Reports of Cases

JUDGMENT OF THE GENERAL COURT (Sixth Chamber)

27 September 2012*

(Fifth framework programme for research, technological development and demonstration — Contracts concerning the projects 'Formation of a New Design House for MST' and 'Assessment of a New Anodic Bonder' — Recovery of part of the financial contribution paid — Enforceable decision — Decision amending the contested decision during the proceedings — Legal basis of the action — Nature of the pleas put forward — Legitimate expectations — Obligation to state the reasons on which the decision is based — Principle of sound administration)

In Case T-387/09,

Applied Microengineering Ltd, established in Didcot (United Kingdom), represented initially by P. Walravens and J. De Wachter, and subsequently by P. Walravens and J. Blockx, lawyers,

applicant,

v

European Commission, represented by S. Petrova, acting as Agent, assisted by R. Van der Hout, lawyer,

defendant,

APPLICATION for annulment of Commission Decision C (2009) 5797 of 16 July 2009 relating to the recovery of a total amount of EUR 258 560.61 plus interest due by the applicant in the framework of the projects IST-1999-11823 FOND MST ('Formation of a New Design House for MST') and IST 2000-28229 ANAB ('Assessment of a New Anodic Bonder'),

THE GENERAL COURT (Sixth Chamber),

composed of H. Kanninen, President, N. Wahl and S. Soldevila Fragoso (Rapporteur), Judges,

Registrar: T. Weichert, Administrator,

having regard to the written procedure and further to the hearing on 12 June 2012,

gives the following

* * Language of the case: English.

Judgment

Legal context

1 Pursuant to the first paragraph of Article 256 EC, '[d]ecisions of the Council or of the Commission which impose a pecuniary obligation on persons other than States, shall be enforceable'.

2 Article 72(2) of Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ 2002 L 248, p. 1) provides that '[t]he institution may formally establish an amount as being receivable from persons other than States by means of a decision which shall be enforceable within the meaning of Article 256 [EC]'.

Factual background to the dispute

3 The European Community, represented by the Commission of the European Communities, concluded two grant agreements with the applicant, Applied Microengineering Ltd, in the context of the fifth framework programme of the Community for research, technological development and demonstration (1998-2002).

4 The first contract, bearing the reference IST-1999-11823 and entitled 'Formation of a New Design House for MST' (the 'FOND MST contract'), was concluded between the Community, represented by the Commission, and the applicant, as sole principal contractor, on 21 December 1999 for a period of 24 months from 1 January 2000. The general conditions of that contract were those which apply to the 'mono-contractor' version of the model contract used for the accompanying measures specific to technology take-up measures.

5 The second contract, bearing the reference IST-2000-28229 and entitled 'Assessment of a New Anodic Bonder' (the 'ANAB contract'), was concluded between the Community, represented by the Commission, and four companies, including the applicant, and was signed on 14 November 2001 for an initial period of 15 months starting from 1 December 2001. That contract was amended five times to take account of the amendments to the contact information of some of the parties to the contract, to extend its period to a total duration of 25 months and to replace the coordinator of the project on 1 August 2003, with the applicant taking the place of another company. The general conditions of that contract were those which applied to the 'multicontractor' version of the model contract used for the accompanying measures specific to technology take-up measures.

6 During the negotiation procedure for each contract, the applicant completed a contract preparation form ('CPF'), intended to provide information on the content of the project as well as an administrative summary concerning the costs and their annual breakdown. On that occasion, the applicant referred to the financial and accounting rules which it had already communicated to the Commission in the context of an earlier contract, financed under the fourth framework programme for research, technological development and demonstration (1994-1998), for which it had based its hourly rate on 'average salaries' and not on actual salaries. The CPF for the FOND MST contract was sent by the applicant to the Commission on 10 November 1999 and that for the ANAB contract was sent to the Commission in March 2001.

