Case 251/84

Centrale Marketinggesellschaft der deutschen Agrarwirtschaft mbH
v
European Economic Community

(Performance of a research contract entered into with the Commission — Reimbursement of leasing costs)

Summary

Public contracts concluded by the European Communities — Arbitration clause conferring jurisdiction on the Court — Application for reimbursement of certain costs incurred in the performance of a research contract — Interpretation of the contract
(EEC Treaty, Art. 181; Commission Regulation No 2935/79)

OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 28 November 1985 *

Mr President,
Members of the Court,

1. This case, in which the Court of Justice has jurisdiction by virtue of an arbitration clause, is concerned with the interpretation of a scientific research contract concluded under Commission Regulation (EEC) No 2935/79 of 20 December 1979 continuing the measures referred to in Regulation (EEC) No 723/78 on market research measures within the Community in respect of milk and milk products. [1]

* Translated from the French.

1 — Official Journal L 334, 28.12.1979, p. 13.

The contract, signed on 4 August and 2 October 1980 by the Centrale Marketinggesellschaft der deutschen Agrarwirtschaft mbH (hereinafter referred to as 'the applicant') and the Commission respectively, was concerned with research to determine the influence of the composition of fatty substances contained in food on blood composition. Clause 1 (3) of the contract provided that the research project was to be subcontracted to Professor Schwandt of Munich University's Faculty of Medicine.

The dispute arose after the final accounts of the expenditure incurred in the research work had been scrutinized by the Bundesanstalt für landwirtschaftliche Marktordnung [Federal Office for the Organization of Agricultural Markets, hereinafter referred to as 'the Office'], which is the 'intervention agency' designated by the Federal Republic of Germany pursuant to Article 3 (1) of Regulation No 2935/79.

Clause 1 (1) of the research contract ('the contract') provides that the expenditure incurred is to be itemized as follows:

(1) Non-durable equipment	DM 70 000
(2) Staff costs	DM 439 000
(3) Costs of material	DM 160 000
(4) Tests to be carried out	DM 161 000
(5) Biometrics — data processing	DM 50 000

Whilst the contract was being performed and at Professor Schwandt's request, the following changes were made in the apportionment of those sums:

(1) Equipment	DM 79 000
(2) Staff costs	DM 520 000
(3) Costs of material, tests to be carried out, biometrics-data processing	DM 281 000

It was established that the applicant had sought to charge to the contract, under the heading of costs of material, the cost of leasing the following three measuring instruments:

Item	*Description*	*Cost in DM*
207	Behring laser nephelometer	20 340.00
211	Sartorius microbalance	12 126.03
212	Eppendorf 5096 measuring device	30 374.40
	Total	62 840.43

The Office, and subsequently the Commission, refused to allow those costs to be charged to the contract on the ground that 'the proposal on which the contract was based does not provide for the use of instruments which have to be acquired under a leasing contract' (letter of 12 December 1983 from the Office to the applicant). However, in accordance with the Commission's instructions of 8 March 1983, it was agreed that 20% of the costs, calculated on the basis of the acquisition value, could be charged to the contract in the following manner:

Description	*Acquisition value*
nephelometer	DM 24 069.00
microbalance	DM 17 176.00
measuring device	DM 38 639.22
Total	DM 79 884.22

Reckonable costs = 79 884.22 x 20% = 15 976.84

Pursuant to Clause 3 (2) of the contract, 75% of that sum, namely DM 11 982.63, was reimbursed to the applicant.

The Commission's decision was based on the assimilation of leasing costs to the cost of purchasing equipment which was governed by Clause 5 (3) of the contract, which states:

'5. (3) If in order to carry out the research work it is necessary to acquire apparatus, instruments, machines

and so on, only corresponding expenditure up to 20% of the purchase price indicated in the contracting party's proposal may be charged to this contract'.

According to the Commission, the materials in question could not be regarded as minor value items (non-durable equipment) since their average useful life under the Bavarian tax rules and the Community rules was longer than three years.

2. The applicant challenges that decision refusing to allow part of the leasing costs to be charged to the contract primarily on the ground that the parties originally agreed to classify the cost of the instruments in question under the heading of costs of material (Sachkosten), with the result that such costs were subject to the general rule embodied in Clause 1 (1) of the contract in conjunction with Clause 3 (2), which provides for the reimbursement of up to 75% of the stipulated expenditure incurred during the research work. The applicant seeks a declaration that it is entitled to the reimbursement of DM 35 147.69, representing 75% of the total leasing costs less the sum of DM 11 982.63 which it has already accepted.

