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Date: 28 September 2016
 To: Ms. Temenuzhka Petkova
 Minister of Energy
 Mr. Petar Iliev
 NEK
 From: White & Case LLP
 Jordanov, Ignatov & Ivanov Law Firm

Memorandum

**Atomstroyexport JSC (“ASE”) v. Natsionalna Elektricheska Kompania EAD (“NEK”)
 (ICC Case No. 18086/GZ/MHM): Award**

1. We have been asked to provide a brief summary of some matters concerning the Final Award dated 14 June 2016 (“Award”).
- I. Overall outcome**
2. ASE brought a total of 7 claims totaling over € 1.1 billion. Very broadly the claims can be split into two categories being (i) claims for work done or equipment ordered; and (ii) other claims for loss profits and work performed out of scope. The Award rejected nearly half of ASE’s claims. Three claims¹ were rejected entirely. Equally, over 85% of ASE’s Claim 6 was rejected. However, the Award granted ASE a number of claims, that is, Claims 1, 2, and most of 3. Again, in broad terms ASE succeeded in its claim for work done or to be paid for equipment manufactured and largely failed in its other claims.
3. The Award rejected most of NEK’s counterclaim, related to the Frame contract.
4. The table below sets out the principal amounts, with interest and penalties calculated to 1 May 2015, that NEK was ordered to pay to ASE:²

Claims	Amount
Claims 1, 2, 3 & 6 (in part) less amounts owed to NEK	€ 539,904,401
Customs duties	RUB 221,274,794
Costs	USD 11,943,108

¹ Claims 4, 5 and 7.

² These are the amounts in the Award as issued. As set out below, NEK has applied to have the Award corrected. If the Tribunal accepts those corrections, these figures will change (in NEK’s favor).

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5. NEK was also ordered to pay:
- (a) € 43,634 per day in contractual interest and penalties (on a principal amount of € 96,582,143) from 2 May 2015; and
- (b) interest on these amounts at the below rates from 2 May 2015:

Claim(s)	Amount subject to interest from 2 May 2015	Rate
Claims 1, 2, 3 & 6	€ 442,487,958	Bulgarian statutory
Claim 3	RUB 221,274,794	Bulgarian statutory
Claims 1, 2	€ 834,300	One-month Euribor +4%

II. Key findings

6. Overall, the Award's key findings were:
- NEK must pay amounts flowing from its contractual obligations (ie it must pay for work done or equipment ordered under the contract), but not more
 - NEK did not breach its good faith or best efforts obligations
 - In effect, NEK was found liable for its contractual obligations, but not found liable for the project's termination
7. The Award is well drafted, and was rendered by experienced and respected arbitrators.
8. We set out below some comments on the resolution of the parties' individual claims.
- A. Claim 1 for unpaid invoices – € 213 million**
- NEK had conceded the principal amounts (€ 134,633,420) because it represented work properly invoiced by ASE and not contested by NEK
 - The tribunal awarded ASE interest and penalties on the principal amounts running from the dates claimed, at the rates requested by ASE
 - Amount awarded: € 212,538,557 (plus further interest as from 2 May 2015)
- B. Claim 2 for project milestones completed – € 27 million**
- The tribunal found that the work on the project had been properly completed by ASE and should be paid for.
 - Amount awarded: € 27,177,658 (plus further interest as from 2 May 2015)

C. Claim 3 for works in progress – € 365 million

- The tribunal found that NEK had ordered and must pay for the equipment covered by Addendum 5 (“LTME”). The LTME fell into two categories:
 - Completed LTME (ASE awarded € 238,082,917 plus its ongoing maintenance and storage costs plus RUB 221,274,794 for certain customs duties)
 - Stopped LTME (ASE awarded € 101,056,254 plus its ongoing maintenance and storage costs) Claims for overhead and project management costs rejected (€ 17.6 million)
- Amount awarded: € 344,678,980 plus RUB 221,274,794 (equivalent to € 347,666,179) (plus further interest as from 2 May 2015)

D. Claim 4 for escalation – € 84 million

- ASE’s claim for escalation was rejected because the Tribunal accepted NEK’s legal arguments, including that parties had never agreed on an escalation formula
- Amount awarded: € 0

