

263-93

۲۶۳-۹۳

CLAIMS TRIBUNAL

دیوان دادرى دعاوى ایران - ایالات متحد

ORIGINAL DOCUMENTS IN SAFE

93

Case No. 263

Date of filing: 18-Sep-86

** AWARD - Type of Award Final
- Date of Award 18-Sep-86
14 pages in English 16 pages in Farsi

** DECISION - Date of Decision _____
_____ pages in English _____ pages in Farsi

** CONCURRING OPINION of _____

- Date _____
_____ pages in English _____ pages in Farsi

** SEPARATE OPINION of _____

- Date _____
_____ pages in English _____ pages in Farsi

** DISSENTING OPINION of _____

- Date _____
_____ pages in English _____ pages in Farsi

** OTHER; Nature of document: _____

- Date _____
_____ pages in English _____ pages in Farsi

CASE NO. 263
CHAMBER TWO
AWARD NO. 254 -263-2

ONESCO, INC.,

Claimant,

and

NATIONAL IRANIAN GAS COMPANY and
THE ISLAMIC REPUBLIC OF IRAN,

Respondents.

IRAN UNITED STATES CLAIMS TRIBUNAL	دادگاه دآوری دعاوی ایران - ایالات متحدہ
ثبت شد - FILED	
Date	18 SEP 1986 ۱۳۶۵ / ۹ / ۲۷
No.	263

AWARD

DUPLICATE
ORIGINAL
دستخبره برابر اصل

Appearances:

For the Claimant:

Mr. E.A. Eisenberg,
Attorney

For the Respondents:

Mr. Mohammed K. Eshragh,
Agent of the Government
of the Islamic Republic
of Iran

Mr. Akbar Shirazi,
Legal Adviser to the
Agent

Mr. Hossein Piran,
Assistant to the Agent

Mr. Mansour Daftarian

Mr. Ghassem Nikou Nazar

Mr. Abbas Hashemi,
Representatives of the
National Iranian Gas
Company

Also Present:

Mr. Daniel M. Price,
Deputy Agent of the
Government of the United
States of America

I. THE CLAIM

1. The Claimant, ONESCO, INC., seeks a total of \$710,934.63, plus interest and costs of arbitration, in connection with a contract for the sale of gas and steam turbine generator sets and related equipment. The Claimant named as Respondents the NATIONAL IRANIAN GAS COMPANY ("NIGC") and THE ISLAMIC REPUBLIC OF IRAN ("the Government of Iran"). All Parties filed written pleadings and a Hearing was held on 24 June 1986.

2. The Claim is composed of three separate items. The first is for damages measured by the cost of providing bank guarantees required under the terms of a letter of credit when the underlying contract did not require such bank guarantees. The second item is also for damages for failure to abide by the payment schedule provided in the contract, measured by the interest the monies could have earned had payments been made according to the schedule. The third item of the Claim is for reimbursement of the time and expenses of service engineers incurred during several visits to Iran.

3. The Claim stems from the purchase by NIGC of several turbine generator sets and related equipment, all covered by an extended warranty. Davy Powergas, Inc. ("Davy Powergas"), acting on behalf of NIGC, issued an Inquiry to which the Claimant responded with a Bid Proposal based on terms negotiated with the turbine manufacturer, Westinghouse Canada Limited ("Westinghouse"). On 12 November 1975, NIGC awarded the contract to the Claimant by sending a Telex of Intent accepting the Bid Proposal. The formal Purchase Order was executed in May 1976 and delivery of all of the turbines and equipment was completed by early 1978.

II. JURISDICTION

4. The Claimant submitted as evidence of its nationality a state certificate, an affidavit of the corporate secretary, and copies from the U.S. passport of the individual majority shareholder of Onesco, Inc. indicating that Onesco is a privately-held corporation formed on 25 June 1968 in the State of New York and that more than 50 percent of the capital stock is owned by a natural person who is a U.S. citizen. On the basis of the evidence, the Tribunal is satisfied that the Claimant is a United States national as defined in Article VII, paragraph 1, of the Claims Settlement Declaration.

