

**THE INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION  
OF THE AMERICAN ARBITRATION ASSOCIATION**

\_\_\_\_\_ X

**VULCAN ENERGY SOLUTIONS LLC, x**

**Claimant x**

**- against - x**

**MINISTRY OF ELECTRICITY OF THE x**  
**REPUBLIC OF IRAQ**

**No. 50 198 T 00441 05**

**Respondent x**

\_\_\_\_\_ X

**FINAL AWARD OF THE SOLE ARBITRATOR**

**I, THE UNDERSIGNED ARBITRATOR, having been designated  
in accordance with the arbitration agreement entered into  
between the above-named parties and dated February 22, 2005,**

**and having been duly sworn, and having duly heard the proofs and allegations of the parties, do hereby, AWARD, as follows:**

***Procedure***

**1. The undersigned was invited by the International Centre for Dispute Resolution on January 20, 2006 to serve as Sole Arbitrator in the above-titled arbitral proceeding. He accepted appointment, disclosing contacts with counsel for the Respondent in prior cases, and counsel for the parties were so informed on January 23, 2006. No objections to his appointment were raised.**

**2. Claimant is principally represented by William Lewis Sessions, Esq., currently of the firm of Sessions Lambert Selwyn LLP. Respondent is principally represented by Jonathan I. Blackman, Esq., of the firm of Cleary Gottlieb Steen & Hamilton LLP.**

**3. A Preliminary Hearing Conference Call with counsel took place on February 23, 2006. Pursuant to it, the parties agreed upon a scheduling order on March 9, 2006, providing for**

**the exchange of requests for production of documents, a deadline for production and exchange of lists of the names of persons with possible knowledge relevant to the arbitration, a deadline for submission of Vulcan's Opening Brief and Witness Statements with Exhibits, a deadline for submission of the Response of the Ministry of Electricity and Witness Statements with Exhibits, a deadline for submission of Vulcan's Reply with Reply Witness Statements and Exhibits, and a deadline for submission of the Ministry's Sur-Reply with Sur-Reply Witness Statements and Exhibits. All prescribed pleadings were duly filed. Hearings on the merits took place in New York City February 5-8, 2007, and were closed on February 8. Witnesses, including two who took part from the Middle East by video link, testified and were examined at the hearings. Post-Hearing Briefs were submitted by the parties on March 5, 2007 and Post-Hearing Reply Briefs were exchanged on March 19, 2007.**

***The Contract***

**4. A Power Rehabilitation Contract ("the contract") was concluded on February 22, 2005 between the Ministry of**

**Electricity for Iraq (the “MOE” or “Ministry”) and Vulcan Energy Solutions (“Vulcan” or “Contractor”) of Elizabethtown, North Carolina, for the refurbishment of turbine and compressor rotors and related work at the Mulla Abdulla Site in Iraq. Vulcan had previously worked as a subcontractor in Iraq; the Power Rehabilitation Contract was its first prime contract. Services were to commence on or about March 15, 2005 and to be completed not later than 210 days from commencement. Total compensation was not to exceed USD \$64,000,000. Article 8.1 of the contract, under the heading “Compensation”, specifies:**

**“The schedule for payment under this provision is provided in Exhibit A. The Contractor will provide services to fulfill the contract requirements and will be paid to provide the services provided in Exhibit B...**

**“At the signing of this Contract, the MOE shall deliver an irrevocable Letter of Credit issued at JP Morgan of New York in the amount of \$12,200,000.00 USD to Contractor as a mobilization fee for labor and required parts. Vulcan will deliver invoices along with appropriate documentation to the MOE for payment every 30 days...”**

**Under the heading, “Invoicing and Payments,” Section 13.2**

**provides:**

**“Contractor shall invoice for that portion of the Services performed during the ½ month and not previously invoiced....MOE**

**shall within five (5) business days issue a letter to Bank holding Letter of Credit, authorizing the release of funds in amount of invoice.”**

**Section 13.4 specifies:**

**“At signing of this contract, The MOE shall provide an irrevocable Letter of Credit issued at JP Morgan Bank in New York City, New York to the Contractor or a USD cash deposit of not less than \$12,200,000.00 USD.”**

**Section 13.5 provides:**

**“Contractor shall submit invoices in a manner that details all Invoiced items...”**

**Section 13.6 provides:**

**“Subject to the terms of this Contract and upon MOE’s written request, Contractor shall furnish evidence reasonably satisfactory to MOE, that all labor furnished and materials consumed by Contractor during the invoice period has been paid in full...”**

**Under the heading, “Applicable Law”, Section 23 provides:**

**“Any disputes arising out of this Contract shall be construed and interpreted according to the United States Law in the State of New York as applicable, excluding provisions thereof, which would refer to the laws of another body of law. In the event of a dispute, each party agrees to binding arbitration under the rules of the American Arbitration Association in New York, New York.”**

