ORDER OF THE COURT OF FIRST INSTANCE
(Fourth Chamber, Extended Composition)
25 November 2003 *

In Case T-85/01,

IAMA Consulting Srl, established in Milan (Italy), represented by V. Salvatore, lawyer,

applicant,

v

Commission of the European Communities, represented by E. de March, acting as agent, assisted by A. Dal Ferro, with an address for service in Luxembourg,

defendant,

APPLICATION for annulment of measures adopted by the Commission on 12 and 21 February 2001 with regard to the costs allowable for Community financing in respect of the REGIS 22337 and Refiag 23200 projects, implemented within the framework of the European Strategic Programme for Research and Development in Information Technologies (Esprit),

* Language of the case: Italian.

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES
(Fourth Chamber, Extended Composition),

composed of: V. Tiili, President, P. Mengozzi, M. Vilaras, J. Pirrung and A.W.H. Meij, Judges,

Registrar: H. Jung,

makes the following

Order

Facts

1 On 24 May 1996, the Commission entered into a contract with IAMA International Management Advisors Srl (hereinafter 'IAMA International'), Capa Conseil, Diagramma and Società Reale Mutua di Assicurazioni establishing the detailed rules of the Commission's financial contribution to a project in the European Strategic Programme for Research and Development in Information Technologies (Esprit), called 'the flexible agency; tools-supported business re-engineering of the insurance services distribution' (hereinafter 'the REGIS contract'). The contract appointed IAMA International as coordinator of the project. The term of the contract was set at 27 months, from 1 May 1996 to 31 July 1998.

2 On 14 October 1996, the Commission entered into a similar contract with IAMA International, in the role of coordinator, and four other companies, established in Italy, France and the United Kingdom, establishing the detailed rules of the Commission's financial contribution to a second project in the Esprit Programme, called 'Re-engineering of the Financial Agency' (hereinafter 'the Refiag contract'). The term of the project covered by that contract was 24 months, from 1 November 1996 to 31 October 1998.

3 Article 10 of both contracts contained a clause designating Italian law as the applicable law.

4 Each of the two contracts had two annexes, one containing the technical description of the project (Annex I) and the other the general conditions applicable to the contract (Annex II). The contents of Annex II were identical for both contracts.

5 In particular, Article 2 of Annex II, entitled 'Management of Project', stated the obligations of the coordinator and the other contractors. The coordinator had inter alia to liaise between the Commission and the other contractors. The latter and the coordinator were to appoint a person or persons, from among their employees, to manage and direct the project. If those duties were assigned to a third party, the Commission's written consent was required. Any change in the ownership or control of one of the contractors, of an affiliate or of an associated contractor had to be notified to the Commission immediately.

6 Article 3 of Annex II provided for the participation of third parties in the performance of the contract by means of the conclusion of subcontracts or associated contracts. With regard to arrangements concluded with affiliates, the

term designating inter alia the entities controlled by one of the contractors, Article 3.2 required the parties to notify them to the Commission. The Commission's approval was not required for arrangements which did not affect the conditions under which the finance contracts had been concluded.

7 Article 18 of Annex II, entitled 'Financial management', defined as allowable, in connection with both finance contracts, actual costs necessary for the project, duly substantiated and incurred during the contractual period.

8 Under Article 7 of Annex II, sole jurisdiction to settle any dispute between the Commission and the contractors relating to the validity, application and interpretation of the two contracts was conferred on the Court of First Instance, and in the event of an appeal on the Court of Justice.

9 By letter of 7 October 1997, addressed to the Commission, Mr David, a member of the board of directors of IAMA International, stated that all the consulting activities of that company had been transferred to IAMA Consulting Srl (hereinafter 'the applicant' or 'IAMA Consulting'). The transfer was the consequence of changes made to the structure of the group led by IAMA International in order to convert IAMA International into a holding company by transferring the whole of the operational sector to the other companies in the group. In that letter, Mr David also explained that, although the REGIS and Refiag contracts had been concluded by IAMA International, all the research work connected with those contracts was carried out by IAMA Consulting. That situation meant that the Commission financing was transferred to IAMA Consulting by means of invoices subject to value added tax. Since it was especially difficult to recover that tax, Mr David asked the Commission to substitute IAMA Consulting for IAMA International for the implementation of the projects covered by the REGIS and Refiag contracts.

