

173-192

STATES CLAIMS TRIBUNAL

دیوان دآوری دعادی ایران - ایالات متحدہ

192

ORIGINAL DOCUMENTS IN SAFE

Case No.

173

Date of filing:

22 July 88

** AWARD

- Type of Award _____

- Date of Award _____

_____ pages in English

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** DECISION

- Date of Decision _____

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** CONCURRING OPINION of*and Dissenting*
Judge Brower

- Date

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DUPLICATE
ORIGINAL

نسخہ برابر اصل

HOUSTON CONTRACTING COMPANY,
Claimant,

and

NATIONAL IRANIAN OIL COMPANY,
NATIONAL IRANIAN GAS COMPANY and
THE ISLAMIC REPUBLIC OF IRAN,
Respondents.

CASE NO. 173

CHAMBER THREE

AWARD NO. 378-173-3

IRAN UNITED STATES CLAIMS TRIBUNAL	دادگاه دآوری دعاری ایران - ایالات متحدہ
شیت شد - FILED	
Date	22 JUL 1988
	تاریخ ۱۳۶۷ / ۴ / ۲۱

CONCURRING AND DISSENTING OPINION OF JUDGE BROWER

1. I concur generally in the Award's findings regarding jurisdiction; in its conclusion that the Claimant is entitled to a substantial monetary recovery for work it performed under the four oil and gas pipeline contracts; in its conclusion that NIOC and NIGC are entitled to monetary recoveries on the counterclaims for capacity tests under the Esfahan-Rey Contract and for unpaid guard salaries under the Gach Saran Contract; and in its dismissal of other counterclaims. For these reasons, and in order to form to such extent the majority necessary to an award, I concur in the present Award.

2. I write separately nonetheless because I disagree with some of the Award's conclusions regarding the Claimant's right to recover funds under three of the four contracts at issue and in its findings concerning NIOC's counterclaims for design defects in the cathodic protection system and the Ghom pressure station under the Esfahan-Rey contract and NIGC's counterclaim for radiographic services under the Tehran Spur Contract.

3. In addition, I strongly disagree with the Award's findings as to HCC's claim for the expropriation of its equipment left in Iran. By concluding that HCC has failed to establish a taking of all of its property as of November 1979 and has failed to demonstrate attempts to retrieve its property thereafter, I believe that the Award does not give adequate weight to the evidence in the record supporting such a taking and creates an incorrect standard of proof for such a claim.

I. ESFAHAN-REY CONTRACT

A. Claim for Supplied Materials Letter of Credit

4. The Award dismisses HCC's claim for U.S.\$207,696.41 alleged to be owed by NIOC under the letter of credit it secured for payment of eighty percent of Part B of the Esfahan-Rey Contract. The basis for the Award's conclusion is its finding that Clause 108.2 of the Particular Conditions of the Contract, covering payment for the supply of materials under Part B and providing a letter of credit as the means of payment, implied that the "lump sum contract price was to be adjusted in accordance with the value of the materials actually supplied." (Para. 91.) According to the Award, this implication is supported by the fact that "the final costs of materials could not be known at the time of the Tender," *id.*, and that Clause 48b of the Particular Conditions provided an "elaborate mechanism" for adjusting the price of materials imported under Part B. Since HCC completed the contract without drawing down the full amount of the letter of credit, the Award posits that HCC either did not ship all the materials required under the Contract or it was able to do so at a total cost less than originally expected. In any event, the Award finds that the implied language in Clause 108 would reduce the contract price.

5. In my view this analysis constitutes nothing less than an amendment to the terms of the Contract agreed upon by the Parties and fully executed by HCC, as established by the Final Certificate issued to HCC on 1 September 1979. The contract by its terms was for a lump sum of rials 7,395,537,000. This lump sum was broken down by parts of the Contract, the price for Part B being expressly stated therein to be rials 3,039,167,000 (U.S.\$44,595,260.45 at the exchange rate of rials 68.15 to the dollar). The mere fact that the Contract, in particular Clause 108, provided for payment to be accomplished under a letter of credit in no way implies that HCC was not entitled to the full contract price agreed upon by the Parties, let alone that an automatic adjustment was to be made to the price if not completely drawn down. Indeed, the portions of the contract which set forth the contract price (see Appendix "H" to Addendum No. 1 of Tender Documents at III/ii/1; Form of Agreement at IV/vii/3) make no reference to Clause 108 as affecting the amounts therein stated.

6. The fact that final costs could not have been known at the time of the Tender in no way affects the Parties' express agreement on the base price for Part B and forms no basis to infer that the contractual price was only conditional. Indeed, contrary to the assertion in the Award, the fact that Clause 48b of the Particular Conditions provided such an "elaborate mechanism" for increasing the price of Part B, such increases having to be invoiced to, and expressly approved by, NIOC, and provided no parallel method for reducing the contractual price strongly implies that the Parties did not intend for such reductions to be made.

