OPINION OF MR ADVOCATE GENERAL TESAURO
delivered on 3 october 1990 *

Mr President,
Members of the Court,

1. The present case, which was brought under Article 153 of the Euratom Treaty, concerns a dispute between Mr Grifoni's undertaking and the Commission relating to work carried out by the former for the Joint Research Centre at Ispra (to which I shall hereinafter refer as 'the Centre').

The facts of the case are relatively simple. I shall summarize them briefly and refer to the Report for the Hearing for further details.

From March 1980 onwards Mr Grifoni carried out work at the Centre on a number of occasions as the successful tenderer for sheet-metal and iron work. That work was carried out pursuant to an outline agreement concluded in advance and on the basis of successive specific orders.

2. The following elements of the contractual relationship between the parties are of particular interest in the present case:

(a) the outline agreement of 21 May 1984, like the preceding one, refers (clause 15) to the General Terms and Conditions applicable to contracts concluded by the Joint Research Centre (February 1976, doc. XIX A/50/76-I), which therefore form part of the agreement;

(b) the payments for the work carried out were determined by the price list for construction work published by the Milan Chamber of Commerce, except for items not contained in the list, which were to be agreed upon on a case-by-case basis (clause 3); the payments were to be entered in the accounts on a cost-reimbursement basis (clause 7);

(c) work which was not included in the order and which proved to be necessary when the order was in the process of being fulfilled had to be 'first authorized in writing by the Directorate of Works after submission by the undertaking of a definitive detailed costing. Any work carried out otherwise shall not be acknowledged and consequently not paid for' (clause 6);

(d) Italian law is applicable (clause 15) and, under the arbitration clause in the General Terms and Conditions, it is expressly agreed that the Court of Justice is competent to settle any disputes.

With regard to the General Terms and Conditions, it should be pointed out that clause 3.1 stipulates that 'contracts shall be concluded by the written agreement of the

* Original language: Italian.

parties'; and that oral agreements have no legal effects pursuant to clause 18, which provides that 'changes to the contract (including additions and deletions) must be made by an additional act subject to the same conditions as the contract; oral agreements shall not be binding on the parties'.

3. Relations between Mr Grifoni and the Commission continued on the basis of the abovementioned contractual clauses until May 1987. During that period the Commission entrusted Mr Grifoni with the performance of diverse tasks by placing various orders; each of those orders contained, in addition to the relevant technical specifications, the most important clauses of the outline agreement; in particular it was confirmed that the General Terms and Conditions formed an integral part of the order, and a clause was reproduced which was identical in content to the abovementioned clause 6.

When relations with the Commission came to an end Mr Grifoni considered that he had not been paid as agreed and he sent requests for further payments. The Commission refused those requests and Mr Grifoni brought the present action seeking payment of what he is allegedly still owed, which he claims is LIT 450 597 910.

4. In the application, Mr Grifoni, after referring to the agreements governing his relations with the Commission, in particular the clause according to which any work carried out was to be entered in the accounts on a cost-reimbursement basis (that is to say on the basis of the services actually supplied, even if they are quantitatively different from those specified in the order), merely stated that 'owing also to the particular payment mechanism used by the Centre' (page 2 of the application) he had not been paid by the agreed method. Such a statement would suggest that Mr Grifoni's claims arose because of the incorrect entry in the accounts of the work he had carried out, particularly since the 'balances of account', which are to be found in an annex to the application, specified for each order, broken down by individual item, the amounts which he considered still owing to him.

5. However, in the reply and at the hearing Mr Grifoni changed the presentation of his claims appreciably, alleging that what was agreed in the written orders corresponded only in part to the actual content of the agreements concluded between the parties orally and that therefore the written agreements are in fact fictitious agreements and in any event a partial and expedient formalization of the oral agreements. In brief, the essence of the claim is that the value of the work carried out by Mr Grifoni was much greater than the written orders would suggest and, consequently, much more than the Centre paid.

Moreover, again in the reply the applicant has asked for an amount — LIT 993 494 064 — which is more than that originally sought in the application. According to Mr Grifoni, that increase is justified by the fact that at the time he lodged the application, in the absence of the relevant information from the Milan Chamber of Commerce, it was not possible to quantify the amounts due under some headings. However, the Commission considers that such a change constitutes the introduction of a new plea in law prohibited

by Article 42(2) of the Rules of Procedure and that it must therefore be considered to be inadmissible.