E. Claim 5 for out of scope works – € 168 million

- ASE’s claim for works undertaken out of scope (ie without a contract) was rejected by the Tribunal. In the arbitration NEK proved that it had not agreed to pay for those works and because the works were of no benefit or use to NEK
- Amount awarded: € 0

F. Claim 6 for lost profits – € 263 million

- The tribunal found that there had been no breach by NEK of its good faith or best efforts obligations to negotiate the EPC Contract and secure financing for the Belene Project
- The tribunal held that NEK’s rejection of all-Russian financing had not been a breach of good faith given the Bulgarian policy
- The tribunal rejected ASE’s claim for lost profits under the EPC Contract (€ 229,940,592) but awarded ASE lost profits under Addenda 5, 8 and 9 (essentially for work done under the contract).
- Amount awarded: € 32,537,225 (plus further interest as from 2 May 2015)

G. Claim 7 for demobilization and subcontractor tender costs – € 7.5 million

- ASE’s claims for demobilization and subcontractor tender costs were rejected entirely
 - Amount awarded: € 0

H. NEK's Counterclaim for old equipment at Belene under the Frame Contract – € 121 million

- NEK argued that it had sold the old Belene equipment to ASE under the Frame Contract
- The tribunal determined that the Frame Contract was not a sales contract but a frame agreement, and that ASE would have bought equipment only if the EPC Contract had entered into force
- Amount awarded: € 878,746 (amount conceded by ASE)

I. Set-off in favor of NEK – NEK's Advance Payment

- Unallocated advances paid by NEK under the Preliminary Agreement and its Addenda were set off
- Amount: € 76,149,262

III. Possible challenge to the Award

9. Once ICC awards are issued, they are final and binding. They cannot be appealed like court judgments often can be. However, in summary, three things can be done with regard to the Award:

- Correction or interpretation of the Award under the ICC Rules
- Applying to challenge the Award in Switzerland
- Resisting the Award's enforcement

10. We consider these below.

A. Correction or interpretation of the Award under the ICC Rules

11. The ICC Rules provide that in certain circumstances Awards can be corrected due to clerical, computational or typographical errors. We identified certain matters that we consider should be corrected under the ICC Rules.

12. On 15 July 2016, NEK applied to have the Award corrected under the ICC Rules. It also sought interpretation on certain issues. The parties then made further submissions, and we are waiting for the Tribunal's decision.

13. ASE has already accepted four of the seven errors NEK identified. Each of those accepted errors will decrease the amount NEK owes to ASE.

B. Applying to challenge the Award in Switzerland

14. The place of arbitration was Geneva, Switzerland. Thus, it would have been possible to attempt to challenge the Award before the Swiss courts. A challenge naturally involves certain costs and the risk of having to pay the other parties' costs in the case of a loss. Also, interest would continue to run during any challenge procedure.

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15. The grounds for challenging an award under Swiss law are very limited. Further, in practice, the Swiss courts rarely accept challenges. We reviewed the possible grounds for challenging the Award in Switzerland and submitted our advice to NEK. Based on that advice, NEK did not decide to challenge the Award, and the time limit for a challenge has expired.

C. Resisting the Award's enforcement

16. To date, ASE has not started enforcement proceedings in Bulgaria or anywhere else. If ASE started enforcement proceedings, NEK would be able to attempt to resist that enforcement.
17. ASE would likely start any enforcement proceedings under the New York Convention on the Enforcement and Recognition of Foreign Arbitral Awards (1958). Bulgaria and Russia are signatories to the convention and bound to comply with it. The New York Convention provides that national court judges are obliged to enforce foreign arbitral awards presented to them in most circumstances. Thus, the starting point would be that a Bulgarian judge presented with the Award should enforce it against NEK's assets in Bulgaria.
18. The New York Convention sets out limited exceptions to the general rule that awards should be enforced. It is thus unlikely that NEK would be able to successfully resist the Award's enforcement in Bulgaria.
19. ASE might also try to have the Award enforced in any other country in which NEK has assets. ⊕


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