JUDGMENT OF THE COURT (Second Chamber)
20 October 1993 *

In Case C-338/92,

Compagnie d'Entreprise CFE SA, a company governed by Belgian law, established in Brussels, represented by Y. Hannequart and A. Delvaux, of the Liège Bar, with an address for service in Luxembourg at the Chambers of G. Medernach, 8-10 Rue Mathias Hardt,

applicant,

v

European Parliament, represented first by J. Campinos, Jurisconsult, acting as Agent, assisted by D. Petersheim, of its Legal Service, and V. Van Houtte-Van Poppel, of the Brussels Bar, and subsequently by D. Petersheim and V. Van Houtte-Van Poppel, acting as Agents, with an address for service in Luxembourg at the Chambers of J. Loesch, 8 Rue Zithe,

defendant,

APPLICATION for the payment of certain amounts on the performance of a contract for construction work,

THE COURT (Second Chamber),

composed of: G. F. Mancini, President of the Chamber, F. A. Schockweiler and J. L. Murray, Judges,

Advocate General: W. Van Gerven,
Registrar: D. Louterman-Hubeau, Principal Administrator,

* Language of the case: French.

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 10 June 1993,

after hearing the Opinion of the Advocate General at the sitting on 15 July 1993,

gives the following

Judgment

1 By application lodged at the Court Registry on 11 August 1992, Compagnie d'Entreprise CFE ('CFE') brought an action under Article 42 of the ECSC Treaty, Article 181 of the EEC Treaty and Article 153 of the EAEC Treaty for an order that the European Parliament ('the Parliament') pay certain amounts on the performance of a contract for construction work.

2 That contract is governed by Belgian law, namely the Civil Code, the Royal Decree of 22 April 1977 concerning public works, supply and service contracts (*Moniteur Belge* of 26 July 1977, p. 9952, hereinafter 'the Royal Decree') and the Ministerial Decree of 10 August 1977 laying down the general conditions governing public works, supply and service contracts (*Moniteur Belge* of 8 September 1977, p. 10931, hereinafter 'the general conditions'), and by the special conditions.

3 The dispute between the parties concerns three issues. The first relates to a claim for updating CFE's tender price on account of the Parliament's delay in placing the order; the second concerns a claim for payment for installing plaster boards which, in CFE's opinion, were not included in the original order. The third concerns a claim for payment for the installation and reinstallation of wall cladding constituting, according to CFE, an additional service.

4 Reference is made to the Report for the Hearing for a fuller account of the facts, in particular as regards the conclusion and the performance of the contract and the legislative and contractual provisions governing the relationship between the parties; the procedure and the pleas and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

The claim for updating the price

5 CFE seeks an updating of its tender price by around BFR 1 689 055. Whereas in the application it seeks an updating to the actual date of the order, namely 18 July 1988, it states in its reply that that updating follows from applying a technical formula for price variation for the period from March 1988, when the order ought to have been placed, to the end of October 1988, when it had to renegotiate new prices with its sub-contractors.

6 CFE bases its claim principally on Article 16(1) of the general conditions, which authorizes it to invoke the Parliament's delay in placing the order notwithstanding a clause in the contract precluding any variation of prices, and, in the alternative, on Article 16(2) of the general conditions authorizing a successful tenderer who has suffered very significant damage to request a variation of the contract in the event of the occurrence of unforeseeable circumstances.

7 The Parliament contends that CFE has substantially amended its claim in its reply, thus rendering it inadmissible under Article 42(1) of the Rules of Procedure of the Court.

8 Concerning the validity of that claim, the Parliament draws a distinction between the period preceding the conclusion of the contract and the actual contractual period. As regards the precontractual period, it contends that CFE could have relied upon Article 38 of the general conditions which allows the successful

tenderer, in the event of delay in concluding the contract, to refuse to sign the contract or to request a higher price. As regards the contractual period, the Parliament maintains that the conditions for the application of Article 16(1) and (2) are not satisfied and that, even on the assumption that they are, CFE does not meet the substantive and formal requirements provided for in Article 16(3) and (4) of the general conditions.

9 As regards admissibility, it should be noted that the claim concerns an updating of the tender price on account of the delay in awarding the contract and that the amount requested has not been altered between the application and the reply. The statement in the reply that the amount claimed is obtained by applying a technical formula for price variation for the period from the date on which the contract ought normally to have been awarded to the date on which the contracts with the sub-contractors were renegotiated is merely an explanation of the amount demanded and cannot be considered as an alteration of the claim in the course of the proceedings. That claim is therefore admissible.

