JUDGMENT OF THE COURT OF FIRST INSTANCE (Single Judge)
16 May 2001 *

In Case T-68/99,

Toditec NV, established in Antwerp (Belgium), represented by E. Ballon and H. Dubois, lawyers, with an address for service in Luxembourg,

applicant,

v

Commission of the European Communities, represented by E. de March and M. Shotter, acting as Agents, assisted by J. Stuyck, lawyer, with an address for service in Luxembourg,

defendant,

APPLICATION pursuant to an arbitration clause within the meaning of Article 181 of the EC Treaty (now Article 238 EC) for the Commission to be required to pay the sum of ECU 74 967, plus interest at the rate of 7% (the legal rate applicable in Belgium) as from 5 June 1998, and counterclaim by the

* Language of the case: English.

Commission for the applicant to be required to pay it the sum of EUR 54 486, plus interest at the rate of 7% as from 31 January 1999,

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES
(Single Judge),

Judge: M. Vilaras,

Registrar: J. Palacio González, Administrator,

having regard to the written procedure and further to the hearing on 8 November 2000,

gives the following

Judgment

1 On 13 February 1996, the European Community, represented by the Commission, entered into an agreement with the applicant entitled 'Esprit Network of Excellence/Working Group — 20526 — Dissemination Coordination for OMI — Discomi' ('the contract'). The contract was concluded for a term of 12 months commencing on 1 December 1995.

2 Pursuant to the contract the applicant undertook to carry out the tasks set out in Annex I (headed 'the technical annex') thereto and was solely responsible for those tasks, in cooperation with four other participants, namely RWM Consulting (Netherlands), HD Geoconsult (Denmark), Hellenic Esprit Club (Greece), and STM Ltd (United Kingdom). Under the technical annex, the overall objective of the Discomi (Dissemination Coordination for OMI) project ('the project') was to improve the visibility of OMI ('Open Microprocessor Systems Initiative') in general to the widest possible audience, and of its commercially available results in particular, through the facilitation and coordination of various dissemination measures. Pursuant to the annex, six types of action were to be undertaken for the purposes of carrying out that task. Detailed work schedules were provided for each of those actions, which included a list of the specific services to be provided (work packages, 'deliverables').

3 The contract falls within the scope of Council Decision 94/802/EC of 23 November 1994 adopting a specific programme for research and technological development, including demonstration, in the field of information technologies (1994 to 1998) (OJ 1994 L 334, p. 24), which was adopted within the framework of Decision No 1110/94/EC of the European Parliament and the Council of 26 April 1994 concerning the fourth framework programme of the European Community activities in the field of research and technological development and demonstration (1994 to 1998) (OJ 1994 L 126, p. 1).

4 Annex IV to Decision No 1110/94 sets out the rules for financial participation by the Community in various types of activities for research, technological development and demonstration (RTD) implemented through specific programmes and provides that the Community's financial involvement in indirect action including preparatory, accompanying and support measures may amount to up to 100% of the costs involved.

5 Annex III to Decision 94/802 sets out the specific rules for implementing the programme and provides that it may be executed through indirect action,

whereby the Community makes a financial contribution to RTD activities carried out by third parties or by joint research centre institutes (JRC) in association with third parties. Annex III also specifies that Community funding for preparatory, accompanying and support measures may cover up to 100% of the cost of those measures.

6 The financial provisions of the contract are contained in Article 4, in the part of Annex II headed 'Reports' and in Appendix 1 of Annex II, headed 'Travel and subsistence'.

7 By virtue of Article 4.1 of the contract 'the Commission shall contribute to the costs, including travel and subsistence expenses, reported by the Contractor and accepted by the Commission in accordance with Article 3.1 and Annex II, up to a maximum amount of ECU 550 000'.

8 Article 4.2 of the contract sets out the arrangements for payment and provides, *inter alia*, that an advance payment of ECU 275 000 is to be paid within 60 days of the signature of the contract by the Commission and that periodic payments are to be made on the basis of the costs stated in the periodic progress reports which are accepted by the Commission. Payments are to be made within 60 days of approval by the Commission of the relevant report. In addition, Article 4.2 provides that 'in the event that the Commission has paid more than the costs reported to and accepted by it, the Contractor shall reimburse the amount of such overpayment within 60 days of a request from the Commission to do so'.

9 Article 3.1 of the contract requires the applicant to submit to the Commission certain 'reports consolidating and summarising the work and results' of all the

participants in the project, namely periodic progress reports every six months from the operative commencement date of the project and a final report within two months of the completion, cessation or termination of the task.

10 Article 3.1 of the contract expressly refers to Annex II thereto, which prescribes the contents of those reports, including the information required in connection with the reporting of costs and the procedure to be followed in submitting them. Pursuant to points 1.1 and 1.2 of Annex II, the periodic progress reports (and the final report) should not only set out in detail all the activities carried out in the performance of the task but also 'shall provide details of the financial situation and shall contain for each of the participants statements of:

— labour costs for management of the task infrastructure, by reference to the actual gross salary, wages, or any other costs directly related to the employment of personnel, such as social charges and pension contributions. The report shall also provide statements of the contractor's labour costs in respect of the coordination of the task. Labour costs shall not include any element of indirect costs or overheads;

— travel and subsistence. Appendix 1 to this Annex specifies the travel and subsistence expenses which will be accepted by the Commission under this contract;

— durable equipment and consumables. Expenditure on durable equipment and consumables shall only be accepted as a cost under this contract where such

expenditure has received the prior approval of the Commission or is specified in [the technical] annex.