7 Article 3(1) of the FOND MST contract and of the ANAB contract provides that the total estimated eligible costs of the projects are EUR 450 000 and EUR 918 808 respectively. Article 3(2) indicates that the Community is to fund those costs up to a maximum amount of EUR 450 000 and EUR 560 000 respectively. Under Article 3(3), those financial contributions are to be paid, according

to the procedure specified in Article 3 of Annex II to those contracts, in respect of the FOND MST contract, to the applicant's bank account, and, in respect of the ANAB contract, to that of the coordinator, responsible for paying it to the principal contractors.

8 Under Article 3(3) of Annex II to those contracts, the various payments made by the Commission are to be treated merely as advances until the last deliverable's approval.

9 Article 3(4) thereof states that if those payments turn out to be greater than the sum actually payable by the Commission, the other contracting parties are required to reimburse the difference to it within a period set by the Commission, by letter sent by registered delivery with acknowledgement of receipt. Where reimbursement is not made within that period, the sum payable is increased by interest at the rate applied by the European Central Bank (ECB) for its main refinancing operations on the first day of the month during which the time-limit set by the Commission has expired, plus 1.5 percentage points, unless interest is due pursuant to another provision in the contract. The interest runs from the day after the expiry of the time-limit set by the Commission until the day of receipt of the funds.

10 That paragraph also specifies that where the Commission is a creditor of one of the other parties to the contract and decides to issue a recovery order against that party, that recovery order is enforceable within the meaning of Article 256 EC.

11 The FOND MST and ANAB contracts, pursuant to Article 5(1) thereof, are governed by Belgian law. Article 5(2) contains an arbitration clause for the purposes of Article 238 EC, granting the General Court and, on appeal, the Court of Justice, sole jurisdiction to hear any disputes between the Community, on the one hand, and the other contractors, on the other hand, as regards the validity, the application or any interpretation of those contracts.

12 Under Article 17(1) of Annex II to those two contracts, '[t]he Commission, or any representative authorised by it, may initiate an audit … at any time during the contract and up to five years after each payment of the Community contribution, as referred to in Article 3(1), first subparagraph, of this annex'.

13 On the basis of those provisions, the Commission asked an audit firm to conduct a financial audit of the applicant's cost statements; the applicant was informed on 16 August 2005. The audit was carried out from 13 to 17 February 2006 and the audit firm sent its preliminary report to the applicant on 22 September 2006 by post and by electronic means. Since the applicant did not receive the paper version of that document, the audit firm resent it by electronic means on 6 November 2006 and granted the applicant a period of one month to submit its comments, in accordance with Article 17(3) of Annex II to those two contracts. That report identified a number of necessary adjustments concerning personnel costs, the use of a subcontractor, travel expenses and other specific costs.

14 The applicant's financial director, responsible for ensuring liaison with the audit firm, requested a period of an additional week in order to respond to the report, which was granted to him on 13 December 2006, but in the end he did not submit any comments, despite two reminders, on 10 and 17 January 2007, and a second request for an extension, on 17 January 2007, which was granted to him. The audit firm therefore signed its report on 20 April 2007. By registered letter of 21 May 2007, the Commission informed the applicant of the closure of the audit, given its lack of response, and indicated to it that it confirmed the finding of that report. The final report of the audit approved by the Commission accordingly concluded that adjustments had to be made to the costs initially accepted by the Commission for an amount of EUR 135 262.94 for the FOND MST contract and EUR 123 297.67 for the ANAB contract.

15 Under Article 17(4) of Annex II to those two contracts, the Commission may, on the basis of the audit's conclusions, take all appropriate measures which it considers necessary, including issuing a recovery order for all or part of the payments made by it.

16 On 6 September 2007, the Commission accordingly sent two pre-information letters to the applicant, indicating to it that, as a result of the audit's conclusions, the contribution to ineligible costs paid by the applicant and advanced by itself would be subject to a recovery order. It also informed the applicant that its staff was required to recover the Community's financial contribution for the amounts of EUR 135 262.94 for the FOND MST contract and EUR 123 297.67 for the ANAB contract. It stated that the debit notes would be issued soon.

