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Case No. 179

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IRAN-UNITED STATES CLAIMS TRIBUNAL

DUPLICATE
ORIGINAL

نسخه برابر اصل

دیوان داوری دعوی ایران - ایالات متحد

Case No. 179
Chamber Two
Award No. 234 - 179-2

AHEI PLANNING ASSOCIATES, INC.,

Claimant,

and

THE GOVERNMENT OF IRAN, IRAN HOUSING
COMPANY, and THE MINISTRY OF HEALTH AND
SOCIAL WELFARE OF THE GOVERNMENT OF IRAN,

Respondents.

IRAN UNITED STATES CLAIMS TRIBUNAL	دادگاه داوری ایران - ایالات متحد
ثبت شد - FILED	
Date	8 MAY 1986 ۱۳۶۵ / ۲ / ۱۸
No.	179

AWARD

Appearances:

For Claimant:

Mr. Brett A. August
Mr. John Holum
Mr. Carl Schenker
Attorneys for Claimant
Mr. Thomas Crane
Representative of
Claimant

For Respondents:

Mr. Mohammad K. Eshragh
Agent of the Islamic
Republic of Iran
Mr. Akbar Shirazi
Legal Advisor to the
Agent
Mr. Yahya Abolfotouh
Attorney for Iran
Housing Company
Mr. Ali Asyhar Nazem Boushehri
Mr. Hasan Naghshineh
Mr. Mir Faramarz Tabaie Bidgoli
Representatives of
Iran Housing Company

Also Present:

Ms. Jamison M. Selby
Deputy Agent of the
United States of America
Ms. Jocelyn Samuels
Legal Advisor to the
Deputy Agent

I. THE CLAIMS

1. The Claimant, AHFI PLANNING ASSOCIATES, INC. ("AHFI"), formerly known as Medical Planning Associates International, Inc. ("MPAI"), a Delaware corporation, seeks damages from the Respondents based on four claims. The first claim, directed against the IRAN HOUSING COMPANY (the "Housing Company"), seeks compensation in the amount of U.S.\$ 499,500, plus interest, for the alleged breach of a contract entered into in 1977 by MPAI and the Housing Company for the provision of medical planning services in conjunction with a medical center to be located in Tabriz (the "Tabriz Contract"). The second claim, also directed against the Housing Company, seeks compensation in the amount of U.S.\$ 83,000, plus interest, for the alleged breach of a contract entered into in 1976 by MPAI and the Housing Company for the provision of medical planning services in the nature of typical plans and architectural space standards for use in designing medical clinics throughout Iran (the "Clinics Contract"). The third claim seeks a total of U.S.\$ 47,489, plus interest, as compensation from the GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN (the "Government of Iran") for the alleged expropriation of property belonging to the Claimant in Iran. The fourth claim, also directed against the Government of Iran, seeks compensation in the amount of U.S.\$ 52,528, plus interest, for the alleged expropriation of the Claimant's bank account at Bank Etebarate Iran, which account allegedly amounted to 1,101,704 rials. The total amount of damages sought by the Claimant is U.S.\$ 701,267, plus interest. The Claimant also seeks costs in connection with the arbitration.

2. The Housing Company denies that it breached either of the two contracts with the Claimant and alleges that MPAI, by failing to perform work under the contracts and by submitting defective work, was the party in default. The Housing Company also counterclaims for allegedly owed taxes

in the amount of 42,488,900 rials and allegedly owed social security contributions in the amount of 45,243,430 rials.

3. The MINISTRY OF HEALTH AND SOCIAL WELFARE OF THE GOVERNMENT OF IRAN (the "Ministry of Health") denies that there is any legal relationship between it and the Claimant and alleges that none of the claims therefore is attributable to it.

4. The Government of Iran denies that the Claimant's property in Iran was expropriated and alleges that the Claimant has made no attempt to withdraw the funds deposited in its bank account in Iran. The Government of Iran also seeks costs in connection with the arbitration.