— other costs. Any other additional or unforeseen cost not falling within the aforesaid categories may be charged with the agreement of the Commission provided that it is necessary for carrying out the task and does not fundamentally affect the scope of the task.

In respect of labour costs and/or expenditure on durable equipment and consumables, only actual costs borne by each of the participants after the operative commencement date which are expressly necessary for the performance of the task shall be accepted by the Commission under this contract.

No other costs or expenditure incurred in the performance of the task shall be reported by the contractor or accepted by the Commission'.

11 Article 8 of the contract requires the contractor 'to maintain, on a regular basis and in accordance with the normal accounting conventions imposed on it, proper books of account and appropriate supporting documentation, including but not limited to invoices and time sheets, to support and justify the costs reported', and also provides that 'these shall also be made available for audits'. Article 9 further confers on Commission officials a 'right to reasonable access' for the purposes of verifying and auditing to sites where the task is being carried out.

12 Lastly, in accordance with Article 14, the contract is governed by Belgian law and, by virtue of Article 15, the Court of Justice of the European Communities has sole jurisdiction in respect of any dispute concerning the contract.

Facts and procedure

13 On 21 March 1996, the Commission, in accordance with Article 4.2 of the contract, made an advance payment to the applicant of ECU 275 000.

14 By letters of 19 July 1996 and 23 August 1996, the applicant submitted its first cost statement to the Commission covering the period of the contract from 1 December 1995 to 31 May 1996 (hereinafter 'the first period'). The costs amounted to ECU 249 213.93, of which ECU 120 307.40 represented the applicant's own costs, while the balance represented the costs applied for on behalf of the other participants in the project. The costs submitted to the Commission were calculated in Belgian francs (BEF) and were converted into ecus by the applicant at the exchange rate applying on 19 July 1996.

15 By letter of 22 November 1996, the Commission, using the BEF/ECU exchange rate applying on that date, accepted the costs submitted by the applicant amounting to ECU 67 342 but refused to accept the balance, namely ECU 51 361. Those of the applicant's costs which the Commission rejected related mainly to a part of the labour costs and the costs for third-party assistance. The costs submitted in respect of other participants in the project were on the whole accepted. In the letter of 22 November 1996, the Commission also sanctioned a first periodic payment to the applicant of ECU 160 015 (of which ECU 67 342 represented the costs accepted by the Commission as the applicant's own expenses, while the balance represented the costs of the other participants in the project).

16 By fax of 4 December 1996, the applicant disputed the refusal to accept such a substantial amount of its costs and undertook to justify them in its consolidated costs statement relating to the project.

17 A final project review meeting was held in Brussels on 16 December 1996. In its fax of 18 December 1996 summarising the results of that meeting, the Commission stated, *inter alia*, that:

'the project was found of interest but unfortunately did not achieve its objectives. Therefore reviewers found that resources were high compared to results'.

18 By letter of 24 January 1997, received by the Commission on 3 March 1997, the applicant submitted its second cost statement covering the period of the contract from 1 June 1996 to 30 November 1996 (hereinafter 'the second period'). The total amount of costs claimed by the applicant in respect of the second period was ECU 167 128, calculated in Belgian francs and converted into ecus at the exchange rate prevailing on 24 January 1997. (ECU 115 767 related to the second period and ECU 51 361 represented the costs relating to the first period which the Commission rejected in its letter of 22 November 1996.)

19 By fax dated 4 March 1997, the Commission drew the applicant's attention to the fact that it had not yet received either the last six-monthly report or, more importantly, the final report required by Article 3.1 of, and Annex II to, the contract.

20 On 26 May 1997 the applicant submitted a version of its final report to the Commission headed 'Version 1'.

21 In its letter of 1 April 1998, the Commission provisionally rejected all the costs claimed by the applicant in its second cost statement (ECU 164 638 instead of

ECU 167 128, applying the BEF/ECU exchange rate as at that date), since they were subject to verification. However, the Commission accepted almost all the costs of the other participants for the second period of the project (namely ECU 180 621), whilst refusing to accept costs amounting to ECU 4 708 reported by HD Geoconsult. The total amount of costs rejected in respect of the second period thus amounted to ECU 169 346. In those circumstances, the Commission stated in its letter that it was not going to make any payments since the total costs already accepted by it, namely ECU 340 636 (180 621 + 160 015), were less than the payments made by it as at that date, namely ECU 435 015 (275 000 + 160 015). In the annexes to that letter, the Commission explained, *inter alia*, that the 'labour costs' reported by the applicant were all provisionally rejected 'awaiting the results of negotiations'.

22 By letter of 4 June 1998, the Commission informed the applicant that it had still not received the consolidated cost statements from all the participants in the project as required by Annex II to the contract. In those circumstances, the Commission suggested to the applicant that the financial side of the project should be finalised on the basis of the actual costs accepted in accordance with the interim payment reports. In that regard, the Commission stated that if it did not receive the consolidated cost statements within one month of the date of its letter, it would reconsider its position in view of Annex II to the contract.

23 The Commission appended a table to that letter which set out a statement for all the participants in the project of the costs which it had accepted for the duration of the contract and the payments already made. The table also showed that payments made to the applicant exceeded the costs accepted by the Commission by ECU 94 379 (namely 435 015 – 340 636).