17 By letter of 22 October 2007, the Commission accordingly issued two debit notes addressed to the applicant, for payment of the amounts of EUR 135 262.94 and EUR 123 297.67 before 26 November 2007.

18 By email of 29 October 2007, the applicant's financial director informed the Commission that he had not forwarded the audit report to his superiors, who had not been informed of the development of the procedure, and that he had resigned from his post.

19 On 9 November 2007, the applicant sent the Commission a reply to the points examined in the audit report, citing in particular the problems encountered in the context of the ANAB contract following the replacement of its coordinator, the positive rating of the final technical reports and the question of cost eligibility given the actual hourly rates and timesheets discrepancies. The Commission sent this letter to the audit firm, which responded to the applicant on 28 January 2008. On 3 June 2008, the applicant responded to that letter by submitting new comments to the Commission and by asking about the procedure to be followed to dispute the two debit notes.

20 On 22 August 2008, the Commission informed the applicant that the comments which it had made concerning the audit report did not contain any new element to justify reopening the audit procedure.

21 On 8 September 2008, the applicant once more disputed the Commission's conclusions and, on 24 October 2010, the Commission sent the applicant two notification letters concerning the calculation of default interest.

22 On 11 February 2009, the applicant disputed the two debit notes and, on 16 July 2009, the Commission adopted Decision C (2009) 5797 relating to the recovery of a total amount of EUR 258 560.61 plus interest due by [the applicant] in the framework of the projects IST-1999-11823 FOND MST ('Formation of a New Design House for MST') and IST-2000-28229 ANAB ('Assessment of New Anodic Bonder'), by which it sought the repayment of the sums of EUR 135 262.94 and EUR 123 297.67, plus default interest, on the basis of the provisions of Article 256 EC ('the contested decision').

23 On the basis of a material error in the debit note concerning the ANAB contract, the Commission issued a credit note for EUR 57 227.32 in favour of the applicant.

24 On 25 March 2010, the Commission adopted Decision C (2010) 2125 rectifying the contested decision, by which Article 1 of the contested decision is replaced by a new article, which amended the amount of the sum to be repaid to it by the applicant in respect of the ANAB contract, fixing it at EUR 66 070.35 instead of EUR 123 297.67.

Procedure and forms of order sought

25 By application lodged at the Registry of the Court of First Instance (now the General Court) on 26 September 2009, the applicant brought this action on the basis of Article 230 EC.

26 Upon hearing the report of the Judge-Rapporteur, the Court (Sixth Chamber) decided to open the oral procedure.

27 The parties presented oral argument and gave their replies to the questions asked by the Court at the hearing on 12 June 2012.

28 The applicant claims that the Court should:

— annul the contested decision;

— order the Commission to pay the costs.

29 The Commission contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

Law

30 In support of its appeal, the appellant puts forward six pleas in law. The first plea alleges infringement of essential procedural requirements. By its second plea, the applicant claims that the Commission's action was time-barred. By its third plea, the applicant claims that the Commission committed manifest errors of assessment concerning the rules applicable to eligible costs. The fourth plea alleges infringement of fundamental social rights. By its fifth plea, the applicant alleges infringement of the principle of the protection of legitimate expectations. The sixth plea alleges failure to state adequate reasons for the decision. Lastly, by its seventh plea, the applicant claims that the Commission infringed the principle of sound administration.

The objection of inadmissibility raised by the Commission

31 At the hearing, the Commission raised an objection of inadmissibility alleging the loss of the applicant's interest in bringing proceedings on account of the adoption, on 25 March 2010, of a decision amending Article 1 of the contested decision and the applicant's failure to request the adaptation of its heads of claim and pleas in law.

32 The applicant submits that its action remains admissible, since the sole purpose of the decision of 25 March 2010 was to amend a material error made by the Commission in the determination of the amount of the sum sought, and not the other aspects of the contested decision, including the justification for the sum sought from it, which it continues to dispute.

