JUDGMENT OF THE COURT OF FIRST INSTANCE (Fifth Chamber)

10 June 2004 *

In Case T-315/02,

Svend Klitgaard, residing in Skørping (Denmark), represented by S. Koll Espensen, lawyer,

applicant,

v

Commission of the European Communities, represented by H. Støvlbæk and C. Giolito, acting as Agents, assisted by P. Heidmann, lawyer, with an address for service in Luxembourg,

defendant,

APPLICATION under Article 238 EC for reimbursement of EUR 19 867.40 allegedly incurred by the applicant in connection with performance of contract No 32.0166 concluded within the framework of Cluster D of the Plant Life Assessment Network (PLAN) project, together with default interest, and for the payment of recovery costs, also with default interest,

* Language of the case: Danish.

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

composed of: P. Lindh, President, R. García-Valdecasas and J.D. Cooke, Judges,

Registrar: D. Christensen, Administrator,

having regard to the written procedure and further to the hearing on 20 January 2004,

gives the following

Judgment

Background to the dispute

1 In 1997 the Commission gave the Joint Research Centre ('JRC') responsibility for approximately 60 projects on the life of industrial plant, under the umbrella of a single project called 'Plant Life Assessment Network' ('PLAN').

2 On 22 December 1997, the Community, represented by the Commission, concluded a contract (No 32.0166) with Mr S. Klitgaard for arranging a technical audit of Cluster D of the PLAN project ('the contract') with a term of 48 months. The applicant had started to carry out that task in October 1997, before the contract had been formally concluded.

Terms of the contract

3 Article 4.1 of the contract, which relates to the applicant's remuneration, states:

'The Commission undertakes to pay the Contractor in return for his services under this contract a maximum amount of ECU 81 000 (eighty-one-thousand) as follows:

— 30%: after the signing of this contract,

— 20%: after acceptance by the Commission of the first yearly report,

— 20%: after acceptance by the Commission of the second yearly report,

— 20%: after acceptance by the Commission of the third yearly report,

— 10%: after acceptance by the Commission of the final report.

It is agreed that the aforesaid sum shall cover all expenditure incurred by the Contractor in the performance of this contract, except those mentioned in Art. 5.'

4 Article 5 of the contract, on travel expenses, states:

'5.1 The Contractor's travel, and subsistence, and any expenses for the shipment of equipment or unaccompanied luggage directly connected with the performance of the tasks specified in Article 3 of this contract shall be reimbursed in accordance with the special provisions of Annex 4.

5.2 These expenses will be payable on presentation of written evidence, including receipts and ticket counterfoils.'

5 At the end of Annex 4, section (c), to the contract a ceiling is placed on travel expenses:

'The expenses described above shall be reimbursed up to a maximal amount of ECU 27 000 for the contractual period of 48 months.'

6 The first and second paragraphs of Article 4.2 of the contract, on the period for payment, state:

'The Commission undertakes to pay sums due pursuant to this contract within a maximum of 60 calendar days running from the date on which the Commission approves or should have approved the reports ("the approval date") to the date on which the Commission's account is debited.

This payment period may be suspended by the Commission if it informs the Contractor concerned, at any time within the period of 60 calendar days counting from the approval date, that the corresponding payment requests are not admissible either because the amount is not due or because the necessary supporting documents have not been produced, or if the Commission sees the need for further checks. The payment period shall continue to run from the date on which the properly established payment requests are registered.'

7 Article 3(b) of Annex 1 to the contract governs approval of the final report by the Commission:

'This report shall describe the entire work carried out and the results obtained in implementation of the contract. It shall also contain a summary of the most important results achieved.

...

The report shall be deemed to be accepted by the Commission if within one month after receipt of ... the final report, the Commission has not expressly communicated its observations to the Contractor.'

8 Under Article 8 of that contract, the Court of First Instance has jurisdiction to rule on all disputes concerning the contract, which is governed by Danish law in accordance with Article 7.

