

Mediterraneo Engineering Co.

v.

Equatoriana Super Pumps S.A.

## Procedural Order No. 2

In conformity with the instructions given in Procedural Order No. 1 there have been a number of requests for clarification. There follow in this Procedural Order the clarifications requested.

### **1. Procedural Order No. 1**

The parties should understand paragraph 6 of Procedural Order No. 1 in regard to the merits as follows: The memoranda and the subsequent oral argument should discuss all matters that go to whether Super Pumps must reimburse to Engineering the purchase price of the pumps and/or must pay damages to Engineering. Those issues might include arguments that would establish Super Pumps' obligations or that might excuse the consequences of either or both of those obligations. However, the memoranda and oral arguments should not attempt to quantify the amount of money that might be payable. Furthermore, the memoranda and oral arguments should not discuss whether interest should be paid on any sum due or the rate at which it would be calculated or the allocation of the costs of arbitration.

### **Legal Rules and Situation in Oceania**

#### **2. Are Equatoriana and Mediterraneo common law or civil law countries?**

Equatoriana is civil law and Mediterraneo is common law.

#### **3. Are any of the countries involved members of the European Union?**

No.

#### **4. What did the parties to the contract know about the political situation in Oceania during the period from May 2008 to October 2008?**

There had been general unrest for several years, but there was no sense that a political crisis was imminent in July 2008 when the contract was signed. Tension started to grow during the month of October 2008 leading to the riots in November 2008.

#### **5. What did the parties to the contract know about the environmental policy in Oceania during the period from May 2008 to October 2008?**

Engineering was more aware of developments in Oceania than was Super Pumps, since Mediterraneo and Oceania were contiguous countries while Equatoriana was on a different continent. Oceania was not known to have an active environmental regulatory policy. In

particular, Engineering was not aware of any plans to restrict the use of metal products that contained beryllium.

### **Contract negotiations and performance**

#### **6. What were the specifications that were set out in Annex I to the contract?**

The specifications related to such matters as the type of pump (direct lift, displacement, velocity, buoyancy or gravity pump), the pumping power and the pumping efficiency. None of these specifications is at issue in the arbitration. Nothing was said about the composition of the steel to be used in the pumps.

#### **7. Did Super Pumps know that the P-52 pumps would be used in an enclosed space?**

Yes, they were aware that the pumps would be installed in a pump house. The pump house already existed and the P-52 pumps would replace the pumps that had previously been in the pump house.

#### **8. Was Super Pumps the contractually specified supplier of the pumps in the contract between Water Services and Engineering?**

No.

#### **9. Who drafted the sentence in the contract between Super Pumps and Engineering that “Equatoriana Super Pumps warrants that the pumps are in compliance with all relevant regulations for importation into Mediterraneo and for use in Oceania?”**

Engineering insisted on the warranty. Super Pumps supplied the sentence and Engineering agreed that it was satisfactory.

#### **10. What was the contract delivery date?**

The delivery date of 15 December 2008 was specified in clause 1 of the contract. Although in Procedural Order No. 1 the Chairman of the Tribunal mentioned the delivery date as “extended to 22 December 2008”, the tribunal has not determined that the contractual date of delivery had in fact been extended.

#### **11. Could Super Pumps have shipped the pumps that had already been manufactured by 30 October 2008 instead of waiting for all the pumps to be produced?**

It would have been physically possible for Super Pumps to have shipped all but the P-52 pumps by 30 October 2008. It did not do so because the contract provided that delivery was to be in a single shipment. A single shipment would be less expensive than multiple shipments. The two parties could have modified the contract if either had taken the initiative to do so. Neither did.

#### **12. Since manufacture of the pumps was completed on 15 November, why did it take until 22 November 2008 for the ship with the pumps to leave port?**

As soon as Super Pumps had been confident that all of the pumps would be ready by 15 November, it contacted its freight forwarder to arrange for the shipment. The Merry Queen was the first ship available after 15 November that was scheduled to call at Capitol City,

Mediterraneo. In any case, one week was a normal period of time to pack the pumps (they were stuffed into a container), bring them to the port and load them on the ship. They were in fact on the ship for two days before the ship left port.

**13. Are ships that pass the Isthmus Canal often delayed?**

It is a rare occurrence, but it has happened before.

**14. Could Super Pumps have shipped the goods by air or on a ship taking a different route?**

The use of the DES (Incoterms 2000) trade term meant that the parties had contracted for ocean shipping. The pumps could have been shipped by air at a great deal of extra expense. There was no other route for ocean shipping that was faster than through the Isthmus Canal. Once the pumps were on the Merry Queen it would have been almost impossible to have transferred them to another ship going around the continent. The pumps were in a container along with numerous other containers and the task of removing any single container out of sequence is time-consuming and expensive. Even if it could have been done, the pumps would not have arrived in Mediterraneo any sooner.

**15. Was Super Pumps aware that Engineering was contractually obligated to deliver the pumps to the project site in Oceania by 2 January 2009?**

Yes, it had been mentioned in the telephone conversation between Mr. Barber and Mr. Haycock on 25 June 2008.