24 By letters dated 5 and 17 June 1998, the applicant disputed the Commission's refusal, in its letters of 1 April 1998 and 4 June 1998, to accept its expenses. It

repeated its request for repayment of ECU 169 346 (see paragraph 21 above) and asked the Commission to pay it ECU 74 967 (that is to say, 340 636 + 169 346 – 435 015).

25 By letter dated 2 December 1998, the Commission sent the applicant a final statement of the costs which it had accepted for the second period. None of the additional costs reported by the applicant had been accepted by the Commission, on the ground of non-performance of the contract. In addition, the Commission reduced the applicant's claim for labour costs for the first period by ECU 9 949, following the determination of an hourly rate of remuneration for two experts employed by the applicant, Dr Geerinckx and Mrs Cuyvers, of BEF 1 565 instead of the amounts invoiced by the applicant (BEF 2 067 per hour and BEF 2 684 per hour respectively). As a result, the amount initially accepted in respect of the applicant's own costs, ECU 67 342 (see paragraph 15 above), was reduced to ECU 57 393. Lastly, the Commission agreed to repay ECU 4 709 in respect of HD Geoconsult's costs, which had initially been rejected when set at ECU 4 708 (see paragraph 21 above).

26 Once these adjustments were made, the total costs accepted by the Commission in respect of all the participants over the entire period of the project amounted to ECU 335 396 (340 636 + 4 709 – 9 949) and the overpayment to the applicant amounted to ECU 99 619 (435 015 – 335 396). In another letter, dated 2 December 1998, the Commission asked the applicant to repay the overpayment, and a debit note was subsequently sent to the applicant on 14 December 1998.

27 Pursuant to Council Regulation (EC) No 1103/97 of 17 June 1997 on certain provisions relating to the introduction of the euro (OJ 1997 L 162, p. 1), the ecu was replaced by the euro with effect from 1 January 1999 at the rate of one euro to one ecu.

28 The applicant formally disputed the Commission's claim for repayment by registered letter dated 20 January 1999. On the same day the applicant's lawyer confirmed the position taken by her client and gave the Commission formal notice of her client's claim for EUR 77 591, representing the costs which had been refused (EUR 74 967), together with EUR 2 624 by way of interest. The applicant also disputed the deduction of EUR 9 949, notified by the Commission in its letter of 2 December 1998, and the refusal to pay the majority of the labour costs submitted by the applicant in respect of the first period.

29 It was in those circumstances that the applicant, by application lodged at the Registry of the Court of First Instance on 5 March 1999, brought the present proceedings.

30 In response to the abovementioned letter of 20 January 1999, the Commission informed the applicant, by letter sent to its lawyer on 29 April 1999, that, after re-examining the file and finding that errors had been made in calculating certain costs and the total number of hours of work completed by the applicant (1 452 hours as opposed to the 710 hours already accepted in respect of the first period), it had decided to make a correction adding EUR 45 133 to the total of the applicant's own costs. Following this correction, the amount of overpayment claimed by the Commission from the applicant was reduced to EUR 54 486 (99 619 - 45 133).

31 In the same letter the Commission provided additional explanations concerning the reduction (as specified in its letter of 2 December 1998 — see paragraph 25 above) of the hourly rates of the two experts employed by the applicant. In addition, the Commission notified the applicant's lawyer that it could not accept the applicant's claim for EUR 74 967.

32 The Commission brought a counterclaim in its statement of defence lodged at the Court Registry on 18 May 1999.

33 Pursuant to Articles 14(2) and 51 of the Rules of Procedure, the First Chamber assigned the case to Mr Vilaras, sitting as a single judge.

34 The Court decided to open the oral procedure and, by way of measures of organisation of procedure, asked the applicant to reply in writing to certain questions. The applicant complied with that request within the period prescribed.

35 The parties presented oral argument and replied to the questions put by the Court at the hearing on 8 November 2000.

Forms of order sought

36 The applicant claims that the Court should:

— declare its application admissible and well founded;

— order the Commission to pay it a sum in euros equivalent to ECU 74 967, plus interest at the rate of 7% (the legal rate applicable in Belgium) as from 5 June 1998;

— in so far as may be necessary, order that an expert's report be obtained;

— dismiss the Commission's counterclaim as unfounded;

— order the Commission to pay the costs.

37 The Commission contends that the Court should:

— dismiss the application as unfounded;

— order the applicant to pay it the sum of EUR 54 486, plus interest at the rate of 7% as from 31 January 1999;

— order the applicant to pay the costs.

The request for an expert's report

Arguments of the parties

38 The applicant submits that, since the Commission failed to use the opportunities provided by Article 9 of the contract relating to technical verification and financial audit, it is appropriate to commission an expert's report for the purpose of verifying whether tasks were performed and whether the costs submitted were actually incurred.

39 The Commission points out that the fact that the applicant has applied for measures of inquiry illustrates that it is incapable of adducing evidence in support of its claim for the disputed costs.

Findings of the Court

40 According to settled case-law, it is for the Court of First Instance to appraise the usefulness of measures of inquiry for the purpose of resolving the dispute (see Case T-138/98 *ACAV and Others* v *Council* [2000] ECR II-341, paragraph 72). In the light of the case-file and in view of the applicant's claims, such measures are neither relevant nor necessary for the purpose of ruling in the present case. It is therefore not appropriate to have recourse to them.