5. A Hearing was held on 28 May 1984.

II. JURISDICTION

6. AHFI, known prior to 19 September 1977 as MPFI, is a Delaware corporation wholly owned by American Hospital Supply Corporation ("AHSC"), an Illinois corporation. The Claimant has provided evidence, including good standing certificates and copies of proxy statements issued during the relevant period, establishing to the Tribunal's satisfaction that AHFI's claims in this case are claims of a national of the United States as defined in Article VII of the Claims Settlement Declaration.

7. The evidence regarding the Housing Company establishes that it is wholly owned by the Iranian Social Security Organization and thus falls within the definition of Iran contained in Article VII, paragraph 3, of the Claims Settlement Declaration. There is no dispute that the other two Respondents are also included within the definition of Iran.

8. The Housing Company has challenged the jurisdiction of the Tribunal on the ground that the two contracts in dispute contain forum selection clauses that operate to oust the jurisdiction of the Tribunal by virtue of Article II, paragraph 1, of the Claims Settlement Declaration.

9. The relevant clause in the Tabriz Contract, Article 21, reads as follows:

All disputes arising between the Parties to this Contract from the execution of the Contract or interpretation of the provisions thereto, which cannot be settled amicably through negotiation or correspondence, shall first be referred to a committee consisting of the highest authority of the Executive Organization (or his deputy) and MPAI for settlement. Should they fail to solve the dispute on the basis of the Contract and relevant rules and regulations, the matter shall be settled through competent courts according to the Iranian Law.

The text of this Article provides only that disputes, failing amicable settlement between the parties, shall be resolved through court proceedings, and that the disputes shall be subject to Iranian law, whatever the court that deals with them. The Tribunal finds that the claims presented in this case which arise from the Tabriz Contract are within its jurisdiction. Consistent with the decision of the Full Tribunal in Part II of Gibbs and Hill, Inc. and Iran Power Generation Company (Tavanir), et al., Award No. ITL 1-6-FT (5 Nov. 1982), reprinted in 1 Iran-U.S. C.T.R. 236, Article 21 of the Tabriz Contract does not fulfill the requirements laid down in the exclusion clause of Article II, paragraph 1, of the Claims Settlement Declaration.

10. The forum selection clause contained in Article 11 of the Clinics Contract reads as follows:¹

All disputes arising out of this agreement, its execution or interpretation thereof, shall be settled through arbitration in Tehran and in accordance with Iranian Laws.

Arbitration is an alternative to litigation in courts. A contract provision requiring recourse to arbitration is not a provision for the "sole jurisdiction" of any court. Even though Iranian law provides for a certain degree of control by Iranian courts over the arbitral process, such control does not deprive the arbitration of its specific character as a means of final settlement of disputes without courtroom litigation. See Part III of Gibbs and Hill, supra.

11. The Tribunal, therefore, holds that Article 21 of the Tabriz Contract and Article 11 of the Clinics Contract do not fall within the scope of the jurisdictional exclusion expressed in Article II, paragraph 1, of the Claims Settlement Declaration. Consequently, the Tribunal has jurisdiction over claims based on these contracts.

12. No jurisdictional questions arise with respect to the third Claim, which involves an alleged expropriation by the Government of Iran.

13. With respect to the fourth Claim, the Claimant has alleged that in November 1979, the Government of Iran expropriated the balance in an AHFI bank account at Bank Etebarate Iran. The Claimant, however, has failed to

¹ Although there are minor discrepancies in the version of Article 11 submitted by the Claimant and the version submitted by the Respondent, these discrepancies are irrelevant to the Tribunal's holding on this issue. The version quoted above is that submitted by the Respondent.

establish that it ever attempted to withdraw funds from that account prior to 19 January 1981, or that such withdrawal was prevented by the Government of Iran. A mere right to payment from a bank account is not an outstanding claim within the meaning of Article II, paragraph 1, of the Claims Settlement Declaration. See Harza Engineering Company and Islamic Republic of Iran, Award No. 19-98-2 (30 Dec. 1982), reprinted in 1 Iran-U.S. C.T.R. 499. Therefore, this Claim was not outstanding on 19 January 1981 and must be dismissed for lack of jurisdiction.

