

DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

26352

FILE: B-207320

DATE: September 28, 1983

MATTER OF: Khaou Chuly Enterprises and Company

DIGEST: In implementation of an international agreement, Navy, acting as construction agent for the United States on a reimbursable basis, contracted with private firm to build an airfield at Ream, in the former Khmer Republic. Because of incomplete, illegible, and conflicting documentation as to which of three possible sources is financially responsible for funding this contract, GAO is unable to identify an available appropriation to pay a proposed settlement with the contractor for damage to his equipment by enemy agents under a War Risk clause in his contract. Unless funds are available to charge these costs, the contractor's claim must fail in accordance with a proviso in the clause itself,

The Navy Regional Finance Center has requested our assistance in determining what appropriation may be used to pay the Navy's proposed settlement of a claim made by Khaou Chuly Enterprises and Company under Navy Contract No. N63008-73-C-0034. That contract, awarded in 1973 to Khaou Chuly, was intended to result in the improvement of an airfield at Ream, located in the Khmer Republic (now Kampuchea). The claim being settled by the Navy arose under a "War Risks" clause contained in the Navy Contract. The Navy has advised us that it lacks "sufficient financial documentation to identify the funds which should be used to satisfy the [proposed] monetary settlement of the claim." As explained below, we are unable to identify an available appropriation that is clearly available to pay this proposed settlement, because of the inadequacy of supporting documentation. We also have substantial doubts that there is a remaining balance in any of the possible funding sources. Under these circumstances, the War Risks clause itself precludes payment.

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Background

On August 12, 1972, the United States Government entered into a "Memorandum of Understanding" with the Government of the Khmer Republic. 23 U.S.T. 3144, T.I.A.S. No. 7491. That Memorandum provides that:

"[I]n recognition of the urgent requirement for the development of communications throughout the Khmer Republic as a major unifying force, and the present and prospective necessity for great reliance upon air transportation for such communications and the present inadequacy of excluding [sic-existing?] airfield facilities for both civil and military aircraft operations, [the United States and the Khmer Republic] hereby propose to jointly plan and finance specific improvements to certain existing airfields, namely Ream, Pochentong and Batambang * * *." (Emphasis added.)

Subsequent to the signing of that Memorandum, the Naval Facilities Command (NAVFAC) awarded Navy Contract No. N63008-73-C-0034 to Khaou Chuly. (NAVFAC states that it has served as construction agent for the United States Government in Southeast Asia for more than a quarter of a century.) The contract, entered into on February 7, 1973, was made for the purpose of improving the airfield at Ream. The Navy maintains that it was requested by other agencies of the U.S. Government to enter into this contract in order to implement the Memorandum of Understanding and that funds for the contract were either to be advanced or reimbursed to the Navy. Navy was unable to provide any written evidence of such an agreement. There are, however, a number of other documents which point to possible funding sources. Unfortunately, they are conflicting. (See later discussion.)

Also contained in the contract was a clause (number 118 on page 34) entitled "War Risks." Under that clause, the U.S. Navy assumed the risk and costs for any damage to, destruction of, or inability to complete the work contracted for, if the damage, destruction, or inability resulted from war-time activity. Clause No. 118(a)(1). The War Risks clause also contained the following provision:

"If material, equipment, and/or installations, owned by the Contractor and located on the site of the work to be performed under this contract for use in the performance of this contract, are lost, damaged, and/or destroyed by, or as a result of, hostile combat action, and not due to any fault or negligence on the part of the Contractor or its employees, to the extent that such risks are not covered by insurance, and within the limit of funds against which indemnification by the Government to the contractor for such loss, destruction, and/or damage may lawfully be charged, an equitable adjustment shall be made to increase the contract price, without allowance for profit, to the extent necessary to [indemnify] the Contractor for such loss, destruction and/or damage, and the contract shall be modified in writing accordingly." (Clause No. 118(a)(2).) Emphasis added. 1/

This latter provision was included in return for the Contractor's pledge that "the contract price does not and will not include any charge or reserve for insurance (including self-insurance funds for reserves)" to cover damage or destruction of its equipment. Clause No. 118(b).

Upon award of the contract, Khaou Chuly began work on the airfield improvements at Ream under the supervision of Navy personnel. However, in the spring of 1975, the Government of the Khmer Republic was overthrown and the Ream construction site was overrun by enemy forces. According to Navy estimates made at that time, the Ream airfield improvements were approximately 55 percent complete when the site was overrun. In August 1975, Khaou Chuly filed several claims, including two for payment under the War Risks clause: one for the value of the work actually completed (\$508,111.77), and another for the value of equipment which was lost when the construction site was overrun (\$4,126,983.72). In June 1976, Khaou Chuly accepted \$20,378.52 as final payment for the value of work actually performed. In accepting that payment, Khaou Chuly released the Government from all claims arising under the Navy contract, except for its claim under the War Risk clause for lost equipment, and another claim which is not pertinent to this case.