Facts

9 On 1 April 1998, the Commission paid the applicant the first instalment in the sum of EUR 24 300, in accordance with Article 4.1 of the contract.

10 By letter of 30 November 1998, the applicant asked the Commission to both pay him the second instalment in the sum of EUR 16 200 and to reimburse his travel expenses for the period from 1 October to 30 November 1998.

11 By letter dated 25 February 1999, the Commission rejected the application for reimbursement of travel expenses, stating as follows:

'As I am sure you are aware, in the original concept ECU 3 500 was foreseen for each PTA project plus the incurred expenses (plus participation fees and expenses for Plan participation). This total amount was in the case of Cluster D ECU 81 000 (see Annex 1: Table of Network Costs).

Unfortunately, due to a typographical error the final version of your contract stated:

"It is agreed that the aforesaid sum shall cover all expenditure incurred by the Contractor in the performance of this contract, except those mentioned in Art. 5."

The final contract should of course have read:

"It is agreed that the aforesaid sum shall cover all expenditure incurred by the Contractor in the performance of this contract, including those mentioned in Art. 5."

We trust that you will have no problem in signing the enclosed amendment.'

12 By letters of 3 March and 26 March 1999, the applicant rejected the Commission's proposal of 25 February 1999 on the ground that the remuneration would not then be proportionate to the services he provided. He communicated two draft amendments intended either to limit the services provided for under the contract or to demand reimbursement of travel expenses over and above the amounts stipulated in Article 4.1 of the contract.

13 On 17 May 1999, the Commission paid the second instalment in the sum of EUR 16 200, including the travel expenses.

14 By letter of 20 May 1999, the applicant informed the Commission that all the operations covered by the contract would be suspended from 1 June 1999 if the Commission did not agree either to pay the travel expenses over and above the amounts stipulated in Article 4.1 of the contract or to limit the services provided for under the contract. He communicated two draft amendments to that effect.

15 By letter of 16 June 1999, the Commission sent the applicant two draft contract amendments, one on the applicant's remuneration and the other on the applicant's services. Pursuant to the first amendment, a ceiling of EUR 81 000 including travel expenses was expressly put on the applicant's remuneration. In return, pursuant to the second amendment, the tasks to be carried out by the applicant were reduced, in particular, in so far as his participation in network meetings was no longer required from 1 June 1999.

16 By letter of 18 June 1999, the applicant replied that the Commission's proposal of 16 June 1999 essentially reflected his second proposal of 20 May 1999. The applicant stated as follows:

'When the two originals of Amendment 1 & 2 are received, one of each will be signed and returned on the explicit condition that the remaining contractual instalments are timely paid.'

17 On 7 July 1999, the applicant signed and returned the two draft amendments to the Commission which then mislaid them. The applicant sent them again on 24 September 1999. The Commission signed them on 29 September 1999.

18 The Commission paid the third and fourth instalments on presentation of the corresponding yearly reports, on 21 December 1999 and 12 December 2000.

19 By letter of 30 November 2001, the applicant sent what it called an 'annual report' and asked the Commission to pay the last instalment. The Commission received that letter on 4 December 2001.

20 By email of 17 December 2001, the Commission asked the applicant to send it, by email, the report received in hard copy on 4 December 2001. In addition, it asked the applicant to supply certain information on the works carried out during the whole of the contract term.

21 By email of 19 December 2001, the applicant forwarded the information requested by the Commission.

22 By letter of 30 January 2002, the Commission informed the applicant that his request for payment of 30 November 2001 could not be settled until he produced documentary evidence of his travel expenses for the entire term of the contract.

23 By letter of 31 January 2002, the applicant informed the Commission that it had not paid the last contractual instalment of EUR 8 100 within the time-limit. Further, it requested the reimbursement of travel expenses in the sum of EUR 19 867.40, relying on its letter of 18 June 1999 according to which acceptance of the first amendment was dependent on compliance with the period for payment of the remaining instalments.