10 The aforementioned letter had been preceded by a letter dated 26 September 1997 referring only to the REGIS contract, in which Mr David asked for the Commission's permission to appoint IAMA Consulting in place of IAMA International as main contractor.

11 By letter of 8 May 1998 sent to the Commission, the applicant communicated the documents needed for its appointment as new contractor in the REGIS contract. It was requested that that substitution should take effect from 1 November 1997.

12 In order to prepare an amendment to the Refiag contract, the Commission sent the applicant an e-mail on 24 June 1998 asking it to specify the date from which IAMA Consulting had replaced IAMA International.

13 By e-mail of 29 June 1998, the applicant replied that the replacement had taken effect from 1 November 1997.

14 The Commission then drew up a draft amendment to the Refiag contract, which was submitted to the applicant for approval. Article 2.1 of the draft set 1 November 1997 as the date on which the change of contractor took place.

15 On 28 October 1998, the applicant sent the Commission four originals of the amendment duly signed. The covering letter stated that no change had been made to it. The Commission signed the amendment to the Refiag contract on 18 December 1998.

16 No amendment was made to the REGIS contract, in spite of the applicant's request to that effect in its letters of 26 September 1997 and 8 May 1998.

17 In performance of the contracts, the Commission paid the sum of ITL 1 357 216 782 (EUR 700 944) for the REGIS project and the sum of ITL 1 041 774 438 (EUR 538 032) for the Refiag project.

18 Exercising the power conferred on it by Article 24 of Annex II to the REGIS and Refiag contracts, the Commission decided to carry out an audit of the statements of expenses submitted by the contractors. That task was entrusted to the audit company GDA Revisori Independenti.

19 As regards the Refiag contract, the audit report points out that between the beginning of the project and 31 October 1997 the costs claimed by IAMA International had been borne entirely by IAMA Consulting, which at the time was not party to the contract, since it replaced IAMA International only from 1 November 1997. The report states that only part of those costs were reinvoiced to IAMA International and concludes that only that part may be regarded as reimbursable.

20 With regard to the REGIS contract, the audit report, after pointing out the absence of an amendment appointing IAMA Consulting as the new contractor in place of IAMA International, takes the view that only the costs borne by IAMA Consulting and reinvoiced to IAMA International are reimbursable.

21 On the basis of the audit report, the Commission informed the applicant by letter of 12 February 2001 that in the case of the Refiag contract, for the period from 1 November 1996 to 31 October 1997 only the expenses incurred by IAMA International would be considered allowable, and for the period from 1 November 1997 to 31 October 1998 only the expenses borne by IAMA Consulting.

22 In the same letter, the Commission acknowledged that, as regards the REGIS contract, the absence of an amendment showing the replacement of IAMA International by the applicant was due to its own failure to act. Consequently, it informed the applicant that, even though there was no amendment to the contract, the replacement would be considered as having taken effect from the date indicated in the applicant's letter of 8 May 1998, 1 November 1997. In that regard, the Commission, disregarding the conclusions of the audit report, stated that it would consider allowable, for the period from 1 May 1996 to 31 October 1997, only the expenses incurred by IAMA International and, for the period from 1 November 1997 to 23 July 1998, only those borne by IAMA Consulting.

23 By letter to the applicant dated 21 February 2001, the Commission confirmed the findings contained in its letter of 12 February 2001 and informed the applicant that it would seek recovery of the sums paid in respect of the REGIS and Refiag projects to the extent that they exceeded the allowable expenses.

24 By fax of 8 March 2001, the applicant challenged the Commission's findings and asked it to recognise, both for the REGIS contract and the Refiag contract, that the expenses incurred by IAMA Consulting from the date on which the contracts came into effect were allowable.

25 By registered letter of 5 April 2001, referring only to the Refiag contract, the Commission replied to the applicant that, as there were no documents proving that the amendment to the contract concluded in December 1998 contained an error regarding the date on which the substitution of IAMA International by IAMA Consulting took effect, it did not intend to make any changes to the findings contained in its letters of 12 and 21 February 2001.

26 By fax of 9 April 2001, the applicant informed the Commission that, as it had received no reply in respect of the REGIS contract, it considered that, as regards that contract, its request of 5 April 2001 for the Commission to recognise that the expenses incurred by IAMA Consulting were allowable had been implicitly granted. With regard to the Refiag contract, the applicant repeated its request for the findings contained in the Commission's letters of 12 and 21 February 2001 to be revised.