**Exhibit A, “Schedule of Payments”, is a table of payments by date and amount. The first lines read:**

<b>“Payments</b>	<b>Date</b>	<b>Amount</b>
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**“Mobilization Fee At Placement of LC \$12,200,000.00USD**

**Invoice 1 30 Days from Mobilization To be determined...”**

**5. The contract was signed in Baghdad on February 21, 2006 by Robert P. Virgo, Vulcan's Vice President for Projects, and, on February 22, 2006, by Dr. Aiham Alsammarae, Minister of Electricity. It was accompanied, apparently as a part of or an appendix to the contract, by a letter in Arabic, with four signatures, untranslated into English.**

**6. The terms of the contract, particularly its technical terms as to the generating units to be rehabilitated and the price of the specifics of the work, were negotiated by Mr. Virgo and Mr. J.C. Adams of Vulcan with representatives of the Ministry of Electricity, led by a senior engineer who had decades of Ministry experience, Mr. Aiser Habib. His technical department of the Ministry signed off on the contract. Whether the legal and commercial departments of the Ministry, whose representatives were present, signed the contract is in dispute between counsel. Practice required their stamps on the contract before its presentation to the Minister and counsel for the Ministry maintain**

**that those stamps do not appear. The contract was presented to Minister Alsammarae for signature. It has not been shown whether, before signature, Minister Alsammarae read the letter in Arabic signed by four of his senior subordinates. The translation provided to the Sole Arbitrator refers to the Minister's "instructions on entering into discussions" regarding "the sole offer" in respect of Mulla Abdullah, and essentially noted that there was a difference between the Ministry and the Contractor on the appropriate price; and that the Contractor did not agree to subjecting the contract to Iraqi law. Vulcan interprets the letter as approval of the contract by the Ministry's senior officials, whereas Mr. Aiser Habib in his oral testimony interpreted it as a conditional approval, meant to signal to the Minister that he and his senior associates had reservations.**

**7. Minister Alsammarae, prior to his appointment as Minister of Electricity in the interim Government of Iraq of which Dr. Ayad Allawi was Prime Minister, had lived in Chicago and engaged for three decades in business there with an electrical contracting firm, KCI Engineering Consultants "(KCI)". The initial**

**meeting between representatives of Vulcan and Minister Alsammarae took place on December 27, 2004, in Chicago, in the premises of KCI, of which Dr. Alsammarae is or was executive director. No other official representatives of the Government of Iraq were present. It is common ground between the parties that, at that meeting, Minister Alsammarae assured the representatives of Vulcan that Vulcan would be given contracts for rehabilitation of generators in Iraq. But it is a matter of acute controversy what else transpired.**

***Allegations of bribery***

**8. In his initial Witness Statement of July 24, 2006, Mr. Adams recounts that he had worked on Vulcan's subcontracts in Iraq but was owed some \$150,000 in unpaid salary. He states that he was induced to join in meeting with Dr. Alsammarae in Chicago by the assurance that, if Vulcan were to win one or more prime contracts, his unpaid wages would be paid. Mr. Adams reports that the Vulcan representatives discussed with Dr. Alsammarae in Chicago the projects that he had in mind and that he then left Vulcan's president, Mr. Ford Graham, together with**

**two employees of KCI, one of whom was Dr. Badar Hussain. Mr.**

**Adams continues:**

**“As we were walking to the car, Mr. Graham told the group that he had agreed to pay a 10% ‘engineering fee’ as a bribe for obtaining any contract with the MOE.” (At p. 5.)**

**Mr. Adams adds that subsequently:**

**“...I learned that there would be no immediate down payment as we expected, but we would need to wait for payment through a letter of credit setup at JPMorgan Chase.” (P. 7.)**

**Mr. Adams further asserts that, when an invoice was required to release funds covered by the letter of credit,**

**“The invoice listed a total of \$12.2 million for ‘work completed during this period’ when in fact Vulcan had not spent any money on mobilization...Finally the invoice included \$3 million for ‘engineering costs’ which represented the kick-back paid to KCI.” (P. 8.)**

**Mr. Adams added that when he returned to Baghdad he was told by an MOE official that:**

**“...everyone at the MOE knew how Vulcan was awarded the Mulla Abdulla contract. He told me that Dr. Alsammarae had failed to follow the established procedures for the approval of the contract...the MOE nonetheless still wanted to see the work performed at Mulla Abdulla, and they would be willing to go forward with the contract and make the advance payment to Vulcan, so long as we either began mobilization or provided a bank guarantee to insure return of the advance payment amount if Vulcan failed to perform...However, the reality was that Vulcan had no financial resources to do any of these things. Although**

**individuals at Vulcan, including myself, had the technical skill necessary to oversee the Mulla Abdulla contract, Vulcan had no money to mobilize men or equipment. Without an immediate up-front mobilization payment, Vulcan was simply unable to begin performance of the contract.” (At p. 9.)**

**Mr. Adams concluded his affidavit by noting that he was in litigation with Vulcan to recover unpaid wages and expenses.**

