Case 220/85

Fadex NV
v
Commission of the European Communities

(Arbitration clause: demand for payment for the supply of goods and services)

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Summary of the Judgment

Public works contracts of the European Communities — Arbitration clause conferring jurisdiction on the Court — Contract for the supply of goods and services — Claim for payment — Application of a penalty clause

REPORT FOR THE HEARING
delivered in Case 220/85 *

I — Facts and procedure

In September 1979, Commission officials discovered that the weight of the cameras used in the Commission's television studio was dislodging the tiles covering the floor of that studio. Consequently the Commission decided to contact an undertaking specialized in laying floor-coverings of an appropriate material.

To that end the Commission contacted Fadex NV, whose registered office is in Antwerp, an undertaking specialized in

* Language of the Case: French.

monolithic acrylic resin-based floor-coverings. It had already carried out work involving the laying of floor-coverings, in particular for Radio-Télévision Belge. One of Fadex's employees was instructed to carry out a preliminary study of the premises with a view to submitting a tender.

By an internal memorandum dated 28 November 1979, the Commission department which uses the television studio informed the Head of the Technical Services Division, Mr Gibbels, that 'the new covering should be level and without joins and sufficiently resistant to bear the weight of cameras and their dollies (approximately 250 kg each)'.

On 4 December 1979 the applicant submitted to the Commission a tender 'for the supply and laying of approximately 80 square metres of Dex-o-tex Neotex P 61, a monolithic acrylic resin-based floor-covering'. According to the terms of that tender, the work involved:

the laying of:

a fibreglass and neoprene membrane;

a neoprene-based bonding layer; and

a wear-resistent layer made of acrylic resin, special cements and appropriate ballast;

machine sanding and the application of a polyurethane filler paste; and

the application of a final layer of polyurethane-based material.

It was also stipulated that it was the Commission's responsibility to:

remove the existing covering;

ensure that the studio was completely empty prior to the application of the products;

make available to the applicant a closed room for the storage of its materials;

supply the electric current necessary for the operation of the machines;

provide a crane or a lift in order to move materials;

provide sufficient heating to ensure a temperature of approximately 10° during the work;

ensure that the room was fully lit.

Fadex's tender was accompanied by a copy of its General Conditions of Sale, Article 13 of which is worded as follows:

'It is agreed between the parties that in the event of a failure to reply within 10 days to the demand referred to in the preceding article or the failure to pay the invoice or the balance due thereunder, the sum due shall, without any further demand, be increased by 20% subject to a minimum of BFR 500, by way of a flat-rate non-reducible surcharge, as compensation for the fact that the undertaking is deprived of the use of the money and is forced to alter its credit arrangements, and for the additional costs incurred by the processing of unpaid invoices, by the meeting of legal fees and by the correspondence which has to be conducted to recover the unpaid amounts, not including additional expenses which may be payable if legal proceedings are instituted.'

The Commission considered that the tender was acceptable in view of the technical nature of the work, the company's references and the proposed price (BFR 150 480). Consequently, on 14 December 1979 the Commission drew up a purchase order, which stipulated that it was 'governed by the provisions of the Commission's General Terms and Conditions Governing Supply Contracts'.

Article 1 of those Terms and Conditions provides that 'the submission of a tender

entails the tenderer's . . . waiving his own conditions of sale or of work'. Article 16 thereof provides that:

'Failing an amicable settlement, the Court of Justice of the European Communities shall have exclusive competence in any disputes relating to the performance or the interpretation of the contracts governed by these General Terms and Conditions. Jurisdiction is thus expressly vested in the said Court of Justice pursuant to Article 153 of the Treaty establishing the European Atomic Energy Community and Article 181 of the Treaty establishing the European Economic Community. No other court whatsoever shall have such competence.'

The applicant completed the work at the end of January 1980 and on 31 January 1980 it sent to the Commission the relevant invoice.

The Commission discovered that unevenness in the new floor-covering made normal usage of the television cameras in the studio impossible. Consequently, it refused to accept the work as completed by the applicant.

On 3 March 1980 the applicant pointed out to the Commission that it had merely laid the agreed floor-covering and that any differences in the level of the floor were the result of the uneven surface of the base.