Forms of order sought by the parties

27 By application lodged at the Registry of Court of First Instance on 11 April 2001, the applicant brought the present action.

28 On 17 July 2001, the Commission lodged its defence at the Court Registry; in the defence it submitted a counterclaim.

29 By way of measures of organisation of procedure, the parties were requested to reply to a written question posed by the Court. They were also requested, pursuant to Article 78 of the Rules of Procedure of the Court of First Instance, to state their views on a possible stay of the proceedings under Article 54 of the Statute of the Court of Justice and Article 77(a) of the Rules of Procedure. They complied with those requests within the time allowed.

30 In its application, the applicant claims that the Court should:

— annul the provisions contained in the Commission's letters of 12 and 21 February 2001 in so far as they refuse to recognise as allowable the expenses incurred by the applicant between 1 May 1996 and 31 October 1997 for the REGIS contract and between 1 November 1996 and 31 October 1997 for the Refiag contract;

— in the alternative, hold the Commission jointly and severally liable for any improper performance of the contract and subsequently review the amounts accounted for in the decision of 21 February 2001, reducing those relating to expenses not recognised as allowable, to the applicant's detriment, in an amount not less than ITL 600 million, the exact amount to be quantified by the Court on equitable principles;

— order the Commission to pay the costs.

31 The Commission contends that the Court should:

— reject the applicant's main claim as inadmissible or unfounded;

— reject the applicant's alternative claim as unfounded;

— on a counterclaim, declare that the applicant is required to pay to the Commission the sum of ITL 1 099 405 866 (EUR 567 796);

— on a counterclaim, order the applicant to pay the above sum together with default interest in accordance with Article 94 of Commission Regulation (Euratom, ECSC, EC) No 3418/93 of 9 December 1993 laying down detailed rules for the implementation of certain provisions of the Financial Regulation of 21 December 1977 (OJ 1993 L 315, p. 1), repealed and replaced by Commission Regulation (EC, Euratom) No 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of Council Regulation (EC, Euratom) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ 2002 L 357, p. 1);

— order the applicant to pay the costs.

32 In its reply, the applicant claims that the Court should:

— reject the Commission's counterclaim as inadmissible;

— grant the forms of order sought by the applicant in its application.

Law

33 Under Article 113 of the Rules of Procedure, the Court of First Instance may at any time of its own motion consider whether there exists any absolute bar to proceeding with an action, and shall give its decision in accordance with Article 114(3) and (4) of those Rules (orders in Case T-100/94 *Michailidis and Others* v *Commission* [1998] ECR II-3115, paragraph 49; Case T-354/00 *M6* v *Commission* [2001] ECR II-3177, paragraph 27, and Case T-387/00 *Comitato organizzatore del convegno internazionale* v *Commission* [2002] ECR II-3031, paragraph 36; judgment in Case T-174/95 *Svenska Journalistförbundet* v *Council* [1998] ECR II-2289, paragraph 80).

34 In the present case, the Court considers that it has sufficient information in the documents before it and decides, pursuant to that article, to give a ruling without continuing the proceedings.

35 The applicant puts forward four pleas in support of its action. The first two pleas allege infringement and misapplication, respectively, of Articles 1362, 1366, 1368, 1370, 1374 and 1375 of the Italian Civil Code. The third plea alleges misuse of powers and the fourth plea alleges that the measures contained in the Commission's letters of 12 and 21 February 2001 do not provide an adequate statement of reasons.

36 In the defence, the Commission makes a counterclaim, seeking an order from the Court requiring the applicant to repay that part of the financing granted for the implementation of the abovementioned projects corresponding to the amount of the expenses considered ineligible. In particular, it claims repayment of ITL 913 874 209, corresponding to the expenses incurred by the applicant, for both contracts, during the period prior to 1 November 1997, and sums of a total of ITL 185 531 657, resulting from corrections made following the audit requested by the defendant in respect of the eligible costs incurred by the applicant.

Admissibility of the action and jurisdiction of the Court of First Instance

Arguments of the parties

37 The defendant claims that the letters of 12 and 21 February 2001 by which it informed the applicant that part of its expenses would not be reimbursed lie within the contractual relations between the applicant and the Commission and do not therefore constitute measures which, under Article 230(4) EC, only the Community judicature has jurisdiction to annul. When, as in this case, the Community judicature is called upon to decide a case by virtue of an arbitration clause inserted in a contract concluded by an institution, its jurisdiction does not derive from Article 230 EC, which relates to the annulment of an administrative measure for specific defects such as infringement of the rule of law or abuse of power. It follows, according to the Commission, that the applicant's main claim, seeking the annulment of measures falling within the scope of private law, must be declared inadmissible.