**9. Affidavits filed by others present at the Chicago meeting flatly and fully deny the account of Mr. Adams and assert that no bribe was ever offered or accepted. The written pleadings of Vulcan state that nothing was said at the meeting in Chicago, directly or indirectly, about any bribe or kickback. The engineering fee is described as a legitimate expense of making the engineering adjustments necessary in the construction process and of ensuring that the plant will function properly. The allowance of substantial engineering fees, Vulcan maintains, is evidence of prudent risk management, not a slush fund for bribery. At the oral hearing, witnesses for Vulcan steadfastly denied any bribe.**

**10. At the same time, counsel for the Ministry pointed to references to an “engineering fee” in e-mail traffic and spread**

**sheets. Thus an e-mail message from Ford Graham to J.C.**

**Adams and others of February 17, 2005 states that:**

**“At some point we need to confirm with the Dr. that he and Badar [a KCI official with whom Mr. Ford had met in Chicago] are on the same page regarding the engineering contracts we have agreed to.”**

**When matters were blocked over the issue of release of the mobilization fee, a message to Mr. Graham of May 31, 2005 from**

**Mr. Hydar Shamkani, an agent in Iraq of Vulcan, remarked that**

**“...Mr. Engineering is still in Amman...Ford, please give the engineering fee some thought. This could make the difference in the deal.”**

**There was considerable e-mail traffic between Mr. Ford and Dr.**

**Alsammarae about expediting issuance of the letter of credit**

**and, once the letter of credit was issued, about authorizing the**

**release of the funds that it covered. In seeking Dr. Alsammarae's**

**assistance after he had left office, Mr. Graham, in an e-mail**

**message of October 17, 2005, wrote to him:**

**“I ask you to intervene and directly force this issue to be paid. Without your influence, we will not get paid and cannot bring our people into the country, nor pay for parts, equipments, service, or even for the engineering services we will require.”**

**11. In a subsequent affidavit of August 22, 2006, Mr. Adams reiterated his allegations about “the total bribe that Vulcan agreed to pay Dr. Alsammarae for the Contract...” (p. 8). He repeated the substance of his bribery allegations in a Sworn Third Statement of December 1, 2006.**

**12. Vulcan brought suit against Mr. Adams in the United States District Court, Northern District of Florida, seeking to bar him from violating non-disclosure provisions of his written agreements with Vulcan. In a settlement of that suit dated January 11, 2007, Mr. Adams accepts that he “has realized that representatives of the firm of Cleary Gottlieb Steen & Hamilton, LLP...counsel for the Ministry...mislead [sic] Adams with respect to his statements made in the arbitration...Adams has realized that Cleary lawyers unfairly constructed Adams’ statements in a manner that inaccurately portrays Adams’ knowledge...”**

**The settlement agreement provides that**

**“Vulcan will pay Adams \$140,000 in full settlement of any and all claims...Adams may have against Vulcan...Adams will clarify and correct all information contained in his statements filed in the...Arbitration and admit where he was speculating in those statements...Adams will acknowledge and confirm Vulcan’s efforts and actions to mobilize in Iraq...withdraw his statements made in the...Arbitration because of Cleary’s misrepresentations and wrongful conduct of Cleary with respect to obtaining the statements from him....”**

**13. Counsel of Cleary Gottlieb filed statements with the Sole Arbitrator (of Andrew Weaver, Esq. and Daniel Zipp, Esq. dated January 23, 2007) in which they set out in detail how they came to have knowledge of Mr. Adams' revelations, affirmed that Mr. Adams' attestations were freely volunteered by him, maintain that drafts of his testimony were reviewed and amended by him, and attest that that testimony was in no way misrepresented by them. Cleary Gottlieb contended that Mr. Adams was being paid to repudiate much of his earlier sworn submissions and to request their withdrawal. Counsel for Vulcan countered that he was paid in settlement of his claims for non-payment of wages and expenses, and submitted that his affidavits should be withdrawn pursuant to his request. The Sole Arbitrator ruled that the Adams' affidavits would remain in evidence and would be given such weight as they appeared to merit.**

**14. Allegations of bribery and the credibility of statements of affiants and witnesses in respect of those allegations will be dealt with below.**

***The Authority of Minister Alsammerae to Contract***

**15. Dr. Alsammerae signed the contract shortly before leaving office in the interim Government of which Mr. Allawi was Prime Minister. Prime Minister Allawi had directed the heads of all Iraqi Ministries on January 29, 2005 “not to adopt any decisions that would be binding on the transitional government, especially in the area of financial obligations...” Counsel for the Ministry accordingly maintain that Minister Alsammarae lacked authority to conclude the contract at issue. Moreover, they maintain that, under the law of Iraq, the Ministry should have advertised for bids or invited a minimum of three companies to submit proposals, whereas in the instant case Minister Alsammarae directed his staff to conclude the contract solely with Vulcan. Counsel for the Ministry observe that the evidence shows that the contract for Mulla Abdulla was awarded to Vulcan without inviting other bids and without following the normal procedures of the Ministry. Public Order 87 of the Provisional Coalition Authority provided that, “to the maximum extent practicable, government contracts” were to be awarded “on a competitive basis”. Standard Iraqi regulations were**