33 In order to rectify an error in calculation pointed out by the applicant in the application, the Commission adopted a decision during the proceedings seeking to replace Article 1 of the contested decision by a new article, which amended the amount of the sum to be repaid to it by the applicant in respect of the ANAB contract by fixing it at EUR 66 070.35 instead of EUR 123 297.67. It did not, on the other hand, amend the other elements of the contested decision.

34 It must therefore be held that only the argument concerning the error in calculation of the amounts to be recovered in respect of the ANAB contract, raised by the applicant in the application, has become devoid of purpose on account of the adoption of the amending decision and that the applicant still has an interest in bringing legal proceedings so far as concerns all of the other pleas and arguments raised in the application.

The legal basis for the action

35 At the hearing, the applicant confirmed that its action had been brought on the basis of Article 230 EC. The Commission, on the other hand, considered that the second and fourth pleas in the application were inadmissible in the context of an action for annulment.

36 It is settled case-law that measures adopted by the institutions in a purely contractual context from which they are inseparable are, by their very nature, not among the measures covered by Article 249 EC (order in Case T-149/00 *Innova* v *Commission* [2001] ECR II-1, paragraph 28; order in Joined Cases T-314/03 and T-378/03 *Musée Grévin* v *Commission* [2004] II-1421, paragraph 64; and judgment of 10 June 2009 in Joined Cases T-396/05 and T-397/05 *ArchiMEDES* v *Commission*, not published in the ECR, paragraph 54).

37 Were the European Union judicature to hold that it had jurisdiction to adjudicate on such acts, it would, where the contract does not contain any arbitration clause, risk extending its jurisdiction beyond the limits placed by Article 240 EC on the disputes of which it may take cognizance, since that article specifically gives national courts or tribunals ordinary jurisdiction over disputes to which the European Union is a party (Case 43/84 *Maag* v *Commission* [1985] ECR 2581, paragraph 26; see also, to that effect, order in Case T-186/96 *Mutual Aid Administration Services* v *Commission* [1997] ECR II-1633, paragraphs 45 to 52).

38 Unlike the acts referred to in paragraph 36 above, the enforceable decisions with which Article 256 EC is concerned are, in the absence of any contrary indication in the EC Treaty, among those referred to in Article 249 EC, the justification for which can only be disputed before the court hearing the proceedings for annulment, on the basis of Article 230 EC (order of 13 September 2011 in Case T-224/09 *CEVA* v *Commission*, not published in the ECR, paragraph 59).

39 This is true, in particular, when an enforceable decision is adopted for the purposes of recovering a debt stemming from a contract concluded by an institution. Even if a contract of that type, as in the present case, expressly allows such decisions to be issued, their legal nature remains defined not by the contract or the national law applicable to it but by the EC Treaty, especially Article 256. That provision does not provide for any legal derogation in respect of enforceable decisions adopted for the purposes of recovering a contractual debt.

40 The European Union judicature must, when adjudicating on an action for annulment on the basis of the provisions of Article 230 EC, assess the lawfulness of the contested act in the light of the EC Treaty or of any rule of law relating to its application, and, thus, of European Union law (see, to that effect, Case 11/70 *Internationale Handelsgesellschaft* [1970] ECR 1125, paragraph 3). On the other hand, in the context of an action brought on the basis of Article 238 EC, an applicant can only complain that the institution party to the contract infringed the terms of the contract or of the law applicable to it (see, to that effect, Case 426/85 *Commission* v *Zoubek* [1986] ECR 4057, paragraph 4, and order in Case T-481/08 *Alisei* v *Commission* [2010] ECR II-117, paragraphs 94 to 96).

41 Therefore, in the present case, the pleas put forward in the application asking the Court to rule on the lawfulness of the contested decision, which is enforceable within the meaning of Article 256 EC, in the light of the terms of the contract and of the applicable national law, must be rejected as inadmissible.

42 It is appropriate to go on to examine each of the pleas raised by the applicant in turn having regard to those principles.

