

JUDGMENT OF THE COURT OF FIRST INSTANCE (Second Chamber)
15 January 2003 *

In Case T-171/01,

Institut de l'audiovisuel et des télécommunications en Europe (IDATE),
established in Montpellier (France), represented by H. Calvet, lawyer, with an
address for service in Luxembourg,

applicant,

v

Commission of the European Communities, represented by M. Wolfcarius and
M. Shotter, acting as Agents, assisted by J.-L. Fagnart, lawyer, with an address
for service in Luxembourg,

defendant,

APPLICATION for a declaration by the Court of First Instance that 'allowable costs' payable by the Commission, for the purposes of the contract concluded between the Commission and the applicant in the context of the Trans-European Telecommunications Networks Programme, covers the whole of the costs invoiced by the applicant's subcontractors under that contract and, in the

* Language of the case: French.

alternative, for compensation for the loss allegedly suffered by the applicant as a consequence of the breaches committed by the Commission in the performance of that contract,

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

composed of: R.M. Moura Ramos, President, J. Pirrung and A.W.H. Meij,
Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 15 May
2002,

gives the following

Judgment

Facts and procedure

1 The Institut de l'audiovisuel et des télécommunications en Europe (IDATE) is a non-profit-making body constituted under French law and governed by the Law of 1 July 1901, its objects being to assist and participate in managing the development of information and communication media in Europe.

- 2 In the context of the Community Trans-European Telecommunications Networks Programme, IDATE concluded with the Commission, on 28 March 1996, Contract No 45504, known as 'Dissemination of Euro-ISDN Benefits for SMEs' (hereinafter 'the contract' or 'the contract at issue').

- 3 As provided in Annex I to the contract, IDATE undertook to organise, in all the Member States of the European Union, seminars aimed at informing and advising small and medium-sized undertakings on the benefits of using Euro-ISDN.

- 4 Under Article 4.2 of the contract, according to the wording inserted by Amendment No 1 of 5 September 1996 to the contract, the Commission undertook to reimburse 50.85% of the costs of performing the contract, up to ECU 1 125 563.

- 5 Article 12 of the contract stipulates that the law applicable to the contract is to be that of France and that the Court of First Instance of the European Communities and, in case of appeal, the Court of Justice of the European Communities are to have jurisdiction in any dispute between the Commission and IDATE concerning the validity, application and interpretation of the contract.

- 6 In accordance with Article 5 of the contract, IDATE used subcontractors in the course of performing the contract. It paid them 50.85% of the costs mentioned in the invoices which they submitted to it for the performance of the subcontracts. For the remainder of those costs, IDATE sent invoices to the subcontractors.

- 7 On 27 February 1998 IDATE sent to the Commission the final report on the performance of the contract, together with the final statement of the costs borne under that contract. All the invoices issued by IDATE's subcontractors were attached to the final cost statement.
- 8 By letter of 23 March 1998, the Commission replied to IDATE, stating that the subcontractors were not signatories to the contract and explaining why it did not agree to settle all the invoices issued by the subcontractors.
- 9 The Commission finally approved the final statement of the costs of performing the contract, which had been sent to it by IDATE, on 10 July 1998. In that document, IDATE mentioned a total cost of ECU 2 275 000, of which ECU 2 019 565 were in respect of subcontracting.
- 10 By letter of 5 November 1998, the Commission informed IDATE that it had effected a set-off between the amount which it owed under the contract for the services provided by one of IDATE's subcontractors, the MARI Group Ltd (hereinafter 'MARI'), and the amount which the Commission had to recover from MARI under other contracts.
- 11 Following that set-off, at the beginning of 1999, the Commission paid to IDATE the balance of the Community contribution provided for.
- 12 After making that payment, the Commission arranged for an audit of the performance of the contract at issue to be undertaken by an auditing company. According to the report of that audit, the part of the costs invoiced to IDATE by

its subcontractors and set off against the sums which IDATE invoiced to its subcontractors was not allowable for the purposes of the contract. IDATE disputed the findings of that report by letters of 15 November 1999 and 14 February 2000.

- 13 By letter of 25 July 2000, the Commission, referring to the findings of that report, expressed the view that the part of the subcontracting costs invoiced to IDATE but not actually paid by it could not be taken into account in drawing up the final financial balance sheet of the contract. Consequently, it requested repayment of a sum of EUR 504 745, stating that the non-reimbursement of part of the subcontracting costs was due entirely to a misinterpretation of the clauses of the contract on the part of IDATE.
- 14 By application lodged at the Registry of the Court of First Instance on 25 July 2001, the applicant brought this action. The written procedure closed on 10 January 2002.
- 15 On hearing the report of the Judge-Rapporteur, the Court (Second Chamber) decided to arrange an informal meeting with the parties and to open the oral procedure.
- 16 On 27 March 2002 the Commission issued a debit note payable by the applicant for an amount of EUR 506 539.35, corresponding to the part of the costs which it regarded as being non-allowable.
- 17 On 15 May 2002 the Court held an informal meeting with the parties. The parties also presented oral argument and replied to the questions of the Court of First Instance at the hearing which was held on the same day.