By a letter of 30 June 1980 the Commission requested the applicant 'to take steps, as soon as possible, to remedy the defects'.

In reply to that letter, the applicant stressed that it had complied with the Commission's purchase order and that the Commission had never informed it of its requirement that the floor should be level. The applicant continued to demand payment of the invoice.

Since it failed to obtain payment for the material and services supplied, the applicant brought an action against the Commission on 31 December 1980 before the Tribunal de première instance [Court of First Instance] Antwerp. By a judgment of 19 June 1984 the Fifth Chamber of that court found on the basis of Article 16 of the General Terms and Conditions Governing Supply Contracts that it lacked jurisdiction *ratione materiae.*

II — Written procedure and conclusions of the parties

Fadex NV brought this action by an application registered at the Court on 19 July 1985.

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.

The Commission was requested to reply in writing to certain questions. It complied with that request within the period prescribed.

The *applicant* claims that the Court should:

declare the application admissible;

order the Commission to pay to it primarily BFR 150 480 in respect of the work completed, and BFR 30 096 representing a flat-rate surcharge of 20% pursuant to Article 13 of the applicant's General Conditions of Sale with the interest provided for under Belgian law. That interest should be calculated as from 31 January 1980, the date on which the invoice was dispatched, until settlement; alternatively from 11 June 1980, the date on which a registered letter containing a formal reminder was dispatched, until settlement; alternatively from 31 December 1980, the date of the action brought against the

Commission before the Tribunal de première instance, Antwerp, until settlement; alternatively from the bringing of the present action until settlement;

order the Commission to pay all the costs.

The *Commission* contends that the Court should:

dismiss the application as unfounded;

order the applicant to pay the costs.

III — Submissions and arguments of the parties

A — *The jurisdiction of the Court*

The parties have agreed to recognize the jurisdiction of the Court on the basis of Article 16 of the General Terms and Conditions Applicable to Contracts. The *Commission* stresses in addition that in accordance with Article 17 of those Terms and Conditions, the applicable law is the law 'in force in the country of employment of the authorizing officer', in this instance Belgian law.

B — *Substance*

1. *The invoice of 31 January 1980*

The *applicant* notes in the first place that according to the terms of its tender of 4 December 1979 it had been agreed between the parties that the Commission would remove the existing covering, and therefore prepare the surface on which the new floor-covering was to be laid. The applicant's contribution consisted merely in the supply and laying of a monolithic acrylic resin-based floor-covering. In the applicant's view that is clear from the Commission's purchase order of 14 December 1979 and the applicant's invoice of 31 January 1980. Accordingly, the applicant claims that it complied with the contract which it had entered into. It denies that it was under any obligation other than to supply and to lay the floor-covering.

The applicant adds that if the Commission considers that there are defects, it should establish the extent of such defects and prove that they are the result of the applicant's failure to carry out the work in accordance with the terms of the contract and the rules of the art. The applicant maintains that no faults were committed in the performance of the contract.

The *Commission* considers that it is clear from the facts and the documents before the Court that it was confronted with a specific problem, namely the resurfacing of a floor which, in its existing condition, prevented the normal use of its television studio. That floor needed to be absolutely level. The Commission considers that the applicant was fully aware of that requirement and points out that it was chosen having regard to the technical nature of the work in question and its references.

According to the Commission, the work completed did not meet the requirement that the floor should be level and, moreover, the applicant does not seriously deny that there are defects. It attributes those defects to the base on which it worked. That base, from which the Commission had removed the defective floor-covering, consisted of a concrete coating. In other words, the applicant had laid the two successive layers of covering without verifying the state of the base, which constitutes serious negligence.

For that reason, the Commission requested the applicant to remedy the defects, but the applicant has always refused to carry out the necessary work. It follows that the applicant clearly manifested its intention to break unilaterally the contract binding it to

the Commission. Its claim for the payment of the invoice of 31 January 1980 is therefore, in the Commission's view, unfounded, as is its demand for interest in respect of the non-payment of that invoice.