14. The Housing Company counterclaims for taxes and social security contributions allegedly due from AHFI under the Tabriz and Clinics Contracts. With regard to tax payments and social security contributions allegedly due, the contracts merely identify which contractual party was responsible for their payment. The obligation to pay such taxes and social security contributions, however, did not arise from the contracts, but from the tax and social security laws of Iran.

15. The Tribunal therefore holds that any liability on the part of AHFI for such tax and social security payments must be deemed to arise not out of the contracts but out of the application of Iranian law. Article II, paragraph 1, of the Declaration limits the jurisdiction of the Tribunal to counterclaims which arise out of the same contract, transaction, or occurrence as the claim. The counterclaims in this Case are therefore outside the jurisdiction of the Tribunal and must be dismissed. T.C.S.B., Inc. and Islamic Republic of Iran, Award No. 114-140-2 (16 March 1984), reprinted in 5 Iran-United States C.T.R. 160, 173.

III. THE MERITS

A. Claim One

16. On 19 March 1977, MPAI and the Housing Company entered into the Tabriz Contract pursuant to which MPAI was to provide specialized medical planning services in connection with the construction of a large hospital complex to be located in Tabriz. The services, consisting of the preparation of studies and reports and the review of architectural drawings, were to be performed in two phases. The total contract price of Phase I, consisting of schematic design studies, was the Rial equivalent on the dates payments were due of U.S.\$ 1,125,000, which amount was to be paid in four equal installments. The total contract price of Phase II, the design development phase, was the Rial equivalent on the dates payments were due of U.S.\$ 375,000, to be paid in five equal installments. Advance payments, constituting the first payment installment in each phase, were to be made against two bank guarantees, each of which was to be released after approval of the work done in each phase. Pursuant to the contract, the Housing Company was also entitled to withhold 10 percent of each payment as a "good performance guarantee" which was to be paid to the Claimant at the latest after approval of the reports and works required to be submitted and performed for both phases. The Housing Company was entitled to terminate the contract for its convenience upon two months notice to MPAI. In the event of such termination, the Housing Company was obligated to pay for all work performed prior to the date of termination.

17. The Claimant completed the work required under Phase I, and the final report on that phase was approved by the Housing Company on 22 April 1978. While certain criticisms were raised by persons employed by the Housing Company, the Company itself did not, prior to the proceedings before this

Tribunal, inform the Claimant that the work was deficient. The Housing Company approved Phase I and requested the Ministry to release the good performance guarantee relating to that Phase. On 9 July 1978, the Housing Company made a written request that the Claimant begin Phase II work and prepare the progress reports and other processes for approval by the Housing Company. On 24 July 1978, the Housing Company made a further request that the Claimant "proceed with the preparation of the Phase II project schedule in accordance with the contract, with regard to the date hereof and transmit the schedule for our approval." On 11 October 1978, AHFI received written notification from the Housing Company that all work was to be stopped until further notice.

18. In payment for the services it rendered, AHFI received all four payments under Phase I, less a deduction for the 5.5 percent tax withholding, and less U.S.\$ 56,250, representing the deductions for the 10 percent good performance guarantee, which were made from only two of the four payments. For services pursuant to Phase II, AHFI has received nothing, not even the advance payment secured by its bank guarantee, which advance payment it requested by an invoice dated 7 August 1978. The Claimant, alleging that it has properly performed all the Phase I work and performed 95 percent of the Phase II work, seeks: (1) U.S.\$ 56,250, representing the amount withheld from the two Phase I payments and never subsequently released; (2) U.S.\$ 356,250, representing 95 percent of the contract price for Phase II; (3) U.S.\$ 75,000, representing the amount of the bank guarantee for Phase II, alleging that it was improperly drawn upon; and (4) U.S.\$ 12,000, representing reimbursement for the expenses incurred in removing its employees' goods from Iran following the Housing Company's suspension of the contract. The total amount to which the Claimant alleges it is entitled under the Tabriz Contract is U.S.\$ 518,250.

19. The Housing Company acknowledges that the U.S.\$ 56,250 withheld from Phase I payments was retained, and alleges that it was entitled to do so due to defects in MPAI's performance. The Housing Company further alleges that no Phase II-related fees were earned by the Claimant, that it did not draw on the U.S.\$ 75,000 bank guarantee, and that under the contract it has no obligation to pay the claimed moving expenses.