7. Rather than being established to create a sliding scale of payment under Part B, the letter of credit was established as the most convenient form of payment to HCC in the United States. Unlike the other two parts of the Contract, Part B was to be paid only in United States dollars and was

for materials shipped from the United States to Iran. It seems obvious that a convenient form of payment in the United States for an expense that HCC would incur there would be a letter of credit opened at a United States bank. It is common knowledge in the field that this indeed is an often used form of payment under many forms of international contracts, including international construction contracts.¹

8. On balance, therefore, because HCC performed all of its obligations under Part B of the Contract, I would have found that it is entitled to the entire lump sum price agreed upon when the Contract was executed.

B. NIOC's Counterclaim for Defects in the Cathodic Protection System

9. The Award finds merit in NIOC's counterclaim for HCC's failure to provide space for a back-up diesel engine at each cathodic protection station. In reaching this conclusion the Award relies upon Clause 7 of the General Conditions of the Contract, which provided that HCC would be responsible for any "discrepancies, errors, or omissions in the drawings and other particulars" even if "such drawings and particulars have been approved by [NIOC]." The Award finds that HCC's failure to provide such space constituted a design defect on the basis of Clause 22 of the General Conditions, which provided, as the Award states, that all work was to be

¹Indeed, the Award's analysis conflicts with its finding on NIOC's counterclaim for repair work at the Ghom Pressure Reducing Station. There the Award finds that the Parties' method of administering the arrangements for payment of the work, i.e., having HCC pay Snamprogetti-Saipem for the work, did not affect HCC's underlying obligations to pay NIOC for that work. (Para. 107). Here, however, the Award finds that the Parties' method of administering the payments under Part B of the Contract alters the underlying obligations of the Respondent.

carried out "to the satisfaction of [NIOC]." While this defect was not mentioned in the 29 September 1977 Completion Certificate, the Award concludes that this alone would not release HCC from liability since Clause 18.1 of the Pipeline Construction Specifications provided for the cathodic protection system to be tested just prior to the termination of the Remedy of Defects Period. The Award thus awards NIOC rials 10,000,000, the amount allegedly spent to design and install the additional space.

10. This conclusion misinterprets and misapplies the applicable clauses of the Contract. The issue to be resolved on this counterclaim is whether the failure of HCC to provide room for the installation of two generators at each station (instead of one) constituted a design error or an omission under Clause 7 of the General Conditions. Based on the evidence in the record I would have concluded that this failure did not constitute such a defect or omission. The 20 September 1977 Completion Certificate expressly confirmed that the "complete" cathodic protection system was installed properly in accordance with the Contract absent a list of items yet outstanding which HCC was obligated to complete. Nowhere on this list did NIOC mention the need to provide additional space for back-up generators. In my view, if a defect or omission of such an evident nature had been perceived, it certainly would have been included on this list. The logical explanation for NIOC's subsequent demand for the additional space is that NIOC later concluded that the system would be more secure if the additional generators could be installed. This demand, however, does not reflect an omission or error within the contemplation of Clause 7, but rather suggests that NIOC wished to add an additional "option" to the project. That being the case, any additional expenses incurred due to this option would be for the account of NIOC.

11. The Award's disregard of the 20 September 1977 Completion Certificate on the basis of the later contractually provided date for the "testing" of the cathodic protection system misses the point and ignores the language of the certificate itself. The certificate not only certified that the cathodic protection system had been completed by that date but also that it had "passed the Tests prescribed in the Contract" and was "ready for commissioning." Consequently, by 20 September 1977 the cathodic protection system had been tested and no defect had been found. The "testing" to be performed "just prior to the termination of the one year Remedy of Defects Period" referred to in Clause 18.1 of the Contract Specification, and which the Award relies upon to find the completion certificate inconclusive, only is a "cathodic protection ground survey" and does not suggest that the system had not been tested previously. Indeed, Clause 18.4 of those same specifications, entitled "Testing," stated that any defect in the cathodic protection system found in the testing of the system was to be repaired "during the maintenance period," the period that started just after the 20 September 1977 Completion Certificate was issued. This strongly implies that testing of the system would have been performed prior to the ground survey discussed in Clause 18.1. Given these facts, I would have found the completion certificate to be conclusive proof that a defect did not exist.

12. Even assuming that the completion certificate was not conclusive evidence of the lack of a defect, the Award, in finding a defect to exist purely on the basis of the requirement of Clause 22 of the General Conditions that work be performed to the satisfaction of NIOC, misreads that provision. In full context that provision states that all work was to be done "in the manner set out in the Specifications" or "where not so set out to the satisfaction of the Engineer." It further states that "all the work on Site shall be carried out in accordance with such reasonable

directions as [NIOC] may give." Thus, if work was set out in the Specifications, the standard to be followed was that of "reasonable directions" from NIOC and not the more stringent standard of "the satisfaction of [NIOC]." Here the Specifications included in some detail the cathodic protection system. See Contract Specifications at VIII/ii/25-28. Thus, the standard to be applied to work on that system was that of "reasonable directions." In this regard NIOC has not substantiated that its position was reasonable, submitting only the opinion of its own legal department that a defect existed. It has provided no independent expert testimony regarding proper international standards for the construction for such systems.² As it here is in the position of counterclaimant, it is NIOC's burden to prove its case.