**consistent with these provisions. Nor was the price of the negotiated contract with Vulcan made public as required. Moreover, it is undisputed that the Ministry made known its intention to award Vulcan a no-bid contract before even receiving from Vulcan a proposal covering the work to be done at Mulla Abdulla.**

**16. Counsel for Vulcan counter that the Iraqi procedures invoked by the Ministry had been displaced by the Coalition Provisional Authority's Public Order 87, which authorized negotiated contracts "whenever the interests of the governmental unit or agency concerned will best be served by awarding the contract on a basis other than the lowest price." That Order remained in effect when the contract was concluded. As to the authority of Minister Alsammarae to contract, Vulcan maintains that the Allawi directive was no more than a guideline which in any event permitted ministers to make exceptions in emergency situations, provided that the minister consulted the Prime Minister. The Ministry has provided no evidence that Minister Alsammarae did not consult the Prime Minister. Minister**

**Alsammarae had apparent authority to enter into the contract; Vulcan relied on that authority; and the Ministry thereafter treated the contract as one that was valid and in force. Not only did it fail to repudiate the contract; it partially performed by providing a letter of credit of which Vulcan was to be the beneficiary. The Ministry did not assert that Dr. Alsammarae lacked the authority to bind the Ministry until it filed its Statement of Defence in the arbitration, more than eight months after the signature of the contract.**

**17. The issue of the authority of Dr. Alsammarae to enter into the contract will be passed upon below.**

***The Mobilization Fee***

**18. The issue most searchingly contested by counsel was that of the payment – or non-payment – of the mobilization fee. The dispute between the parties turned above all on that question.**

**19. The Ministry opened a letter of credit in favor of Vulcan not at, but some weeks after, the signing of the contract. However, JP Morgan was not authorized to make payment under**

**the letter of credit in the absence of mobilization on the ground at Mulla Abdulla, or until an invoice was transmitted by Vulcan in support of the expenses of that mobilization, or, in the alternative, the provision by Vulcan of a bank guarantee for the amount of the drawdown under the letter of credit.**

**20. Vulcan argues that the governing provisions of the contract are clear and compelling. They are set out above in paragraph 4 of this Award. Para. 8.1, on “Compensation, Value” provides that,**

**“At the signing of this Contract, the MOE shall deliver an irrevocable Letter of Credit issued at JP Morgan of New York in the amount of \$12,200,000.00USD to Contractor as a mobilization fee for labor and required parts. Vulcan will deliver Invoices with appropriate documentation to the MOE for payment every 30 days.”**

**The specification, “At the signing of this Contract”, Vulcan argues, is unambiguous; “at” means then, not later; and that the Ministry “shall” deliver an irrevocable Letter of Credit is a mandatory obligation. The references to invoices refers to invoices for subsequent payments for subsequent work. Moreover, under the heading “Invoicing and Payments,” Article 13.4 confirms that:**

**“At the signing of this contract, The MOE shall provide an irrevocable Letter of Credit issued at JP Morgan Bank in New York City, New York to the Contractor or a USD cash deposit of no less than \$12,200,000.00USD.”**

**Vulcan finds this prescription to be equally clear and categoric.**

**It argues that this interpretation is sustained by the format of Exhibit A, the Schedule of Payments, reproduced in paragraph 4 above. The essence of Vulcan’s argument is that the Ministry stands in breach of the contract because it failed to open the letter of credit at the signing of the contract; because, once the letter of credit was belatedly opened, the MOE conditioned drawing on it upon either the commencement of Vulcan’s mobilization on the ground at Mulla Abdulla or the rendering of an invoice for the expenses of so doing or upon Vulcan’s provision of a bank guarantee. Vulcan maintains that these conditions were extra-contractual and that, in attempting to fulfill them, it reserved its rights, making clear its position that the Ministry was unconditionally bound to open a letter of credit on the signing of the contract on the basis of which Vulcan could immediately draw down \$12,200,000. In the event, Vulcan did furnish an invoice purporting to show that it incurred expenses in**

**mobilizing totalling \$12,200,200, because, it says, it was given to understand that the \$12,200,000 would be released once it did so. It also transmitted a guaranty from its insurance broker which it maintained fulfilled the request for a bank guaranty. Vulcan did not dispute that, in the absence of payment of the mobilization fee to it, it was not in a financial position actually to incur the expenses of mobilization. It argues that a small company such as Vulcan could not have been expected to incur the very large expenses of mobilization, in an area of acute danger, without an “up-front” payment by the MOE; and that it made its position on payment of the mobilization fee at the signing of the contract clear throughout the negotiation of the contract and thereafter.**