5. The Respondents clearly fall within the definition of "Iran" contained in Article VII, paragraph 3, of the Claims Settlement Declaration.

6. The Claimant alleged that the claims were owned continuously during the relevant period as required by Article VII, paragraph 2, of the Claims Settlement Declaration. The Claim, as described above, clearly arises out of "debts, contracts . . . , expropriations or other measures affecting property rights" as required by Article II, paragraph 1, of the Claims Settlement Declaration.

7. The Respondents, however, argued that the Claim was not outstanding on the date of the Claims Settlement Declaration. The Respondents based this argument on the fact that the Claimant had not filed suit on its claim with any court. The Tribunal observes that the requirement in the Claims Settlement Declaration that claims and counterclaims be "outstanding on the date of this Agreement" is directly followed by the words "whether or not filed with any court." The plain meaning of this phrase contradicts the argument advanced by the Respondents and it is dismissed accordingly. Accord Phillips Petroleum Company Iran and The

Islamic Republic of Iran et al., Award No. ITL 11-39-2 (30 Dec. 1982) at pp. 9-10; Amoco Iran Oil Co. and The Islamic Republic of Iran et al., Award No. ITL 12-55-2 (30 Dec. 1982) at pp. 8-9.

8. Based on the foregoing evaluation of the evidence and the contentions of the Parties, the Tribunal concludes that it has jurisdiction over this Claim.

III. THE MERITS

A. The Damages Claims

1. The Bank Guarantee Expenses

9. The Claimant alleged that it incurred expenses of \$105,707.59 in fees for bank guarantees demanded by NIGC to secure the amounts to be advanced under a letter of credit prior to delivery of the turbine generator sets. The Claimant argued that the requirement of bank guarantees under the Letter of Credit was in breach of the payment terms of the underlying contract and that, in any event, NIGC later promised to reimburse the Claimant for these extra expenses. The evidence consists of copies of the Claimant's invoices for these expenses with the debit notices of the issuing bank, the Purchase Order, the Letter of Credit, and correspondence among the Parties and Davy Powergas regarding the issue of reimbursement.

10. NIGC argued that since the Claimant accepted the terms of the Letter of Credit, a separate contract which contained the provision for the bank guarantees, it has no grounds for claiming the associated costs before the Tribunal. NIGC also argued that pursuant to normal trade practices, it is customary to provide bank guarantees for advance payments received under a letter of credit and that therefore the requirement of bank guarantees was an implied

term of the contract of sale between the Parties. Finally, NIGC denied liability for the alleged promises of one of its employees and of Davy Powergas to reimburse the Claimant for the bank guarantee expenses, promises which NIGC asserts were made without authority.

11. The Tribunal notes from the evidence submitted that the Inquiry issued by Davy Powergas provided that payment be made "by an irrevocable and confirmed letter of credit." No further payment terms were specified. The Bid Proposal of the Claimant issued in response to this Inquiry was not submitted in evidence by either of the Parties. The Telex of Intent sent by NIGC on 12 November 1975 accepting the Claimant's bid only stated in this regard that a "confirmatory purchase order . . . will be mailed soonest and letter of credit opened." The Purchase Order was not received by the Claimant until 3 May 1976. The payment terms in the Purchase Order provided that payment would be made by an irrevocable letter of credit with funds disbursed according to the following schedule:

- (i) 20% of total value with contract;
- (ii) 75% divided in monthly payments beginning 1 month after contract date, providing progress is monitored by Davy Powergas and Invoices approved by Davy Powergas; and
- (iii) the balance of 5% 30 days after final delivery to port of shipment.

The contract date was defined by the Purchase Order as 12 November 1975, the same date as the Telex of Intent accepting the Claimant's bid.

12. The Claimant was advised on 7 May 1976 that the Letter of Credit had been opened. The terms of the Letter of Credit were not communicated until 27 May 1976. One of the conditions to drawing the downpayment was presentation

of an unconditional bank guarantee conforming to one of two standard forms provided by Bank Markazi. One of the other terms of the Letter of Credit was also unacceptable to the Claimant since it conditioned payment on delivery of the goods, rather than in advance of delivery, as specified in the payment terms of the Purchase Order. The bank guarantee condition also did not provide for a reduction in the amount of the guarantee as deliveries of turbines were accomplished. Consequently, the Parties negotiated two amendments to the Letter of Credit in July and August 1976. However, the condition of the bank guarantee remained in the amended Letter of Credit.