13. On balance I would have dismissed this counterclaim on the ground that NIOC has not established that there was a defect or omission in the system.

C. Defects at the Ghom Pressure Reducing Station

14. The Award also finds merit in NIOC's counterclaim for amounts allegedly paid to Snamprogetti-Saipem, an Italian company, for additional work in correcting a defect in the part of the system known as the Ghom Pressure Reduction Station. In finding this to be a debt owed by HCC to NIOC the Award determines that, since HCC under normal circumstances would have been required to compensate NIOC for this additional work, the method of payment agreed upon by the

²The Award's conclusion that "it seems reasonable . . . that the space allocated in the design to one unit may not be sufficient to allow proper access to two such units" (Para. 97) is conclusory and not based on any evidence in the record. Furthermore, while such a request may be reasonable, it does not mean that the failure to provide such space is a defect in the system.

Parties, i.e., for the Italian contractor to invoice HCC for the charges through NIOC, should not operate to release HCC from its underlying obligation to bear these costs. The Award thus grants NIOC rials 5,873,356, the amount invoiced by the Italian contractor to HCC and allegedly paid by NIOC.

15. The Tribunal should have dismissed this counterclaim for lack of jurisdiction on the ground that NIOC is asserting the claim on behalf of a third party not eligible to be a party to this proceeding. The only evidence of an obligation is the 5 February 1980 minutes which expressly stated that "Saipem will carry out the work in co-ordination with [HCC] and invoice any additional work through NIOC to Houston." This clearly spells out that the debt was owed, if at all, to Snamprogetti-Saipem and not to NIOC.³ Indeed, as pointed out in the Award the invoice forwarded to HCC for payment was a Snamprogetti-Saipem invoice and not a NIOC one and in NIOC's cover letter of 17 February 1981 to HCC, attached to the invoice, NIOC directed HCC "to arrange for the payment of this invoice to Snamprogetti-Saipem." (Emphasis added.) Thus, if NIOC did indeed eventually pay this invoice, it did so at its own risk and may not now assert a claim for a debt truly owed to another.⁴

³It is irrelevant the Snamprogetti-Saipem addressed the invoice to NIOC since this was the agreed upon method of invoicing HCC. It thus does not suggest that Snamprogetti-Saipem looked to NIOC as the debtor.

⁴There also is no evidence in the record that NIOC actually has paid this invoice. Its only submission on this point is an internal communication, dated 20 August 1984, stating that payment to Saipem "was approved." In any event, and alternatively, any claim for payment based on that approval would fall outside our jurisdiction, which is limited to claims arising on or before 19 January 1981. Snamprogetti-Saipem did not even issue its invoice until 9 February 1981.

16. The Award's assertion that HCC under ordinary circumstances would have been liable for the additional work and thus the Parties' chosen manner of administering the debt should not affect its debt to NIOC is unfounded. The only evidence of a debt at all is the 5 February 1980 minutes. Without this evidence there would be no basis to conclude that HCC owed money for additional work performed by another contractor. If these minutes are adequate to establish the existence of a debt and an agreement by HCC to bear the costs of the work (as the Award finds) then they are adequate also to establish to whom the debt is owed.

II. GACH SARAN CONTRACT

A. Additional Work Claims

17. The Award grants HCC the sum of U.S.\$3,355,249.58 (net U.S.\$1,913,249.88 after subtracting monies paid on account) on its fifty-nine separate claims for additional work performed under the Contract. In reaching this figure the Award analyzes each of the claims separately, absent those which the Respondent admitted to be due, and dismisses the majority of HCC's claims for lack of proof. Its final figure for the claims is less than one-fifth of what HCC claimed for this work, U.S.\$18,399,315.

18. While I concur in many areas of reduction of the amounts claimed, the Award's analysis reduces the amount found due and owing to HCC to less than the amount authorized for payment to HCC under Payment Certificate 16. In that certificate, which was signed by representatives of Foster Wheeler and OSCO, to which NIOC is the successor in interest, the Respondent authorized a U.S.\$5,000,000 payment "on account" to HCC for additional work performed under the Contract. Of this authorized payment HCC received only U.S.\$1,442,000, the remaining U.S.\$3,558,000 being withheld

due to HCC's alleged abandonment of the Contract in December 1978.

19. The assumption, which is drawn from the Award's analysis of the claim, that the Respondent approved for payment an amount greater than that which it admitted was due to HCC seems to me to be unrealistic. Practically speaking, there were no advance payments to be made under this contract and the U.S.\$5,000,000 "on account" payment was specifically made for outstanding claims on work already performed. It is highly unlikely and in fact, according to Mr. White's testimony, unheard of in such a contract for an employer to approve for payment more than that which it believed due and owing for the work. Common sense suggests that this would be the case in such a situation.