The first plea, alleging infringement of essential procedural requirements

43 The applicant claims that the Commission infringed certain essential procedural requirements, first, by sending some letters to it at an incorrect address and, secondly, by refusing to reopen the audit procedure following its comments. The Commission submits that it did not infringe any essential procedural requirement and observes that the applicant acted negligently in informing it only of one change of address.

44 That plea must be rejected as inadmissible in the context of an action brought on the basis of Article 230 EC, in so far as it is based only on essential procedural requirements provided for by the terms of the contract and not on a rule of European Union law.

The second plea, alleging that the Commission's action was time-barred

45 Under Article 17(1) of Annex II to the FOND MST contract and the ANAB contract, '[t]he Commission, or any representative authorised by it, may initiate an audit … at any time during the contract and up to five years after each payment of the Community contribution, as referred to in Article 3(1), first subparagraph, of this annex'. The first subparagraph of Article 3(1) of those documents describes the procedure for the payment of the Community's contribution by distinguishing between, first, the 'initial advance', which must be paid within a maximum period of 60 days after the signature of the contract, second, the 'periodic payments', which take place within a maximum period of 60 days from the date of approval by the Commission of the periodic reports and any corresponding cost statements or other project deliverables and, third, the 'final payment', which must be paid within a period of 60 days from the date the Commission approved the last project deliverable.

46 The parties disagree on the manner in which Article 17(1) of Annex II to those two contracts should be interpreted, the applicant taking the view that the Commission's action was time-barred as regards the payments made more than five years before 27 September 2005, the date of the start of the audit procedure, which concerned the advances, whereas the Commission takes the view that the limitation period could only start to run from the first payment repaying the costs actually incurred.

47 Since this plea relates to the interpretation of the contractual terms, it must be rejected as inadmissible in the context of an action brought on the basis of the provisions of Article 230 EC.

The third plea, alleging manifest errors of assessment concerning the rules applicable to eligible costs

The reference to incorrect terms in the audit report

48 The applicant indicated in the reply that it was apparent to it from the Commission's defence that the auditor had referred to incorrect article numbers in respect of the ANAB contract, which rendered the audit procedure completely void.

49 Although a plea alleging that an incorrect legal basis has been chosen is admissible in the context of an action brought on the basis of Article 230 EC, the applicant claims, in the present case, that the auditor based his report on incorrect contractual terms, but does not dispute the legal basis of the contested decision, namely Article 256 EC and Regulation No 1605/2002. Consequently, that claim must be rejected as inadmissible.

The manifest errors of assessment relating to eligible costs

50 The applicant claims, furthermore, that the Commission committed manifest errors of assessment regarding the rules applicable to eligible costs by following the interpretation of the contractual provisions made by the auditor.

51 Since those arguments relate to the interpretation of the contractual terms, they must be rejected as inadmissible in the context of an action brought on the basis of Article 230 EC.

The fourth plea, alleging infringement of fundamental social rights

52 The applicant submits that the effect of the contested decision was to pay its employees at a rate far below that of the minimum wage, which constitutes an infringement of the right to equitable remuneration and therefore an infringement of fundamental social rights.

53 It must however be pointed out that no provision of European Union law permits the inference that the Commission is liable for the use made of the funds awarded in the context of the fifth framework programme for research, technological development and demonstration by those benefiting from them. Moreover, the only effect of the contested decision is to call for the reimbursement of personnel costs which the Commission considers not to be eligible costs by virtue of the contractual terms and it does not seek to set the hourly wage of the applicant's employees retroactively.

54 Moreover, the applicant's argument that, under Belgian law, the contracts must be analysed in the light of the common intention of the parties, and that their content can, inter alia, be interpreted in accordance with the pre-contractual evidence, must be rejected as inadmissible in the context of an action brought on the basis of Article 230 EC.

55 The fourth plea must therefore be dismissed in its entirety.

The fifth plea, alleging infringement of the principle of the protection of legitimate expectations

56 The applicant submits that the Commission infringed the principle of the protection of legitimate expectations by not providing it, for five years, with any information as to the unacceptable nature of its method of calculating salary costs, of which it had been aware since the pre-contractual stage.