6. At the hearing, in view of Mr Grifoni's submissions regarding the legal basis of his claims as contained in the reply, the question of the competence of the Court arose.

In that regard, the competence of the Court cannot, in my opinion, reasonably be disputed for two reasons, both of which are decisive.

Firstly, it is common ground that, as was expressly stated at the hearing, regardless of whether Mr Grifoni's argument that his services were agreed mainly orally is well-founded or relevant, such services are in any event governed by the general rules of the outline agreement; moreover, the arbitration clause was never annulled by a subsequent contrary wish of the parties. There is therefore no factor which would enable the Court to reach a conclusion which is different from and contrary to the one which emerged from the application and which is not contested by the Commission.

Secondly, it is fundamentally impossible for the Court not to be competent at least for a part of the application, since the applicant himself has confirmed, as will be seen better below, that some of the services which are the subject-matter of the dispute also correspond exactly to what was agreed in the written orders. Consequently, at least with regard to that part of the application, and subject to the observation I shall make later with regard to other aspects, the Court's competence is beyond doubt.

7. That having been said, it appears appropriate to determine first of all whether the Commission's objection based on Article 42(2) of the Rules of Procedure is well founded and, more generally, to define the subject-matter of the application. That determination, it need hardly be said, is to be made on the basis of the provisions governing the procedure before the Court, the applicability of Italian law obviously being limited to substantive law.

In that regard, it should be pointed out that it is clear from Article 19 of the Statute of the Court of Justice and from Article 38(1) of its Rules of Procedure that the application by which a case is brought before the Court must expressly provide certain information, including, in particular, the subject-matter of the proceedings, a summary of the pleas in law on which the application is based and the and the form of order sought by the applicant. In addition Article 42(2) of the abovementioned Rules of Procedure prohibits the introduction of new pleas in law unless they are based on matters of law or of fact which come to light in the course of the procedure.

In the present case those conditions have certainly not been met. Moreover, it is clear from the case-law of the Court of Justice that 'the subject-matter of the claim must be set out in the application, and no new claim may be submitted in the course of the proceedings'.[1] The only exception to that

1 — Judgment in Case 191/84 *Barcella* v *Commission* [1986] ECR 1541. Similarly, see the judgments in Case 232/78 *Commission* v *France* [1979] ECR 2729, Case 152/78 *GEMA* v *Commission* [1979] 3173 and Case 124/81 *Commission* v *United Kingdom* [1983] ECR 203.

rule is to be found in cases relating to non-contractual liability where, although damage is imminent and foreseeable, the amount of the damage cannot be precisely assessed. In such cases the Court has held that changing the amount cannot be regarded as amending the application or introducing new pleas in law.[2]

Accordingly, in my opinion, the abovementioned exception is at best applicable only in so far as, at the time Mr Grifoni lodged his application, it was impossible for him to quantify precisely the amounts which, according to him, he is stilled owed.

Since the amounts in question relate to work which had been completed for some time, it cannot, in principle, be argued that it was impossible to determine precisely what those amounts were at the time of the application. Moreover, Mr Grifoni himself does give any justification for a change in the *amount* sought; he merely states that 'the accounts produced ... show a credit greater than that which appears in the accounts contained in an annex to the application' (p. 20 of the reply). A comparison of the summary statement of account contained in an annex to the application and the one contained in an annex to the reply shows that the only heading for which Mr Grifoni was unable to determine the price (or at least for which he refrained from doing so, subsequently adducing a justification) is the demolition of roofs which was left blank since the relevant price was not on the list and therefore had to be established by an expert. On the other hand, no mention is made of the assistance in laying gutters and flashing, while the assistance in mounting industrial roofs had already been calculated and included in the total amount sought in the application.

Moreover, a comparison of the two statements of account in question shows clearly that it was only at the reply stage that Mr Grifoni took into consideration and therefore calculated the balances owed to him in respect of a number of orders which do not appear in the annexes to the application among the orders in respect of which Mr Grifoni claimed to be entitled to further payments.

It should be added that, with regard to some of the orders which already appeared in the annexes to the application, at the reply stage, Mr Grifoni has increased the size of the sum which he claims is still owed to him.