13. On 12 October 1977, the Claimant invoiced NIGC for the bank guarantee expenses incurred up to that date for payments it had made to Chase Manhattan Bank, requesting payment because during "the period of the negotiation and inquiry stage of the [Purchase Order] it was never brought to [Onesco's] attention by Davy Powergas or National Iranian Gas Co. that the forthcoming letter of credit would require bank guarantees as a prerequisite to drawing advance and progress payments from the credit." In May and June 1978, the Claimant invoiced NIGC for the additional expenses incurred up to the expiration of the bank guarantees following the completion of the deliveries and the final draw on the Letter of Credit in May 1978.

14. On 1 June 1978, Davy Powergas informed both NIGC and the Claimant of the results of its investigation into the issue of responsibility for the cost of the bank guarantees. Davy Powergas concluded that "N.I.G.C. is obligated to pay" because "the cost of this unconditional bank guarantee . . . was not included in Onesco's quotation nor was the cost part of the purchase order issued by N.I.G.C." and because such costs were paid by NIGC to other vendors "under the same circumstances."

15. The Claimant provided evidence that, following this report, the Parties held a number of discussions on the question of the bank guarantee costs, including discussion of an amendment to the Purchase Order which would have provided for reimbursement of the bank guarantee costs by NIGC. The amendment was never executed and Onesco's invoices were never paid.

16. The Tribunal decides that while the Claimant consented to the condition of bank guarantees in connection with the Letter of Credit, such a requirement by NIGC was inconsistent with the payment terms of the Purchase Order. The Purchase Order provided that the Claimant was to provide certain goods according to a certain schedule and NIGC was to pay a certain amount by letter of credit according to a certain schedule. There was no obligation on the Claimant corresponding to the Letter of Credit to provide bank guarantees securing those amounts paid prior to delivery of the goods. While the Tribunal shares NIGC's opinion that advance payments made pursuant to an irrevocable letter of credit are typically secured by a bank guarantee, it notes that such guarantees are expressly required by the underlying contract. In this regard, the Tribunal notes that in NIGC's own contract with Davy Powergas, it specified that Davy Powergas would provide a bank guarantee to secure the advance payment, but that NIGC would bear the cost of the bank guarantee. The Claimant disputed the obligation to provide bank guarantees from the time the issue first arose and maintained its position throughout the course of relations between the Parties, both before and after the establishment of the Letter of Credit. In these circumstances, the Tribunal declines to imply in the Purchase Order any obligation on Onesco to provide the bank guarantees. Accordingly, the Tribunal awards the Claimant the amount of \$105,707.59 for the fees charged to Onesco for the bank guarantees, as represented in the amount of its invoices to NIGC in this regard.

2. Damages for Late Payments

17. The Claimant alleged that it is entitled to \$560,553.70 as damages for the failure of NIGC to make timely payments as required under the terms of the Purchase Order. The Claimant calculated the losses represented by these late payments in terms of an annual rate of 9 percent simple interest for the number of days each payment was received late with respect to the payment schedule contained in the Purchase Order. The payment schedule contained in the Purchase Order, quoted above in paragraph 11, provided for NIGC to make two types of payments prior to delivery of the final piece of equipment -- a 20 percent downpayment with the contract and 75 percent payable in sixteen equal monthly installments starting one month after the date of the contract. The final 5 percent was only payable following completion of all deliveries. The 20 percent downpayment was received by the Claimant on 30 July 1976, over 8 months after the date of the contract. The Claimant did not receive the progress payments according to the monthly schedule contained in the Purchase Order. The Claimant based its argument on liability for damages on the failure of NIGC to open the Letter of Credit within a reasonable time and the conditions in the Letter of Credit which prevented the Claimant from receiving progress payments according to the monthly schedule.