20. Indeed, the evidence in the record establishes this point. In the Foster Wheeler close-out report on the Contract, which the Respondent submits with its pleadings, Payment Certificate 16 is described as a "recommended payment related to work valued by [HCC] at \$12 million . . . [but that] FW assessment supporting the recommendation totalled approximately \$5 million, and with escalation, \$6 million." The Respondent therefore had assessed the value of the work prior to approving Payment Certificate 16, which represented its assessment of the value of HCC's claims. For the Award, which reviews the claims some years after the work was performed and assessed by the Respondent, to assess the work at a figure less than that which the Respondent itself did at the time of the Contract is extremely unfair to HCC. In my view the Tribunal's assessment cannot fall below the figure agreed upon by the Parties to the Contract

as representing at least the minimum amount due for the additional work.⁵

21. With this overall criticism of the Award's handling of the fifty-nine claims, I now proceed to delineate some specific areas of disagreement with the Award's analysis of the individual claims.

1. Reduction for Hours Beyond Normal Ten Hour Workday Claimed as Standby Time

22. While finding merit in HCC's claims for standby time and delay concerning the delivery of pipe and explosives (Item 3), its civil crews (Item 7), its mechanical crews (Item 8), its work on the water supply system (Item 28), its welders (Item 42) and changes in the work permit system (Item 62), the Award reduces the amounts recoverable by the number of standby hours beyond the normal ten hour workday which HCC charged to NIOC. In reaching these conclusions the Award concedes that the need to compensate workers for hours beyond a normal workday while they were on standby "may have been a necessary factor for HCC to retain its workforce," yet concludes that "it is not a basis for full reimbursement from NIOC." (Para. 185).

23. To this conclusion I dissent. As the Award finds, the delays which caused these additional expenses and the need to put substantial portions of HCC's workforce on standby for extended periods of time were the result of failures on the part of NIOC and Foster Wheeler, NIOC's supervising

⁵ Obviously, to the Respondent the U.S.\$5,000,000 represented full payment and not a "minimum" amount for the outstanding claims since the figure was based on Foster Wheeler's assessment of the work. HCC, however, would claim this to be only a "minimum" amount due.

engineer, to provide HCC necessary materials in a timely manner and to coordinate and administer the project properly. At the Hearing Mr. Neil White, HCC's Contract Administrator for the project, testified that, when delays occurred and workers were put on standby, it was necessary nonetheless to compensate them on a standard twelve-hour day basis or they would have been lost to competing projects in the same labor market. Mr. White further testified that, due to the fact that the Gach Saran project was in the middle of the desert in a remote part of Iran, labor conditions and working hours had been settled prior to the workforce going to the project site. White also attested at the Hearing that Foster Wheeler was aware of the need for ensuring a twelve-hour workday and consented to it by having its Chief Inspector sign the time sheets for standby, which included these additional hours.

24. In light of this testimony and the fact that the time sheets reflecting the additional hours were signed by a Foster Wheeler representative, I am at a loss to comprehend the basis for the Award's conclusion that HCC's need to retain its workforce is not an appropriate basis upon which to compensate it for its losses. In my view, the fact that HCC incurred necessary expenses as a result of action or inaction on the part of NIOC's representative on the project, and NIOC, through the signature of its representative on the time sheets, recognized these delays as legitimate clearly furnishes an adequate basis for compensating HCC for its entire loss.

25. The Award's reference to Clause 8.8.3 of the Special Conditions, which provided that HCC was required to "minimise or eliminate extra costs" as a result of delay in the delivery of materials, is simply not applicable here. HCC in its post-performance report of the delays prepared by Mr. Neil White, and as documented in numerous correspondence to Foster Wheeler placed in the record, stated that to

minimize the extra costs caused by the delays it "delay[ed] the arrival of welding crews and manpower for pipeline activities." Indeed, this is implicit in the voluminous correspondence with Foster Wheeler during the period of delay. Besides this measure I simply do not understand what the Award expected that HCC should have, or could have, done, absent terminating its workforce and rehiring once the materials arrived. Stating the obvious, this would have increased costs under the Contract and indeed, according to Mr. White's undisputed testimony, would have been impossible.

26. The Award points to no evidence in the record, and indeed there is none, to substantiate its conclusions. The only evidence upon which its decision could be based is the affidavit and Hearing testimony of Mr. Peter Charles Becker, Foster Wheeler's Project Director for the Gach Saran project from its inception until December 1977. In his affidavit and at the Hearing Mr. Becker questioned the practice of paying overtime to workers who were "standing idle," and thus suggested that the charges were not sustainable. To credit the opinion of Mr. Becker on this project subsequent to his testimony at the Hearing, however, is in my view wholly inappropriate. During his testimony Mr. Becker had no recollection of any of the plethora of correspondence from HCC to him and other Foster Wheeler employees, dated during the time of work on the project and specifically addressing the issues of delay and standby. Indeed, at the Hearing it was discovered that Mr. Becker had been discharged from his position on the project by his employer in 1977 for reasons that he refused at the Hearing to state. What became painfully apparent from his testimony and the cross-examination by Claimant's counsel that followed was that Mr. Becker's performance in his position as Project Director might well have been a cause of the substantial problems and delays which plagued the project from its inception.