8. I therefore consider that the change in the *amount* of the claim cannot be permitted. It is clear that the size of the total sum which Mr Grifoni considers that he is still owed could have been determined accurately in the application since it relates to work which had already been completed for some time and which was to be paid for in accordance with a known price list. The item 'Demolition of roofs', for which there was no price fixed in the list of prices, could perhaps be considered to be the only exception. However, in my view, between the time the work was completed and the time the application was lodged, Mr Grifoni had sufficient time and opportunity to

2 — Judgment in Joined Cases 56-60/74 *Kampffmeyer* v *Commission and Council* [1976] ECR 711.

determine the price of the item in question by obtaining an expert opinion or information from the Chamber of Commerce.

Nor could the fundamental objection on the part of the Commission to Mr Grifoni's claims be considered to be an unexpected and unforeseeable procedural position, since Mr Grifoni had repeatedly requested, in vain, payment of the alleged credits out of court.

I therefore propose that the Court should declare the application admissible with regard only to the smaller amount referred to in the application; the remainder constitutes a change in the claim which is unjustified and consequently not permitted.

9. Coming now to consideration of the question whether the claims are well founded, I would point out that three distinct situations can be identified from the comprehensive reconstruction by Mr Grifoni of his relations with the Commission, although based on the general premise that all the work was always agreed orally, and from examination of the various orders in respect of which Mr Grifoni claims that he is entitled to further payment:

(a) work carried out in accordance with a *written* order (even if it is deduced that the written order was subsequent to the oral order), but wrongly entered into the accounts;

(b) work carried out on the basis of oral orders, subsequently regularized but without any correspondence between what was actually agreed and what was carried out (on the basis of the oral agreement) and what is to be found in the written order;

(c) work carried out on the basis of exclusively oral orders but formalized in writing.

Common to all three situations is the fact alleged by Grifoni (in the reply) that the agreements relating to the individual jobs were always agreed orally, something which the Commission disputes, in view of the provisions governing the contractual relationship in question.

10. Even leaving aside the procedural problems which could strictly speaking arise, since at the reply stage not only was there a change in what was claimed but also in the legal basis of the claims, I am of the opinion that there are substantive reasons why the claims corresponding to the last two arguments must be rejected.

The argument in favour of the existence and the relevance of verbal agreements and orders with a content different and wider than that of the written orders is not only unsupported by any evidence, but also conflicts with the specific rules governing the relationship which is the subject-matter of this case and to which the parties make express reference.

It should also be noted that Article 50 of the Financial Regulation[3] provides that contracts concluded by the Community following adjudication must be in writing. As I have already mentioned, there is a similar provision in Article 3.1 of the General Terms and Conditions, which the parties expressly accepted as an integral part of the outline agreement. Article 18 of the General Terms and Conditions provides, in addition, that any changes to the contract must be made in a supplementary document, subject to the same conditions as the contract, and confirms that oral agreements are invalid and may not be relied on.

Article 6 of the outline agreement provides that any changes or additions to the work ordered will not be recognized or paid for unless authorized in writing. A similar provision is to be found in Article 342 of the Law on public works in force in Italy[4] and in Article 1659 of the Civil Code, which is applicable to changes which have been agreed.[5]

The agreement as to form so concluded, relating to future eventualities in an existing contractual relationship, shows that, in the absence of conclusive behaviour which is inconsistent with the desire to retain the obligation as to form agreed previously, the written form is desired *ad substantiam*. In any event, the abovementioned legal rules are applicable.

11. Moreover, under Italian law, whose substantive provisions govern the rules of evidence, there are limited possibilities for proving the existence of oral agreements differing from the content of a document. In particular, with regard to additional or differing agreements made prior to the document, they may not be proved by the testimony of witnesses (Article 2722 of the Civil Code).[6] The Court may allow evidence to support agreements concluded subsequently, on the basis of an assessment of likelihood, having regard to the status of the parties and to the nature of the contract (Article 2723 of the Civil Code).[7] However, when, as in the present case, the parties have agreed on the written form, the evidence of witnesses is accepted only in the event of the loss of the document (Article 2725 of the Civil Code).[8]

12. In the light of the rules set out above, and in particular the exclusions as regards evidence laid down by Italian law, I consider that Mr Grifoni's claims based on the existence of oral agreements and oral orders which are different from the content of the written agreements and orders must be dismissed.