Forms of order sought by the parties

18 The applicant claims that the Court should:

- declare that ‘allowable costs’ payable by the Commission, for the purposes of the contract, covers the whole of the costs invoiced to it by its subcontractors under that contract;

- in the alternative, order the Commission to pay to it the sum of EUR 503 662 by way of damages for the loss suffered by it as a consequence of breaches committed by the Commission in the performance of the contract and, accordingly, to acknowledge the set-off between that sum and the sum of EUR 503 662 which it would be required to repay to the Commission under the same contract;

- order the Commission to pay the costs.

19 The Commission contends that the Court should:

- dismiss the application as inadmissible;

- in the alternative, dismiss the application as unfounded;

- order the applicant to pay the costs.

Law

- 20 The applicant asks the Court of First Instance to declare that ‘allowable costs’ payable by the Commission, for the purposes of the contract, covers the whole of the costs invoiced to it by its subcontractors under that contract. In the alternative, the applicant claims that the Court of First Instance should order the Commission to pay to it the sum of EUR 503 662 by way of damages on account of the loss suffered by it as a consequence of the breaches committed by the Commission in the performance of the contract and, accordingly, to acknowledge the set-off between that sum and the sum of EUR 503 662 which it would be required to repay to the Commission under the same contract.
- 21 The Commission disputes the admissibility of both the applicant’s claims and, in the alternative, contends that they are unfounded.
- 22 The Court takes the view that the applicant’s principal claim must be considered.

Admissibility

Arguments of the parties

- 23 The Commission submits that the applicant does not have a direct and present interest in the granting of its claim. It points out that the declaration sought from the Court by the applicant would enable the latter to object to the set-off announced by the Commission between its debt to, and any claims it may have against, the Commission. The defendant submits that, since the applicant has not pleaded that it may have claims against the Commission, that set-off remains pure conjecture.
- 24 The applicant asserts that its principal claim is admissible. Referring to a letter of 20 April 2001 from the Commission, in which the latter states its intention to pursue recovery of the amount owed to it by the applicant in respect of performance of the contract, the applicant claims that it has a vested and present interest in seeking settlement of a dispute between itself and the Commission. In addition, it points out that it is either the other party to, or a subcontractor in connection with, several contracts under which it is due to receive payments from the Commission.

Findings of the Court

- 25 It is beyond dispute that the question submitted to the Court, namely the interpretation of 'allowable costs' for the purposes of the contract at issue, concerns the obligations arising from that contract (Case 426/85 *Commission v Zoubek* [1986] ECR 4057, paragraph 11, and Case C-114/94 *IDE v Commission* [1997] ECR I-803, paragraph 82).

- 26 Moreover, the applicant has a vested and present interest in seeking settlement of the dispute which exists between it and the Commission.
- 27 As the applicant points out, without being challenged by the Commission, on the one hand, it is the other party to, or subcontractor in connection with, several contracts under which it is due to receive payments from the Commission and, on the other hand, the latter, by a letter which it sent to the applicant on 20 April 2001, had already informed it of its intention to effect a set-off between its debt to, and any claims it may have against, the Commission.
- 28 Furthermore, on 27 March 2002 the Commission issued a debit note payable by the applicant for an amount corresponding to the part of the costs which it regarded as non-reimbursable.
- 29 Consequently, the present application is admissible so far as concerns the principal claim of the applicant.

Substance

Arguments of the parties

- 30 The applicant argues that ‘allowable costs’ payable by the Commission, for the purposes of the contract, covers the whole of the costs invoiced to it by its subcontractors under that contract.

- 31 In support of that claim, the applicant submits, first, that such an interpretation follows from point 1.2 of Annex II to the contract, under which, in order to be allowable, costs generated by the contract must have actually been borne, necessary for the project, substantiated and incurred during the period specified in the contract.
- 32 It adds that, in 1998, with the agreement of the Commission, a system for the centralisation of all subcontractors' costs was set up at its premises, under which the subcontractors would invoice to it 100% of the costs which they had actually borne. The applicant submits that it was therefore logical for it to become the subcontractors' creditor for the financing which they had to raise. In the same way, it was also justifiable for the applicant to effect a set-off between those claims and the costs which were invoiced to it by its subcontractors and which were not reimbursed by the Commission, up to 49.15%.
- 33 Second, the applicant argues that the interpretation which it is defending is consistent with the scheme of the contract.
- 34 The applicant refers in this regard to the fact that the draft contract submitted to the Commission in October 1995 provided that the costs of performing the contract were to be financed not only by a Community contribution, but also by the receipts and financing which it and its subcontractors had undertaken to raise under that contract. The apportionment of the financing of the contract and the participation of the subcontractors in that financing were determined in cooperation with the Commission and approved by it. Moreover, the subcontractors also took part in the negotiation of the contract with the Commission.
- 35 The applicant further argues that, despite the fact that the contract was signed only by it, both it and the Commission continued to regard the subcontractors as