41 The applicant's request that an expert's report be obtained must, therefore, be rejected.

The applicant's main claim

Arguments of the parties

42 The applicant puts forward a single plea alleging that the Commission has acted in breach of the contract.

43 The applicant claims generally that the Commission has failed to fulfil its contractual obligations in refusing to reimburse the disputed costs submitted by it without giving any reasons for the refusal and without giving the applicant the opportunity to defend itself. It also complains that the Commission did not avail itself of the opportunity afforded to it by Articles 8 and 9 of the contract to check that the task was carried out and that the costs incurred were genuine. In any event, the applicant's activities and the costs incurred by it in the context of the project are familiar to the Commission and are established by the costs statements, the periodic progress reports and the final report, as well as by the statement submitted at the meeting of 16 December 1996.

44 The applicant goes on to challenge the Commission's refusal to accept certain specific costs relating to the first and second period.

45 As regards the first period, the applicant claims that the Commission made a number of errors relating to the labour costs of the two experts, the costs for third-party assistance and the other costs.

46 As regards labour costs, the applicant asserts that the hourly rate of BEF 1 565 accepted by the Commission in respect of the two experts employed by the

applicant in the course of the project (Mrs Cuyvers and Dr Geerinckx) is not justified and bears no relation to the professional qualifications of the persons concerned. In addition, taking account of the complexity of the tasks carried out and the responsibility they entailed, the rates applied by the applicant, which, it claims, included neither indirect charges nor overhead costs, are justified and are comparable to the rates accepted by the Commission for other participants from nearby Member States in the same project.

47 The applicant also claims that the Commission's acceptance of 66 hours of work by Mrs Cuyvers during the first period instead of the 660 hours reported is either a factual mistake or the result of an inaccurate and erroneous assessment of the services provided by that expert during that period.

48 The applicant also challenges the refusal, which it considers erroneous and devoid of any statement of reasons, of certain costs relating to third-party assistance during the first period, namely costs relating to management and secretarial assistance provided by Bejolu and Antwerp Business Centre, as well as the refusal of the other costs.

49 As to the second period, the applicant submits that the Commission's decision to refuse all the costs reported, including those relating to a sub-contract with Mr Molina, provision for which was made in the technical annex, is incomprehensible, especially since the only explanation for this refusal was 'non-performance', that is to say non-performance of the contract, which the applicant describes as absurd and not at all the case. In support of its submission, the applicant cites the 'EMSYS 1996' conference which it organised in Berlin on 23 to 25 September 1996 as part of the project and which the Commission called 'the main success of the project'.

50 According to the applicant, the fact that the project did not achieve all of its objectives cannot be equated with non-performance of the contract on its part. In that regard, the applicant emphasises that it was under an obligation to use its

best efforts and not under an obligation to achieve the objectives. Consequently, the examples cited by the Commission of tasks which were not performed are irrelevant.

51 As regards, in particular, the Commission's refusal to accept expenditure on consumables (which in the cost statement produced by the Commission on 1 April 1998 are categorised as other costs), the applicant claims that under Annex II to the contract it was not necessary to seek prior approval from the Commission for expenditure on consumables, since such expenditure was specified in the technical annex. In that regard, the applicant submits that that annex allowed it a budget for consumables of ECU 10 000.

52 The applicant also alleges that the Commission did not fulfil its duty of faithful cooperation in the performance of the contract. The Commission at no time made any comments or criticisms about the periodic progress reports that the applicant regularly submitted to it. That is why the applicant cannot accept the criticisms made in the final review report drafted by the reviewer, Mr Vernon, on 16 January 1997 and cited by the Commission. The last four pages of the report were never sent to the applicant. If they had been, it would have responded immediately. Moreover, according to the applicant, the refusal to accept Mrs Cuyvers' costs could hardly be regarded as a criticism made in good time, since the refusal was issued only on 22 November 1996, that is to say exactly seven days before the end of the project. Furthermore, the applicant claims that the Commission's belated re-adjustment of its calculations, made in its letter of 29 April 1999, is proof of an arbitrary attitude on its part, which is representative of its attitude in connection with the establishment of the final accounts for the project.

53 In response to the Commission's criticisms as to the incompleteness of the final report on the project and the absence of a consolidated cost statement for all the participants in the project, the applicant claims, first, that the Commission does not explain in what way the final report was incomplete and, second, that a consolidated cost statement could not be delivered unless there was an agreement

on the amount to be declared. According to the applicant, the contract did not lay down any time-limits within which cost statements were to be delivered. Cost statements were provided to the Commission with all the information required 'within normal and workable delays'.

54 Turning next to the nature of the contract, the applicant contests the Commission's characterisation of the contract in its statement of defence as a 'subsidy contract' entered into within the framework of Council Decision 94/802 and not as a 'commercial contract for the provision of services', and also disputes the consequences which the Commission alleges derive from such a characterisation. Moreover, it is not clear how characterising the contract in one way or another can have any effect on either the Commission's obligation to make an appropriate and correct assessment of the tasks performed by the applicant under the contract, or its obligation to accept the costs reported by the applicant.

