimant worked on the project both in Iran and in the United States. The last of the Claimant's employees to leave Iran departed on 12 December 1978. The departure from Iran of the Claimant's personnel was caused by living and working conditions in Iran related to the Islamic Revolution which the Tribunal found "made it impossible for the Claimant's employees to continue working there.", Interlocutory Award No. ITL 23-120-2, p. 6 (27 July 1983).

Subsequent to 12 December 1978, all of the Claimant's work on the RSK II project was done in the United States.

6. Expert No. 1 expressed the opinion that the Claimant should have stopped work on 28 December 1978, the end of the accounting period in which the last employee of the Claimant left Iran. This opinion is based upon the Expert's conclusions that the effective severance of communication between the Claimant and KWPA after December 1978 and the unavailability of concrete geological information on the alternative sites for the powerhouse, information which was to have been obtained through the incompleting drilling program, meant that work performed in 1979 "could not be performed adequately and accurately" and therefore "was no longer done in accordance to the standards of a good engineering practice."

7. Using that opinion of Expert No. 1, Expert No. 2 examined the invoices and the applicable standards of the draft contract and concluded that the Claimant is entitled to U.S.\$1,225,464.55.

8. At the Hearing and in its comments to the Experts' Report, the Claimant objected to Mr. Rambert's finding that work done by it after 28 December 1978 was not compensable. The Claimant argued that the Expert's findings were based on the premises that there was insufficient communication between it and KWPA and that since the geological drilling campaign was discontinued in December 1978 all work on the project should have been suspended whether or not the Claimant's continuation of work depended on the results of the drilling campaign. The Claimant suggested that many items of the work it performed in 1979 did not depend on the drilling campaign as these related to the remedying of deficiencies at RSK I powerhouse, the electrical engineering and system study work, and the betterments and improvements to the existing powerhouse and dam. The Claimant presented

expert testimony at the Hearing to attest that when the Claimant left Iran in 1978, all field studies and investigations, except for the drilling program, were completed and that at the time the drilling program was interrupted it had generated sufficient data so that the Claimant's work involving the conceptual design of the RSK II powerhouse could continue in Boston. The Claimant further argued at the Hearing that the geological data available in 1979 provided a sufficient basis for the conceptual design of an above-ground plant at the site selected by the Claimant, which site avoided all the geological or hydraulic problems presented by the other sites. The Claimant clarified at the Hearing that the rationale for the drilling program was to cut down the price of the bids and the results thereof were only necessary before the tender documents were sent to the bidders. It also emphasized that the urgency of the project was critical in its decision to continue work despite the incomplete geological data available.

9. The Claimant has further argued that it was obligated by its contract and by the standards of good engineering practice to continue its work on what had always been considered a most urgent project until the moment its client, KWPA, ordered it to stop. The Claimant contends that stopping work in December 1978 would have required it to predict the course and outcome of the Islamic Revolution and the future desires of KWPA. It argues that force majeure, frustration of purpose, and impossibility of performance did not operate to discharge it since all the field studies and investigations for the conceptual design were completed by December 1978 and it was bound to continue performance in Boston until termination.

10. As to Mr. Rambert's conclusion that the Claimant kept KWPA insufficiently informed of the work it was performing, the Claimant contends that such a conclusion goes contrary

to the Tribunal's decision in its Interlocutory Award that KWPA was sufficiently informed of the Claimant's work. The Claimant therefore considers that it is entitled to be paid for the work which it performed in 1979.

11. The main thrust of the Respondents' position on the Experts' report is that since the terms of reference of the Experts required them to express their opinion on whether the Claimant's work had met the "standards of good engineering practice" and whether that work was both "necessary" and was performed "adequately" and "accurately", that the Experts had only judged one narrow portion of the work as complying with those standards -- the electrical engineering work performed through 1978. According to the Respondents, the Experts arrived at the conclusion that in all other instances the work was either unnecessary, inaccurate, inadequate, or had a nil practical value for KWPA, and therefore did not conform to the standards of good engineering practice. To the extent that work prior to 28 December 1978 was considered by the Respondents as unnecessary, inaccurate, inadequate, or of nil value, they requested the Tribunal to deduct the amounts from the invoices.