38 As regards its counterclaim, the Commission, in reply to a written question posed by the Court, states that the Court's jurisdiction to hear the counterclaim derives from its jurisdiction in respect of the main action.

39 The applicant maintains that the contracts at issue contain aspects of public law, which arise not only from the nature of one of the contracting parties, namely the Commission, but also from the fact that the Commission, by means of an instrument of private law, pursued objectives of public interest. It follows, according to the applicant, that, in a situation such as that in this case, the Commission enjoys, within that contractual legal relationship, prerogatives arising under both the law of the parties and its own discretionary power. However, the exercise of those various prerogatives is subject to review by the Court, which must seek to assess its conformity with the principles of private and administrative law applicable to the case.

40 As regards the counterclaim made by the Commission, the applicant submits that it is inadmissible.

Findings of the Court

41 Under Article 238 EEC, the Community judicature shall have jurisdiction to give judgment pursuant to any arbitration clause contained in a contract concluded by or on behalf of the Community, whether that contract be governed by public or by private law.

42 The Court's jurisdiction to decide a case arising from a contract to which the Community is party is based on the abovementioned provision and the arbitration clause inserted in that contract.

43 In the present case, Article 7 of Annex II to the contracts at issue stipulates that 'the Court of First Instance... and, in the case of appeal, the Court of Justice... shall have exclusive jurisdiction in any dispute between the Commission and the Contractors concerning the validity, application and interpretation of this contract.'

44 It must be stated, first of all, that this case relates to the interpretation of certain stipulations in the contracts at issue concerning inter alia the participation of third parties in the fulfilment of the obligations entrusted to the cocontractors and the eligibility of the costs incurred by those third parties. The applicant also claims that, by reason of the relationship which it has had with the Commission since the contracts in question were concluded, its position was, from the beginning, that of a cocontractor.

45 In spite of the contractual framework of the legal relationship which is the subject of the present proceedings, it is clear that, in this case, the main action before the Court is really not a claim pursuant to Article 238 EC but an action for annulment under Article 230 EC.

46 That is the obvious conclusion of an analysis of the application initiating proceedings and of the applicant's other written pleadings.

47 The applicant refers to its action as an action for annulment and sets out principal forms of order seeking a declaration from the Court of the unlawfulness and consequent annulment of the measures allegedly contained in the Commission's letters of 12 and 21 February 2001, by which the Commission informed the applicant that part of the expenses incurred by it would not be recognised as eligible for the Community financing in question. The applicant thus requests the Court to carry out a review of legality in respect of the measures taken by an institution, which, although taken in a contractual context, are, according to the applicant, administrative in nature. In support of that claim, the applicant puts forward pleas to support a declaration that the measures in question are vitiated by defects characteristic of administrative measures, such as the infringement of the rule of law, abuse of power and failure to state the grounds.

48 In its reply, expanding its pleas and arguments and replying to the plea of inadmissibility raised by the Commission, the applicant dwells on the administrative nature of the contested measures, which it infers from the identity of their author, which acts, although in a contractual context, as a public authority, and from the aims of general interest pursued by the defendant institution, by entering into the contracts at issue. On that basis, the applicant reiterates its claim for annulment.

49 Finally, with regard to the counterclaim brought by the Commission, the applicant maintains that it is inadmissible particularly because it seeks an order from the Court requiring the applicant to pay sums which the Commission, if it were established that the contested measures were lawfully adopted, could claim independently by adopting an enforceable decision against the applicant.

50 However, the applicant's argument, which constitutes the basis of its action for annulment and according to which the Commission's letters of 12 and 21 February 2001 are in the nature of administrative measures, cannot be upheld.

51 Nothing in those letters supports the conclusion that the Commission acted in the present case in the exercise of its prerogatives as a public authority. By those letters, the defendant institution, on the basis of the interpretation of the facts and relevant clauses in the contracts at issue, in essence simply informed the applicant of its position with regard to the eligibility of part of the expenses it had incurred. By so doing, the Commission acted only within the framework of the rights and obligations arising out of the contracts at issue. That conclusion is not affected by the finding that the aims pursued by the Commission, through the conclusion of those contracts, form part of the task of general interest entrusted to the Commission in the context of the Esprit programme.

