

DUPLICATE
ORIGINAL

نسخه برابر اصل

CASE NO. 41

CHAMBER THREE

AWARD NO. 51-41-3

POMEROY CORPORATION,

Claimant,

and

GOVERNMENT OF THE ISLAMIC
REPUBLIC OF IRAN,

Respondent.

IRAN UNITED STATES CLAIMS TRIBUNAL	دادگاه داری دعاوی ایران - ایالات متحده
ثبت شد - FILED	
۱۳۶۲ / ۲ / ۱۸	
8 JUN 1983	
41	۴۱

AWARD

Appearances:

For Claimant:

Mr. R.N. Pomeroy,
Pomeroy Corporation
Mr. F.H. Lane, Mr. T. Devitt,
Attorneys

For Respondent:

Mr. M.K. Eshragh,
Deputy Agent of the
Islamic Republic of Iran
Mr. Ghaemi,
Legal Adviser to the Agent
Mr. M.A. Shamloo,
Attorney
Mr. Tajzadeh
Mr. Azadeh

Also present:

Ms. Jamison Selby,
Deputy Agent of the United
States of America

I. THE PROCEEDINGS

POMEROY CORPORATION ("Pomeroy"), filed its Statement of Claim against Respondent, the GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN on 16 November 1981. The Respondent filed its Statement of Defence on 14 April 1982 together with a Statement of Counterclaims; in those Statements the Navy of the Islamic Republic of Iran was named as Respondent and Counter-claimant. The Claimant filed a Reply to the Statement of Counterclaims on 3 June 1982.

On 3 August 1982, the Tribunal issued an Order scheduling a joint Hearing on all issues in the case and in the related Case No. 40, R.N. Pomeroy, K.S. Pomeroy and R.M. Pomeroy v. Government of the Islamic Republic of Iran, for 10 November 1982. The Order further required the Respondent to submit a Rejoinder to the Claimant's Reply by 17 September 1982 and set 30 October 1982 as the final date for the submission of documentary and other written evidence by both Parties along with any final written comments the Parties wished to make.

On 13 October 1982, Respondent filed its Rejoinder to the Claimants' Reply. A Supplemental Statement was filed by the Respondent on 25 October 1982, in which it restated some of its defences and raised a number of new defences.

On 29 October 1982, the Claimant filed a Supplemental Submission including sworn affidavits, an expert's opinion on Iranian law, a memorial discussing the legal issues presented by the case and certain documents.

The Hearing was held on 10 November 1982 with all Parties present. The Parties agreed that evidence submitted in this case as well as in the companion Case No. 40 would be deemed to have been received in both cases. On the day of the Hearing, the Respondent filed a Statement requesting, inter alia, that this matter be consolidated with Case No. 432, Brown & Root, Inc., et al. v. the Iranian Navy, et al., or that the cases be heard jointly (see below at IV).

On 19 November 1982, after the Hearing was closed, the Tribunal issued an Order for post-hearing submissions under which the Respondent was permitted to file rebuttal evidence by 10 January 1983 and the Claimant permitted to file surrebuttal evidence by 10 February 1983.

On 7 December 1982, the Respondent filed a Rejoinder which addressed the testimony given at the Hearing and contained in sworn affidavits of certain of Claimant's witnesses. At the request of the Respondent, the Tribunal ordered, on 11 January 1983, that deadlines for the further evidentiary submissions be extended to 1 February 1983 for the Respondent and 4 March 1983 for the Claimant.

On 12 January 1983, the Respondent filed a Supplemental Submission consisting of a memorial on certain issues in the case. On 7 February 1983, the Claimant filed a Post-Hearing Submission including additional documentary evidence and stating that the Claimant intended to make no further submissions.

II. CONTENTIONS OF THE PARTIES

The Claimant alleges that it is organized under the laws of Nevada, a state of the United States, and that all of its capital stock has been owned by natural born United States citizens since its inception.

The Claimant seeks compensation for amounts allegedly due, but not paid, under the terms of a contract under which Pomeroy agreed to provide administration services to the Iranian Navy's staff office in Houston, Texas, in connection with two projects for the construction of naval facilities in Iran.