parties to that contract. It was on that basis that in 1998 the Commission regarded MARI as being the creditor of a sum under the contract and effected the set-off between that sum and the sum owed to it by MARI under other contracts.

- 36 With regard to the applicant's first argument, concerning the interpretation of point 1.2 of Annex II to the contract, the Commission argues the amounts which were not actually paid out by the applicant cannot be regarded as 'actual costs' within the meaning of that point.
- 37 The Commission submits that, since it has no contractual relationship with the subcontractors, costs incurred by them but not reimbursed by the applicant cannot be charged to it or be the subject of a Community contribution.
- 38 The Commission also challenges the applicant's argument that, when paying the balance of the transactions, it merely effected a set-off between the invoices issued by its subcontractors for costs and the invoices issued by it in respect of the receipts and financing which its subcontractors were to have raised.
- 39 In that regard, the Commission argues that, if there had been any receipts, the applicant was entitled to use them only to cover all or part of the 49.15% of the actual costs of the project for which it was liable. It further submits that the aggregate amount of the Commission's receipts and financing may not exceed the total cost of the project since, under Annex II to the contract, the applicant was not entitled to make any profit on the project.

- 40 The Commission points out that, in any event, it is apparent from the final costs statement which IDATE attached to its letter of 10 June 1998 that the seminars organised by the subcontractors did not generate any receipts.
- 41 With regard to the applicant's second argument, based on the scheme of the contract, the Commission disputes, first, the view that the parties considered the subcontractors to be parties to the contract.
- 42 Furthermore, as regards the set-off effected with MARI, the Commission points out that it had a debt to the applicant and a claim against MARI and that, for its part, MARI had a claim against the applicant. The Commission maintains that MARI agreed to waive its claim against the applicant provided that the latter agreed to substitute itself for MARI in regard to the debt owed by that company to the Commission. According to the Commission, that transaction constitutes a novation within the meaning of Article 1271(2) of the French Civil Code. Consequently, it maintains that, since the applicant became liable for the debt which was originally MARI's, the Commission was entitled to effect a set-off between that debt and part of the claim which the applicant had against the Commission.
- 43 At the hearing, at the request of the Court, the Commission confirmed having received from the applicant invoices relating to subcontractors' expenses. It also stated that it did not dispute the genuineness of the expenditure mentioned in the cost statements furnished by the applicant. However, it pointed out that it likewise did not acknowledge the genuineness of that expenditure.

Findings of the Court

44 As a preliminary observation, it must be recalled that, when an action under an arbitration clause is brought before it, the Court must settle the dispute on the basis of the national substantive law applicable to the contract. In this case, under Article 12 of the contract at issue, that law is French law.

45 According to Article 1161 of the French Civil Code:

‘All the clauses in a contract shall be interpreted by reference to one another, so that each is interpreted in the manner called for by the document as a whole.’

46 ‘Allowable costs’ within the meaning of the contract must therefore be interpreted by reference, first of all, to the provisions thereof which are relevant in the context of this case.

47 Under point 1.2 of Annex II to the contract:

‘Allowable costs are those actual costs defined hereafter, which are necessary for the project, can be substantiated and are incurred during the period specified in Article 2.1 of the contract [the term of the contract]. Allowable costs after that

period shall be limited to those relating to the reporting, review or evaluations requirements of this contract.

...

Allowable costs may include all or any of the following categories of costs:

— Personnel

— Equipment

— Third party assistance

— Travel and subsistence

— Consumables and computing

— Other costs

— Overheads.

Costs shall exclude any profit and be determined in accordance with accounting principles relating to historic cost and the internal rules of the Contractor.

No contractor shall incur unnecessarily high or extravagant cost on the project. No costs may be charged in respect of marketing, sales and distribution costs for products and services, interest, returns on capital employed, provisions for future losses or liabilities, and any costs related to other projects.’

48 Point 1.3.3 of Annex II to the contract at issue provides:

‘Costs of subcontractors and external services shall be allowable costs in accordance with Article 5 of the contract.’