**21. The Ministry for its part maintains that the proper interpretation of the terms of the contract sustains its conditioning drawing on the letter of credit as it did. It points out that a letter of credit is a document used in commerce that requires the issuing bank to make payment on presentation of**

**the requisite documents. It cites New York law defining a letter of credit as**

**“a definite undertaking...by an issuer [the bank issuing the letter of credit] to a beneficiary at the request or for the account of an applicant...to honor a documentary presentation by payment or delivery of an item of value.” NY U.C.C. para. 5-102(a)(10).**

**The MOE’s here specifying that mobilization on the ground should be documented by an invoice attesting to the expenses of mobilization, or, in the alternative, that a bank guaranty be provided, was in accord with commercial practice and the normal meaning accorded to a letter of credit. The Ministry observes that Section 8.1 of the contract required Vulcan to deliver invoices “along with appropriate documentation to the MOE for payment every 30 days”. Section 13.2 of the contract further provides that**

**“Contractor shall invoice for that portion of the Services performed during the ½ month and not previously invoiced...MOE shall within five (5) business days issue a letter to Bank holding Letter of Credit, authorizing the release of funds in amount of invoice.”**

**Counsel for the Ministry contend that there is no exception in the foregoing language for the initial mobilization payment; mobilization is part of the Services and the Services must be**

**performed and invoiced for payment to be made. In point of fact, the Letter of Credit Advice of April 20, 2005 to Vulcan referring to the Mulla Abdulla contract stated that**

**"At the request of the Issuing Bank indicated above [JP Morgan Chase Bank], we are forwarding a letter of credit issued in your favor. We are holding the original Letter of Credit at our counters pending presentation of documents for examination by us...Upon completion of our review of documents under this credit, and provided they comply with the terms and conditions, we shall forward your DOCUMENTS TO JPMORGAN CHASE BANK, LONDON. Payment shall be effected only upon receipt of funds from them. ALL DOCUMENTS MUST BE PREPARED PER THE TERMS AND CONDITIONS OF THE LETTER OF CREDIT...DOCUMENTS UNDER THIS LETTER OF CREDIT SHOULD BE PRESENTED TO THE FOLLOWING LOCATION...Payment will be made against Applicant's instructions according to contractors invoices and acts of executed works in accordance with the monthly schedule and acceptance of the goods, to be advised to us by the Trade Bank of Iraq..."**

**The MOE further argues that Vulcan's contention that the MOE had in effect agreed to make an unsecured \$12.2 million loan to a small company of less than \$2 million in equity was inherently implausible. While an earlier draft of the contract provided for an immediate payment to Vulcan, Mr. Adams (see paragraph 8 above) recognized on the signature of the contract that it no longer so provided. In an e-mail message of February 20 addressed to Mr. Graham, Mr. Adams wrote:**

**“The Bad News. There will be no down payment. The down payment cannot exceed 20% of the total project price and will only be paid after the LC is released by JP Morgan of New York. We will also be able to invoice our first and possibly the second invoice at that time as well.”**

**22. The Ministry further argues that the fact that Section 13.4 of the contract provides, as an alternative to provision of the letter of credit, for “a USD cash deposit of not less than \$12,200,000 USD”, does not show that Vulcan was entitled to a cash payment of that sum in advance of mobilization. The MOE by virtue of this provision had the choice of making payment by a letter of credit or by means of a cash deposit. But the provision for a cash deposit did not mean that Vulcan was entitled to immediate payment in cash; it looked to a deposit on which Vulcan would draw against conforming documentation. Finally, the Ministry argues that, insofar as the provisions of the contract on payment of the mobilization fee are ambiguous, the contract should be construed *contra proferentem*. The contract was drafted by Vulcan and ambiguities should be interpreted against it.**

**23. Finally, the Ministry draws attention to a memorandum of February 22, 2005 sent by Mr. Marc Solochek, a financial officer of Vulcan Power Group, immediately after signature of the contract, that was sent to Mr. Graham, Mr. Virgo, Mr. Adams and others of the Vulcan group.**

**"I have reviewed the final contract between the Iraqi Ministry of Electricity ("MOE") and Vulcan Energy Solutions ("VES") and have the following thoughts and comments.**

**...Initial funding under the contract also seems confusing. The second paragraph of Section 8.1 provides, 'The schedule for payments under this provision is provided in Exhibit A.' Exhibit A is a three column schedule: ...The first item listed under "Payments" is Mobilization Fee. That item under 'Date' says "At placement of LC". And the amount is listed as \$12,200,000 (which is the total of the LC). The third paragraph of Section 8.1 provides, 'At the signing of this Contract, the MOE shall deliver an irrevocable Letter of Credit issued at JP Morgan of New York in the amount of \$12,200,000.00 USD to Contractor as a mobilization fee for labor and required parts.' Given the provision of Exhibit 8, does this mean that VES can draw the entire 12.2 million immediately for mobilization?**