The Claimant contends that the contract in question was duly executed on 10 November 1977 by Pomeroy and legally authorized representatives of the Iranian Navy (the "Contract"). The Contract covered the two year period from the date of execution to 9 November 1979 and required Pomeroy to provide its services by supplying "a staff of

qualified and skilled experts". Pomeroy was to be compensated according to stated rates based upon specified categories of employees supplied. In addition, the Navy was required to pay an annual fee ("firm fee") in the amount of US \$75,000 "for the Services of the Corporation, including corporate support offices", payable in equal monthly installments (Article 3 (b) and Schedule II of the Contract). Pomeroy was required to submit monthly invoices and the Navy was required to audit these invoices within ten days after receipt and to pay verified invoices "immediately". Finally, provision was made for the settlement of all unresolved disputes arising between the parties by recourse to "arbitration according to Iranian Laws and Regulations".

By telex dated 10 March 1979 and delivered to Pomeroy on 12 March 1979, the Navy notified Pomeroy that it was terminating the Contract and after this latter date Pomeroy asserts it ceased performing services under the Contract.

The Claimant contends that it fully performed its obligations under the Contract until advised that the Contract was terminated. The Claimant alleges that payments under the Contract were duly made through October 1978, but that the Government of Iran ordered that a cheque issued by the Navy as payment for the full amount due for November 1978 not be paid. Furthermore, the Claimant alleges that invoices which were submitted for December 1978 and January, February and March 1979, and which were audited and approved by the Navy's appointed auditor, were not paid.

Included among the invoices remaining unpaid are amounts for employee services and monthly installments of the agreed-upon firm fee.

The Claimant originally sought recovery in the amount of US \$271,070 for both work performed and the balance of the firm fee. During the course of the proceedings, the Claimant amended the amount of the unpaid principal of the firm fee to reflect overhead costs, including Iranian taxes, which Pomeroy did not incur as a result of termination of the Contract. Therefore, the Claimant now seeks U.S. \$257,737, plus interest at a reasonable rate, and its costs of arbitration.

In response, the Navy objects to the jurisdiction of the Tribunal over the claim contending that exclusive jurisdiction over the claim lies with the courts of Iran on the basis of the Contract's arbitration provision, the Iranian nationality of the Respondent and the availability of a local remedy in Iran and the fact that the Contract was executed in Iran.

In its defence on the merits of the claims, the Navy asserts that the contract is invalid on the grounds that it was executed without proper authority and in violation of Iranian law and that Pomeroy was not statutorily eligible to enter into the Contract. The Navy also alleges that the Contract is invalid because no Farsi language version of the contract instrument was ever executed.

The Navy does not deny that it failed to make payments required by the contract, but maintains that such failure is excused on four grounds. First, it alleges that the invoices submitted by Pomeroy were not audited and approved in the manner required by the Contract. Second, it argues that the Contract's remuneration provisions are exorbitant in relation to both the services performed by Pomeroy and compensation customarily paid to other consulting firms. Third, the Navy alleges that Pomeroy breached the Contract by failing either to supply qualified personnel or to perform its duties adequately. Finally, it contends that it is not liable for the portion of the agreed-upon fixed fee falling due after the date of termination because (a) the Contract not being valid in the first place, its "termination" in March 1979 could not give rise to any liability for the Navy, and (b) in any event the Contract includes no provision for the indemnification of losses resulting from termination.

The Navy has also presented two counterclaims against Pomeroy. First, the Navy seeks the return of US \$351,530 in payments allegedly made under the Contract and return of the cheque issued as payment against the invoice for November 1978. This counterclaim is based upon the alleged invalidity of the Contract and its allegedly excessive remuneration provisions. Second, the Navy seeks an unspecified amount for losses incurred as a consequence of Pomeroy's alleged contract breaches. The Navy also claims interest on the above amounts and its costs of arbitration.

In response to the counterclaims, the Claimant asserts the legal validity of the Contract and the reasonableness of its remuneration terms and therefore denies any duty to return past payments as sought in the first counterclaim. The Claimant offers, however, to submit the cheque issued by Navy in payment of the invoice for November 1978 to the Tribunal for disposition in connection with the Tribunal's award. With regard to the second counterclaim, the Claimant maintains that it fully performed its obligations.