49 Article 5.1 of the contract stipulates:

‘The Contractor may enter into subcontracts subject to the prior written approval of the Commission being required. In any case, the Contractor shall not be released from its obligations under the contract. The Contractor shall impose on any subcontractor the same obligations as apply to itself under the contract.’

50 Article 5.2 states:

‘Obligations shall be imposed in each subcontract giving the Commission the same rights concerning the technical monitoring of, and access to, the subcontractor as the Commission has in respect of the Contractor.’

51 Article 6 of the contract provides:

‘6.1 The Commission, or its authorised representatives, shall be given reasonable access to sites or premises of work on the project and to documents concerning the project’s management, progress and review....’

6.2 The Commission, or persons authorised by it, shall be entitled to carry out audits up to two years after the completion date or the termination of the contract. They shall have complete on-site access at all reasonable times, to personnel engaged on the project and all documents, computer records, and equipment relating to the project or, where necessary, be entitled to require submission of any such documentary evidence.

6.3 The Court of Auditors of the European Communities shall be entitled to the same rights, under the same terms and conditions, as the Commission in respect of auditing.’

- 52 According to the applicant, ‘allowable costs’ payable by the Commission, for the purposes of the contract, covers the whole of the costs invoiced by the applicant’s subcontractors under that contract. However, the Commission submits that costs defrayed by subcontractors but not reimbursed by the applicant may not be charged to it.
- 53 It must be emphasised at the outset that, in support of its view, the Commission does not challenge the genuineness, in this case, of the expenditure effected by the subcontractors or rely on any other breach of the contract by the applicant. It merely contends that its view corresponds to a correct interpretation of ‘allowable costs’ for the purposes of the contract.
- 54 ‘Allowable costs’, which appears in point 1.2 of Annex II to the contract at issue, must be interpreted, in particular, in the light of point 1.3.3 of the same annex. The latter provision expressly provides that, in accordance with Article 5 of the contract, costs of subcontracts are to be regarded as allowable costs. Furthermore, that article specifically provides that, subject to the prior written approval of the Commission, the contractor may enter into subcontracts for the execution of the project.
- 55 It must therefore be concluded that, with regard to the allowable nature of expenditure incurred in respect of performance of the contract at issue, the contract does not make any distinction between expenditure incurred by the contractor itself and expenditure incurred by subcontractors which have been approved beforehand by the Commission.
- 56 That interpretation also follows from the scheme of the contract at issue. That contract expressly provides that the contractor may have recourse to subcontracting for the purpose of fulfilling its contractual obligations (see paragraph 49

above). In so far as the subcontractors ensure the execution of the project in that way, which, moreover, had been announced to the Commission during the negotiations which preceded the conclusion of the contract, the costs which they incur on that basis cannot be excluded from the category of allowable costs.

- 57 That interpretation of the contract is confirmed by the conduct of the Commission towards MARI, since the set-off effected by the Commission in relation to that company presupposes the existence and payability of MARI's claim against it in respect of performance of the contract at issue.
- 58 In those circumstances, 'allowable costs' payable by the Commission, for the purposes of the contract at issue, must be interpreted as meaning that those costs include all costs invoiced to the applicant by its subcontractors under that contract, provided that those costs correspond to expenditure actually incurred by the subcontractors.
- 59 That interpretation does not affect the right of the Commission to monitor the genuineness of expenditure incurred by the subcontractors in respect of performance of the contract, since the contract provides the Commission with every means of monitoring compliance by the subcontractors with their obligations.
- 60 The combined application of Articles 5 and 6 of the contract at issue enables the Commission to verify the genuineness of expenditure effected by the subcontractors in respect of performance of the contract, in the same way as it may do so with regard to the contractor. Article 5 provides that the contractor must impose on the subcontractor the same obligations as apply to itself under the contract.

Article 6 even provides for an extensive right of access for the Commission and the Court of Auditors to the work premises and documents concerning the execution of the project financed by the Community budget, a right of access which therefore also extends to the premises and documents used by the approved subcontractors.

- 61 The forms of order sought by the applicant in relation to its principal claim must therefore be granted.
- 62 In those circumstances, there is no need to rule on the admissibility and substance of the applicant's alternative claim.

Costs

- 63 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. Since the Commission has been unsuccessful, it must be ordered to pay the costs in their entirety in accordance with the forms of order sought by the applicant.

On those grounds,

THE COURT OF FIRST INSTANCE (Second Chamber),

hereby:

1. Declares that 'allowable costs' payable by the Commission, for the purposes of the contract at issue, covers the whole of the costs invoiced to the applicant by its subcontractors under that contract.
2. Orders the Commission to pay the costs.

Moura Ramos

Pirrung

Meij

Delivered in open court in Luxembourg on 15 January 2003.

H. Jung

R.M. Moura Ramos

Registrar

President