24 By letters of 4 February and 12 March 2002, the applicant contested the Commission's request for documentary evidence of the travel expenses, alleging that the Commission was trying to delay payment of the last instalment. Further, it again requested the Commission to pay the last instalment before 1 April and to reimburse his travel expenses before 1 May 2002.

25 On 18 April 2002, the Commission received the documentary evidence requested.

26 The Commission paid the last instalment on 15 May 2002. However, since the Commission had not allowed the claim for reimbursement of the travel expenses, the applicant brought this action on 10 October 2002.

Forms of order sought

27 The applicant claims that the Commission should be ordered:

— to pay him the sum of EUR 19 867.40 for reimbursement of travel expenses, and interest at the discount rate of the Bank of Denmark plus 5% from 30 April 2002 until the day of payment;

— to pay him the sum of EUR 592.95 for the costs of recovery, and interest at the discount rate of the Bank of Denmark plus 5% from 30 March 2002 until the day of payment;

— to pay the costs.

28 Further, the applicant requests that, by way of measures of organisation of procedure, the Commission disclose certain documents, in particular, a copy of the agreement between the JRC and the Commission and the budget on which that agreement is based.

29 The Commission claims that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

30 The Commission does not agree to the request for measures of organisation of procedure.

Law

The claim for the Commission to be ordered to pay the sum of EUR 19 867.40

31 In support of its claim, the applicant claims that the Commission owes him the travel expenses which he incurred in performing the contract, amounting to EUR 19 867.40 plus interest. In this respect the applicant relies essentially on two principal arguments and on an argument in the alternative.

32 First, the applicant concedes that it agreed to the ceiling of EUR 81 000, including travel expenses, on its total remuneration by two amendments concluded on 29 September 1999, one of which amended Article 4.1 of the contract. In his opinion however those amendments are not valid, and therefore the original version of Article 4.1 of the contract, stipulated on 22 December 1997, applies.

33 Secondly, the applicant claims that the original version of Article 4.1 of the contract excludes from the sum of EUR 81 000 the travel expenses incurred in performing the contract and therefore gives him the right to reimbursement of those expenses over and above that sum.

34 In the alternative, the applicant claims that, in any event, the Commission tacitly agreed, during performance of the contract, to reimburse all the travel expenses which he incurred over and above the sum of EUR 81 000.

The invalidity of the two amendments

— Arguments of the parties

35 In respect of the invalidity of the two amendments, the applicant claims, on the one hand, that during the negotiations it made compliance with the time-limit for payment of the remaining instalments a condition of their validity, a condition which the Commission accepted. On the other hand, it claims that since the Commission paid the last instalment late, that condition has not been fulfilled, so that the two amendments are invalid.

36 Concerning the late payment of the last instalment, the applicant claims that the due date was 4 March 2002. Accordingly, since it paid the last instalment on 15 March 2002, the Commission did not comply with the time-limit for payment provided for in the first paragraph of Article 4.2 of the contract.

37 In accordance with Article 4.1 of the contract, the Commission received its report on the performance of the contract on 4 December 2001. Because it did not put forward its observations on that report within the month which followed, the report was deemed to be approved on 4 January 2002, in accordance with Article 3(b) of Annex 1 to the contract. In that respect, the applicant adds that the fact that the Commission received an electronic version on 19 December 2001 does not allow it to claim that the final report was received on that date. Under the first paragraph of Article 4.2 of the contract, the period for payment of 60 days began to run from 4 January 2002.

38 Next, the applicant disputes the Commission's claim that the period for payment was suspended. In so far as the Commission claims that the parties agreed upon a fixed remuneration there was no need to demand documentary evidence for the travel expenses. Furthermore, the further checks sought by the Commission were not clearly stated in the contract. Indeed the parties did not agree that the requests for supplementary information had a suspensory effect on the period for payment. Moreover, since it did not seek those checks in the period agreed, the Commission was not entitled to suspend the period.

39 Finally, the applicant claims that, during the four years of the contract term, the Commission did not challenge the way in which he presented his requests for reimbursement of travel expenses by sending in particular simple summaries without attaching any documentary evidence. Therefore that method became a part of the contract.