III. JURISDICTION OF THE TRIBUNAL

The primary basis of the Tribunal's jurisdiction is found in Article II, paragraph 1, of the Declaration of the Government of the Democratic and Popular Republic of Algiers Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran of 19 January 1981 ("Claims Settlement Declaration"), which establishes the Tribunal for, among other purposes,

the purpose of deciding claims of nationals of the United States against Iran ... and any counterclaim which arises out of the same contract, transaction or occurrence that constitutes the subject matter of that national's claims, if such claims and counterclaims ... arise out of ... contracts ... excluding claims arising under a binding contract between the parties specifically within the sole jurisdiction of the competent Iranian courts

Whether a claim is a "claim of a national" of the United States is governed by the definition set forth in Article VII of the Claims Settlement Declaration, which provides:

1. A "national" of Iran or of the United States, as the case may be, means (a) a natural person who is a citizen of Iran or the United States; and (b) a corporation or other legal entity which is organized under the laws of Iran or the United States or any of its states or territories, the District of Columbia or the Commonwealth of Puerto Rico, if, collectively, natural persons who are citizens of such country hold, directly or indirectly, an interest in such corporation or entity equivalent to fifty per cent or more of its capital stock.

2. "Claims of nationals" of Iran or the United States, as the case may be, means claims owned continuously, from the date on which the claim arose to the date on which this Agreement enters into force, by nationals of that state, including claims that are owned indirectly by such nationals through ownership of capital stock or other proprietary interests in juridical persons, provided that the ownership interests of such nationals, collectively, were sufficient at the time the claim arose to control the corporation or other entity, and provided, further, that the corporation or other entity is not itself entitled to bring a claim under the terms of this Agreement.

The Claimant has submitted copies of stock certificates and has presented testimony which indicate that it was organized under the laws of the State of Nevada of the United States in November 1977 and has maintained its legal status to present. That evidence also demonstrates that all of its outstanding shares have been held since its inception by three individuals. Finally, the Claimant has submitted passport and birth registration documents demonstrating that these three persons have been United States citizens since

birth. The Respondent has offered no evidence to contest this evidence. Therefore, the Tribunal determines that the claim is the claim of a national of the United States within the meaning of Article VII, paragraph 2.

The remaining jurisdictional issue raised by the Respondent is whether the claim is excluded from the Tribunal's jurisdiction by virtue of any clause in the Contract referring disputes to be settled exclusively by Iranian courts.

The Contract provides, in Article 10, for disputes to be settled "through arbitration according to Iranian Laws and Regulations".

The Tribunal has held that such a clause is not one "specifically providing that any disputes [under the contract] shall be within the sole jurisdiction of the competent Iranian courts ...", so as to divest the Tribunal of jurisdiction over the claim under Article II, paragraph 1 of the Claims Settlement Declaration. See Gibbs & Hill Inc. and TAVENIR, et al., Case No. 6, Interlocutory Award No. 1-6-FT.

In view of the foregoing, the Tribunal determines that it has jurisdiction over the Claimant's claims.

Article II, paragraph 1 of the Claims Settlement Declaration, establishes that a counterclaim comes within the Tribunal's jurisdiction only if it arises out of the same required subject matter as does the claim.

The first counterclaim, based upon the alleged invalidity of the Contract and its allegedly excessive remuneration provisions, and the second counterclaim, based upon alleged breaches of the Contract, both clearly arise out of the same required subject matter as does the claim. Therefore, the Tribunal has jurisdiction over the counterclaims.

IV. RESPONDENT'S REQUEST AS TO PROCEDURE

The Respondent has requested that this matter be consolidated with Case No. 432 or that the cases be heard jointly (see above at I). The Claimants in the latter case were contractors with regard to the projects in which Pomeroy was to provide its services under the contract at issue here. The Tribunal has not, however, found the two cases so closely connected that the request for consolidation or joint hearing should be granted at such late stage of the proceedings.

V. MERITS OF THE CLAIM AND COUNTERCLAIMS

1. The claim

There is no dispute that payments were made as required for both personnel supplied and for the monthly installments of the firm fee, for the first year of the Contract. Furthermore, the Claimant has submitted evidence demonstrating that the amount of US\$220,757 remains outstanding under invoices for November and December 1978 and January,

February and March 1979,² for both personnel services and installments of the firm fee, and that the remainder of the firm fee remains unpaid. The Navy has not contested this evidence, nor has it denied the Claimant's allegations in this regard. Consideration must turn, then, to the Navy's asserted justifications for non-payment -- invalidity of the Contract; non-compliance with the Contract's auditing requirements; exorbitant remuneration provisions; and failure of performance.