55 However, the wording of the contract is clear and does not need to be interpreted in the light of Decisions 94/802 and No 1110/94. If it were necessary to interpret the contract, any interpretation should be on the basis of Articles 1156 to 1164 of the Belgian Civil Code, which applies by virtue of Article 14 of the contract. The applicant nevertheless points out that Article 1156 of the Belgian Civil Code, which provides that when a contract is interpreted the common intention of the parties must be examined rather than the literal meaning of the words of the contract, applies only if the wording of the contract is not clear, which is not the case here.

56 In that regard, the applicant recalls that under Article 1 of the contract, it undertook to carry out the task set out in the technical annex. In consideration of its performing this task, the Commission was to contribute to the costs incurred by the participants and accepted by it in accordance with Article 3.1 and Annex II to the contract up to a maximum amount of ECU 550 000. The applicant submits that as long as the maximum funding limit of ECU 550 000 is observed, there is no suggestion in the contract that the Commission's

contribution to the costs is only partial. On the contrary, from the Project Administrative Overview (see page 6 of the technical annex) it is clear that the Commission was to reimburse the cost of the project in its entirety since that cost was the same as the amount for funding, namely ECU 550 000.

57 Furthermore, Decision 94/802 allows for 100% funding of dissemination or promotion tasks such as those carried out by the applicant under the contract. The possibility of full funding is a logical consequence of the nature of those activities since undertakings engaged in dissemination and promotion do not benefit either directly or indirectly from those activities. In those circumstances the applicant submits that the disputed contract should be characterised as a 'commercial contract for the provision of services' within the framework of the ESPRIT programme.

58 As a preliminary point, the Commission contends that the contract is a subsidy contract for partial financial support from the Community for a task to be undertaken by the applicant on the terms laid down in the contract. Such Community financial support is dependent on the formal acceptance by the Commission of the real costs incurred and reported by the applicant in the course of performing the contract. The Commission's response to the applicant's argument that it was under an obligation only to use its best efforts is that it does not deny that the applicant 'was under the obligation to make its best efforts', but it nevertheless had to provide evidence of the efforts made within the framework of the project.

59 The Commission contends that in so far as the applicant does not deny that the contract was entered into in the framework of the ESPRIT programme under Decision 94/802, it cannot deny that the contract is a subsidy contract and not a contract for the provision of commercial services. The Commission adds that regardless of the nature of the contract, the parties expressly agreed that Community financial support would be dependent on the formal acceptance by

the Commission of the costs actually incurred and reported by the applicant in the course of performing its contractual obligations in accordance with Article 4.1 of the contract. Furthermore, the Commission maintains that, although Decision 94/802 allows for 100% Community funding, it does not provide that funding must necessarily be made at 100%.

60 In view of the nature of the contract, the amounts mentioned in Article 4.2 are only maxima and the Commission has not only a right but a duty to check thoroughly that all the costs declared are justified and reasonable. According to the Commission, payment can and should occur only if the costs reported by the applicant were really incurred in the execution of the project and were necessary.

61 In that regard, the Commission refers to Annex II to the contract and explains that labour costs cannot and should not be accepted unless the applicant can prove that the remuneration mentioned (i) was actually paid and could genuinely be claimed, (ii) was paid to persons who actually spent time working on the project and (iii) was not higher than the remuneration which the applicant would normally pay to persons carrying out comparable tasks.

62 In the present case, the applicant has not proved that the remuneration allegedly paid to Mrs Cuyvers was actually paid to her, nor that she was entitled to it. The Commission contends that Mrs Cuyvers presented only a statement of the hours she had worked, and did not provide any documentation in support (invoices, payslips and the like). In those circumstances, the Commission takes the view that the applicant has not shown either that the work alleged to have been done was actually done or that the hours reported in respect of the two experts had actually been spent working on the project.

63 As to the reduction in Mrs Cuyvers' and Dr Geerinckx's hourly rate, the Commission contends that the rate that it adopted corresponds to the rate which the applicant itself proposed in a similar project. The Commission emphasises that, as long as the applicant does not prove that higher labour rates were justified, it can only accept an hourly rate of BEF 1 565. In addition, according to the Commission, since the contract was a 'subsidy contract', the applicant could not claim that its usual commercial rates applied as they encompassed fixed costs, namely 'indirect costs or overheads', which, under Annex II to the contract, did not qualify for reimbursement. Lastly, the Commission also contends that it was in no way bound to apply the hourly rate used by other participants in the project from other Member States to the applicant, since each contract was individual and specific to each signing party.

64 The Commission goes on to contend that it refused to accept the third-party costs and the other costs because they were neither allowed by the contract nor specified in the technical annex nor specifically authorised by its staff. Furthermore, costs for consumables fell within overhead costs and therefore were not allowable.

65 As to the costs submitted by the applicant for the second period, the Commission explains that they were initially rejected on the ground of non-performance of the contract, that it then proceeded to an accounting adjustment of EUR 45 133 in the applicant's favour and that the refusal of the rest of the costs submitted for that period continues to be warranted.

66 In that regard, the Commission refers to the project review which found that the project had not produced positive results. In particular, the Commission cites the final review report of 28 January 1997 based on the reports of the reviewers Mrs Graham and Mr Vernon, which were drawn up in January 1997 and state that: 'Globally, the project was found of interest but unfortunately did not achieve its objective. Therefore reviewers found that resources were high compared to

results'. It also emerges from that report that certain services that were provided were not appropriate, while other essential services were not provided.