1. The Phase I Good Performance Guarantee

20. With regard to the Claimant's request for payment of U.S.\$ 56,250, representing the amount of the Phase I good performance guarantee withheld by the Housing Company, the Tribunal determines that this amount should be paid to the Claimant. Although the Housing Company has alleged that its failure to pay the amount was due to defects in the Claimant's performance, there is no evidence that the Housing Company ever complained of defects until this Claim was brought before the Tribunal, almost four years after the work was completed. On the contrary, several months after the Claimant had completed the Phase I work, the Housing Company affirmed that it had approved that work. In a letter dated 15 October 1978 to the Ministry of Health, the Housing Company not only stated that the Claimant's work had been approved but requested the Ministry of Health to return to MPAI the Phase I good performance guarantee withheld from payments made to MPAI.

2. Phase II Payments

21. With regard to the Claimant's demand for 95 percent of the amount payable under Phase II of the Tabriz Contract, the Tribunal does not find that the Claimant is entitled to the full amount sought. Although the Claimant alleges that it completed 85 to 95 percent of the work required under Phase II, the evidence substantiating this claim consists

primarily of internal, but contemporaneous, AHFI memoranda estimating the percentage of work performed. The Claimant submitted invoices to the Housing Company for the second and third Phase II payments. As provided in Article 11 of the contract, each was for 20 percent of the Phase II fee. The second payment was due at the end of one-third of the five-month duration of Phase II and the third was due at the end of two-thirds of that period. However, these invoices are dated only one day apart, were submitted three months after the contract was suspended, and only recite as justification that the time periods established in the contract for payment of the installments had elapsed.

22. The Claimant has also submitted to the Tribunal the work product allegedly completed under Phase II. The Housing Company reviewed this work product and filed with the Tribunal a lengthy critique and evaluation in which it asserted that the Claimant had performed only 21 percent of the contemplated contract performance in Phase II. In assessing the evidence submitted by both parties, the Tribunal has arrived at a figure which it believes represents a fair estimate of the amount of compensation to which the Claimant is entitled for its efforts in connection with Phase II of the Tabriz Contract. The Tribunal has given due weight to the fact that, although required by the contract to submit monthly progress reports to the Housing Company, the Claimant has provided no evidence demonstrating that it submitted such reports, although, following the Hearing, it provided the Tribunal with a copy of an internal version of its report for the month of September 1978. Furthermore, although specifically requested by the Housing Company's letter of 24 July 1978 to submit the Phase II project schedule required under the contract, there is no evidence that the Claimant did so. Moreover, the Claimant did not submit any of the Phase II work product to the Respondent until obligated to do so by the Tribunal during the course of the proceedings. Taking into account all the

evidence and deducting the 5.5 percent which would, in any event, have been deducted from any payments, the Tribunal determines that the Claimant is entitled to compensation in the amount of U.S.\$ 106,312.50.

3. Phase II Bank Guarantee

23. The Claimant also seeks U.S.\$ 75,000, alleging that the Housing Company wrongfully drew upon the bank guarantee intended to secure the Phase II advance payment, when no advance payment had ever been made.

24. The Housing Company denied that it ever drew on the bank guarantee or received the U.S.\$ 75,000. Indeed, it would not have been necessary for the Housing Company itself to draw on the letter of credit, for as the transaction was structured, the Iranians Bank (now Bank Tejarat) held the letter of credit from Citibank International ("Citibank") and issued in turn its own letter of credit in favor of the Housing Company.

25. In the course of the proceedings, the Claimant provided evidence--in the nature of correspondence, payment orders, and receipts--showing that in April 1980 it paid U.S.\$ 75,000 to Citibank in payment of the letter of credit, allegedly drawn by the Housing Company on 17 March 1980. In September 1981, in reply to a further inquiry from Bank Tejarat, Citibank informed Bank Tejarat that the proceeds of the letter of credit, drawn in 1980, had been paid at that time into a blocked account, and that those funds were transferred to the Federal Reserve Bank of New York on 18 July 1981, pursuant to the U.S. Executive Order 12279 and sections 535.213 and 535.221 of Title 31 of the Code of Federal Regulations, as required by the Iran-United States settlement arrangements. Those deposits in U.S. banking institutions in the United States were then used pursuant to paragraph 6 of the General Declaration of 19 January 1981 to

fund the Security Account established by paragraph 7 of that Declaration, and the balance was transferred to Iran.

