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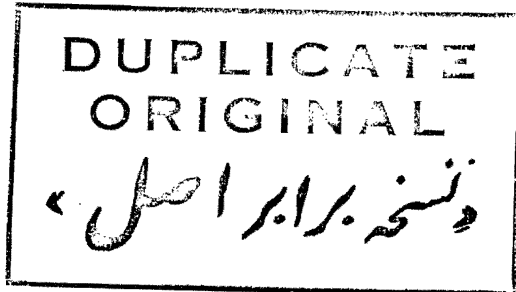
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IRAN-UNITED STATES CLAIMS TRIBUNAL

دیوان داری دعاوی ایران - ایالات متحدہ



CASE NO. 217

CHAMBER TWO

AWARD NO. 207-217-2

SHANNON AND WILSON, INC.,

Claimant,

and

ATOMIC ENERGY ORGANIZATION
OF IRAN,

Respondent.

IRAN UNITED STATES CLAIMS TRIBUNAL	دادگاه داری دعاوی ایران - ایالات متحدہ
ثبت شد - FILED	
Date	5 DEC 1985 تاریخ
	۱۳۶۴/۹/۱۴
No.	217 شماره

AWARDAppearances:

For the Claimant:

Mr. James L. Hawkins
Attorney
Mr. Walter L. Wright
Representative and Witness

For the Respondent:

Mr. G. Niaki
on behalf of the Agent of The
Islamic Republic of Iran
Mr. A. Shirazi
Legal Advisor to the Iranian
Agent
Mr. S.M. Doorchezadeh
Legal Advisor to the Iranian
Agent
Mr. A. Kousheshi
Assistant to the Legal
Advisors
Mrs. S. Khatatane
Attorney for AEOI
Mr. A. Pousty
Technical Representative for
AEOI

Also Present:

Mr. Daniel Price
Deputy Agent of the United
States of America
Mr. Michael Glanz
Legal Advisor to the Deputy
Agent

I. THE CLAIM

1. The Claimant, SHANNON and WILSON, INC. ("S&W"), claims against the ATOMIC ENERGY ORGANIZATION OF IRAN ("AEOI") for the payment of \$552,095, and interest thereon, as compensation for geotechnical and engineering services allegedly provided by S&W for AEOI's benefit. The Claim is based on an agreement concluded between S&W and Energy Technology Consultants ("Enertec") on 11 December 1977 and an amendment to the Agreement dated 11 March 1978 (collectively "the Agreement"), and a contract concluded between AEOI and Enertec on 28 June 1978 ("the Contract"). Enertec is an Iranian private joint stock company, formed as a joint venture by three private Iranian entities: Pars Consult, Eco-Zist and Tehran Berkeley.

2. The Contract obligated Enertec to provide geotechnical and geological confirmation studies, in connection with the investigation of two site locations for a two unit nuclear power station in the area of Saveh, Iran. The Agreement obligated S&W to perform certain services, which included certain geologic, geophysical, seismologic, earthquake engineering, geohydrologic and geotechnical engineering studies. These types of services were among those Enertec was to perform in its Contract with AEOI, and a number of S&W personnel were included on Enertec's organizational chart, which was appended to the Contract, although they were not specifically identified as such. No direct contractual relationship existed between S&W and AEOI, however.

3. Enertec commenced its work in December 1977, with the assistance of S&W, prior to the execution of the Contract, pursuant to a letter of intent of 26 December 1977 executed by Enertec and AEOI. Under the terms of the letter of intent, Enertec received an advance payment of \$700,000. Work continued until AEOI cancelled the Contract in December

1978. The Contract work consisted of three phases. AEOI's technical representative stated at the Hearing that Enertec had completed work on Phase One, comprising 10-15 percent of the total work to be performed.

4. On 29 November 1978, Enertec and its three constituent companies signed a memorandum of agreement with S&W quantifying Enertec's debt to S&W as a result of work performed by S&W under the Agreement. Enertec acknowledge that it owed S&W \$520,824 in respect of such services, in addition to the amount of \$327,176 it had already paid. The amount claimed comprises this \$520,824, plus additional amounts invoiced to Enertec over the period November 1978 through March 1979 totalling \$31,000. These latter invoices related to the Claimant's efforts to obtain payment from Enertec after departing Iran, and the Claimant conceded at the Hearing that they could not be claimed against AEOI. S&W never invoiced AEOI directly; all its invoices were to Enertec.

5. The record indicates that on 21 October 1978, S&W filed a suit before an Iranian Court against Enertec, Tehran Berkeley, Eco-Zist and Pars Consult to collect such debt. The Claimant's attorney stated that he believed such suit had been dismissed for lack of jurisdiction, while the Legal Advisor to the Agent of Iran asserted that the suit was stayed pending the Tribunal's decision here. The exact status of such suit is thus not known to the Tribunal, nor has evidence been adduced as to the present condition of Enertec.