**16. Did Engineering pay customs duty on the pumps?**

No duty has been paid. The pumps were released under custom's seal for storage in Engineering's warehouse. Duty would be payable if the pumps were to be used in Mediterraneo. If the pumps were either shipped to another country, including surface shipment by rail or truck through Mediterraneo, there would be no customs duty payable in Mediterraneo.

**17. Did Engineering respond to the messages sent by Super Pumps on 28 November 2008 and 12 December 2008 (Claimant's Exhibits Nos. 9 and 10) prior to its message of 28 December 2008?**

It acknowledged receipt of the messages, but said nothing that either party thought of sufficient interest to bring the communications to the attention of the tribunal.

**18. Were there any holidays in Mediterraneo between 28 December 2008 and 31 December 2008?**

No.

**19. Have any of the 50 countries to which Super Pumps has previously delivered adopted the two regulations adopted in Oceania regarding beryllium?**

No, the regulations in Oceania may be unique. There are regulations in a number of countries dealing with working conditions where beryllium dust may occur during manufacturing processes. Moreover, regulations that limit the discharge of pollutants that contain beryllium into navigable waters and into waste treatment works are fairly common.

**20. Has the office that the Military Council said would be created to consider exceptions to its decree been created and has it made any exceptions?**

The office began operating on 2 March 2009. By the time it was created there were 73 requests for an exception pending. The first decisions were issued 16 April 2009. Of the 73 original requests, 27 were granted.

**21. Did Engineering request an exception?**

No, it did not. It considered doing so prior to sending the letter of 5 January 2009. (Claimant's Exhibit No. 13) In essence it had to choose between accepting the pumps when they arrived on the chance the office to be created in Oceania would grant an exception or to declare the contract with Super Pumps avoided and seek to recover the money it had already paid for the pumps. Engineering considered that the chances that the office would be created relatively promptly and that an exception would be granted were highly problematical.

**22. Did the contract between Engineering and Water Services have any provisions regarding the consequences of late delivery?**

The contract specified a schedule for performance, which included the dates for delivery of the pumps. However, the only provision regarding the consequences of late performance provided penalties for delay in completion of the project. No penalties for delay in delivering the pumps to the project site were mentioned.

**23. Had Engineering previously done business with Trading Company of Mediterraneo?**

Mr. Haycock and several other personnel in Engineering were aware of Trading Company of Mediterraneo, but Engineering had never purchased equipment from it or sold to it.

**24. Had Super Pumps previously done business with Trading Company of Mediterraneo?**

Super Pumps had never heard of Trading Company of Mediterraneo prior to preparation of its case for the arbitration.

**25. Would the used pumps that Trading Company of Mediterraneo had available have satisfied the desire of Water Services to have "furnish[ed] and install[ed] new pumps" in the irrigation project?**

The statement in Mr. Barber's letter of 5 May 2008 (Claimant's Exhibit No. 1) meant that Water Services wished to replace the existing pumps. Water Services anticipated that the pumps would be newly manufactured, but it was not specified in the contract. The pumps available from Trading Company of Mediterraneo were only slightly used and would have been acceptable to Water Services. They did not contain beryllium or any of the other elements mentioned in the decree.

**26. Did Engineering have the financial resources to have purchased the pumps from Trading Company of Mediterraneo or any other source of pumps that might have been available?**

Yes.

## **Conciliation Procedure**

### **27. What was the reason that clause 18 of the contract called for the representative of the parties in the conciliation should be the CEO of each company?**

Clause 18 was a regular provision of Super Pumps' sales contracts. It had been used for the previous three years and had been included in the contract of 2006 concerning the irrigation project in Patria. During the entire three year period there had been no disputes that had led to invocation of the procedure set out there.

### **28. What were the functions and authority of Mr. William Holzer, Deputy CEO of Engineering, in the ordinary course of business?**

Mr. Holzer was in charge of operations. He exercised such other duties as were delegated to him by the CEO. The law in Mediterraneo does not specify any particular duties of a Deputy CEO.

### **29. Was Mr. Holzer's name with his title in the list of participants at the conference?**

Yes. Mr. Stecker, CEO of Super Pumps, received a copy when he registered at the conference on 28 May 2009.

### **30. Why did the CEO of Engineering not participate in the conference?**

His daughter was getting married on 29 May 2009. He had full confidence in Mr. Holzer to represent Engineering in the conference and in the conciliation proceedings.

### **31. Were the names and addresses of the representatives of the two parties communicated in writing to the other party as provided in Article 6 of the UNCITRAL Conciliation Rules?**

Yes, but the titles were not given. Mr. Stecker did not know the name of the CEO of Engineering.

### **32. Did the parties participate actively in the conciliation proceedings?**

Yes, but neither party was particularly conciliatory. They were both sure of their legal positions. Since they did not have regular business dealings with one another, both were willing to sacrifice any future business contacts. After two days of fruitless discussions and after consulting the parties the conciliator declared that further efforts at conciliation were no longer justified. No proposals for a settlement of the dispute, as envisaged by Article 7 of the UNCITRAL Conciliation Rules, had been made. His written declaration to the parties in writing with a copy to the Danubia Arbitration and Conciliation Center was dated 4 June 2009.

(Signed)  
Chairman of the Arbitral Tribunal

October 29, 2009