12. At the Hearing, Mr. Rambert confirmed the view expressed in his report that the work which the Claimant carried out in 1979 could only have been undertaken in close collaboration with KWPA in order to correspond with good engineering practice and further that such work could not have been adequately carried out without the basic results of various geological investigations. In his view, an engineering consultant has to stop work if an indispensable basis for such work -- like the result of the drilling program -- is not available. Mr. Rambert considered the drilling program as the most important ingredient in the determination of the choice of the type of powerhouse, its location, and its capability. The Expert maintained his conclusion that the Claimant's work in 1979 was not

compensable, stating that while he was aware that not all of the work performed by the Claimant during 1978 was satisfactory, at the same time, not all the work performed in 1979 was unsatisfactory, he drew the line at December 1978, since on the basis of the evidence he did not have sufficient information to determine what items of work were valid or invalid and the early start approach of the Claimant conflicted with KWPA's preference for a turn-key approach. It was conceded that the line drawn at 28 December 1978 was somewhat arbitrary but the Expert considered that since the Claimant knew that it did not have the basis on which useful work could be undertaken, it should have stopped work in December 1978, the time when the indispensable close contact between the Owner and the Engineer for all practical purposes ceased, and waited until it had the results of the geological study as well as the ongoing input of KWPA.

III. REASONS FOR THE AWARD

13. Review of the evidence in this Case reveals that work on the RSK II project suffered from a number of serious problems which must be kept in mind while evaluating the Claim. KWPA was preoccupied with two concerns that produced real and often conflicting pressures. These concerns were, first, to obtain a fixed price, no-claim contract for construction of RSK II which would avoid the extra and escalating costs KWPA had been forced to pay for construction of the Karun Dam and the first powerhouse and, second, to ensure completion of the project in the minimum possible time in order to provide a "spinning reserve" power capacity essential to prevent system collapse during the early 1980s when it was anticipated that the first two units of the Bushehr nuclear power plant would begin operation and when newly constructed transmission lines would create a nation-wide, interconnected power system. During the course of the Claimant's work in 1978, it was frequently reminded

by KWPA of both the urgency of the project and the no-claim contract requirements.

14. The Tribunal, after having heard the Parties and the Experts and after having considered the evidence before it, is satisfied that the Claimant's work in 1979 was not in compliance with the standards of good engineering practice. Most of the remaining intermittent communication of the Claimant was conducted with Mahab, with whom it was associated, and not with KWPA, the Owner. This lack of communication between the Claimant and KWPA after December 1978, in view of the revolutionary events in Iran at the time, should have caused the Claimant to slow down its work since the inadequate information and communication with KWPA would result in work which would be of no practical use to the Owner as it only represented a theoretical or academic solution and not a practical and realistic one which could only be elaborated in close co-operation with the Owner. The work was therefore inadequate and inconsistent with the standards of good engineering practice.

15. The urgency of the project is one of the justifications advanced by the Claimant for continuing its work in 1979 in the absence of both meaningful contact with KWPA and of important geological data. While KWPA's sense of urgency was made clear at the beginning of the project, it had lessened by September 1978. The Claimant's notes of an important meeting between the top management of both Parties on 13-14 September 1978 reflect a considerably lengthened timetable and states that "[a]llthough important, time is no longer the overriding consideration it was as recently as two weeks ago." Moreover, with the onset of increased civil disturbances and strikes in December 1978 and January 1979, it should have become apparent to the Claimant that the Bushehr and transmission line projects were delayed, at the least, and that the RSK II project therefore could also safely be delayed.

