REPORT FOR THE HEARING
in Case C-338/92 *

I — Facts and written procedure

1. On 23 November 1987, the European Parliament, in its capacity as contracting authority, issued an invitation to tender for the fitting-out of three conference rooms in the 'Van Maerlant' office building which the Belgian State had had built in Brussels for the European Parliament.

2. The tender for and the performance of the works are governed by Belgian law, specifically by the Civil Code, the Royal Decree of 22 April 1977 concerning public works, supply and service contracts (*Moniteur* of 26 July 1977, p. 9552, 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* of 8 September 1977, p. 10931, hereinafter 'the general conditions'), and by special conditions.

3. Article 38(1) of the general conditions provides that:

'if notification of approval of the tender has not been given within the period prescribed (60 days from the opening of tenders or as otherwise provided for in the special conditions), the contract cannot be concluded without the unconditional written agreement of the tenderer concerned'.

Under paragraph 2 of that Article,

'where the tenderer agrees to maintain his tender only if the price is increased, the competent authority may, instead of recommencing the procedure,

— agree to the price increase requested ...,

— or refer to the unsuccessful tenderers ...,

— or request all the other tenderers to review their prices ...'.

4. Article 16 of the general conditions, concerning complaints and applications, provides that

'1. The successful tenderer may rely on omissions, delays or conduct of whatever nature he attributes to the administration or its servants, and which cause him delay and/or damage, in order to secure an extension of the time-limit for performance, variation or termination of the contract and/or damages, as the case may be.

* Language of the case: French.

2. The successful tenderer ... may ... if he sustains very significant damage, in order to request the variation or the termination of the contract, rely on circumstances which he was not reasonably able to foresee when the tenders were lodged or the contract concluded, which he was not able to avoid, and the results of which he was not able to prevent, despite having taken all necessary steps.

3. A contractor ... who finds that conduct or circumstances of whatever nature, whether or not referred to in paragraphs 1 and 2, disrupt the ordinary performance of the contract, and who is thus entitled to request ... variation or termination of the contract, and/or damages, must bring the matter to the attention of the administration forthwith ... or lose that entitlement.'

Paragraph 4 of that article requires complaints and applications to be lodged in writing with proper substantiation and supporting figures, within certain mandatory time-limits.

5. Article 42 of the general conditions governs alterations to the work to be carried out and the variation of the unit price. That provision requires, in particular, a written order by the contracting authority and sets up a special procedure for price variation.

6. Under Article B 13.1 of the special conditions, the validity of the tender is 600 calendar days from the lodging of the tender and any price variation is excluded prior to the expiry of that period.

Article A 15 provides that the choice of the successful tenderer must be notified to the contractor within 180 calendar days from the day after the opening of tenders.

Under Article B 28.1, the work was to start on 15 May 1988 and finish by 27 February 1989.

7. Compagnie d'Entreprise CFE, ('CFE'), which had been given the contract by the owner, the Belgian State buildings authority, for building the carcass and installing the finishings in the Van Maerlant building and coordinating all the operators, lodged, with other tenderers, a tender for a contract to fit out three conference rooms.

8. Tenders were opened on 28 January 1988. On 21 June 1988, the European Parliament informed CFE that its tender had been chosen and pointed out that the time-limits stipulated were essential.

9. On 18 July 1988, the contract was signed by the European Parliament and sent to CFE; CFE signed the contractual documents on 8 August 1988, pointing out that

'the cover against variation included in our prices was based on the performance schedule provided for in the special conditions, which entailed an order for commencement of work in February-March 1988. On the basis of price trends ... between the date forecast and the actual date under the standard formula for building works, it appears

that a price increase of +/-2% took place. We should like to try to find an equitable solution to this problem with you.'

10. The work to be carried out is specified in the special conditions and the architect's detailed plans.

Article A 2.2. provides, as regards the extent of the work, that

'... the contract ... also includes all work and ancillary supplies needed for full completion and to satisfy the usual purpose of each item of work ...'

Under Article A 5.1 of the special conditions,

'The contract ... constitutes a qualified lump sum contract, with a schedule of unit prices. The term "qualified lump sum" means that the European Parliament reserves the right to alter the construction specifications to a specified extent. Notwithstanding that right, the "lump sum" shall remain applicable ...'

Article A 5.2 lays down that

'The various documents ... are complementary. Accordingly, an item shown on the plan but not indicated in the tender specifications, or vice versa, must be performed by the successful tenderer without any compensation in that regard.'

11. The installation of plaster boards on partitions is governed by Article 5.1.5 of the special conditions, paragraphs 2 and 3 of which provide that

'... all partitions shall be erected from the floor base tiling to the under side of the roof'

'... the contractor shall comply with the descriptions in the detailed plans as regards the composition and alternation of the various materials used ...'

Article B 16.3 provides that

'if the successful tenderer considers that the orders received are contrary to the contractual provisions, he must inform the contracting authority by registered letter'.

