JUDGMENT OF THE COURT OF FIRST INSTANCE (Second Chamber)
10 June 1999 *

In Case T-10/98,

E-Quattro Snc, a company incorporated under Italian law, established in Laveno-Mombello, Italy, represented by Giuseppe Marchesini, advocate with rights of audience before the Corte di Cassazione, with an address for service in Luxembourg at the Chambers of Ernest Arendt, 8-10 Rue Mathias Hardt,

applicant,

v

Commission of the European Communities, represented by José Luis Iglesias Buhigues, Legal Adviser, and Barry Doherty, of its Legal Service, acting as Agents, assisted by Alberto Dal Ferro, of the Vicenza Bar, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

APPLICATION, pursuant to Article 153 of the EAEC Treaty, for compensation for damage allegedly suffered in connection with a contract concluded with the Community,

* Language of the case: Italian.

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Second Chamber),

composed of: A. Potocki, President, C.W. Bellamy and A.W.H. Meij, Judges,

Registrar: J. Palacio González, Administrator,

having regard to the written procedure and further to the hearing on 3 December 1998,

gives the following

Judgment

Factual background to the dispute and procedure

1 On 28 March 1996, the applicant and the European Community, represented by the Commission, represented for that purpose by the Director of the Environment Institute of the Joint Research Centre, Ispra ('the JRC'), entered into a contract relating to consulting services for technical and logistic support to be provided to the European Chemicals Bureau ('the ECB'), which is part of that institute.

2 Under Article 9 thereof, the contract is governed by Italian law. Pursuant to Article 10 of Annex 2 thereto, the Court of Justice of the European Communities is to have sole jurisdiction in disputes between the contracting parties.

3 The contract provided for two stages. The services stipulated for the first stage, that is for the period from 28 March 1996 to 27 March 1997, comprised assistance in the preparation of scientific meetings and the creation of a computerised data base of scientific information (Annex 1 to the contract).

4 The payment agreed for those services was ECU 190 400 (Article 6.1 of the contract). In April and July 1996, pursuant to Article 7.1 of the contract, the Commission made two payments totalling ECU 133 280. The balance, namely 30% of the global contract price, was to be paid after acceptance by the Environment Institute of the final report prepared by the applicant. The invoice corresponding to the balance of ECU 57 120 for technical and logistic assistance was drawn up by the applicant on 6 March 1997 and sent to the Commission by letter of 10 March 1997. Payment was to be made within 60 days of receipt of the request for payment (Article 7.2 of the contract).

5 By letter of 18 March 1997, received on 22 March 1997, the Commission informed the applicant that it had been decided not to authorise the start of the second stage of the contract.

6 By letter of 20 May 1997, the applicant insisted that the balance for the first stage of the contract be paid.

7 Under Article 12 of the contract, the Commission's Directorate-General for Financial Control carried out an audit of the applicant's accounts on 10 June

1997. A report on that subject was drawn up by that Directorate-General on 23 June 1997.

8 It is in those circumstances that, by application lodged at the Registry of the Court of Justice on 16 July 1997, the applicant brought the present action, registered under number C-257/97.

9 By order of 9 December 1997, the Court of Justice, finding that it manifestly did not have jurisdiction to hear the case brought before it, referred the case to the Court of First Instance in accordance with Article 48 of the EAEC Statute of the Court of Justice and reserved the costs.

10 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Second Chamber) decided to open the oral procedure. As a measure of organisation of procedure, the parties were requested to reply to certain questions and to produce certain documents. The parties complied with those requests.

11 The parties presented oral argument and answered the questions put to them by the Court at the hearing on 3 December 1998.

12 On that occasion, the applicant indicated that it was withdrawing its application for the Commission to be ordered to make good the damage suffered as a result of the purported termination of the contractual relationship, of which the Court took formal note.

Forms of order sought by the parties

13 The applicant claims that the Court should:

— order the Commission to pay compensation for the damage suffered and being suffered by the applicant as a result of the persistent delay in paying the balance for the services described in the unpaid invoice;

— order the Commission to pay interest as from the due date and until actual payment of the balance;

— order the Commission to pay the costs.

14 The Commission contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

Substance

Arguments of the parties

15 The applicant submits that, according to the terms of the contract, the Commission must make payment within two months of presentation of an

invoice. Payment may be deferred only if the services covered by the invoice are contested or the invoice and documentation are incomplete (Article 7.2 of the contract).

16 In this case, the invoice was drawn up on 6 March 1997. However, on the day the present action was brought, payment had still not been made, even though no notice had been given of a complaint of the kind referred to in Article 7.2 of the contract.