6. In its Claim here, S&W seeks recovery from AEOI under three alternative theories. First, S&W claims on the Contract. S&W contends that, pursuant to the Agreements it was a de facto co-venturer in Enertec, pointing out that its personnel assigned to the project and Enertec's personnel were integrated in a homogenous manner so as to preclude S&W from being considered a subcontractor. This theory,

however, was abandoned by S&W at the Hearing. Second, S&W contends that it was a third party beneficiary of the Contract. Third, S&W claims under the theory of unjust enrichment.

7. AEOI denies that the Claim is attributable to it, asserting that S&W has a claim against Enertec only. On the merits, AEOI contends that it has already overpaid Enertec for its services, which included those of S&W.

8. Enertec and AEOI apparently have never resolved their dispute as to amounts, if any, owed by AEOI to Enertec or vice versa. AEOI states that it paid Enertec a total of 137,420,000 rials (almost \$2 million), which amount comprised a total of roughly one-fourth of the total price of the Contract. The Claimant's vice-president testified that the work performed by Enertec, if performed in the United States, would have had a total value of \$3.2-4 million. Neither Party presented evidence concerning the amount of unpaid invoices outstanding between Enertec and AEOI.

9. A Hearing was held on 7 October 1985.

II. REASONS FOR THE AWARD

A. Jurisdiction

1. Nationality of S&W

10. The Claimant has satisfied the Tribunal that it is a national of the United States as defined in Article VII(1) of the Claims Settlement Declaration. S&W was incorporated in the state of Washington on 23 February 1962. It is a closely held corporation, in which the vast majority of the outstanding shares have been owned by United States nationals at all relevant times, as demonstrated by corporate records and the birth certificates and passports

of sixteen shareholders. It is therefore unnecessary for the Tribunal to determine the dominant and effective nationality of Mr. M. Mike Alizadeh, who possesses both United States and Iranian nationality under the respective laws of these States. Mr. Alizadeh owned at the relevant period not more than 5.3 percent of the shares of S&W, and S&W has established the requisite degree of ownership by United States nationals excluding such shares.

2. Jurisdiction over Enertec

11. The Claims Settlement Declaration limits the Tribunal's jurisdiction to claims against the governments of the States Party, their agencies and instrumentalities, and entities controlled by such. See Articles II(1), VII(3) and (4). While the Statement of Claim is denominated as a claim only against AEOI, it lists Enertec as an Iranian instrumentality and party to the Claim.

12. The evidence indicates, however, that Enertec is a private stock company, incorporated in Tehran on 19 January 1978. No evidence has been adduced indicating that Enertec was controlled by AEOI or by the Government of the Islamic Republic of Iran at the time the Claim arose or on 19 January 1981 or, indeed, at any other time. The Tribunal therefore concludes that Enertec is not an entity controlled by the Government of Iran; accordingly, the Tribunal lacks jurisdiction over a claim against Enertec.

3. Jurisdiction over AEOI

13. It is undisputed that AEOI is included within the definition of "Iran" in Article VII(3) of the Claims Settlement Declaration. The Claim as against AEOI is therefore within the Tribunal's jurisdiction.

4. Other Jurisdictional Issues

14. Pursuant to Article II(1) of the Claims Settlement Declaration, the Tribunal has jurisdiction over claims "arising out of debts, contracts, . . . expropriations or other measures affecting property rights." Claims seeking payment for services performed, based on unjust enrichment and third party beneficiary theories, fall within the scope of this grant of jurisdiction. See Sea-Land and Government of the Islamic Republic of Iran, et al., Award No. 135-33-1 pp. 16-17, 27-30 (22 June 1984); Benjamin R. Isaiah and Bank Mellat, Award No. 35-219-2, pp. 7-11 (30 March 1983).

15. AEOI, however, objects to the Claimant's advancing a theory of unjust enrichment, arguing that a claim on such theory was not stated in the Statement of Claim and that its subsequent assertion constitutes the untimely filing of a new claim which is prejudicial to it. While the words "unjust enrichment" were not mentioned explicitly in the Statement of Claim, the necessary factual elements were set forth. Changes in theories of recovery are not to be considered new claims when the fact on which they are based are clearly stated and if there is no prejudice. See Cal-Main Foods Inc. and Government of the Islamic Republic of Iran, et al., 133-340-3, p.12 (11 June 1984). As no prejudice is indicated in this Case, the Tribunal will consider the merits of S&W's unjust enrichment theory.

B. Merits

1. Third Party Beneficiary Claim

16. A third party beneficiary may be defined as "[o]ne for whose benefit a promise is made in a contract but who is not a party to the contract." Black's Law Dictionary p. 1327 (5th ed.). See also Article 196, Iranian Civil Code (M. Sabi trans. 1973); 4 A. Corbin, Contracts §774 (1951). S&W contends that it was an intended beneficiary of the Contract, as demonstrated by provisions in the Agreements

providing that Enertec was to pay S&W for its work as funds were received from AEOI. S&W, however, fails to point to any provision in the Contract in which an obligation is included in favour of S&W, expressly or implicitly. The evidence indicates that all parties involved, including AEOI, perceived the Claimant's contributions merely as part of Enertec's contractual performance. In these circumstances, the Claimant's theory cannot succeed.