27. Given that no evidence exists to question HCC's need to compensate its workforce on the basis of a twelve-hour day or to question Foster Wheeler's recognition of this delay, I would have awarded the Claimant the full amount requested on the claims.

2. Delays Due to Lack of Pipe/Explosives (Item 3) and Standby of Civil Crews (Item 7)

28. While awarding substantial sums under both items, the Award significantly reduces the amounts HCC claims due by failing to award the sums requested for increased administrative costs, camp costs, warehousing costs and general services costs caused by the delays (Item 3 - Rials 115,585,016, Item 7 - Rials 30,470,000). The Award rejects these portions of the claims on the ground that they "are not evidenced by any supporting document or calculations" and that "the Tribunal is not convinced that they reflect additional expenses that would otherwise not have been incurred." (Para. 186).

29. The Award is correct that HCC has not supplied evidence, besides the White Report, to quantify its claims in this respect. However, in the context of these claims this is not a basis for the Award to conclude that no recovery is due for such costs. As alleged in the White Report, these costs, i.e., field management, field warehouse, camp operations, field general services and administration are "an essential part of a pipeline operation which must continue once started whether bending stringing, welding, etc. or any of the subsequent field operations are taking place." There is no evidence in the record to dispute this and it seems reasonable that these operations are integral and would be affected by delays in the Work Programme and substantial standby time.

30. Indeed, the Award is simply wrong in its statement that no evidence of these facts has been submitted. While no time sheets or invoices have been submitted, substantial correspondence between HCC and Foster Wheeler has been submitted establishing that considerable delay was being realized due to the Respondent's failure to supply necessary materials, that civil crews were being forced to go on standby as a result and that these problems were severely affecting HCC's work schedule. Consequently, a substantial delay was established and the affect on HCC's Work Programme became apparent.

31. The issue for the Tribunal thus becomes one of quantifying these increased expenses. While it is true that no time sheets or invoices or other raw data have been submitted, HCC does use the unit prices for such services as set forth in the Contract, where applicable. If this information was deemed inadequate by the Tribunal, I believe that it then should have arrived at its own equitable figure for HCC's increased expenses incurred due to this delay. The fact that there was delay and that such delay adversely affected HCC's Work Programme is established, the Award having found so in awarding amounts for other parts of these claims. Since HCC must have incurred additional administrative, supervisory and camp expenses due to this delay, it seems reasonable for the Tribunal to have set an equitable figure for the amount of these expenses to be reimbursed to HCC. Indeed, the Tribunal has used such an equitable approach in one instance under the Tehran Spur Contract. See Section III(B)(2)(d)(xiii).

32. Because such calculations are inherently somewhat arbitrary, to give the Respondent the benefit of HCC's failure to submit more detailed information I would use a conservative approach in reaching this figure. HCC has claimed such expenses of U.S.\$1,639,563.79 and U.S.\$432,198.53 under the two items for a total of U.S.\$2,071,702.37. Bearing in mind

this conservative approach and the fact that the delay for the period claimed has been established, in my view an award of U.S.\$500,000 on these items would have been proper.

3. Additional Civil Work on Manifolds (Item 57)

33. The Award dismisses HCC's claim for expenses incurred as a result of an increase in the civil works required on the manifolds on the ground that HCC did not "fully discharge[] its burden of proof in respect of this sizeable claim and the performance of the works." (Para. 223) In reaching this conclusion the Award nonetheless concedes that a four page handwritten memorandum entitled "Civil Remeasurement of Section 2 Manifolds," which HCC submits and claims to have been written by Foster Wheeler engineers and to be evidence of Foster Wheeler's agreement to a revaluation of the civil work by an additional U.S.\$2,515,000, was not rebutted by the Respondents.

34. While not much need be said about this claim, I feel compelled to question the Award's conclusion as to the Claimant's burden of proof in view of its finding on the Respondents' defense to this claim. HCC submitted two documents in support of its claim, the handwritten memorandum evidencing a remeasurement of the civil works in the amount already stated and a post-Project report authored by Mr. White further attesting to the amount due. In addition, at the Hearing Mr. White gave detailed testimony concerning the remeasurement, including asserting (which the Award apparently accepts as true) that Foster Wheeler engineers authored the handwritten report. Indeed, in the Foster Wheeler close-out report on the Contract, submitted as evidence by the Respondent, Foster Wheeler states that "there had been a remeasurement of the Civil Works on the manifolds carried out by Mr. White of Houston and FW prior to the end of 1978."

35. In view of NIOC's complete failure to rebut this evidence and the admission in the close-out report that such a remeasurement had been performed, I would have found that the Claimant adequately substantiated its claim. The handwritten memorandum, authored by Foster Wheeler, expressly provides that the revaluation of the civil works was in the amount here claimed. Coupled with the White report reaffirming the debt and Mr. White's testimony at the Hearing, I fail to see how HCC has not established a prima facie case for recovery. This being the case, I would have awarded the full amount requested for this portion of the claim.