57 According to settled case-law, any individual in regard to whom a European Union institution has given rise to justified hopes may rely on the principle of the protection of legitimate expectations (Case 265/85 *Van den Bergh en Jurgens and Van Dijk Food Products (Lopik)* v *Commission* [1987] ECR I-1155, paragraph 44).

58 Nevertheless, the right to rely on that principle requires that three conditions be satisfied cumulatively. First, precise, unconditional and consistent assurances originating from authorised and reliable sources must have been given to the person concerned by the European Union authorities. Second, those assurances must be such as to give rise to a legitimate expectation on the part of the person to whom they are addressed. Third, the assurances given must comply with the applicable rules (see Case T-347/03 *Branco* v *Commission* [2005] ECR II-2555, paragraph 102 and the case-law cited; Case T-282/02 *Cementbouw Handel & Industrie* v *Commission* [2006] ECR II-319, paragraph 77; and Case T-444/07 *CPEM* v *Commission* [2009] ECR II-2121, paragraph 126).

59 So far as concerns the first condition, it is settled case-law that such assurances, in whatever form they are given, are precise, unconditional and consistent information from authorised and reliable sources (Case T-273/01 *Innova Privat-Akademie* v *Commission* [2003] ECR II-1093, paragraph 26). On the

other hand, a person may not plead a breach of the principle of the protection of legitimate expectations unless the administration has given him precise assurances (Case T-290/97 *Mehibas Dordtselaan* v *Commission* [2000] ECR II-15, paragraph 59).

60 In the present case, it is not apparent from the information in the file that the Commission gave the applicant the precise assurance that it would accept its method of calculation of the personnel costs.

61 The mere fact that the applicant had informed the Commission, in the CPF sent before the signature of the contracts, of the financial and accounting rules which it had applied during the previous contracts and that, in exchanges in February and March 2001, it had sent it information mentioning the use of target salaries cannot by definition be treated as the communication by the Commission of precise, unconditional and consistent information as regards its acceptance of that method.

62 Since the applicant has not identified any precise assurance or promise which could have given rise to a legitimate expectation on its part that the Commission would accept its method of calculation of the personnel costs, the fifth plea must be rejected as unfounded, without there being any need to examine the other two conditions referred to in paragraph 58 above.

The sixth plea, alleging failure to state adequate reasons for the decision

63 The applicant submits that the Commission did not provide an adequate statement of reasons for the contested decision.

64 The Court has consistently held that the scope of the obligation to state reasons depends on the nature of the measure at issue and on the context in which it was adopted. The statement of reasons must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in such a way as to enable the European Union judicature to review the lawfulness of the measure and the persons concerned to ascertain the reasons for the measure, so that they can defend their rights and ascertain whether or not the decision is well founded.

65 It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 253 EC must be assessed not only with regard to its wording but also with regard to its context and all the legal rules governing the matter in question (Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 63, and judgment of 30 November 2011 in Case T-238/09 *Sniace* v *Commission*, not published in the ECR, paragraph 37).

66 In particular, the Commission is not obliged to adopt a position on all the arguments relied on by the parties concerned. It is sufficient if it sets out the facts and the legal considerations having decisive importance in the context of the decision (Joined Cases C-341/06 P and C-342/06 P *Chronopost and La Poste* v *UFEX and Others* [2008] ECR I-4777, paragraph 96, and Joined Cases T-102/07 and T-120/07 *Freistaat Sachsen and Others* v *Commission* [2010] ECR II-585, paragraph 180).

67 Lastly, where a party was closely involved in the process by which the contested decision came about and is therefore aware of the reasons for which the administration adopted it, the scope of the obligation to state reasons will be defined by the context thus created by the party's involvement in that process (see, to that effect, Case 819/79 *Germany* v *Commission* [1981] ECR 21, paragraphs 19 to 21, and Case 14/88 *Italy* v *Commission* [1989] ECR 3677, paragraph 11). In such a situation, the requirements of the case-law will be considerably eased (see, to that effect, Case 1252/79 *Acciaierie e Ferriere Lucchini* v *Commission* [1980] ECR 3753, paragraph 14, and Joined Cases 275/80 and 24/81 *Krupp Stahl* v *Commission* [1981] ECR 2489, paragraphs 10 to 13).