10 As regards the substance, it should first be pointed out that, as the Advocate General notes in point 9 of his Opinion, it cannot be concluded from the diversity of the time-limits given in the special conditions for the validity of the tender, notification of the choice of the successful tenderer, and the commencement and completion of the work — all of which are specified in the Report for the Hearing — that those time-limits are not mandatory.

11 With regard to the conclusion of the contract, it should also be noted that CFE failed to invoke, at the time of the notification of the order, its allegation of delay in placing that order, as it might have been permitted to do under Article 38 of the general conditions.

12 Finally, CFE has not shown the existence of any omissions, delays or conduct of whatever nature, within the meaning of Article 16(1) of the general conditions, on

the part of the Parliament, which, in fact, complied with the time-limits in the special conditions for choosing the successful tenderer. Nor has CFE proven the existence of very significant damage which was not reasonably foreseeable, as provided for in Article 16(2). As the Advocate General points out in point 12 of his Opinion, it cannot be inferred from the Belgian case-law in this field that a price increase of around 4%, on which the applicant relies, constitutes very significant damage. Furthermore, CFE cannot argue that it could neither reasonably foresee that price increase nor avoid the consequences thereof by concluding contracts with its sub-contractors as soon as possible after 21 June 1988, the date on which it was notified of the choice of the successful tenderer.

13 In any event, CFE failed to inform the contracting authority as soon as possible of the offending conduct and circumstances in accordance with Article 16(1) and (2), and to lodge any complaints and applications, with proper substantiation and supporting figures within the time-limits, in accordance with Article 16(3) and (4).

14 The first head of claim must therefore be dismissed as unfounded.

The claim for payment for installing plaster boards

15 CFE maintains that the installation of plaster boards was referred to neither in the special conditions nor in the detailed plans drawn up by the architect and therefore constitutes additional work; accordingly it should be paid BFR 215 437 in accordance with Article 42 of the general conditions.

16 The Parliament replies that the disputed work is referred to in Article 5.1.5 of the special conditions and that, even if it were to be supposed that it was not referred

to in the detailed plans, it ought to have been performed by the successful tenderer as work which, although ancillary, was necessary under Article A 5.2 of the special conditions. In any event, CFE should have informed the contracting authority that, in its opinion, that work was not consistent with the provisions of the contract.

17 In that regard, it is clear from Article 5.1.5 of the special conditions that the work in issue comprises the whole of the partitioning included in the three rooms and that all the partitions must be erected from the floor base tiling to the under side of the roof.

18 CFE failed, moreover, to inform the contracting authority by registered letter, in accordance with the provisions of Article B 16.3 of the general conditions, that the order to carry out that work was, in its opinion, contrary to the contractual requirements.

19 The second head of claim must therefore also be dismissed as unfounded.

The claim for payment for installing and reinstalling the wall panelling

20 CFE claims that the removal and replacement of the wall panelling constitutes an additional service not provided for in the initial order and that, in accordance with Article 42 of the general conditions, the Parliament must pay it the sum of BFR 393 600.

21 The Parliament contends that the work fell within the scope of the tasks for which the applicant was responsible and that the requirements of Article 42 are not satisfied.

22 As the Advocate General states in point 17 of his Opinion, the work in issue must be considered as carpentry work, in the broad sense of the word, covered by lot 5.1 for which CFE was responsible, or at least as ancillary work under Article A 2.2 of the special conditions.

23 In any event, Article 42 of the special conditions authorizes the successful tenderer to carry out work giving rise to additional expenditure only where he has drawn up a prior estimate and obtained the Parliament's written authorization. However, CFE performed the work without claiming that it constituted an additional service and without having recourse to the procedure provided for by Article 42.

24 The third head of claim and, consequently, the whole of the application must therefore be rejected as unfounded.

Costs

25 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the applicant has been unsuccessful, it must be ordered to pay the costs.

On those grounds,

THE COURT (Second Chamber)

hereby:

1. Dismisses the application;

2. Orders the applicant to pay the costs.

Mancini Schockweiler Murray

Delivered in open court in Luxembourg on 20 October 1993.

J.-G. Giraud G. F. Mancini

Registrar President of the Second Chamber