26. The Tribunal finds that: (i) the advance payment which the bank guarantee secured was never paid under the contract; (ii) the bank guarantee could only lawfully be drawn upon in a situation where MPAI had refused to perform; (iii) MPAI never refused to perform but instead was ordered to stop work; and (iv) for reasons not known, the letter of credit was drawn down, reimbursed by AHFI, and ultimately was paid to the Government of Iran in the context of the Algiers settlements. Therefore, the Tribunal holds that the Claimant is entitled to reimbursement of the amount of the letter of credit by the Government of the Islamic Republic of Iran.

4. Moving Expenses

27. The Claimant also seeks U.S.\$ 12,000 as reimbursement for the cost of removing its personnel from Iran.

The evidence provided by the Claimant to substantiate this Claim consists of several freight forwarder's invoices for air freight, totalling 25 percent more than the amount claimed, for shipments in the name of the Claimant's representative in Iran. However, the Claimant has not provided any evidence that these expenses were related to personnel or supervision costs connected with the Tabriz Contract, which forms the basis for any claim in this regard. Therefore, the claim for moving expenses must be dismissed for lack of proof.

B. Claim Two

28. On 16 June 1976, MPAI and the Housing Company entered into a contract pursuant to which MPAI was to perform

medical planning services in relation to a program for the establishment of medical clinics throughout Iran (the "Clinics Contract"). The contract price was 13,880,000 rials payable in four installments. Under the contract, the Housing Company was entitled to withhold 10 percent from each payment as a "good performance guarantee", which total amount was to be returned to AHFI within 30 days of approval of the final documents relating to the contract.

29. On 7 August 1978, MPAI submitted its final documents for work pursuant to the Clinics Contract. The Housing Company never paid the last invoice of 4,105,000 rials² or released 1,388,000 rials, representing the 10 percent good performance guarantee to be withheld from payments made to MPAI. The Housing Company now alleges that it failed to pay the Claimant and to release the 10 percent good performance guarantee amount because of defects in the Claimant's work under the Clinics Contract.

30. Having reviewed the evidence, the Tribunal concludes that the Claimant is entitled to compensation for the amounts not paid under the Clinics Contract. There is no evidence that at any time prior to the institution of this Claim the Respondent notified the Claimant of any serious defects in the work performed pursuant to the contract. Furthermore, the evidence introduced before the Tribunal regarding the alleged defects is merely conclusory and seem largely to reflect changes of policy with regard to the medical clinics, rather than latent defects initially not evident to the Housing Company. The Tribunal, therefore,

²This amount reflected reductions for the 5.5 percent tax withholding and for 10 percent of the gross amount withheld as the good performance guarantee. It had been the contractual practice of the parties for the Housing Company to deduct and withhold the 5.5 percent tax on all rial payments to MPAI.

holds that the Claimant is entitled to the sum of U.S. \$ 77,942.53, representing the equivalent of 5,493,000 rials.³

C. Claim Three

31. The Claimant alleges that its office in Tehran was taken over in November 1979 by a revolutionary committee acting on behalf of the Government of Iran, following which event, furniture and equipment presently valued at over U.S.\$ 47,000 was expropriated.

32. The Claimant, however, has failed to produce evidence establishing that the Government of Iran was responsible for the loss of this property in Tehran. The only evidence adduced by the Claimant in support of this claim for expropriation is an affidavit by the International Sales Manager of AHFI that he received a phone call from the Iranian landlord, relating that unidentified persons, styled as "representatives of a revolutionary committee" had occupied the leased offices and taken possession of AHFI property. The Tribunal considers that this is an inadequate basis upon which to find responsibility by the Government of Iran for the expropriation claim. This claim, therefore, must be dismissed for lack of proof.