4. Claims for Installation of Burn-off Pits (Item 70), Relocation of Flare Lines at GS-20 (Item 71), Installation of Crossing at M-21 (Item 79) and Installation of Burn-Pits (Item 80)

36. The Award dismisses these claims for the aggregate sum of U.S.\$548,618.85 on the grounds that the Claimant has not established that the work was performed at Foster Wheeler's request or that it was extra work not already provided for in the contract price or specifications. In each case the Claimant has submitted time sheets for the work, signed by a representative of Foster Wheeler, and the post-Project report prepared by Mr. Neil White attesting to the validity of the debt.

37. In light of this evidence I would have concluded that HCC has proven its claims adequately. Initially, time sheets signed by a Foster Wheeler engineer must be considered proof that the work was performed pursuant to Foster Wheeler's request, or at least that, once the work was performed, Foster Wheeler approved of it. As for the failure of HCC to establish that the work was not within the contract, it should be remembered that the Respondent never

contended that such work was covered by the contract price, but rather argued simply that the claim was never submitted to it, and that no evidence shows the work to have been performed to Foster Wheeler's satisfaction or that HCC was ordered to perform this work. NIOC's failure to argue that this work was within the contract specifications, in my view, thus is an admission that such work was not within the contract. At any rate, in light of Mr. White's testimony as to the validity of the debt in this regard and NIOC's failure to allege otherwise, there is certainly no basis for the Award to question the claims on this ground.

38. On balance, I would have awarded the Claimant the amounts requested.

5. Shutdown at GS 80 (Items 65) and Standby for Instrument Fitter (Item 96)

39. The Award rejects these two claims for the respective sums of U.S.\$2,372.34 and U.S.\$9,417.30 on the ground that "there is nothing to indicate that either Foster Wheeler or NIOC has been notified of a potential claim so as to satisfy the requirements of Clause 43(1) of the General Conditions." (Para. 240). Clause 43(1) provides that HCC was to notify the Respondent of any additional charges claimed "[w]ithin one month after any additional expense is incurred."

40. I would have awarded the sums requested for both of these claims. No evidence suggests that this formality was followed by the Parties during the course of the Contract. Indeed, the Award in relation to Clause 42 of the General Conditions, entitled "Contract Amendments," holds that such formalities were routinely not followed by the Parties. Thus to deny the Claimant at this late date its right to recover monies established from the record to be due on the basis of such a formality appears to be somewhat unreasonable. Even, however, if the Clause were said to apply, I

would have found that the signature of the representative of Foster Wheeler, which appears on each time sheet submitted to establish the debt, was proof that the Respondent was notified of HCC's claim for such funds.

6. Re-Stringing of Incorrectly Issued Pipe (Item 9), Additional Expense Incurred Due to P.U.-2 Road Closure (Item 59), Additional Concrete Backfill (Item 76), Additional Painting (Item 83) and Retest at Wellhead GS17 (Item 90)

41. The Award summarily rejects these claims for the aggregate amount of U.S.\$472,637.18 on the grounds that the documents in support of the claims show "crucial deficiencies" since "some appear incomplete or do not bear necessary signatures or authorizations." (Para. 179). As a result the Award concludes the HCC has failed to substantiate them adequately.⁶

42. Upon review of these five claims, I disagree with the Award's dismissal and as to four of them find the Award's dismissal to be inconsistent with its handling of evidence elsewhere. For the claims of restringing of incorrectly issued pipe, additional concrete backfill, additional painting and retest at wellhead GS17 the Claimant submitted time sheets signed by a representative of Foster Wheeler fully detailing the work claimed. In addition, as to items 76 and 83 HCC also submitted correspondence between the Parties reflecting the Respondent's obligation to pay such expenses and/or Foster Wheeler's order for the work to be performed. Given the signed time sheets reflecting that the work was performed and no allegation that such work was

⁶The Award does not deal with these claims separately. They appear on the list of nineteen claims it finds to be inadequately evidenced. (Para. 179).

within the original contract, I fail to see the basis for distinguishing these claims from those the Award finds reasonable to grant.

43. While the time sheets HCC submits for its claim for additional expenses incurred due to P.U.-2 road closure (item 59) are not signed, several documents submitted by HCC establish that the road was closed and that Foster Wheeler had agreed to consider HCC's additional costs as a result of this closure. In my view these letters between the Parties verify that which is on the time sheet and thus I believe the Award should have granted the amounts requested.

B. Retention Monies

44. I concur in the Award's disposition of HCC's claim for retention funds and the finding that Clause 52 of the General Conditions governs HCC's entitlements. In so holding, however, the Award neglects to grant HCC "reasonable demobilization expenses" to which Clause 52 states it is entitled. Since the Award finds Clause 52 to govern the rights of HCC it thus is obligated to calculate and award HCC an amount reflecting such expenses. While HCC has not briefed this issue, this is only because the Award rejected its retention claim analysis and invoked the Clause on its own volition. It therefore should be up to the Tribunal to arrive at an equitable figure for such expenses or give HCC the chance to submit evidence of such expenses.