40 The Commission replies that it made payment of the last instalment within the period laid down in Article 4.2 of the contract.

41 First, contrary to the claims of the applicant, the period for payment began to run on 19 January 2002, a month after receipt of the electronic version of the applicant's report and the information necessary to enable it to be classed as a final report in accordance with Article 3(b) of Annex 1 to the contract.

42 Next, under the second paragraph of Article 4.2 of the contract, according to the Commission the period for payment was suspended from 30 January 2002, the date on which it asked the applicant to supply the documentary evidence, until 18 April 2002, the date on which the documents requested were received. Therefore, taking account of the suspension, 38 days had elapsed between 19 January 2002, the date of acceptance of the final report, and 15 May 2002, the date of payment.

43 The Commission refutes the applicant's argument that it was not justified in requesting documentary evidence. According to the Commission, the fact that there was an agreement on a fixed price did not prevent it from requesting documentary evidence under the second paragraph of Article 4.2 of the contract.

44 It is of the opinion, on the contrary, that the Article on suspension of payment was intended to ensure that it obtained information to substantiate the travel expenses actually incurred. It claims that it could not reimburse travel expenses in excess of the maximum of EUR 27 000 and that, if the expenses actually incurred were less than that, it was entitled to demand a reduction in the contract amount, a right which it did not however exercise in this case owing to the drafting error in Article 4.1 of the contract.

45 The Commission also refutes the applicant's claim that the suspensory nature of the requests for further checks was not provided for in the contract. On the contrary, the second paragraph of Article 4.2 of the contract provided clearly that the period

for payment could be suspended if it considered it necessary to make further checks. According to the Commission that stipulation was specific, giving it the right to request documentary evidence.

46 Finally, as regards the applicant's claim that simple summaries consistently used to substantiate those travel expenses became a 'part of the agreement between the parties' replacing the second paragraph of Article 4.2 of the contract, the Commission maintains that the fact that it did not assert earlier its right, as a party to the contract, to request more comprehensive evidence does not mean that it had waived that right. It adds that it was important for it to be able to check the documentary evidence relating to travel expenses at the end of the contract.

— Findings of the Court

47 The parties do not agree, first, on the date from which the period for payment of the last instalment began to run, and secondly on whether the Commission was entitled to suspend the period for payment.

48 As regards the date of commencement of the period for payment, the first paragraph of Article 4.2 of the contract provides that the period for payment of 60 days begins to run from the date of approval of the final report presented by the applicant in accordance with Article 4.1 of the contract. Article 3(b) of Annex 1 to the contract provides that the final report is to describe the entire work carried out and the results obtained in implementation of the contract. It also provides that the final report is to be deemed to be approved if the Commission does not communicate its observations within one month of presentation of the report.

49 In this case, according to the case-file and as the parties stated at the hearing, the report received by the Commission on 4 December 2001 included only information in relation to the fourth year of performance of the contract, rather than information on all four years of performance of the contract as the contract itself provides. Further, on 17 December 2001, the Commission asked the applicant to supply certain supplementary information on the performance of the contract for the entire contract term. The applicant did not therefore satisfy the requirements relating to the contents of the final report until 19 December 2001, the date on which it supplied the Commission with the information requested. Since the Commission did not submit observations on the final report within the month which followed, that report is deemed to have been approved on 19 January 2002. Consequently, the period for payment of 60 days began to run from 19 January 2002.

50 As to whether the Commission was entitled in this case to suspend the period for payment, according to the case-file and as the parties stated at the hearing, instead of providing the Commission with documentary evidence of the travel expenses incurred during performance of the contract, the applicant merely attached summaries to each of the reports presented pursuant to Article 4.1 of the contract. It is also apparent from the case-file that in its letter of 30 January 2002 the Commission requested the applicant to provide documentary evidence for all the travel expenses incurred during performance of the contract and informed the applicant that that request triggered suspension of the period for payment.