68 The plea relating to the failure to state adequate reasons for the contested decision must be examined in the light of those principles.

69 First, the applicant criticises the Commission for having, in the contested decision, merely referred to the audit report, without attaching it as an annex and without itself having analysed the facts.

70 It must be pointed out at the outset that the audit report was sent to the applicant, which had the opportunity to respond to it by submitting its comments.

71 Furthermore, it is apparent from the contested decision that the Commission indicated that, according to the audit report, certain statements of costs submitted by the applicant had been overvalued, and specified that the costs at issue were personnel costs, costs relating to assistance by a third party and travel costs, stating the amounts concerned in respect of each of those contracts. Next, the Commission referred to the comments submitted by the applicant outwith the time-limits provided for in the contract and stated that, since those comments did not contain any additional information such as to justify reopening the audit procedure, it had decided to implement the procedure for recovery of the sums at issue.

72 By referring to the audit report, the Commission therefore showed, in the contested decision, sufficiently clearly the reasons for which it had decided to recover the sums at issue, thus enabling the applicant to defend its rights before the European Union judicature and that latter to exercise its power of review over the lawfulness of that decision, without it having been necessary to attach that audit report as an annex to it (see, to that effect, Case C-360/92 P *Publishers Association* v *Commission* [1995] ECR I-23, paragraph 39; Case T-85/94 *Branco* v *Commission* [1995] ECR II-45, paragraph 32; and Case T-114/92 *BEMIM* v *Commission* [1995] ECR II-147, paragraph 41).

73 Second, the applicant submits that the Commission did not take account of the arguments it raised in response to the audit report. It must however be noted that the contested decision contains sufficient reasons as regards that issue, the Commission having referred to the applicant's letters of 9 November 2007 and 3 June 2008 and stated that it had taken the view, after examining them, that they did not contain any element such as to justify reopening the audit procedure, inter alia so far as concerns the personnel costs (salary sacrifices, calculation of hourly rates and communication of those rates before the start of the projects).

74 The sixth plea must therefore be rejected in its entirety.

The seventh plea, alleging infringement of the principle of sound administration

75 The applicant alleges that the Commission infringed the principle of sound administration and its duty of care by refusing to assess the evidence which the applicant had presented to it after the closure of the audit procedure and by sending its letters to an incorrect address.

76 It should be noted that the guarantees afforded by the European Union legal order in administrative proceedings include, in particular, the principle of sound administration, enshrined in Article 41 of the Charter of Fundamental Rights of the European Union, proclaimed in Nice on 7 December 2000 (OJ 2000 C 364, p. 1), which entails the duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case (Joined Cases T-191/98, T-212/98 to T-214/98 *Atlantic Container Line and Others* v *Commission* [2003] ECR II-3275, paragraph 404).

77 It is therefore necessary to examine whether the complaints raised by the applicant are such as to demonstrate that the Commission infringed this principle.

The mistakes relating to the postal address of the letters

78 So far as concerns the address at which various letters were sent by the Commission to the applicant, it must, as a preliminary point, be observed that that latter informed the Commission only of a single change of address of 7 January 2002, by a commercial circular of 25 February 2002. The applicant however acknowledges that it changed address two other times, on 17 May 2006 and on 27 November 2007.

79 First, it is apparent from the file that the Commission sent the letter informing the applicant of the opening of the audit procedure on 16 August 2005 by registered delivery, to its former address, valid until 7 January 2002, but that it nevertheless received the acknowledgement of receipt of that letter on 27 September 2005. It must moreover be noted that the applicant admitted having received that document by registered delivery and that it indeed produced it attached as an annex to the application.