2. Unjust Enrichment Claim

17. The concept of unjust enrichment appears in various forms in the different legal systems of the world, including Iran, see Articles 336 and 337, Iranian Civil Code, and "is widely accepted as having been assimilated into the catalogue of general principles of law available to be applied by international tribunals." Sea-Land, supra at 27. This concept represents a principle based on justice and equity and therefore "makes it necessary to take into account all the circumstances of each specific situation".¹ As the Tribunal stated in Sea-Land, supra at 7, to have recourse to the principles of unjust enrichment,

"[t]here must have been an enrichment of one party to the detriment of the other, and both must arise as a consequence of the same act or event. There must be no justification for the enrichment, and no contractual or other remedy available to the injured party whereby it might seek compensation from the party enriched."

18. S&W argues that it was unjust for AEOI to induce the expenditure of funds by S&W to produce the result desired by AEOI and as directed by AEOI, and then to deny payment for the reasonable value of the work performed. It further argues that the doctrines of restitution and quantum meruit

¹Sea-Land, supra at 28, quoting Jiménez de Aréchaga, "International Law in the Past Third of a Century," Recueil des Cours, 1978 at 299-300.

recovery are fashioned to relieve that unjust windfall which AEOI seeks to retain.

19. In rebuttal, AEOI argues that accepting such a claim is impossible in a triangular relationship where both AEOI and S&W had separate contracts with Enertec. AEOI further argues that this theory can be invoked only in the event of being the sole and ultimate solution for recovery available to the injured party, and that if there is a contract or any similar instrument which is legally valid and enforceable, there is no legal ground to justify lodging a claim on a subsidiary or alternative basis.

20. In this connection, the Tribunal notes that S&W might well have serious difficulties in obtaining compensation pursuant to its contract with Enertec. However, by contracting only with Enertec, and not with AEOI, S&W assumed the risk that Enertec might not be able to collect all the funds which it considered due from AEOI. The Agreement provides that "Enertec shall cause each item in each invoice to be satisfied in full [less ten percent retention] not later than five (5) Iranian working days after payment of the amount of each such item by AEOI, provided, however, that in any event Enertec shall cause the amount of each invoice to be satisfied in full not later than ninety (90) days from the date of the invoice. . . ." (Emphasis added.) Thus, the Agreement provided that, even in the case of non-payment by AEOI, S&W had recourse against Enertec.

21. Given that a contractual relationship exists between S&W and Enertec, S&W's unjust enrichment claim can at best be only a subsidiary remedy. However, the Tribunal need not decide the question as to whether such a remedy is available as the Claimant has failed to prove that AEOI was unjustly enriched.

22. The Claimant has provided evidence that it performed work benefitting AEOI and has supplied some evidence of the value of such work. The 29 November 1978 Memorandum of

Agreement between Enertec, its constituent companies, and the Claimant indicates how those parties valued the Claimant's work, but the Claimant has provided very little evidence on the value of Enertec's work for the Respondent. The Claimant did not, however, submit copies of the invoices it sent to Enertec, which would more clearly demonstrate the scope of services performed. In any event, even assuming that AEOI was enriched by the Claimant's work and that the Tribunal could quantify the value of such enrichment, the Claimant nonetheless has failed to demonstrate that AEOI did not pay Enertec fully in respect of this work. The evidence before the Tribunal indicates only that Enertec was paid the equivalent of some \$2 million. The Tribunal does not know the total of Enertec's invoices. Moreover, the evidence concerning the extent and quality of Enertec's work is sparse and conflicting. Absent persuasive evidence that Enertec was underpaid for the work performed, the Tribunal could not find that AEOI was unjustly enriched and therefore does not have to decide whether or not such relief could be available when a claimant has a contractual claim against a third party but not against an enriched respondent.

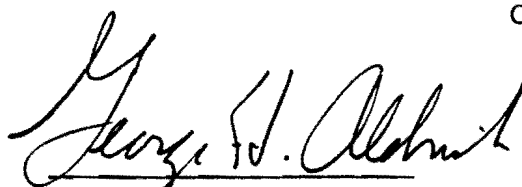
23. For the foregoing reasons,

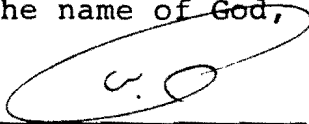
THE TRIBUNAL AWARDS AS FOLLOWS:

- a) The claim is dismissed.
- b) Each Party shall bear its own costs of arbitration.

Dated, The Hague
5 December 1985


Robert Briner
Chairman


George H. Aldrich

In the name of God,

Hamid Bahrami-Ahmadi
Concurring