**If so, then what does Section 13.2 mean? That section provides, 'Contractor shall invoice for that portion of the Services performed during the ½ month and not previously invoiced...MOE shall within five (5) business days issue a letter to Bank holding Letter of Credit, authorizing the release of funds in amount of invoice.' ...Unless there is an obligation to maintain a \$12,200,000 letter of credit at all times during the contract, which would require MOE reimbursing Morgan for each draw**

**and Morgan restoring the LC upon reimbursement to \$12,200,000, an immediate draw of \$12,200,000 for mobilization would render the last sentence of Section 13.2...meaningless...**

**“If, in fact, VES will have the full \$12,200,000 mobilization fee immediately available, acquiring the parts and materials to carry out this project should not be difficult. However, if the intent of the contract is to invoice for services, part and materials, even during the mobilization period, these invoicing provisions will make VES’ ability to acquire parts and materials very difficult without some working capital at our disposal...Hopefully, we can reserve these needs from the \$12,200,000 mobilization fee (assuming we have access to it all up front)...”**

**24. The issue of the mobilization fee will be likewise ruled upon below.**

***Damages***

**25. Last, there was dispute between the parties as to whether, if Vulcan’s claims of breach of contract were to be sustained, it proved damages. Vulcan maintains that the Ministry violated its clear obligation to pay the \$12,200,000 mobilization fee upon execution of the contract and that, because of that breach, it sustained damages for mobilization and contract fulfillment expenses, particularly for provision of security at Mulla Abdulla, as well as for lost profits. Vulcan claims a total of some \$22,000,000 (In his Second Sworn Statement, Mr. Graham**

**stated that a true and accurate calculation of damages totalled \$22,225,002 but that sum subsequently was modestly modified at the oral hearing). Of that sum, \$14,232,000 is for profit that Vulcan asserts that it would have made had the contract been implemented. In the alternative, Vulcan makes a claim for recovery in quantum meruit.**

**26. The Ministry contends that Vulcan made virtually no expenditures in implementation of the contract, that it would have not made a profit had the contract been implemented, that Vulcan has not met its burden of proof to establish damages, and that no damages should be awarded.**

**27. In view of the following holdings, the question of damages does not require further consideration.**

***Disposition of the Principal Issues of Liability***

**A. The question of bribery**

**28. Under the law of the State of New York, “a contract procured through bribery is not enforceable.” *Swig Weiler & Arnow Mgmt. Co. v. Stahl*, 817 F. Supp. 404, 406 (S.D.N.Y. 1993).**

**In *World Duty Free Co., Ltd. v. Republic of Kenya*, International Centre for Settlement of Investment Disputes, Case No. ARB/00/7, it was stated that “bribery is contrary to the international public policy of most, if not all, States...” Vulcan recognizes that it is “undisputed that a contract procured through bribery may not be enforceable”.**

**29. The question however is not one of legal principle but one of proof. It is accepted that bribery will often be difficult to prove, that “corruption will rarely be substantiated by clear evidence” (to quote from *Gulf Resources Corp. v. Republic of Congo*, ICC Case No. 12990 of December 29, 2005). Nevertheless it must be substantiated. Otherwise there is danger that claims of bribery in avoidance of contractual obligations will be made, particularly by governmental defendants, when the facts may not sustain such claims.**

**30. In the instant case, the essential evidence supporting a finding of corruption is that provided by a former employee of Vulcan who was a principal negotiator of the contract, J. C. Adams. His recounting of the elements of bribery in his three**

**witness statements is credible. His withdrawal in large measure from those statements, and his charges against counsel of Cleary Gottlieb, are, in the circumstances set out above, incredible. Moreover, there is some corroborative evidence of the charge of bribery in e-mail traffic not originating with Mr. Adams, in the testimony of an employee of a third party, Mr. Brian Waddell, and in financial tables referring to a fee, but that evidence is inconclusive. The circumstances of Minister Alsammerae meeting with Vulcan's representatives in Chicago in the absence of any other Ministry representatives, his assurance that Vulcan would be awarded contracts, as well as his continuing concern with the implementation of the Mulla Abdulla contract once he had left office, are disquieting. Nor are other circumstances surrounding Dr. Alsammarae, which are matters of public record, reassuring. Nevertheless, Mr. Adams' statements are critical to sustaining the bribery charge. While those statements remain in evidence, they have been devalued by Mr. Adams. Mr. Adams cannot be heard at the same time to**

**approve and reprobate. In the end, the contract cannot be set aside on the ground that it was procured by bribery.**

**B. The Authority of Minister Assamarae to Contract**

**31. Counsel of the Ministry have raised legitimate questions about the authority of its then Minister Alsammarae to enter into the sole source contract with Vulcan. His assurances given in Chicago that contracts would be given to Vulcan; his arranging for Vulcan to be the sole source of the Mulla Abdulla commission; his acting to bind the Government of Iraq despite Prime Minister Allawi's apparent injunction; his signing off on a contract that apparently lacked the stamps of the legal and commercial sections of his Ministry, all this gives ground to question Minister Alsammarae's authority to enter into a valid contract with Vulcan.**