51 In that connection, the applicant's claim that the Commission was not supposed to request documentary evidence since the parties had agreed upon a fixed remuneration must be rejected. Section (c) of Annex 4 to the contract, which was not amended by the first amendment, puts a ceiling of EUR 27 000 on the applicant's travel expenses. It does not therefore appear from the contract that the parties fixed a set amount for the reimbursement of travel expenses. Moreover, Article 5.2 of the contract, which was not amended by the first amendment, expressly states that the travel expenses were payable on presentation of documentary evidence.

52 The applicant's claim that the right of the Commission to ask for supplementary proof was not clearly stipulated in the contract, that such a request does not have the effect of suspending the period for payment, and that its request in this case was late must also be rejected. The second paragraph of Article 4.2 of the contract gives the Commission the right to suspend the period for payment in the 60 days following approval of each of the reports presented by the applicant in accordance with Article 4.1 of the contract 'if [it] sees the need for further checks'.

53 Finally, the applicant's claims that the Commission waived its right to demand further checks pursuant to the second paragraph of Article 4.2 of the contract must be rejected. The fact that it did not request documentary evidence at any stage prior to payment of the last instalment is not sufficient to conclude that it waived that right.

54 Accordingly, given that the period for payment was suspended from 30 January 2002, the date on which the Commission requested from the applicant the documentary evidence of the travel expenses, until 18 April 2002, the date on which the documentary evidence requested was received by the Commission, only 38 days elapsed between approval of the final report on 19 January 2002 and the payment of the last instalment by the Commission on 15 May 2002.

55 The applicant's claim that the payment of the last instalment was late must therefore be rejected. Consequently, without its being necessary to determine whether the validity of the two amendments was subject to compliance with the period for payment of the remaining instalments, the applicant's argument that those amendments are invalid must be rejected.

56 Consequently, there is no need to adjudicate on the applicant's argument that the original version of Article 4.1 of the contract entitles him to reimbursement of travel expenses over and above the sum of EUR 81 000.

The alternative argument, concerning the tacit agreement by the Commission to reimburse travel expenses incurred by the applicant over and above the sum of EUR 81 000.

57 In the alternative, the applicant claims that in any event the Commission, after signing the contract and its amendments, tacitly agreed to reimburse all the travel expenses incurred over and above the sum of EUR 81 000. For that purpose, the applicant refers to the records of the number of hours annexed to each of the yearly reports presented pursuant to Article 4.1 of the contract and which were never disputed by the Commission.

58 The Commission replies that after the conclusion of the amendments to the contract it did not give the applicant any reason to believe that it would reimburse its actual expenses beyond the sum of EUR 81 000. On the contrary, the amendments agreed between the parties clearly show that that was not its intention.

59 The Court finds in this connection that the applicant annexed to the reports presented pursuant to Article 4.1 of the contract records of the number of hours spent on the PLAN project. Those documents certainly do not establish that the Commission tacitly agreed to pay the travel expenses over and above the sum of EUR 81 000, contrary to the wording of Article 4.1 of the contract as amended. Therefore that argument must be rejected as unfounded.

60 Having regard to all the foregoing, the application for the Commission to be ordered to pay the sum of EUR 19 867.40 must be dismissed, without its being necessary to order the measures of organisation sought.

The application for payment of the costs of recovery

61 In support of its application for the costs of recovery, the applicant maintains that the Commission is required to pay him the costs of recovery he incurred in obtaining payment of the last instalment.

62 In that regard, it was found earlier that the last instalment was paid within the contractual period. It follows that the application for payment of EUR 592.95 in respect of the costs of recovery must also be dismissed.

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 the applicant has been unsuccessful, it must, having regard to the form of order sought by the Commission, be ordered to pay the Commission's costs in addition to its own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber)

hereby:

1. Dismisses the action;

2. Orders the applicant to pay its own costs and the costs of the Commission.

Lindh García-Valdecasas Cooke

Delivered in open court in Luxembourg on 10 June 2004.

H. Jung
Registrar

P. Lindh
President