3 — OJ L 356, p. 1.

4 — Law No 2248 of 20 March 1865, Annex F.

5 — Article 1659(1) and (2) provides that 'the successful tenderer may not change the arrangements agreed for the work without authorization from the orderer. Such authorization shall be evidenced in writing'

6 — Article 2722 reads as follows: 'The testimony of witnesses shall not be admitted as evidence if it concerns additional agreements or agreements that conflict with the content of a document, and which are alleged to have been concluded earlier or contemporaneously'.

7 — Under Article 2723, 'When it is alleged that, after the creation of a document, an additional agreement or one that conflicts with the content of the document was concluded, the court may allow evidence to be given by witnesses only if, having regard to the status of the parties, to the nature of the contract and to any other circumstance, it appears likely that oral additions or amendments were made'.

8 — Article 2725 provides that 'When, by law or in accordance with the wishes of the parties, a contract must be evidenced in writing, the evidence of witnesses is accepted only in the case stipulated by paragraph 3 of the preceding article. The same rule applies in cases in which the written form is required on penalty of nullity'.
Under the aforementioned Article 2724(3), 'The evidence of witnesses is accepted in any case: . . . 3) when the contracting party has at no fault of his own lost the document which served him as evidence'

13. However, there remains to be considered the claim corresponding to the case mentioned at (a) above, based on the assumption that the work carried out in accordance with particular written orders was not paid for as agreed.

Not only is that claim not supported by any evidence or by the beginnings of evidence that might reasonably open the way to possible measures of inquiry, it is also contradicted by the documents before the Court.

The documents entitled 'balance of account', annexed by Mr Grifoni to his application, cannot be regarded as evidence. In those documents, drawn up by Mr Grifoni, he merely specifies, by item and by order, the grounds which, taken as a whole, give rise to the claim for payment; thus they merely specify the claim contained in the very concise application.

The Commission, on the other hand has duly produced, in an annex to its defence, the documents which, in relation to each order, evidence the 'final account of the work' carried out by Grifoni, with the relevant amounts specified by Grifoni (on his headed note-paper), the Centre's approval with the words 'the work conforms technically to the order', and the signatures both of Mr Grifoni and of the competent official of the Centre.

The applicant does not dispute that he received the sums mentioned in those documents; he simply denies that they effect a full discharge, claiming that the documents are not regular invoices but provisional documents.

Mr Grifoni's argument cannot be accepted in so far as the documents in question, regardless of whether or not they can be described as invoices, certainly effect full discharge for the Centre, precisely because they evidence payment of the sum asked for, and therefore owed, and hence the extinguishment of the claim against the orderer, in the absence of any evidence to suggest that Mr Grifoni, from whom the documents come, regarded them as only partial or provisional. That is particularly so since in none of those documents is it stated that they relate to a payment on account, or similar, and in most of them it is in fact stated that they constitute payment 'in settlement' (orders 136/85, 695/85, 378/85, 631/85, 709/85, 106/85, 628/85, 637/80).

There is no doubt, therefore, that the documents produced by the Commission show that the amount owed was paid or at least accepted unreservedly by Mr Grifoni. In that regard it should be pointed out, moreover, that the Italian legislation on invitations to tender for public works, which is in principle also applicable to the present case,[9] lays down an obligation to express a reservation at the signing of the various stages of advancement of the work and of the final stage, if it is wished to make claims subsequently.[10] In the absence of such a

9 — In this regard, see the judgment in Case 318/81 *Commission* v *CO.DE.MI.* [1985] ECR 3706, in particular 3713, and the Opinion of Mr Advocate General Slynn, ibid., p. 3693, in particular p. 3698 et seq.

10 — Article 54 of Royal Decree No 350 of 25 May 1895.

reservation, the right to make claims is lost. That rule is designed to meet the need for certainty in the economic relations of a public authority and it does not permit a party to a contractual relationship to vary its claims in the passage of time.

14. On the basis of all the above considerations, I therefore propose that the Court should:

(1) Declare the application inadmissible with regard to the modification of the claim after the application was lodged;

(2) Dismiss the remainder of the application;

(3) Order the applicant to pay the costs.