ORDER OF THE PRESIDENT OF THE COURT
28 APRIL 1982 [1]

Commission of the European Communities v CO.DE.MI. SpA

(Appointment of a technical expert)

Case 318/81 R

Application for the adoption of interim measures — Appointment of a technical expert (EAEC Treaty, Art. 158; Statute of the Court of Justice of the EAEC, Art. 37; Rules of Procedure, Art. 83 (2))

In Case 318/81 R

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, Gianluigi Campogrande, acting as Agent, assisted by Pietro Ziccardi, with an address for service in Luxembourg at the office of Oreste Montalto, Jean Monnet Building, Kirchberg,

applicant,

v

CO.DE.MI. SpA, whose registered office is in Milan, represented and assisted by Mario Savanco, of the Milan Bar, and Ernest Arendt, of the Luxembourg Bar, with an address for service in Luxembourg at the Chambers of the latter in Centre Louvigny, Rue Philippe-II,

defendant,

THE PRESIDENT OF THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

makes the following

1 — Language of the Case: Italian

ORDER

Facts and Issues

I — Background to the proceedings

1. By letters of 14 and 20 December 1979, the Commission of the European Communities placed an order with the company established under Italian law styled CO.DE.MI. SpA, whose registered office is in Milan, for the construction at the Ispra Joint Research Centre of two buildings, one called IP (Ingresso Principale [Main Entrance Building]) and the other MB (Management Building), for the price of LIT 1 068 351 682 (IP) and LIT 1 370 000 000 (MB).

2. Those letters expressly stipulate that the General Terms and Conditions Applicable to Contracts Awarded by the Joint Research Centre — February 1976 — hereinafter referred to as "the Conditions" are to form an integral part of the orders. They also state that in the case of the IP building the works must be handed over within 420 days and in the case of the MB building within 450 days following the date of the memorandum recording the start of the works. The works started on 11 February 1980 (MB) and 20 March 1980 (IP).

3. According to Article 15 of the Conditions: "In the event of a dispute arising where verification of the facts or technical examinations are required, either party may obtain an expert's report before bringing any legal proceedings.

To this end, either party shall inform the other in writing of the subject of the dispute and shall propose the name of an expert. The other party shall be required to signify within 15 working days whether or not it accepts the proposed expert, and in the event of non-acceptance shall make a counter-proposal to which a reply shall be given within 15 working days of notification thereof.

Such correspondence shall be conducted by registered letter with advice of delivery.

If the two parties do not succeed in reaching agreement, the required expert shall be appointed, at the request of the party which first makes application, by the President of the Court of Justice of the European Communities."

4. Article 16 of the conditions contains a clause regarding jurisdiction: "Failing an amicable settlement, the Court of Justice of the European Communities shall have exclusive competence in any disputes relating to the performance or the interpretation of the contracts governed by these general terms and conditions. Jurisdiction is thus expressly vested in the said Court of Justice pursuant to Article 153 of the Treaty establishing the European Atomic Energy Community and Article 181 of the Treaty establishing the European Economic Community. No other court whatsoever shall have such competence."

5. The execution of the orders in question gave rise to disagreements between the parties as a result of which, in May 1981, CO.DE.MI. suspended the works then in progress. By registered letter of 1 July 1981, the Commission

terminated both contracts, reminding CO.DE.MI. that the Court of Justice had jurisdiction to resolve any disputes and suggesting Mr C., an engineer of Milan, as the expert chosen by it to carry out the checks relating to the state of progress of the works, taking into account the specifications issued by the party which commissioned them, in accordance with Article 15 of the Conditions. CO.DE.MI. did not signify its acceptance of that proposal and the parties were unable to reach agreement.

6. In fact, when it suspended the works, the defendant had already sought and obtained on 12 May 1981 from the President of the Tribunale di Varese, by an *ex parte* application, the appointment of an expert in order to carry out a "precautionary technical check" involving a description of state of the works and ascertainment "of the decisions taken by the principal", that is to say the Commission in its capacity of awarding authority. The Commission opposed enforcement of that order, alleging lack of jurisdiction on the part of the Tribunale di Varese, by virtue of the provisions of the contracts between the parties. In view of that opposition, the President of the Tribunale di Varese, by a second order of 20 July 1981, applied to the Court of Justice for enforcement by that court of his order of 12 May 1981. By order of 1 February 1982 the Court of Justice declared that application to be inadmissible.

II — Written procedure

7. By an application received at the Court Registry on 23 December 1981, the Commission brought an action pursuant to the clause specifying the competent court and in accordance with Article 153 of the EAEC Treaty and Article 181 of the EEC Treaty. Essentially, the Commission claims that the Court should:

1. Declare that the contracts in question are automatically terminated as from 18 July 1981 as a result of the letter of cancellation dated 1 July 1981;

2. Declare that CO.DE.MI. was required as from 18 July 1981, to vacate the sites and order it to do so without delay;

3. Order CO.DE.MI. to refund part of the price and to compensate the Commission for the damage caused to it;

4. Order that various preparatory inquiries be carried out so as to give the Court information regarding the causes, the nature and the consequences of the failure to complete the works.