17 Failing the Commission's performance of its contractual obligations and an official explanation of the delay referred to, the applicant is claiming compensation for the damage suffered, corresponding to the amount of the unpaid invoice, together with interest as from the expiry of the time-limit of two months after receipt of the invoice.

18 The applicant company makes it clear that it cannot be criticised for alleged contraventions at the stage when the contract was prepared; it had at that time produced complete and truthful documentation concerning the date it was formed, its financial position and the curricula vitae of its directors.

19 As for the performance of the contract, the applicant does not dispute that the creation of a computerised data base, which formed part of the subject-matter of the contract, has not been completed. However, that is the result of an express request from the other party to the contract. The tasks of a scientific nature were thus postponed, at the express request of ECB officials, until the second stage of the contract. Accordingly, the applicant was charged with ever more time-consuming administrative tasks, as is illustrated by a letter of 28 May 1996 from the Commission entitled 'Note to the attention of the ECB staff'. It was therefore not a question of incomplete performance of the contract by the applicant, but of performance of other tasks requested by the other party to the contract.

20 In those circumstances, according to the applicant, payment of the balance for the services relating to the first stage of the contract appears justified and legitimate, because it corresponds to other activity which the applicant undertook at the express request of the other party to the contract. The applicant relies, in that regard, on a handwritten memorandum which constitutes the minutes of a meeting of 27 January 1997, which the Head of Unit of the ECB attended, and determined the programme of collaboration for the next few months.

21 Therefore, the only question which could arise would be to determine, from the financial point of view, the degree of equivalence between the administrative services which were in fact provided and the data-processing services originally stipulated in the contract.

22 The Commission contends that it has discovered a number of irregularities in connection with the contract at issue. The applicant has not provided some of the services stipulated in the contract and, contrary to what it claims, no amendment to the contract was agreed. In those circumstances, the conduct of the Commission is lawful and the applicant's application must be dismissed.

Findings of the Court

23 Under Article 13 of the contract signed between the parties on 28 March 1996, the annexes thereto form an integral part of the contract.

24 Annex 1 to the contract sets out the services which were to be provided by the applicant during the first stage of the contract.

25 Apart from the assistance to be given to the Environment Institute in the organisation of about 55 meetings planned in Ispra or outside Ispra (Article 3(a) of Annex 1 to the contract), provision was made for the establishment of a computerised data base of scientific information.

26 In the 'Cost proposal' drawn up by the applicant in connection with the procedure of tendering for the contract, the budget allocated to the development of that data base was ECU 44 300, to which should be added the costs of specialised staff.

27 In its pleadings, the applicant did not dispute the fact that the computerised data base has not been established. Nor did it deny this during the oral procedure.

28 Admittedly, the applicant did produce at the hearing a document, entitled 'Final Report', signed by an agent of the JRC. That document contains, in point 2 thereof, several explanations about the computerised system of scientific information, and *inter alia* the following sentence: 'The system has been improved and is now fully operational.'

29 However, the applicant admitted at the hearing that the computerised data base referred to in point 2 of the final report is not that stipulated in Article 3(b) of Annex 1 to the contract, but a file of names and addresses prepared in connection with the organisation of the meetings referred to in Article 3(a) of Annex 1 to the contract.

30 It is thus common ground that the computerised data base stipulated in the contract of 28 March 1996 has not been developed.

31 Furthermore, the Court finds that the file of names and addresses to which the applicant refers is mentioned in the last paragraph of point 1 of the document entitled 'Final Report'. Point 2 of that document, on the other hand, deals specifically with the computerised system of scientific information. The reference to the system being operational therefore appears to be wrong. The applicant stated, moreover, at the hearing that, if the final report drawn up by the applicant had not contained those explanations about the computerised data base, it would have had difficulty in obtaining payment of the balance.

32 The cost proposal drawn up by the applicant also provided for the employment of two computer engineers for development of the data base and one scientific consultant at costs of ECU 28 000 and ECU 12 000 respectively. The applicant produced before the Court, *inter alia*, two contracts for provision of services concluded between two natural persons and itself. It claims that those contracts are those corresponding to the employment of the two computer engineers initially provided for. However, without its being necessary to examine the genuineness of that claim, it is sufficient to point out that the computer engineers' function was to establish the computerised data base of scientific information. That is precisely what has not been developed. The services which may have been provided by the two persons in question cannot therefore correspond to those originally agreed, for which payment of ECU 28 000 was stipulated.