67 The Commission also notes that during the final review meeting on 16 December 1996 attended by the applicant, the project manager appointed by the applicant admitted that: 'We didn't manage to generate dissemination actions for the outside world other than the announcement of the OMI conference'. It follows in the Commission's submission that, although the applicant performed some work, it nevertheless failed, with the exception of the conference held in Berlin between 23 and 25 September 1996, to carry out the other tasks essential to the project, which were set out in the technical annex.

68 In those circumstances, the Commission considers that its assessment of the tasks performed by the applicant under the contract was made in good faith and was correct. Taking into account the information provided by the applicant, the Commission came to the conclusion that not all the costs reported had actually been incurred. Moreover, in view of the poor results achieved, the Commission could not deduce from the information in its possession that the applicant had incurred more costs than the Commission had already accepted.

69 As regards the applicant's submissions on the absence or insufficiency of a statement of reasons, the Commission refers to Article 1315 of the Belgian Civil Code which provides that 'any person who claims that an obligation should be performed shall provide evidence thereof' and contends that it is in no way bound to give reasons for its rejection or acceptance of costs reported to it. On the contrary, it is for the applicant to justify the costs in question. In any event, the Commission performed its contractual obligations in good faith and has given sufficient reasons in the present case for refusing the costs reported by the applicant.

70 In response to the applicant's assertion that the Commission at no time made any complaint to it while the contract was being performed, the Commission

contends that by rejecting (in its letter of 22 November 1996) a part of the costs relating to Mrs Cuyvers' services, it was in fact criticising some of the work performed by the applicant. In addition, the Commission contends that it was only after completion of the project that it could assess whether the costs submitted tallied with the work carried out under the contract.

71 The Commission goes on to refute the applicant's submission that the Commission's acceptance in its letter of 29 April 1999 of 742 additional hours amounts to proof of its arbitrary attitude. The acceptance of Mrs Cuyvers' additional hours, which formed the basis for the adjustment in the applicant's favour, was based upon a more favourable assessment of the costs reported by the applicant. That last assessment was made in the absence of any evidence of actual costs incurred and on the basis of the work deemed necessary to produce the project results and deliverables.

72 The Commission also disputes the applicant's assertion that no contractual time-limits were imposed for providing cost statements and, in that connection, it refers to Article 3 of the contract. According to the Commission, the reports to be sent to it were to contain, *inter alia*, detailed financial information in accordance with Annex II to the contract. However, the applicant's final report was incomplete since it did not contain, for example, a general statement of the services provided per work package per participant.

73 Lastly, in response to the applicant's argument that a part of the final review report was never sent to it, the Commission replies that the report concerned was sent to the project manager officially appointed by the applicant and that the Commission was not responsible for its distribution.

Findings of the Court

Preliminary observations

74 It must be noted that under the contract the applicant undertook to perform the task described in the technical annex headed 'Dissemination Co-ordination for OMI (Discomi)'. To that end, six categories of different actions were to be carried out in the framework of detailed work packages which included a list of the various specific services to be provided.

75 In order to enable the Commission to verify that the other contracting party was fulfilling its obligations in accordance with the programme described in the technical annex, Article 3.1 of, and Annex II to, the contract also imposed a requirement on the applicant to keep the Commission informed of the progress of the work and of the costs incurred. In particular, the applicant was required to submit to the Commission within specific time-limits, first, periodic progress reports including a cost statement for each participant in the project and, second, a final report describing the results obtained and detailing proposals for their exploitation, as well as a detailed cost statement for all the participants in the project throughout its duration.

76 Furthermore, the contract and Annex II thereto laid down a series of conditions concerning the rules for reimbursement of the various categories of costs incurred by the applicant.

77 If account is taken of those conditions, the issue of how the contract should be characterised, about which the parties have given conflicting views in the course of the proceedings, has no effect on the outcome of the dispute. As the parties

themselves have admitted, they remain bound to fulfil their contractual obligations irrespective of the nature of the contract.

78 It is therefore necessary to consider whether the applicant's claim is well founded as regards each of the categories of costs in respect of which it seeks reimbursement, namely labour costs, third-party costs, expenditure on durable equipment and consumables and other costs. In doing so, the procedural and substantive conditions laid down by the contract must be taken into account.

Labour costs

79 As regards, in the first place, 'labour costs', it must be observed that the applicant challenges the refusal to reimburse it for a part of the labour costs of its two experts, Mrs Cuyvers and Dr Geerinckx. In that regard, it puts forward two arguments, alleging (i) that the Commission's reduction of their hourly rate, invoiced at BEF 2 684 per hour and BEF 2 067 per hour respectively, to BEF 1 565 per hour was unjustified and (ii) that its assessment of the total number of hours of work completed by those experts throughout the period of the contract was incorrect.

80 Those arguments cannot be accepted.

81 As regards, initially, the hourly rate accepted by the Commission in respect of the two experts, it must be noted that paragraph 1.1 of Annex II expressly provides that 'labour costs shall not include any element of indirect costs or overheads'. On the basis of that clause, it was the applicant's responsibility to submit financial statements enabling the Commission to verify that fixed charges were

not included in respect of labour costs, even before it verified whether the costs involved in performance of the task in question were actually incurred and were necessary.