16. The Tribunal also notes the significance which the Claimant gave to the geological program until the departure of its personnel in December 1978. The critical nature of the drilling program was recognized explicitly in the Claimant's notes of the 13-14 September meeting, where it was stated that it would be expedited by KWPA. The drilling program was important in at least two ways, i.e., first, to provide solid evidence of the geological suitability of the site to be chosen for construction of the powerhouse and related facilities and, second, to reduce the risks to be assumed by the construction contractors and thereby lower the cost to KWPA of a fixed price, no-claim contract. In September 1978, the Parties agreed upon a timetable calling for completion of the drilling program by 15 February 1979; however, KWPA's subsequent contractual arrangements with a drilling company were inadequate to meet any such schedule. While a single rig was placed in operation and worked 24 hours a day, six days a week until late December 1978, it completed only 5 drillholes out of a projected 60. Also, no holes were drilled at the site preferred by the Claimant, at least partly because KWPA's surveyors went on strike before the proper locations could be marked. Nevertheless, despite the absence of this drilling information, which the Claimant in September 1978 had termed "critical", it proceeded to complete its Report on Site Selection in February 1979 and its architectural and other conceptual design in accordance with the September 1978 agreed schedule of events. Further, the Claimant selected a site without reference back to KWPA, whose agreement with the selected site was indispensable. The Claimant's draft tender documents would have protected KWPA from claims by placing geological risks on the construction contractor, however, the absence of the drilling data would inevitably have resulted in higher prices because of the unknown risks.

17. The Tribunal is satisfied with the Expert's view that the comparability of the bids or a conceptual design could

not have been achieved without the necessary geological data and close and continuous co-operation with the Owner. The Claimant's decision to proceed with its work after leaving Iran and to select a site without the KWPA's consent, knowing the importance of collaboration with the Owner, meant that it did so at its own risk. The work done in 1979, conducted in a vacuum, was of limited theoretical value, its practical utility to the KWPA being nil. Although some of the work performed by the Claimant before the end of December 1978 might only have been of limited use to KWPA, the Tribunal, based on the evidence before it, holds that such work was basically performed adequately and accurately and according to standards of good engineering practice. The Tribunal recognizes the difficulty in drawing any firm line after which date the work done by the Claimant could be considered of no value and, to the extent that such a line would be arbitrary since the premises on which both Parties operated were different, it concurs in awarding the amount determined by the Experts as the Claimant's entitlements -- U.S.\$1,225,464.55.

IV. INTEREST

18. In order to compensate the Claimant for the damages it has suffered due to delayed payments, the Tribunal considers it fair to award the Claimant simple interest at the annual rate of 11½ per cent on the unpaid amount found due on its invoices from 28 December 1978.

V. COSTS

19. In the course of the proceedings in this Case, the Claimant was required to advance U.S.\$ 52,500 against the cost of the Experts appointed by the Tribunal. The actual cost has amounted to U.S.\$52,417.95, leaving a balance with

the Tribunal of U.S.\$82.05. The services of the Experts were required primarily because of the technical complexity of the work performed by the Claimant. In the circumstances of this Case, the Tribunal believes these costs should be borne equally by the Claimant and KWPA. The remaining balance with the Tribunal of U.S.\$82.05 should be paid to the Claimant.

VI. AWARD

20. For the foregoing reasons,

THE TRIBUNAL AWARDS AS FOLLOWS:

(a) The Respondent, KHUZESTAN WATER AND POWER AUTHORITY, is obligated to pay the Claimant, CHAS. T. MAIN INTERNATIONAL, INC., One million two hundred twenty-five thousand four hundred sixty-four United States Dollars and fifty-five cents (U.S.\$1,225,464.55), plus simple interest at the rate of 11½ per cent per year (365-day basis), calculated from 28 December 1978 to the date on which the Escrow Agent instructs the Depositary Bank to effect payment out of the Security Account, plus the sum of Twenty-six thousand two hundred eight United States Dollars and ninety cents (U.S.\$26,208.90) as partial costs of expert advice.

(b) These obligations shall be satisfied by payment out of the Security Account established by paragraph 7 of the Declaration of the Government of the Democratic and Popular Republic of Algeria of 19 January 1981.

(c) With respect to all costs other than the costs of expert advice, each Party shall bear its own costs of arbitration.

(d) The Secretary-General of the Tribunal shall pay to the Claimant, CHAS T. MAIN INTERNATIONAL INC., the sum of Eighty-two United States Dollars and five cents (U.S.\$82.05)

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

Dated, The Hague

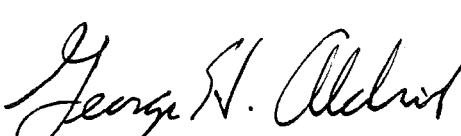
20 June 1986



Robert Briner
Chairman
Chamber Two

In the name of God,



Hamid Bahrami-Ahmadi
Concurring in part,
Dissenting in part
See separate opinion

George H. Aldrich
Concurring Opinion