IV. INTEREST

33. 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 on the amounts

³The dollar exchange rate of 70.475 rials, the official exchange rate in September 1978 when final payment was due, is used since the Tribunal determines that the Claimant would probably not have retained the rials payable under this contract in Iran at that time.

found payable. The Tabriz Contract provides that overdue payments would be subject to interest at the annual rate of 6 percent. The Tribunal decides to award interest at this contractual rate on the amounts found owing to AHFI under the Tabriz Contract. The Clinics Contract contains no interest provision, and the Tribunal therefore decides to award interest on amounts owing under that Contract at a rate of 12 percent. The bank guarantee, although required under the terms of the Tabriz Contract, was issued as a separate document in favor of the Iranian's Bank. Only payments to AHFI which were delayed beyond thirty days were subject to the interest provision in the Tabriz Contract. Therefore, the Tribunal decides to award interest on the amount improperly drawn under the bank guarantee at a rate of 12 percent.

V. COSTS

34. Each party shall bear its own costs of arbitration.

VI. AWARD

For the foregoing reasons,

THE TRIBUNAL AWARDS AS FOLLOWS:

(a) The IRAN HOUSING COMPANY is obligated to pay to the Claimant, AHFI PLANNING ASSOCIATES, INC., the following amounts:

(1) Fifty-six thousand two hundred fifty United States Dollars (U.S.\$ 56,250), plus simple interest at the rate of 6 percent per annum (365-day basis) from 12 August 1978;

(2) One hundred six thousand three hundred twelve United States Dollars and Fifty Cents (U.S.\$

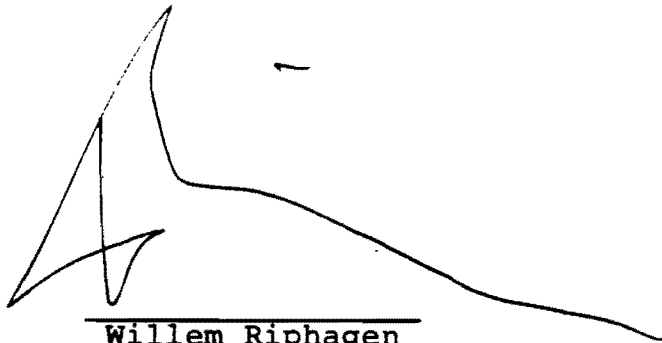
106,312.50), plus simple interest at the rate of 6 percent per annum (365-day basis) calculated from 20 January 1979;

(3) Seventy-seven thousand nine hundred forty-two United States Dollars and Fifty-three Cents (U.S.\$ 77,942.53), plus simple interest at the rate of 12 percent per annum (365-day basis) calculated from 7 September 1978;

- (b) The GOVERNMENT OF IRAN is obligated to pay to the Claimant, AHFI PLANNING ASSOCIATES, INC., Seventy-five thousand United States Dollars (U.S.\$ 75,000), plus simple interest at the rate of 12 percent per annum (365-day basis) calculated from 20 April 1980;
- (c) Interest on all amounts shall run from the date specified above until and including the date the Escrow Agent instructs the Depositary Bank to pay the Award.
- (d) The Claim for moving expenses is dismissed on the merits for lack of proof;
- (e) Claim Three is dismissed on the merits for lack of proof;
- (f) Claim Four and the Counterclaims are dismissed for lack of jurisdiction;
- (g) Each of the parties shall bear its own costs of arbitration;
- (h) These 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 Government of Algeria of 19 January 1981;

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

The Hague
8 May 1986

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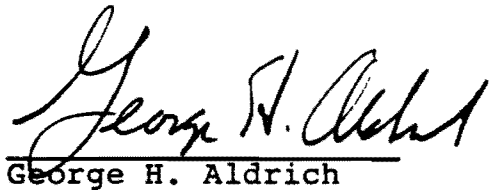
Willem Riphagen
Chairman
Chamber Two

In the name of God,

A handwritten signature in black ink, featuring a large, loopy initial 'H' followed by 'A'.

Hamid Bahrami-Ahmadi

Concurring in parts
Dissenting in parts

A handwritten signature in black ink, written in a cursive style, appearing to read 'George H. Aldrich'.

George H. Aldrich