82 In the present case the applicant has confined itself to setting out its alleged labour costs in respect of the two experts concerned without adducing any proof either to the Commission or to the Court that those costs were actually incurred and that they did not include fixed charges. Moreover, as the Commission contends (and the applicant does not deny), the applicant has not proved that the higher rates of remuneration were justified when compared with the rate accepted by the Commission, which corresponds to the rate which the applicant itself had applied in a similar project. In those circumstances, the applicant's argument that the rates applied by it were justified if account is taken of the complexity of the tasks performed and the responsibility that they entailed is not well founded and must be rejected. Lastly, the claim that the hourly rates applied by the applicant were comparable to rates applied by other participants from nearby Member States in the project is irrelevant.

83 As regards, next, the Commission's assessment of the total number of hours which the two experts spent working on the project, it must be noted that, out of a total of 2 647 hours reported by the applicant (1 304 for the first period and 1 343 for the second), the Commission initially accepted only 710 hours and subsequently, when the adjustment was made in its letter of 29 April 1999, 742 additional hours were accepted, which brought the total number of hours accepted to 1 452.

84 In its assessment, the Commission found not only that the applicant had not proved that the work supposedly done by the two experts had actually been done, since it was not established that the number of hours in question had actually

been spent working on the project, but also that it had not established that the remuneration reported had actually been paid to those experts.

85 The applicant does not dispute the Commission's arguments but confines itself to submitting that the fact that the Commission accepted 742 additional hours of work in its letter of 29 April 1999 was proof of the arbitrary nature of the institution's assessment on that point.

86 That argument must be rejected. The mere fact that the Commission, on its own initiative and despite the absence of further proof, made an adjustment in the applicant's favour cannot allow the applicant to obtain any additional adjustment unless it can provide proof that its claim to that effect is well founded.

Third-party costs

87 Second, as regards third-party costs, it must be borne in mind that the applicant is claiming, first, reimbursement of sub-contracting costs incurred during the second period pursuant to a contract for the supply of services entered into with Mr Molina. Express provision for entry into a contract with Mr Molina for ECU 40 000 was made in the technical annex (see Part 1, point 2.3 of the annex). Following the adjustment made by the Commission on 29 April 1999, the entirety of the costs relating to the contract with Mr Molina was accepted by it, with the result that this part of the applicant's claim has become devoid of purpose.

88 The applicant also claims, as costs falling within the same category, reimbursement of the costs of management support, secretarial assistance and legal advice which were borne by it throughout the two periods of the contract. It is apparent from the documents before the Court that contracts for the supply of services were entered into for those purposes with the Fiduciaire Spaenjaers, Bejolu, Dubois and Antwerp Business Centre. However, the expenses under those agreements do not fall within any of the categories of expenses which may be reimbursed under Annex II to the contract. In so far as the agreements in question were not, in contrast to the contract entered into with Mr Molina, specified in the technical annex, the expenses arising under them could be charged (under Annex II to the contract) only with the Commission's agreement, provided that they were necessary for carrying out the task and did not affect the scope of the task. The applicant does not claim that those conditions are met in the present case. It is also apparent from the annexes to the Commission's letter of 1 April 1998 that the management and secretarial assistance had specifically been made the responsibility of one of the other participants in the project (RWM Consulting), so that the alleged assistance from the suppliers at issue was not necessary. In those circumstances the part of the applicant's claim concerning reimbursement of those expenses is not founded and must be rejected.

Expenditure on consumables

89 Third, as regards the sums claimed by the applicant by way of expenditure on consumables and durable equipment, it should be noted that, in the statement in its letter of 22 November 1996, the Commission had initially accepted a sum of ECU 2 491 for expenditure on consumables relating to the first period. However, at the time of the adjustment made in April 1999, the amount in question, revalued at EUR 2 429 on account of the BEF/EUR rate of conversion, was finally rejected. Moreover, the Commission had also refused in its statement of 1 April 1998 the amount of ECU 2 213 representing the applicant's expenditure on consumables during the second period. To justify refusal of that expenditure, the Commission, first, relied on the fact that no prior authorisation had been obtained and, second, maintained that the expenditure on consumables constituted general non-refundable costs.

90 Under Annex II to the contract, expenditure on consumables is accepted only if it has received the prior approval of the Commission or is specified in the technical annex. The technical annex provides that a budget of ECU 10 000 has been specifically set aside for the applicant for expenditure on consumables. As the Commission acknowledged at the hearing, the reimbursement of expenditure on consumables within the limit of the budget was not subject to the prior approval prescribed by Annex II to the contract. If account is taken of those express terms, the Commission's argument that expenditure on consumables constitutes general non-refundable costs is also unfounded. Consequently, and in so far as the budget of ECU 10 000 has not been exceeded in the present case, the applicant's claim for reimbursement of those costs is well founded and the Commission must be ordered to pay it the appropriate sum of EUR 4 642 (2 429 + 2 213).

Other costs

91 Finally, with regard to the other costs reported, it must be observed that in fact what is at issue are general costs amounting to ECU 7 138 in respect of telephone, fax and courier charges and the like.

92 The Commission rejected those costs, relying on the fact that the conditions stipulated in the contract and its annexes for reimbursement of those costs were not met. In that regard, it is clear that, since, under Annex II to the contract, general costs were not refundable, the applicant claimed reimbursement of the abovementioned costs by categorising them as other costs. However, in relation to costs falling within that category, Annex II provides that 'any other additional or unforeseen cost not falling within the aforesaid categories may be charged with

the agreement of the Commission provided that it is necessary for carrying out the task and does not fundamentally affect the scope of the task'.