The Navy contends that the Contract is invalid on the asserted grounds that the Navy official who signed it lacked authority to do so, that Pomeroy was not an eligible contractor approved by the Council of Ministers as required by statutory law and that no Farsi language version of the Contract was executed.

Even if the Navy's assertions of the invalidity of the Contract were correct, the Navy conducted itself in a manner which indicates that it considered the Contract to be valid, by making substantial payments under the Contract and by accepting services from Pomeroy.

²This total includes an amount of U.S. \$584 which Pomeroy mistakenly failed to include in its invoice for February 1979 but which was discovered in a subsequent audit by the Navy's accountant.

It is a general principle of law recognized in the law of Iran and the United States that a party may not deny the validity of a contract entered into on its behalf by another if, by its conduct, it later consents to the contract. As such, the Navy's conduct constitutes a ratification of the Contract whether or not the Navy's signatories lacked proper authority. Furthermore, the Claimant has presented uncontradicted written testimony from the two principal Navy officers involved that the Contract was specifically approved by the then commander-in-chief of the Navy and that the signatory had fully-delegated powers to execute the Contract. Regarding the eligibility of Pomeroy under the statute authorizing one of the two Navy projects referred to in the Contract, the requirement of approval by the Council of Ministers contained in the statute relates only to contractors engaged in the construction of the project and not to contractors assisting the Navy in performing its own role. Finally, the Tribunal finds no basis in the Contract for the Respondent's contention that the signing of a Farsi language version of the Contract was a condition to validity. Therefore, even if the Tribunal had not determined that the Navy had ratified it, the Contract could not be held to be invalid on the ground that it had been signed by the parties in English only.

The Navy contends that its non-payment is excused because Pomeroy's invoices were not audited as required by the Contract. The contract provides that the Navy "is bound

to audit the invoice within ten (10) days after receiving it and in case of verification of the services performed, pay the sum to the Contractor immediately". The contract also specifies that the "Contractor's time records and other supporting documents of category billings shall be subject to audit by the Project Auditors, Whinney-Murray and Company". The Claimant has submitted copies of the audit reports of Ernst & Ernst, chartered accountants, the Houston, Texas affiliate of Whinney-Murray & Co., for the five outstanding invoices indicating that the Contract's auditing requirements were met. Furthermore, the Claimant introduced copies of letters from the Navy's representative in the United States indicating approval of the November and December 1978 and February 1979 invoices and a copy of a supplemental audit submitted to the Navy by its accountant indicating that the January, February and March invoices "fairly reflect charges for services rendered and permissible service fee in conformity with Schedules I and II to [the] Contract." The Navy has neither specifically contested these audit reports nor produced any evidence of non-compliance with the Contract's auditing requirements. Indeed, the Navy has failed to specify any respect in which those requirements were not honoured. The Tribunal must conclude that the Contract was fully complied with in this regard.

The Navy has also asserted that the Contract's remuneration provisions are exorbitant and should therefore not be fully enforced. Even assuming that the Tribunal can inquire

into the fairness of the remuneration under the Contract, the only evidence on the point produced by the Navy was an excerpt from a contract with the consulting firm of Stanwick International Inc. which provided for compensation at rates lower than those of Pomeroy's contract. No evidence of the nature of Stanwick's duties or qualifications was presented, and, more importantly, there was no attempt to show customary commercial practice on rates of compensation for work such as that performed by Pomeroy. It is apparent that, at the time it contracted with Pomeroy, the Navy was in a position to be fully aware of rates of compensation paid for comparable services and, as the employer under the Stanwick contract, was particularly familiar with the rates paid thereunder. Having validly entered into the Pomeroy contract, the Navy cannot be heard to complain now that its terms were disadvantageous. Moreover, the Claimants produced some evidence indicating that the rates set forth in the Contract were specifically approved as being reasonable by a deputy prime minister in charge of reviewing the construction projects. In view of the above, the Tribunal holds that this defence must be rejected.

Finally, the Navy has not produced any evidence in support of its contention that Pomeroy breached its duties under the Contract by failing to supply qualified personnel or otherwise. Moreover, the Navy has not even specified any particular instance whereby Pomeroy violated its duties. By failing to establish even a prima facie case for contract breach, the Navy has not met its burden of proof on this defence and it must be rejected.