According to the applicant, the Commission has altered its position with regard to leasing contracts by departing from the general rule and applying the exception in Clause 5 (3). In order to resolve the problem at issue it is necessary to determine the category of apparatus in which the instruments in question are to be classified and consider what is the aim of leasing contracts.

In the first place, operations involving the use of those instruments have taken the place of manual operations carried out in the laboratory; that explains why the corresponding costs were classified as laboratory costs in Professor Schwandt's proposal, which was subsequently incorporated into the contract under the heading of costs of material.

Secondly, the applicant argues that the conclusion of a leasing contract is not sufficient to permit the instruments in question to be classified as durable. It claims that since those instruments have lost their accuracy after being used for two years and can therefore be used only for teaching purposes, they are no longer of any asset value to the research institute which has therefore returned them to the supplier. The applicant therefore maintains that the instruments in question are non-durable equipment falling under the heading of costs of material, and that, under the general rule referred to earlier, up to 75% of the cost of such equipment is refundable.

3. In the Commission's view, under the terms of the contract the only system of defraying expenditure is that provided for by Clause 5 (3). The question of leasing costs arose for the first time in this case; subsequently, it was expressly decided to reimburse 20% of those costs.

There is nothing in Professor Schwandt's proposal to indicate that the choice of a leasing contract was contemplated. Before resorting to a system of procuring equipment which is not provided for by the contract, the applicant or the subcontractor should have consulted the Commission. No proof of any subsequent agreement in that regard has been furnished. The contractual rule governing the purchase of equipment is based on the notion that all the contracting parties must be accorded equal treatment, so as to ensure that a party who purchases equipment is not treated less favourably than a party who leases it. Since the contracting parties are presumed already to possess the apparatus required to carry out the research, the only solution envisaged by the contract should specific materials be needed is to purchase them subject to reim-

bursement on the terms laid down in Clauses 5 (3) and 3 (2) of the contract.

Finally, the Commission maintains that the applicant has failed to establish that the instruments in question were no longer capable of functioning properly on completion of the research.

4. The solution of the dispute before the Court does not in my view depend on the classification of the instruments in question under one or other of the five headings specified in Clause 1 (1) of the contract.

It is necessary in the first place to ascertain whether a specific agreement has been concluded between the parties which provides for the reimbursement of 75% of the leasing costs. Professor Schwandt's initial proposal, as has moreover been confirmed at the hearing, did not contain any indication either of the need for such instruments or of the methods of procuring them.

Professor Schwandt's letter of 25 August 1982 requesting an adjustment in the apportionment of total expenditure between the items initially stipulated (Annex K 13) and the Commission's acceptance of that request dated 18 October 1982 (Annex K 14) are both silent in that respect.

Accordingly, in the absence of a specific agreement reflecting the will of the parties, the only course of action is to refer to the contract itself.

The agreement concluded between the parties seems to be based on the following reasoning: the parties agree that such research contracts must be entrusted to bodies which already possess the necessary basic apparatus and that such contracts cannot have as their purpose to provide those bodies with such apparatus.

Those are the circumstances in which the contract confers on the applicant the possibility of acquiring additional specific materials which are essential in order to bring the research to a successful conclusion.

Those materials are of two kinds:

Non-durable materials which are incapable of being used for any other purpose on completion of the research: the Commission contributes up to 75% of the cost of such materials, not exceeding the sum stipulated in the contract (Clause 1 (1), points 1 and 3 of the contract and Annex I, Financial provisions, V, Guidelines, point 3);

Durable materials which, on completion of the research project, retain their value as assets for the party contracting with the Commission: the Commission's contribution is limited to 20%, not exceeding the aforesaid maximum contribution towards the cost of such apparatus (Clause 5 (3) of the contract and Annex I, IV).

The contract provides that additional apparatus of that kind may be obtained only by purchase. Consequently, even though its choice may have been determined by a technical requirement, the applicant cannot, in the absence of an express agreement in that regard, rely on the aforesaid provisions in order to obtain a contribution higher than that which the Commission is prepared to make.

Any other solution would enable the contracting party concerned to escape the application of the rule embodied in Clause 5 (3). The materials acquired under a leasing contract are presumed to have a useful life which is longer than the period for which they are leased. Moreover, leasing costs are higher than ordinary rental costs and may, as in this case, be only slightly less than the

purchase price. Accordingly, to order the Commission, as a result of the applicant's unilateral choice of a leasing contract, to reimburse 75% of the expenditure involved, towards which the Commission would have made a much smaller contribution in the event of purchase, would be tantamount to constraining the Commission to give its agreement. The parties are and must continue to be governed by the contract.

5. Accordingly, I suggest that the Court should:

(i) dismiss the application submitted by the applicant;

(ii) order the applicant to bear the costs.