12. By letters of 18 August, 28 November and 14 December 1989, CFE drew the European Parliament's attention to the fact that because of the delay in placing the order CFE had had to place its orders with suppliers and sub-contractors during the period from August to October 1988, instead of March to May 1988, at rates which took account of the significant increase in construction prices since June 1988. CFE repeated that in its view an equitable settlement of the problem required the application to the invoices for the work in question of a technical formula for price variation used in Belgium, leading to a price increase of BFR 1 689 055.

13. In the course of the work a problem arose regarding the installation of plaster boards; the requirement by the European Parliament's architect that they be installed on the whole elevation of the partitions was considered by CFE to be an order for additional work not referred to in the special conditions, amounting to BFR 393 600.

14. A final issue concerns the installation and reinstallation of wall panelling. Since the material chosen by CFE did not meet the safety requirements, the painting of the panelling was given to another undertaking. The panelling was removed for painting and then reinstalled by CFE, which claims BFR 306 344 for additional work in that regard; the European Parliament rejects that claim.

15. Article 2.4 of the contract concluded between CFE and the European Parliament introduced a procedure for the amicable settlement of disputes by reference to one or two experts; where that procedure fails, the issue is to be submitted to the Court of Justice under Article 42 of the ECSC Treaty, Article 181 of the EEC Treaty and Article 153 of the EAEC Treaty.

16. Since no amicable settlement could be reached, CFE brought this action.

II — Written procedure and forms of order sought

1. The application was lodged at the Court Registry on 11 August 1992.

2. The written procedure followed the normal course. Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry. By decision of 22 March 1993, the Court decided to refer the case to the Second Chamber.

3. *Compagnie d'Entreprise CFE*, the applicant, claims that the Court should:

— declare the three heads of the application admissible and founded;

— order the European Parliament to pay it:

(a) the principal sums of:

— BFR 1 689 055

— BFR 215 437

— BFR 393 600

(b) interest for late payment, at the contractual rate fixed by Article 15 (of the Ministerial Decree) on the above principal sums and on the interest outstanding for more than a year at the date on which the application was lodged at the Registry

(c) the costs of the action.

4. *The European Parliament*, the defendant, contends that the Court should:

— reject the application as unfounded,

— order the applicant to pay the costs of the action.

III — Pleas in law and arguments of the parties

A — *The claim for an updating of the price*

1. *CFE* states at the outset that its claim does not concern price variation during the performance of work but updating the tender price; in this regard, the applicant seeks in the application an updating of the price to the time of the order and, in the reply, an update to the day when it was able to place orders with its sub-contractors at higher prices, namely between August and the end of October 1988. Applying the technical formula for price variation for the period between March and October 1988, which is the best method of updating the price, this results in an increase of about 4%.

Article B 28.1 of the special conditions sets 15 May 1988 as the starting date for the works and 27 February 1989 as the finishing date, which meant that the order had to be placed around 1 March 1988. The clauses under which the order must be placed within 180 days of the opening of tenders, which are in turn valid for 600 days, are inapplicable in as much as they are inconsistent with the essential clause concerning the start and finish of the works.

CFE points out that the relevant date is that of the definite order of 18 July 1988, and not that of the letter of intention of 21 June 1988. As from 4 July 1988, the applicant stressed the urgency of placing the order. The principle of the *bona fide* performance of contracts, set out in Article 1134(3) of the Belgian Civil Code, and the prohibition on any alteration of the tenders after opening, laid down in Article 27 of the general conditions, are not in issue. The legal basis of the claim is Article 16 of the special conditions governing the relationship between the parties to the contract.

CFE principally argues that Article 16(1) confers a right on the contractor to obtain variation of the conditions of the contract in the broad sense; according to Belgian case-law, that provision should be applied notwithstanding any clause prohibiting price variation. The applicant points out, in this respect, that the European Parliament's conduct was prejudicial in that it was late in placing the order on account of budgetary difficulties. Article 16(3) concerning the duty to report the circumstances referred to was observed, since the applicant reported the negative results of the delay on 8 August 1988, the order having been received on 1 August.

In the alternative, CFE argues that there are extraordinary and unforeseeable circumstances which have caused very significant damage within the meaning of Article 16(2).

Taking account of the mandatory time-limits for starting and finishing the work, the delay in placing the order constitutes a circumstance which was not reasonably foreseeable at the time of lodging the tender. Damage equivalent to about 4% of the amount of the tender must be considered as very significant.

2. *The European Parliament* replies, principally, that Article B 13.1 of the special conditions prohibits any price variation. The applicant cannot circumvent that prohibition by requiring in its application an update of the price to the time of the order, or, in its reply, an update to the day when it was able to place orders with its sub-contractors.