93 The applicant's complaint is limited to alleging that the Commission rejected those costs without giving any reasons for so doing, and fails to advance any specific arguments or evidence showing that the abovementioned conditions for reimbursement were met in the present case. In those circumstances, the applicant's argument alleging that the refusal to accept those costs was unwarranted must be rejected.

The Commission's breach of its obligations

94 The applicant's general complaint that the Commission failed to give reasons for rejecting the entirety of the costs at issue and thus prejudiced the rights of the defence must be rejected at the outset, since that complaint seeks in fact to reverse the burden of proof. As the present case is a dispute concerning the performance of an agreement, it is necessary to take as a basis the relevant contractual provisions relating, first, to the services to be provided and the costs involved and, second, to the reimbursement of those costs.

95 Pursuant to the terms of the contract and Article 1315 of the Belgian Civil Code, which applies thereto, it was undoubtedly for the applicant to prove that the expenditure had actually been incurred and that other contractual formalities had been observed in order to be able to claim reimbursement of that expenditure. The Commission would have been obliged to give reasons for rejecting the expenses at issue only in the event that the applicant had provided such evidence. Although the applicant maintains that it has all the evidence required by the contract and claims to have provided such evidence to the Commission (see paragraph 43 above), it has not established this. It has not produced any of the

evidence that is alleged to exist to the Court but instead has confined itself to proposing that an expert's report should be obtained.

96 In criticising the Commission for not undertaking verification of the disputed costs pursuant to Articles 8 and 9 of the contract, the applicant confirms by implication that it has not submitted any evidence to the Commission. In that regard, it must be observed that those provisions, which empower, but do not require, the Commission to carry out technical verifications and financial audits, do not release the applicant from its obligation to provide financial statements in support of its payment requests in accordance with Article 3 of and Annex II to the contract.

97 Moreover, there are no grounds for accepting the applicant's argument which seeks to explain its failure to comply with the obligation to submit a consolidated cost statement for all the participants in the project by the lack of agreement with the Commission as to the amount of costs to be reported, since no such condition is to be found in the contract.

98 Therefore, the Court must reject the applicant's submission that the Commission did not fulfil its duty of faithful cooperation in the performance of the contract when it did not criticise the periodic progress reports submitted to it. First, the fact that the Commission did not make any comments on, or any criticism of, the services provided by the applicant does not affect the obligations to which the applicant was subject under the contract. Second, it was only after completion of the contract that the Commission could ascertain whether the expenses reported corresponded to the work carried out under the contract. In that regard, it should be added that, as is clear from its fax of 4 December 1996, the applicant still had to submit to the Commission, following completion of the contract, documentary

evidence of its costs for the first period. The applicant only presented its cost statement for the second period on 3 March 1997.

99 Finally, the Court must reject the applicant's other two complaints alleging that the Commission (i) did not send it Mr Vernon's report and (ii) did not explain to it in what way the final report was incomplete. As regards the first complaint, the Commission contends, and is not challenged on this point, that Mr Vernon's report was forwarded to the project manager officially appointed by the applicant and that it was not responsible for distributing the report to the various participants in the project. As to the fact that the final report was incomplete, it is apparent from the documents before the Court that the Commission, by its letter of 4 June 1998, had informed the applicant that the consolidated cost statement for all the participants had not yet been submitted to it. Consequently, the applicant's complaints are unfounded and must be rejected.

100 On the basis of the foregoing considerations, the applicant's claim must be upheld in so far as it seeks reimbursement of EUR 4 642 for expenditure on consumables and dismissed as to the remainder.

The defendant's counterclaim

Arguments of the parties

101 The Commission claims, pursuant to Article 4.2 of the contract, that the applicant should repay it the sum of EUR 54 486, which represents the difference between the costs accepted by the Commission and the sums actually paid to the applicant.

102 The applicant contends that since the Commission has provided no explanation as to how the amount it is claiming is calculated, the counterclaim is not well founded and must be dismissed.

Findings of the Court

103 It is apparent from the documents before the Court that the Commission paid the applicant a total amount of EUR 435 015. Following the adjustment made by the Commission in its letter of 29 April 1999, the expenditure accepted under the contract was set at EUR 380 529. It follows that the Commission is justified, under Article 4.2 of the contract, in claiming repayment from the applicant of an overpayment of EUR 54 486. If the amount owed to the applicant (set above at EUR 4 642) is deducted from that, the Commission's counterclaim must be allowed in the amount of EUR 49 844. That sum will bear interest at an annual rate of 7% as from 31 January 1999.

Costs

104 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's

pleadings. However, according to Article 87(3), the Court may order that the costs be shared or that each party bear its own costs where, as in these proceedings, each party succeeds on some and fails on other heads.

105 In the circumstances of the present case, the Court considers that it is fair to order the applicant to pay, in addition to its own costs, half of the Commission's costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Single Judge)

hereby:

1. Allows the applicant's claim in so far as it seeks reimbursement of expenditure on consumables amounting to EUR 4 642;

2. Dismisses the remainder of the application;

3. Allows the Commission's counterclaim;

4. Orders the applicant to pay the Commission the sum of EUR 49 844, plus interest at an annual rate of 7% as from 31 January 1999;

5. Orders the applicant to bear its own costs and to pay half of the costs incurred by the Commission;

6. Orders the Commission to bear half of its own costs.

Delivered in open court in Luxembourg on 16 May 2001.

H. Jung — Registrar

M. Vilaras — Judge