2. *The penalty clause invoked by the applicant*

The *applicant* claims that Article 13 of its General Conditions of Sale applies to the disputed contract. It concedes that the purchase order stipulates that that contract is to be governed by the Commission's General Terms and Conditions Governing Supply Contracts. That stipulation cannot, however, be interpreted as constituting a waiver on its part of its own General Conditions of Sale. Moreover, those Conditions and Terms do not rule out the possibility that a tenderer may demand the payment of a flat-rate surcharge in the event of failure to pay an invoice in good time.

The *Commission* contends that that argument is unfounded. It notes that pursuant to the purchase order drawn up on 14 December 1979 by the Commission the contract is governed exclusively by the provisions of the abovementioned General Conditions and Terms. Consequently, it argues that the applicant's General Conditions of Sale cannot apply in this case since they were not accepted by the Commission.

IV — Replies to questions put by the Court

The Commission's replies to the two questions put by the Court and the applicant's observations in that connection may be summarized as follows:

A — *Does the Commission consider that the applicant's employees ought to have noticed that the surface was not level when they laid the covering?*

The *Commission* points out that the workmen employed by Fadex, which had been selected because of its specific technical expertise in laying floor-coverings in television studios, and in particular in working with Dex-o-tex, included a foreman who supervised the work. In the Commission's view, the foreman ought to have verified the state of the surface to ensure that it was level both before and during the different stages of the work.

The Commission refers to Belgian academic opinion on that subject [1] and stresses that the contractor is under a duty to perform the work promised under the contract 'properly'. That duty implies a further duty of 'foresight', which 'requires the contractor to take into account the end-result desired and to advise and forewarn the client in particular so as to avoid defective performance . . . '. [2]

The *applicant* points out, in the first place, that although it specializes in laying Dex-o-tex floor-coverings, that does not mean that it is specialized in laying floor-coverings for television studios. It emphasizes in addition that the Commission's purchase order did not contain any specification regarding the need for the surface to be absolutely level; it was, however, clearly stated therein that Dex-o-tex was a floor-covering and not a levelling material and would not therefore remedy defects in the base. Finally, the applicant notes that the Commission relies on the fact that the surface is not sufficiently level but it does not make clear in its submissions the extent of that defect. It appears from an internal memorandum from the relevant Commission department dated 6 March 1980 that on the basis of measurements taken with 'the means at their disposal' the unevenness of the surface amounts to a slope of 2mm per metre in the last third of the studio.

1 — *Inter alia* M. A. Flamme and J. Lepaffe, *'Le contrat d'enterprise'*, Brussels, Bruylant, 1966 and M. A. Flamme and P. Flamme, *'Le contrat d'enterprise', 10 ans de jurisprudence (1966-75), Journal des Tribunaux*, 1976, pp. 337, 357 and 377, especially points 29 and 30, p. 344.

2 — See the first of the abovementioned works, at pp. 80 and 81.

B — *In contracts such as the present, and according to current practice in the place in which it was concluded, is the party who contracts to lay the floor-covering under a duty to inspect the state of the floor?*

The *Commission* considers that the contractor is under a duty to ensure that the specific result which it has agreed to effect is fully achieved. In this instance, the result sought by the laying of the proposed covering was an absolutely level floor for the television studio. The applicant was therefore under an obligation as to the result to be achieved, namely the laying of a floor-covering, without any defects, on which it was possible to move heavy television cameras easily.

The applicant claims that the base on which the different layers constituting the covering were placed was not perfectly level. However, in so far as that situation represented a problem for the undertaking or even prevented it from carrying out perfectly the work entrusted to it, it was under a duty by virtue of its duty to give specialist advice to notify the client of that fact.

The *applicant* claims that, according to Belgian case-law, in most cases the contractor is merely under a general obligation of care and attention so that it is for the client to establish the contractor's fault. In any event, even if the contractor was under an obligation as to the result to be achieved, that obligation cannot make him liable for defects which are attributable not to faults committed in the actual performance of work which was entrusted to it but to defects of planning or performance concerning the structure on which the work was to be carried out, unless there was clear external evidence of those defects. In the applicant's view, it is generally accepted that the contractor is under two obligations: an obligation to inform and an obligation to foresee. However, the question whether the contractor has fulfilled those two obligations must be resolved by reference to the result sought by the client as explained by him to the contractor prior to the conclusion of the contract.

J. C. Moitinho de Almeida
Judge-Rapporteur