In its reply the applicant made a significant amendment to the claim, which is inadmissible under Article 42(1) of the Rules of Procedure of the Court. Moreover, fictitiously and without explanation, the applicant dates all the orders with its sub-contractors as of 31 October 1988; however, the contracts could have been renegotiated within a much shorter period.

The demand for the price to be updated to 31 October 1988 covers two stages, a precontractual stage until 19 July 1988 and a contractual stage after that date.

As regards the precontractual period, the European Parliament points out that the applicant, since it argues that there was a delay in the notification of approval of the tender, could have requested a price increase or refused to sign the contract on the basis of Article 38 of the general conditions. The applicant has tried to obtain a price increase without initiating the procedure under Article 38. Moreover, the 2% price increase in the precontractual period does not constitute an extraordinary, unforeseeable and unavoidable circumstance.

As regards the contractual period, the European Parliament points out that the legal relationship between the parties is governed by the general conditions and, more specifically, by Article 16.

The European Parliament denies that laying down time-limits for the validity of the tender and for notification of the European Parliament's decision to the tenderer is inconsistent with the time-limits for completion of the work; those clauses are evidence that the European Parliament wished to avoid any price variation and take precautions against a possible delay in completion of the structural work, on which the fitting work depends. However, the delay in placing the order was due to the applicant's delays in completing the structural work; the applicant therefore must have known that it was impossible to comply with the period initially laid down for performing the work. Although informed that its tender had been chosen as early as 21 June 1988, the applicant expressed reservations only at the time of signing the contract, thus attempting, contrary to Article 27 of the Royal Decree, to alter its tender after opening.

The applicant cannot rely upon Article 16(1) of the general conditions. As from the signature of the contract, it cannot rely upon the administrative authority's conduct prior to the conclusion of the contract. The applicant has, furthermore, failed to prove the administrative authority's conduct subsequent to the conclusion of the contract.

Nor does Article 16(2) apply. Even if a 4% price increase were shown, it constitutes a normal and foreseeable risk in a lump sum contract and has not been considered by Belgian case-law to be a very significant loss.

In the alternative, the European Parliament argues that if Article 16(1) or (2) were to apply, the applicant could be successful only if it were to prove that it had a justified expectation as regards the period for carrying out the work and that the tender price was set on the basis of that period. It should, furthermore, have drawn the conduct alleged to the attention of the European Parliament within 30 days of the date on which it ought normally to have become aware of it, namely 21 June 1988, and should have substantiated and provided figures for its claim in accordance with Article 16(3) and (4).

In this respect, the European Parliament points out that the applicant knew that, in the light of the progress of the structural work, the dates for the performance of the work could not be complied with and that it was not obliged to sign the contract. The special conditions require the tenderer to list the sub-contractors, which means that the applicant had presumably obtained firm commitments from them at least for the period of validity of its tender; if it did not hold them to those commitments, the applicant took a risk, or indeed acted extremely rashly. The applicant has also failed to show that the alleged damage, in particular the increase in sub-contractors' charges, was real. The assessment of the alleged damage is also questionable: the applicant applies a standard formula involving wages and materials without showing the relative weight of each of those components; moreover, it determines its damage as being equivalent to the increase in prices either as of 18 July 1988 or as of 31 October 1988, even though it was informed of the order as early as 21 June.

B — *The claim for payment for the installation of plaster boards*

1. *CFE* claims to have performed the initial work in accordance with the special conditions and the detailed plans. Additional work was performed by special order of the contracting authority's architect and were immediately reported to the European Parliament.

2. *The European Parliament* replies that the architect simply pointed out that, under Article 5.1.5 of the Special Conditions, plaster boards are to be installed on the whole elevation of the partitions. If the applicant considered that it had been given additional work, it should have reported the matter immediately to the contracting authority.

The special conditions and the architect's detailed plans are complementary and therefore the successful tenderer should comply with the document which provides for the broadest service. Even if it were accepted that the work was not mentioned in the plans, it would be ancillary work, generally accepted as a normal supplement for the completion of first-rate work as provided for in Article A 5.2 of the special conditions.

C — *The claim for payment for the installation and reinstallation of wall panelling*

1. *CFE* points out that the initial order implied that the removal of the panels for painting was its responsibility. Since the painting was given to another undertaking, the installation and reinstallation of the wall panelling constituted an additional service not included in the remainder of its work and, in accordance with Article 42 of the general conditions, it is entitled to an additional payment.

2. *The European Parliament* points out that Article 42 gives a right to payment for the additional works ordered by the contracting authority only if there has been a written order and the special procedure for price variation has been complied with. Likewise, Article A 5.1 of the special conditions states that the successful tenderer may not carry out any work giving rise to additional expense without a prior estimate and written permission from the European Parliament and authorized agents. In any event, the work in issue remained in the applicant's sphere of competence even after responsibility for the painting work had been given to another undertaking.

F. A. Schockweiler
Judge-Rapporteur