18. NIGC argued that the Purchase Order did not specify a date by which it was required to open the Letter of Credit and that under Clause 10 of the General Conditions attached to the Purchase Order the Claimant had 10 days in which to lodge any complaint about delay in establishing the Letter of Credit.

19. The Tribunal notes that Clause 10 of the General Conditions reserves to NIGC the right to change specifications, method of shipment or packing, and place or time of

delivery, with possible consequent effect on the purchase price. The Tribunal deems this provision irrelevant to the question of failure to abide by the payment schedule of the contract. While no date was specified in the contract for the establishment of the Letter of Credit, the Tribunal decides that it should have been established within a reasonable time. Accord Economy Forms Corporation and The Government of the Islamic Republic of Iran, Award No. 55-165-1 (14 June 1983) at p. 19. In the circumstances of this Case, given that the first monthly progress payment was due within one month of the contract date, a reasonable time could not have been any longer than one month. Indeed, the evidence indicates that one month after the contract date, the Claimant requested that the downpayment be paid. The Claimant also informed NIGC on 2 January 1976 that the first progress payment was overdue and reiterated that the downpayment had not been received. In these circumstances, the Tribunal finds that NIGC breached its obligation to open the Letter of Credit or to make the required payments within one month of the contract date. The questions remain, however, as to whether the Claimant has proven any damages arising from the breach and whether it has waived its claim to any such damages.

20. According to the evidence submitted to the Tribunal, the Claimant wrote to NIGC on 12 October 1977 explaining that it had been charged interest by Westinghouse for late payment of the 20 percent downpayment and the monthly progress payments established pursuant to the parallel payment schedule in its Purchase Order with Westinghouse and requesting a settlement of the amounts owed Westinghouse. Westinghouse calculated its interest charges at 1 percent over the prime rate available from Canadian banks during the relevant periods. The interest rate applied by Westinghouse therefore fluctuated between 10.25 percent and 8.25 percent. However, the amount claimed by Westinghouse in respect of the monthly progress payments was reduced to correspond to

the amount of progress on manufacture actually achieved in comparison to that assumed by the payment schedule. The discount applied by Westinghouse in early 1977, after the first set of deliveries, was 40 to 50 percent. Later, on 16 August 1979, Westinghouse presented the Claimant with its total claim, based this time strictly on the payment schedule, in the amount of Canadian \$356,988.49. In the meantime, on 30 June 1978, after all payments finally had been drawn under the Letter of Credit, the Claimant invoiced NIGC for interest at the constant annual rate of 9 percent for the number of days payment was received after becoming due according to the payment schedule, which invoice totalled \$560,553.70.

21. The record fails to demonstrate to the Tribunal's satisfaction that the Claimant ever paid Westinghouse for its interest claim or that the Claimant remains liable for that amount on its separate contract with Westinghouse, which is not at issue in this proceeding. To the extent that this part of the Claim is based on monies alleged to be owing to Westinghouse, it is dismissed for lack of proof. Moreover, the earliest date reflected in the record that the Claimant asserted its own claim for interest on late payments was in its letter of 12 October 1977, over a year after it started drawing payments and only after it was faced with a claim from Westinghouse. In these circumstances and to the extent that this part of the Claim is based on loss of use of monies, the Tribunal decides that the Claimant waived any claim for damages from NIGC in connection with the late establishment of the Letter of Credit by drawing the 20 percent downpayment without making any contemporaneous claim within a reasonable amount of time for interest on that late payment.

22. With respect to the monthly progress payments, the Tribunal notes that under the Letter of Credit, once established, the Claimant could have caught up with the

payment schedule by drawing at once all of the monthly progress payments to which it was entitled up to that time. One of the Purchase Order conditions on drawing progress payments under the amended Letter of Credit was that each invoice be approved by Davy Powergas. There is no evidence in the record that Davy Powergas was ever requested to approve monthly invoices, or that it ever refused. Rather, the record indicates that the Claimant drew payments on roughly a quarterly basis. No explanation was given for the variance with the payment schedule set forth in the Purchase Order. The Tribunal also notes that this category of advance payments was only payable "providing progress is monitored by Davy Powergas." Therefore, this category of advance payments was also subject to a condition which could have affected the payment schedule. In the absence of further evidence, the Tribunal decides that the Claimant has not shown that any progress payments were in fact late. Therefore, the Tribunal finds that the Claimant is not entitled to any damages in connection with these progress payments.