**32. Nevertheless is it striking that, after Minister Alsammarae's departure from office, and after dispute between the Ministry and Vulcan arose over the payment of the mobilization fee, and despite the prolongation of that dispute, the Ministry neither repudiated nor terminated the contract, on the**

**ground of Minister Alsammarae's lack of authority or otherwise.**

**On the contrary, as counsel for Vulcan have pointed out, the Ministry performed the contract, in part, by establishing the letter of credit.**

**33. In view of the foregoing, it is concluded that the Ministry cannot now be heard to avoid the contract on the ground of the lack of authority of Minister Alsammarae to conclude it.**

**C. The Mobilization Fee**

**34. In the end, the disposition of this dispute must turn on its paramount issue: payment of the mobilization fee. The issue is finely balanced. The terms of the contract are susceptible of an interpretation that goes either way, as was illuminated on the day after of its conclusion by the memorandum of Mr. Solochek, and, more, by the able arguments of counsel on both sides of the question.**

**35. It is clear that in contracting it was the intention of Vulcan that the mobilization fee of \$12,200,000 be paid to it at the signing of the contract, and in advance of its actually mobilizing men and material at Mulla Abdulla. That was not only**

**its objective, it was the prerequisite of its performance. But the intention of the Ministry is less clear. It accepted a contract, apparently drafted almost entirely by Vulcan, which did not unconditionally so prescribe, for the reasons set forth in detail above.**

**36. What is clear is that payment was provided for by means of a letter of credit. Or, more precisely, Section 13.4 provided that:**

**“At the signing of this contract, The MOE shall provide an irrevocable Letter of Credit issued at JP Morgan Bank in New York City, New York to the Contractor *or a USD cash deposit of not less than \$12,200,000.00USD.*” (Emphasis supplied.)**

**What was not unconditionally provided was that, at the signing of the contract, the Ministry shall pay \$12,200,200 to Vulcan as a mobilization fee. The alternative provision was for a cash deposit, not for a cash payment, i.e, the MOE was afforded the option either of setting up a letter of credit on which Vulcan could draw, or making a cash deposit on which it could draw. By the terms of the contract, the option was that of the Ministry. The contract does not provide that, at the option of Vulcan, the Ministry shall provide an irrevocable Letter of Credit or a cash**

**deposit. If the intention of both parties had been that, on the signing of the contract, the MOE would be obliged immediately and unconditionally to pay Vulcan \$12,200,000, there would have been no point in the contract's referring at all to a letter of credit, which characteristically requires payment upon presentation of conforming documents. Why the contract speaks of a cash deposit is less clear. But what is clear is that the Ministry was not obliged to make the cash deposit.**

**37. There is reason to suppose that the Ministry's insistence on Vulcan's mobilizing on the site of Mulla Abdulla, or providing an Invoice for services actually performed, or providing a bank guaranty, as a condition for releasing the funds under the Letter of Credit, was influenced by its perception of the circumstances of the conclusion of the contract, as well perhaps as uncertainty about the ability of Vulcan to perform. But that does not detract from the tenability of the Ministry's legal position.**

**38. It is accordingly concluded that Vulcan has not established that the Ministry was in breach of the contract by its treatment of payment of the mobilization fee.**

**D. AWARD**

**39. The claims of Vulcan Energy Solutions for a finding that the Ministry of Electricity has breached its contract with Vulcan Energy Solutions, and for an award of damages, attorneys' fees and interest, are denied.**

**40. Each party shall be responsible for the fees of its attorneys.**

**41. The administrative fees and expenses of the International Centre for Dispute Resolution ("ICDR") totaling NINETEEN THOUSAND FOUR HUNDRED DOLLARS AND ZERO CENTS (\$19,400.00) shall be borne as incurred by the parties. The compensation and expenses of the arbitrator totaling ONE HUNDRED TWENTY THOUSAND TWO HUNDRED TWENTY FOUR DOLLARS AND FORTY CENTS (\$121,224.40) shall be borne equally by the parties.**

**I hereby certify that, for the purposes of Article 1 of the New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards, this Final Award was made in New York, N.Y.**

March 28, 2007  
**March 28, 2007**

Stephen M. Schwebel  
**Stephen M. Schwebel**

**District of Columbia: ss**

**I, Stephen M. Schwebel, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my Award.**

March 28, 2007  
**March 28, 2007**

Stephen M. Schwebel  
**Stephen M. Schwebel**

E. Sherman  
**Notary Public**

**EVANGELA R. BUTLER-SHERMAN**  
Notary Public, District of Columbia  
\* Commission Expires Feb. 14, 2011

**THE INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION  
OF THE AMERICAN ARBITRATION ASSOCIATION**

----- x

**VULCAN ENERGY SOLUTIONS LLC, x**

**Claimant x**

**- against - x**

**MINISTRY OF ELECTRICITY OF THE x No. 50 198 T 00441 05  
REPUBLIC OF IRAQ**

**Respondent x**

----- x

**DISPOSITION OF APPLICATION FOR COMPLETION AND  
CLARIFICATION OF THE FINAL AWARD**

**I, THE UNDERSIGNED ARBITRATOR, having rendered an Award in the above-titled proceeding dated March 28, 2007, having received from the Claimant a Request for Completion and Clarification of that Award, and having received from the Respondent a Statement in Opposition to that Request, rule as follows.**