1/ The actual contract contains a typographical error using the word "identify" rather than "indemnify." Comparison of this clause to otherwise identical clauses in other contracts from this period provides the basis for clarification of this error. See Les Etablissements Eiffel-Asie, 80-2 B.C.A. para. 14,500 (May 23, 1980).

Subsequently, in 1977, the Navy contracting officer denied Khaou Chuly's claim for lost equipment. NAVFAC Final Decision No. 77-178, November 11, 1977. 2/ Khaou Chuly appealed that decision to the Armed Services Board of Contract Appeals, but the appeal was dismissed when Khaou Chuly and the Navy verbally negotiated a proposed compromise settlement of the claim. The Board of Contract Appeals dismissed Khaou Chuly's appeal "subject to reinstatement only if the settlement agreement is not consummated." Khaou Chuly Enterprises, ASBCA No. 22612, August 21, 1980. According to the Navy, the proposed compromise negotiated with Khaou Chuly has yet to be reduced to writing, but it provides for the payment to Khaou Chuly of \$600,000 for lost equipment plus \$150,000 interest (as required by the Navy contract), in return for Khaou Chuly's release of its claim. (The Navy negotiated that settlement, based upon its appraisal of the value of equipment which it believes was actually on the construction site in the spring of 1975.)

Prior to finalizing the proposed settlement of Khaou Chuly's claim, the Navy sought to identify the appropriation from which payment would be made in order to assure that sufficient funds were available to pay the settlement. Although the large packet of materials submitted by Navy attests to diligent research on the funding sources for the contract in question, many of the documents are illegible and incomplete, or, at best inconclusive.

For these reasons, Navy has requested our assistance in determining what appropriation may properly be used to pay the proposed settlement of Khaou Chuly's claim.

Discussion

As explained earlier, the Navy was acting as construction agent for the United States in carrying out the provisions of the Memorandum of Understanding with the Government of the Khmer Republic for the upgrading of three airfields. The documents submitted make it clear that the financing of the total project--i.e., all three airfields--was to come from funds contributed, in various proportions, by the Defense Security Assistance Agency (DSAA) from the Military Assistance Program (MAP) appropriation, by the Agency for International Development (AID),

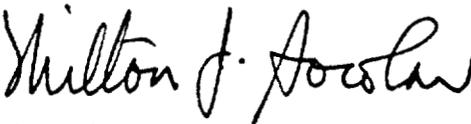
2/ Because the contracting officer's final decision was issued prior to March 1, 1979, the effective date of the Contract Disputes Act of 1978, 41 U.S.C. § 601 et seq., that act is not applicable to Khaou Chuly's claim. See, e.g., Monroe M. Tapper & Assoc. v. United States, 611 F.2d 354 (Ct. Cl. 1979).

and from the Government of the Khmer Republic. However, the evidence is conflicting on whether MAP and/or AID funds were ever allocated to construction of the Ream Airbase, which is the only one involved in the Khaou Chuly contract.

The contract itself (and its various amendments) cite Navy's own appropriation (17X1205), a Navy trust fund (17FT800), and several Embassy trust funds. It is clear that Navy's own funds would not be available to pay for the construction in question except as an accommodation in its role as construction agent for the Cambodian area. We have no doubt that reimbursement from other sources was expected and agreed to--but from which source? The listing of Embassy trust funds was explained by the Commander, Naval Facilities Engineering Command as a depository device to receive contributions from the Government of the Khmer Republic. The failure to mention MAP or AID funds does not conclusively rule them out as a funding source, however. According to another document, AID acknowledged that at least some of its money "might" have been used for the Ream airfield, but later alleged that the accounting report on which that acknowledgement was based was "not meaningful." The DSAA stoutly maintains that no MAP funds were used for the Ream contract and funds made available under the other two contracts are not available for this one.

Conclusion

As accounting officers of the Government, we are unable to pinpoint the proper source of funds to pay the proposed settlement with Khaou Chuly on the basis of the documents supplied to us. Moreover, we note that of the three possible funding sources identified--Government of the Khmer Republic, MAP, or AID appropriations--only MAP has an available balance which could be applied to the settlement if MAP's responsibility could be established. If MAP's funds are not involved, it appears to us that the contractor's claim fails under the War Risk clause because the Government's responsibility was tied specifically to the availability of a fund to which the costs could be charged.

for 
Comptroller General
of the United States