80 Secondly, as regards the letter of 21 May 2007 informing the applicant of the closure of the audit procedure, it is apparent from the file that that was sent by registered delivery with acknowledgment of receipt to the address indicated by the applicant to the Commission in the circular of 25 February 2002. The Commission cannot be criticised for having followed this course of action given the applicant's failure to notify the Commission of its change of address of 17 May 2006. In the first place, the sole fact that the contractual period had come to an end did not exempt the applicant from informing the Commission of its change of address as long as an audit procedure was taking place. In the second place, the mere reference to the applicant's address in the signature of its emails to the auditor in 2006 does not suffice for a finding that the Commission had been duly informed of the change of address, even if those exchanges of emails were forwarded by the auditor to the Commission (see, to that effect, Case 108/79 *Belfiore* v *Commission* [1980] ECR 1769, paragraph 6).

81 Thirdly, the applicant criticises the Commission for sending several other documents to it at an incorrect address, namely the pre-information letters of 6 September 2007, the debit notes of 22 October 2007 and a letter of 9 January 2008. Likewise, it submits that on 22 September 2006 the auditor sent his draft audit report, on behalf of the Commission, to an incorrect address.

82 However, it is apparent from the file that the auditor sent his preliminary report on 22 September 2006 to the address indicated by the applicant on 25 February 2002, but that that time the letter was returned to him. The auditor also sent the report twice to the applicant by email, on 22 September 2006 and 6 November 2006, on which date the applicant admits to having received it. In the same way, the letters of 6 September 2007 and the debit notes of 22 October 2007 were sent by the Commission by registered delivery with acknowledgement of receipt to the applicant at the address provided by the applicant in 2002. Lastly, the applicant has not provided any details about a letter of 9 January 2008 which it submits was sent to the wrong address and which is not included in the file.

83 It follows from all the foregoing that the Commission did not act negligently in the sending of its letters to the applicant.

The refusal of the Commission to assess the evidence presented after the closure of the audit procedure

84 The applicant submits that the Commission ought to have taken into account the comments which it expressed on the audit report on 9 November 2007 and on 3 June 2008 and should have consequently reopened the audit procedure.

85 It is apparent from the file that the applicant received the audit report on 6 November 2006 and that it had one month to submit its comments. The applicant's financial director, responsible for ensuring liaison with the audit firm, requested a period of an additional week in order to respond to the report, which was granted to him on 13 December 2006, but in the end he did not submit any comments, despite two reminders, on 10 and 17 January 2007, and a second request for an extension, on 17 January 2007, which was granted to him. Thus the applicant did not submit any comments on the audit report within the prescribed periods.

86 The Commission nevertheless agreed to examine the information provided by the applicant on 9 November 2007 and on 3 June 2008. It informed the applicant, however, on 22 August 2008, that that information did not contain any new element to justify reopening the procedure. In that letter of 22 August 2008, the Commission thus examined the arguments submitted by the applicant and found that they did not contain any additional information to justify reopening the audit procedure, since they related to the issue of the Commission's knowledge of the overstatement of the personnel costs and the grounds for that overstatement but they did not contain any element designed to establish that the applicant had not made such an overstatement, forbidden by the terms of the contract.

87 Therefore, it must be held that the Commission agreed to take into account the evidence submitted to it after the closure of the audit procedure and that the argument that it refused to examine that evidence is factually inaccurate.

88 It follows from all the foregoing that the Commission carefully and impartially examined all the relevant elements of the present case and that it therefore did not infringe the principle of sound administration.

89 Consequently, the seventh plea must be rejected, as must, therefore, the action as a whole.

Costs

90 Under Article 87(2) of the Rules of Procedure of the Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

91 Since the applicant has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the Commission.

On those grounds,

THE GENERAL COURT (Sixth Chamber)

hereby:

1. **Dismisses the action;**

2. **Orders Applied Microengineering Ltd, in addition to bearing its own costs, to pay those incurred by the European Commission.**

Kanninen Wahl Soldevila Fragoso

Delivered in open court in Luxembourg on 27 September 2012.

[Signatures]