III. TEHRAN-SPUR CONTRACT

A. Standby Due to Pipe Delivery Delays

45. The Award dismisses HCC's claim for U.S.\$765,034 in standby costs due to NIGC's failure to supply pipe in a timely manner on the grounds that HCC has failed "to prove

to the satisfaction of the Tribunal that the costs claimed relate to the additional cost of an extension of time for completion." (Para. 406). The Award relies upon Clause 17.1 of the Special Conditions of the Contract, which provided that "[i]f [NIGC] supplied pipe is not supplied such that [HCC] can work continuously [sic] and the time for completion is extended, the additional cost of such extension shall be borne by [NIGC]." While finding potential liability to arise from this clause, the Award nonetheless posits that, because HCC did not present evidence to link the extended dates on the Contract with this cause of delay, the contract provides no basis for a recovery.

46. I disagree. HCC's letter to NIGC dated 20 December 1978 submitted in support of this claim not only outlines the delay caused by the lack of pipe and the expenses HCC incurred from this delay but also states the "[t]he completion program for various stages of the project obviously must be extended because of these delays." (Emphasis added). Consequently, it is clear that the completion dates were extended due to these delays, thus invoking Clause 17.1 and NIGC's liability. In my view it is irrelevant that, as the Award points out, HCC has not submitted the revised work programme in order to determine the extent of the extension of the completion date caused by this delay. What is relevant to Clause 17.1 is whether the failure of NIGC to supply pipe in a timely manner caused HCC to extend its completion date. The December 1978 letter establishes this point.

47. Once established, therefore, NIGC became responsible for "the additional cost of such extension." The issue for the Tribunal is thus what were these additional costs. In my view the best evidence of the costs of this extension of the completion date is HCC's contemporaneous invoice for the cost of the delay itself. Obviously, any time during which HCC's workforce was on standby due to the lack of pipe is

work time that would have to be made up in the future and thus constitutes reasonable evidence of the costs incurred by HCC due to the extension of the completion date. Given that NIGC does not rebut these figures, I would have credited them.

48. I thus would have awarded HCC the full amount requested.

B. Counterclaim for Radiographic Services

49. The Award finds merit in NIGC's counterclaim for the payment of U.S.\$21,957.45 in radiographic services performed by NIGC. In support the Award refers to Clause 20 of the Special Conditions of the Contract, which provided that HCC was to supply "all radiographic equipment and services," and concludes that this clause raises a presumption that such matters were for HCC's account. The Award also refers to two internal NIGC memoranda reflecting the fact that such services were performed by NIGC and were assessed at the amount here claimed.

50. While I agree that Clause 20 made HCC responsible for the supply of radiographic services, I would have found the evidence submitted by NIGC in support of its counterclaim inadequate. Initially, it is clear from the memoranda that HCC was never billed for these services since both documents are internal NIGC correspondence and make no reference to notifying HCC of such charges. Equally as important, NIGC gives no indication as to what these radiographic services were, when they were performed and how the cost of such services was assessed.

IV. EXPROPRIATION CLAIM

51. While finding a taking of some equipment to have occurred, the Award nonetheless dismisses HCC's claim for the expropriation of its equipment on the ground that the record does not provide a basis for determining precisely the items of equipment expropriated. In reaching this conclusion the Award initially finds that in May 1979 members of the Ahwaz Revolutionary Committee took control of the Ahwaz equipment yard and seized a portion of the equipment at the yard for its own use. The Award, however, finds HCC's contention that after November 1979 the Revolutionary Committee ceased permitting HCC to export any of its equipment to be unfounded, given that HCC has provided no evidence of any attempts on its part to export the equipment subsequent to that date. In turn, the Award finds that the assertion of the taking of all of the equipment claimed "is contradicted by the detailed RFEs subsequently prepared by HCC in July 1979 and by the undisputed fact that HCC was able to export a substantial part of its equipment after May 1979." (Para. 470).

52. While I have numerous difficulties with this analysis of the claim, I am most concerned by what appears to be the rather sizable burden of proof which the Award places on HCC to establish its claim, a burden which in the context of the events of this Case is virtually impossible for HCC to meet. The Award's demand that HCC establish, inferentially by means other than affidavits and internal listings of equipment still in Iran, that the Ahwaz Revolutionary Committee prevented HCC from removing equipment from the yard subsequent to the May 1979 seizure and that such authorities prevented removal even after HCC had obtained export approval for a given item begs the question -- how? While I realize that HCC, as Claimant, has the burden of proving by a preponderance of the evidence the validity of its claim, I do believe that the circumstances of a case should impact on

the form of evidence required. The Award does not specify exactly what further evidence would be necessary for HCC to substantiate its Claim. Here, where the allegation is that local Revolutionary Committees simply took over an equipment yard at gun point and refused HCC's demands for the release of its equipment, it is difficult to envision what further evidentiary support could have been obtained, absent documentary evidence or statements emanating from the local Komiteh evidencing a takeover. Obviously, requiring such verification of the taking in order to establish the claim would be inherently unreasonable, leaving HCC's only option to be affidavits of those individuals most knowledgeable of its equipment in Iran.