52 Therefore, the two letters in question form no part at all of the Commission's exercise of its prerogatives as a public authority, so that, as the Commission rightly points out, neither those letters nor the measures which it might find it necessary to adopt subsequently in order to recover the sums corresponding to the expenses which it considers were not covered by the finance could, contrary to what the applicant maintains, be enforceable.

53 It follows from the foregoing that the Commission's letters which are the subject of this action are part of a purely contractual context from which they are inseparable and that, by their very nature, they are not among the measures covered by Article 249 EC, annulment of which may be sought before the Community judicature pursuant to the fourth paragraph of Article 230 EC (see to this effect the orders in Case T-186/96 *Mutual Aid Administration Services* v *Commission* [1997] ECR II-1633, paragraphs 50 and 51, and Case T-149/00 *Innova* v *Commission* [2001] ECR II-1, paragraph 28).

54 Consequently, the applicant's principal claims, in so far as they seek the annulment of measures of a purely contractual nature, cannot be regarded as admissible.

55 The applicant's principal claims must therefore be declared inadmissible.

56 By its alternative claims, the applicant requests that the Court, if its principal claim is not upheld, find 'the Commission jointly and severally liable for any improper performance of the contract' and, on that basis, 'review the amounts set out in the Commission's decision of 21 February 2001, reducing those [relating to expenses not] recognised [as eligible], to the detriment of IAMA Consulting, in an amount not less than ITL 600 million, the exact amount to be quantified by the Court on equitable principles'.

57 The wording of the forms of order sought in the alternative by the applicant, reproduced above, does not enable the Court to understand the exact import of the claim before it.

58 Under Article 21 of the Statute of the Court of Justice and Article 44(1)(c) of the Rules of Procedure, an application shall contain the subject-matter of the dispute and a brief statement of the grounds on which the application is based. Regardless of any question of wording, that statement must be sufficiently clear and precise to enable the defendant to prepare its defence and the Court to carry out its review (order in Case T-515/93 *B* v *Commission* [1994] ECR-SC I-A-115 and II-379, paragraph 12). In order to guarantee legal certainty and sound administration of justice, it is necessary, for claims to be admissible, that the basic legal and factual particulars relied on be indicated, at least in summary form, coherently and intelligibly in the text of the application itself (see to this effect the judgments in Case C-347/88 *Commission* v *Greece* [1990] ECR I-4747, paragraph 28; Case C-52/90 *Commission* v *Denmark* [1992] ECR I-2187, paragraph 17 et seq.; Case T-387/94 *Asia Motor France and Others* v *Commission* [1996] ECR II-961, paragraph 106; Case T-113/96 *Dubois et Fils* v *Council and Commission* [1998] ECR II-125, paragraph 29; and Case T-277/97 *Ismeri Europa* v *Court of Auditors* [1999] ECR II-1825, paragraph 29).

59 In the present case, it is clear that, apart from the simple statement of the forms of order sought in the alternative, neither the application nor the reply contains anything making it possible to assess on what grounds the applicant bases those forms of order, or to understand how they may be substantiated. In particular, neither the wording of those forms of order nor the applicant's pleadings make it possible to establish whether the request for a review of the amounts considered by the Commission not eligible for Community financing is based on the contracts at issue or on the alleged wrongful conduct of the Commission, which might found non-contractual liability on the part of the Communities.

60 In those circumstances, it must be held that the forms of order sought in the alternative by the applicant lack the necessary clarity and precision for the Court to be able to carry out its judicial review. They must therefore be declared inadmissible.

61 In the light of all the foregoing, the application must be dismissed in its entirety.

62 As regards the Commission's counterclaim, the Court considers, on the basis of the combined provisions of Article 225(1) EC and Article 51 of the Statute of the Court of Justice, that it does not have jurisdiction, in the circumstances of the case, to hear and determine the action and decides, pursuant to Article 54(2) of the Statute of the Court of Justice, to refer it to that Court.

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 asked for in the successful party's pleadings. Since, in this case, the applicant has been unsuccessful, and the Commission has asked for costs, the applicant must be ordered to pay the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber, Extended Composition)

hereby orders:

1. **The applicant's main and alternative claims are dismissed as inadmissible.**

2. **The counterclaim lodged by the Commission is referred to the Court of Justice.**

3. **The applicant is ordered to pay the costs.**

Luxembourg, 25 November 2003.

H. Jung
Registrar

V. Tiili
President