8. In its defence, CO.DE.MI. contends that the Commission's claim should be rejected. It asserts that the delay in the execution of the works is attributable to the awarding authority and requests, by way of counter-claim, that the Court declare the contracts to be terminated by reason of default on the part of the awarding authority, that it determine the amounts due to CO.DE.MI. and order the Commission to pay compensation for the damage caused. Furthermore, it proposes that certain inquiries be carried out in order to prove that its claims are well founded.

9. By an application received at the Court Registry on 31 March 1982 the Commission, pursuant to Article 158 of the EAEC Treaty, Article 37 of the Statute of the Court of Justice of the EAEC and Article 83 of the Rules of Procedure, requested that, as an interim measure, a technical expert be appointed:

"in order to determine the present quantitative and qualitative state of the operations, works and equipment on the site occupied by the undertaking CO.DE.MI. at the Ispra Centre for construction of the IP (Main Entrance Building) and MB (Management Building), and to determine any defects and deficiencies in the works. In the discharge of the duties entrusted to him, the expert will be required to take into account the fact that on completion of the checks which he is instructed to carry out the condition of the works and the site on which they are located must be such as to enable them to be handed back by the contractor to the awarding authority."

10. In its observations regarding that application for the adoption of an interim measure, CO.DE.MI. claims that the Court should:

"Primarily:

Define the task to be entrusted to the expert in the following terms: 'To identify and describe the works carried out by CO.DE.MI. on the sites on which the IP and MB buildings are being constructed at the Ispra Centre, their state of advancement and also the materials on site.'

In the alternative:

And, only if the President of the Court considers it appropriate to extend the expert's terms of reference, order the expert also to identify any changes evident in the said works in relation to the original plans and also the decisions taken by the contracting authority and the project manager up to the end of 1981 with regard to the carcass work to be completed and the technical installations (electricity, air conditioning and heating and sanitary installations) to be carried out."

III — Submissions and arguments of the parties

11. The *applicant* claims that it is necessary and urgent, pending such decision as the Court may pronounce on the substance of the case, to determine the state of the works, particularly with a view to making it possible for CO.DE.MI. to vacate the site.

12. The *defendant*, whilst adhering to its view that the checks now requested by the Commission coincide with those which the Tribunale di Varese ordered to be carried out and could therefore already have been completed, declares that in essence, and subject to certain clarifications it approves the measures requested.

13. Both parties were requested by the President to put forward the names of experts who might be appointed and both complied with that respect.

Decision

Pursuant to Article 158 of the EAEC Treaty, Article 37 of the Statute of the Court of Justice of the EAEC and Article 83 of the Rules of Procedure of the Court, the President of the Court may, at the request of one or more

parties to a dispute brought before the Court, prescribe the necessary interim measures pending a decision on the substance of the case.

2 The checks requested at this stage of the proceedings both by the Commission and by the defendant are of a precautionary and urgent nature. In particular they are necessary in order to determine the situation on site on the date when work was suspended as a result of the dispute between the parties. Moreover, it is in the interests of the parties for an inspection, at which they are both represented, to be carried out regarding the state of the site and of the contruction work already performed. The checks to be carried out will moreover be without prejudice to any other preparatory inquiries requested by the parties in the main proceedings, which may be ordered by the Court at a later stage.

3 It is therefore appropriate to appoint an expert to carry out the checks specified below.

On those grounds,

THE PRESIDENT,

by way of interim measure,

hereby orders as follows:

1. **Mr C., of Milan, Libero Professionista Consulente del Tribunale [professional consultant to the court], is hereby appointed as a technical expert and, after inviting the parties to be present, attending on site and obtaining such information as he may consider relevant, which shall forthwith be disclosed or furnished to him by the parties to the main proceedings, shall:**

   (a) describe the works executed by CO.DE.MI. on the sites where the buildings at the Ispra Centre, referred to as IP and MB in the Commission's letters of 14 and 20 December 1979 commissioning those works, are under construction and determine how far they have progressed;

(b) describe the qualitative standard of the works, in particular their present condition and the extent to which they conform to the requirements laid down in the clauses and conditions;

(c) describe the equipment and materials still on site and their present condition.

2. The technical expert hereby appointed is authorized to call upon the services of local technical assistants if he considers such assistance necessary for the discharge of the duties entrusted to him.

3. The technical expert shall inform the Court of his findings in a written report within three months after notification to him of this order; before so doing he shall submit his draft report to the parties, allowing them a brief period not exceeding 10 days in which to make any observations.

4. The Commission shall make such funds available as may be necessary for the discharge of the duties entrusted to the technical expert.

5. Costs are reserved.

Luxembourg, 28 April 1982.

J. A. Pompe
Deputy Registrar

J. Mertens de Wilmars
President