33 The applicant claims, however, that, although the services at issue have not been provided, it is because, at the JRC's request, the applicant concentrated its efforts on the first part of the services under the contract, namely the organisation of meetings, which had turned out to be a heavier responsibility than expected.

34 In that regard, it should be noted that, under the terms of Article 11 of Annex 2 to the contract, the provisions of the contract and of the annexes thereto could not be amended or added to except by supplementary agreement signed by a duly authorised representative of each of the contracting parties. The contract of 28 March 1996 was concluded in the name of the Community, represented by the Commission, represented for the purpose of signing the contract by the Director of the Environment Institute of the JRC.

35 It is clear from the case-file that there is no evidence to show that the contract was amended in the way stipulated in Article 11 of Annex 2 thereto.

36 In the course of the written procedure, the applicant relied on two documents.

37 The first is a memorandum of 28 May 1996 from the ECB to the staff of that bureau. After mentioning the signing of the contract with the applicant, the author of the document reminds the staff of the ECB of the internal procedures to be followed, as regards both the organisation of the meetings and the administrative procedures to be followed. Nothing in that document, drawn up scarcely two months after the contract was concluded, can be regarded as amending it.

38 The second document is a handwritten note which constitutes the 'minutes' of a meeting of 27 January 1997, which the Head of Unit of the ECB attended, laying down the programme of collaboration for the next few months. First, nothing confirms the authenticity of that document: it is not dated, its author is unknown and there is nothing even to show that it relates to a meeting of 27 January 1997, or that the Head of Unit of the ECB attended it. In any event, that handwritten document of a few lines contains only names and periods without a single coherent sentence. It cannot be concluded from it that the contract had been validly amended in respect of one of its essential aspects.

39 At the hearing, the applicant produced two additional documents in order to prove the agreement which had been made between the parties to amend the initial contract and consequently to postpone the work linked to the establishment of the computerised data base.

40 The first document is a memorandum of 5 August 1997 from the Commission. It is there stated that the technical annex to the contract, which defines the services to be provided by the applicant, was 'amended orally'.

41 The Court observes, first, that that memorandum is an internal Commission document, drawn up in connection with the preparation of the defendant's pleadings in the present case. It is clear from the evidence presented at the hearing that counsel for the applicant had cognisance of that memorandum at the time when disciplinary proceedings were brought against certain JRC agents in connection with the contract of 28 March 1996, proceedings in which he was also representing the agents in question. He took a copy of that internal memorandum in connection with those disciplinary proceedings.

42 The fact remains, in any event, that that memorandum does not constitute an amendment of the contract in the form stipulated in Article 11 of Annex 2 of the contract.

43 The second document is the one entitled 'Final Report'.

44 It should be pointed out, first, that the applicant has not been able to establish the circumstances in which it came into possession of that document. In the light of the hearing, it is established that that document was not given by the JRC to the applicant in the context of their contractual relationship. Moreover, if such had been the case, the applicant would have been in a position to produce it in its application. It seems, in reality, that that document, signed by an agent of the JRC, was brought to the attention of counsel for the applicant, like the document analysed above in paragraph 40, only when disciplinary proceedings were brought by the Commission against certain JRC agents in connection with the contract of 28 March 1996, proceedings in which counsel for the applicant was also counsel for the agents concerned.

45 Furthermore, that document makes no reference to an amendment of the terms of the contract. Although it describes the tasks undertaken by the applicant in the organisation of meetings, it does not show that that work went beyond what was stipulated in the initial contract. Moreover, in point 2 relating to the computerised data base of scientific information, the final report confirms, on the contrary, that the applicant was aware that, in order to obtain payment of the balance, it needed to claim that it had also completed that work, although that was not true.

46 Consequently, no document shows that the contract was amended by the method stipulated.

47 The application for an order requiring the Commission to pay compensation to the applicant for damage suffered as a result of delay in payment of the balance of the price must therefore be dismissed. Consequently, the application for payment of interest as from the due date until actual payment of the balance must also be dismissed.

Costs

48 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs, if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the Commission.

49 Since the Court of Justice, in its order of 9 December 1997, cited above, reserved the costs, the present order includes the costs relating to proceedings before the Court of Justice.

On those grounds,

THE COURT OF FIRST INSTANCE (Second Chamber)

hereby:

1. **Dismisses the action;**

2. **Orders the applicant to pay the costs.**

Potocki Bellamy Meij

Delivered in open court in Luxembourg on 10 June 1999.

H. Jung A. Potocki

Registrar President