B. The Engineers' Services Claim

23. The Claimant stated that it arranged, at NIGC's request, for several visits to Iran by Westinghouse service engineers for inspection of equipment following delivery and for supervision of installation of the gas turbine generator sets. According to the Claimant, these expenses represent additional services available under the Purchase Order but not included in the contract price, for which it submitted invoices totalling \$44,673.34. The Claimant submitted in evidence its invoices, backup expense documentation, and correspondence between the Parties.

24. NIGC stated that it never received the invoices prior to these proceedings, although at the Hearing it acknowledged that upon inspection of the invoices submitted

in evidence it did not dispute this element of the Claim. NIGC argued, however, that it should not be assessed interest on this amount because it never received original invoices, signed and sealed by the Claimant, with which it could have processed payment at the time.

25. The Tribunal notes that all of these invoices were submitted to NIGC c/o Davy Powergas in the United States. In the absence of information concerning Davy Powergas, the Tribunal is satisfied that NIGC had notice of the amounts due, if not directly, then at least indirectly through Davy Powergas. The Claimant is therefore entitled to interest on the amounts found owing.

26. In view of the agreement of the Parties on the invoices, the Tribunal awards the full amount of the invoices for the engineers' expenses.

C. Interest

27. In order to fully compensate the Claimant for the elements of the Claim to which it is entitled, the Tribunal considers it reasonable to award simple interest at the annual rate of 11 percent.

28. Because the invoice amounts were due as of a number of different dates, the Tribunal has calculated interest from 30 days after the date of each invoice up to and including 4 October 1979, the date payment was due on the last invoice, in order to provide the Depositary Bank with a common date from which it may calculate the interest up to the date payment is effected from the Security Account.

D. Costs

Each Party shall bear its own costs of arbitration.

E. Summary

29. The Tribunal finds that the Claimant is entitled to payment of \$105,707.59 for the bank guarantee expenses and \$44,673.34 for the service engineers' expenses, making a base amount of \$150,380.93. Interest at 11 percent from the date payment was due on each invoice awarded up to and including 4 October 1979 amounts to \$21,385.87. The Tribunal therefore awards the amount of \$171,766.80, plus additional interest on the base amount from 5 October 1979.

IV. AWARD

For the foregoing reasons,

THE TRIBUNAL AWARDS AS FOLLOWS:

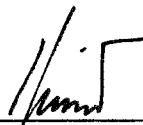
(a) The Respondent NATIONAL IRANIAN GAS COMPANY is obligated to pay the Claimant ONESCO INCORPORATED the sum of One Hundred Seventy-One Thousand Seven Hundred Sixty-Six United States Dollars and Eighty Cents (U.S.\$171,766.80), representing U.S.\$150,380.93 in principal awarded plus U.S.\$21,385.87 in simple interest up to and including 4 October 1979, plus additional simple interest on the base amount of U.S.\$150,380.93 at the annual rate of 11 percent (365-day basis) from 5 October 1979 up to and including the date the Escrow Agent instructs the Depositary Bank to make payment out of the Security Account.

(b) This obligation shall be satisfied by payment out of the Security Account established pursuant to Paragraph 7 of the Declaration of the Democratic and Popular Government of Algeria of 19 January 1981.

(c) Each of the Parties shall bear its own costs of arbitration.

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

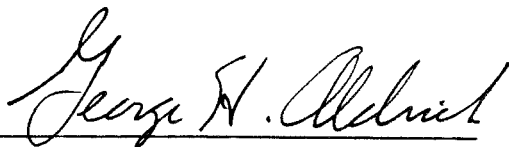
Dated, The Hague
18 September 1986



Robert Briner
Chairman

In the name of God,



Hamid Bahrami-Ahmadi
Dissenting in part,
Concurring in part

George H. Aldrich