53. Having stated the obvious, there is no doubt, and the Award concurs, that the Ahwaz yard was seized in May 1979 and some of HCC's equipment taken. Numerous communications from HCC to NIGC protesting this action during the summer of 1979 establish this point. It further is correct, as the Award points out, that NIGC permitted HCC to export some of its equipment after the seizure. Where I initially part company with the Award, however, is in its analysis of the events subsequent to November 1979 and the status of the equipment in Iran at that time. In my view the evidence establishes that at that point the Ahwaz Revolutionary Committee and that at Ali Abad had ceased permitting HCC to remove any more of its equipment for export and thus may be said to have deprived the Claimant of all of its remaining property in the yards. Following the precedent this Chamber set in Sedco, Inc and National Iranian Oil Company, Award No. ITL 55-129-3 (28 October 1985), reprinted in 9 Iran-U.S. C.T.R. 248, I thus would have regarded the date of taking as May 1979, the time of Iran's first definite interference with the rights of HCC.

54. As evidence of this point, HCC submits the affidavits of Mr. Nasser Esphahanian, a Senior Vice President for

Middle East Operations for HCC at the time of the taking, and Mr. J.W. Gully, then HCC's Equipment Manager, both intricately involved in the oversight of HCC's equipment during this time and both attesting to this series of events and Iran's refusal to permit further export of equipment. In addition, HCC submits a letter, dated 1 December 1979, from HCC to NIGC in which HCC noted that "[o]ur warehouse facility in Ahwaz, including our equipment, spare parts and supplies at that location, has been seized, and we are denied the use of same." (Emphasis added). This letter, dated immediately subsequent to the time that HCC claims its ability to retrieve any of its equipment ceased, is significant in that it is the first letter in which HCC asserts that all of its equipment at Ahwaz was seized. Finally, HCC submits the minutes of the 26/27 January 1980 meeting, which, as the Award concedes, "suggest that most, if not all, of the equipment remaining at Ahwaz was no longer under HCC's control, even if not actively being used by the Revolutionary Committee." (Para. 469).

55. In my view, this evidence establishes that as of November 1979 HCC was unable to retrieve any further equipment from its equipment yards in Ahwaz and Ali Abad. As mentioned previously, the Award's demand for further evidence exhibiting subsequent attempts of HCC to retrieve goods from the local committees is, I believe, an unreasonable demand on the Claimant, given the nature of the taking alleged. Moreover, even if no further demands had been made, I believe that the evidence, in particular the January 1980 minutes, suggest that such attempts would have been futile, thereby mooted any need for them to be made.

56. The issue thus becomes what equipment remained at the equipment yards under the control of Iran at that time. In determining the amount of equipment still in Iran, HCC, as attested in the Esphahanian and Gully affidavits, and as repeated in testimony at the Hearing, started with the list

of all items shipped to Iran or purchased there. This list, according to Mr. Gully, was routinely kept as part of HCC's ongoing inventory of equipment. From this list it deleted those items that went out of service or were sold in Iran and those items HCC was able to export subsequent to the seizure. It thus arrived at what HCC proclaims to be the entire list of equipment still in Iran which it was unable to export.

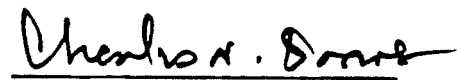
57. Given that this list was derived from inventories kept in the normal course of HCC's business, I believe that it is the best evidence available of what remained in Iran and thus I would have accepted it with one caveat. In the telex referred to in the Award from Mr. Eichstaedt, HCC's Project Manager, he referred to several items on the current list which he described as "so disassembled or cannibalized that it is not practical to ship." I believe this telex to be adequate proof that HCC had no interest in regaining possession of these few items and thus I would have deleted them from the list.

58. What bolsters the credibility of this listing is the lack of any credible evidence contesting it. No evidence in the file establishes that any of these items was ever shipped out of Iran. The Award's reliance on the Eichstaedt telex, which also discusses other items on the list that HCC wished to ship, and RFEs obtained by HCC for listed items as proof that HCC had control of these items or in fact was able to ship them out of Iran is completely unfounded. These documents indeed represent an interest on the part of HCC to export these items and in this regard only reinforce HCC's assertion that it continued attempting to regain possession of its equipment. However, as the Gully affidavit makes clear and as restated by Claimant's counsel at the Hearing, while it was one thing to obtain an export permit for a given piece of equipment, it was quite another actually to wrest control of the item from the local Komiteh and

export it. Indeed, this is established by NIGC's submissions, which at one point assert that export permits for specific items establish that such items were exported and at another point attest that its expert examined those exact items at Ahwaz at the end of 1980. None of these documents thus may be said to discredit HCC's affidavits regarding what remains in Iran under government control.

59. Given this state of the facts, I would have found an expropriation of the equipment alleged by HCC to have occurred, absent the several pieces to which I previously referred. As the value of this equipment has not been addressed by the Award, I see no reason to comment on it other than to state that the independent expert's appraisal submitted by the Claimant appears to form an adequate basis for an award.

Dated, The Hague
22 July 1988


Charles N. Brower