The uncontroverted evidence shows that the Navy failed, without justification, to make payments for the supply of personnel under audited invoices as required by the contract in the following amounts: US \$51,950 under the invoice of 16 December 1978; US \$49,550 under the invoice of 1 February 1979; US \$44,600 under the invoice of 5 February 1979; and US \$74,072.55 under the invoices of 15 March 1979. Furthermore, the Claimant has calculated the billing error indicated in the 12 June 1979 audit report and has demonstrated that US \$584 is due thereunder.

Furthermore, the evidence proves that the Navy has failed to pay the balance of the firm fee in accordance with the Contract, amounting to US \$50,213. During the course of the proceedings, the Claimant reduced the principal amount of this portion of its claim by deducting 26.5% of the asserted uninvoiced balance to reflect that portion of the firm fee attributable to overhead costs which it did not incur as a result of the termination of the Contract which deduction yields a uninvoiced fee balance of US \$36,980.

The Respondent contends that is it not liable for the uninvoiced portion of the firm fee, arguing that the 12 March 1979 notice cannot be regarded as a notice of termination since no valid contract was ever entered into. The Tribunal has, however, found the Contract to be valid and binding and therefore cannot accept this argument. Thus

the Tribunal holds that the Contract was in force and valid until the notice of termination was delivered on 12 March 1979.

The Navy having terminated the Contract for no fault of Pomeroy Corporation, the Tribunal finds that the Claimant is entitled to compensation for its losses caused by the termination. The Claimant claims the outstanding portion of the firm fee provided for under the Contract, arguing that this amount equals the profits it lost through the Contract being terminated.

In the absence of circumstances sufficient to justify a reduction of the firm fee due, the Tribunal holds that the Claimant should be awarded damages in the amount sought, US \$36,980.

2. Total principal amounts due to the Claimant

Thus, the Tribunal finds that the Claimant is entitled to recover a total of US \$257,736.55 for invoiced payments due and for damages.

3. The counterclaims

The two counterclaims of the Navy are based upon the same legal grounds as its defences of breach of contract and

contract invalidity. In order to prevail on these counter-claims and be entitled to an award thereunder, the Navy necessarily had to prevail on these defences as well. Because the Tribunal has been unable to sustain the Navy's position on the defences, it must likewise hold against the Navy with respect to these counterclaims. The counterclaims are therefore dismissed.

4. Interests on amounts due

The Claimant has further sought interest damages for delay in payment of the above amounts at a reasonable rate as determined by the Tribunal.

The Tribunal holds that the Claimant is entitled to compensation for the Respondent's failure to pay the monies owing and determines the damages in this respect to be \$100,000.

5. Costs of arbitration

Finally, the Claimant has requested an award for its costs of arbitration, including attorneys' fees, in the amount of US \$16,420. The Tribunal holds that, in the circumstances of the case, the Claimant is entitled to costs of arbitration under Articles 38 and 40 of the Tribunal Rules in the amount of \$5,000.

VI. AWARD

THE TRIBUNAL AWARDS AS FOLLOWS:

The Counterclaims of the Respondent THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN are hereby dismissed.

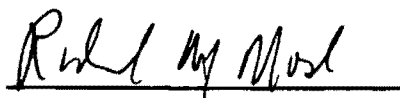
The Respondent THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF IRAN is obligated to pay and shall pay to the Claimant POMEROY CORPORATION the sum of Three Hundred Sixty Two Thousand Seven Hundred Thirty Six and 55/100 United States Dollars (US \$362,736.55). Such payment shall be made out of the Security Account established pursuant to Paragraph 7 of the Declaration of the Government of the Democratic and Popular Republic of Algeria dated 19 January 1981.

This Award is hereby submitted to the President of the Tribunal for notification to the Escrow Agent.

Dated, The Hague,
8 June 1983

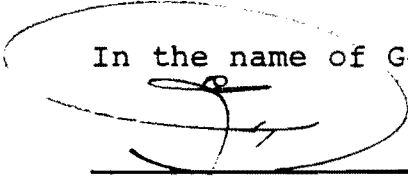


Nils Mangård
Chairman
Chamber Three



Richard M. Mosk

In the name of God,



M. Jahangir Sani

DISSENTING OPINION