**1. Article 30 of the International Arbitration Rules of the International Centre for Dispute Resolution provides:**

**"1. Within 30 days after the receipt of an award, any party, with notice to the other parties, may request the tribunal to interpret the award or correct any clerical, typographical or computational errors or to make an additional award as to claims presented but omitted from the award.**

**"2. If the tribunal considers such a request justified, after considering the contentions of the parties, it shall comply such a request within 30 days after the request."**

**2. The Sole Arbitrator has given consideration to the Claimant's Request for Completion and Clarification of the Award, as well as to the Respondent's Opposition to Vulcan's Request. The respective contentions of the parties have examined and weighed.**

**3. The Sole Arbitrator does not consider the Request of the Claimant to be justified.**

**4. There is no question presented of any clerical error or any error of a typographical or computational nature.**

**5. The Claimant maintains that certain claims presented by the Claimant were not addressed and dealt with in the Award but, on the contrary, were omitted. The Claimant also maintains that passages of the Award require interpretation.**

**6. Article 27 of the ICDR's International Arbitration Rules prescribes that awards "shall be final and binding on the parties" and "shall state the reasons upon which the award is based". Article 30, quoted above, does not furnish ground for reconsideration of an award. It does not invite or permit re-argument of issues decided upon in an award.**

**7. The meaning of the Award of March 28, 2007 is unambiguous. It does not require interpretation. The gravamen of the Claimant's case was that the Respondent was unconditionally obligated to make payment of the mobilization fee at the signing of the contract. The analysis of the Claimant**

**in support of that fundamental contention was set forth in the Award, together with the rebutting perspective of the Respondent. The Sole Arbitrator acknowledged that that issue was finely balanced. He set out the considerations that cut in favor of the contentions of the Claimant and against them. He found that, on balance, on this determinative issue, for the reasons set out in the Award, the Respondent was not, by the terms of the contract, bound to pay out the mobilization fee without regard to the Claimant's providing documentation required by the letter of credit provided for in the contract or without regard to actual mobilization on the ground. He found that a joint intent of the parties to the contrary could not be established. The Sole Arbitrator declined to accept the arguments of the Respondent that bribery rendered the contract unenforceable and that the Minister of Electricity of the then Government of Iraq lacked authority to commit the Iraqi Government. On these issues the Award sustained the position of the Claimant. But on the dispositive issue of the time and mode**

**of payment of the mobilization fee, and conditions that could be attached to that payment, the Respondent prevailed.**

**8. The Claimant acknowledges that its Statement of Claim "alleged only one breach of the contract, the Ministry's 'failing and refusing to pay the Mobilization Fee and or consenting to the draw of the Mobilization Fee under the Letter of Credit". But it observes that at the opening of the hearing, Claimant presented the Tribunal with an Amended Statement of Claim that specified five breaches of contract. Claimant now maintains that, "The Award does not appear to address these alleged breaches".**

**9. These alleged breaches however essentially relate to and turn upon the issue of the mobilization fee. They are not independent breaches of contract that required separate consideration and disposition in the Award. They are incidental to and subsumed by the treatment by counsel of the issue of the mobilization fee and equally are incidental to and subsumed by the Award's analysis and holding on this dispositive issue. The Respondent now employs its discussion of what it advances as five distinct breaches of contract as a vehicle to re-argue**

**questions that were argued in the pleadings, and, in particular, at the hearing. These grounds were listed and discussed in the Respondent's opening brief as elements of its argument that the Ministry was in breach of the contract. The Sole Arbitrator gave those aspects of Respondent's position due consideration. They do not require reconsideration.**

**10. In addition to maintaining that there are claims that the Award did not address, the Respondent contends that the reasoning of the Award requires clarification on three points. However, a request for clarification should go to the meaning of the Award, not to its reasoning; and the meaning of the Award is clear.**

**11. The Claimant in its "Conclusion" requests "a reconsideration of this Award". As the Sole Arbitrator understands the International Arbitration Rules of the International Centre for Dispute Resolution, reconsideration of an award is not consistent with the finality and binding effect of awards prescribed by Article 27(1) of the Rules.**

**FOR THE FOREGOING REASONS,**

**The request of the Claimant for Completion and Clarification of  
the Award of March 28, 2007 is denied.**

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**Stephen M. Schwebel  
Sole Arbitrator  
Washington, D.C.  
May 3, 2007**