

Case T-303/04 R

European Dynamics SA

v

Commission of the European Communities

(Public service contracts – Community tender procedure – Interim measures –
Application for suspension of operation – Urgency – None)

Order of the President of the Court of First Instance, 10
November 2004

Summary of the Order

1. *Applications for interim measures – Suspension of operation of a measure – Conditions for granting – Serious and irreparable damage – Burden of proof – Causal link between the alleged damage and the contested act*

(Art. 242 EC)

2. *Applications for interim measures – Suspension of operation of a measure – Conditions for granting – Serious and irreparable damage – Financial loss*

(Art. 242 EC; Rules of Procedure of the Court of First Instance, Art. 104(2))

3. *Applications for interim measures – Suspension of operation of a measure – Conditions for granting – Serious and irreparable damage – Non-financial loss*

(Art. 242 EC; Rules of Procedure of the Court of First Instance, Art. 104(2))

1. The urgency of an application for interim measures must be assessed in relation to the need for an interim order in order to avoid serious and irreparable damage being caused to the party seeking the interim measure. It is for that party to adduce proof that it cannot await the outcome of the main action without suffering such damage. Therefore, if the applicant does not show a link between the alleged damage and the acts suspension of whose operation is sought, the interim measures cannot be regarded as relevant and necessary for avoiding the occurrence of the alleged damage.

(see paras 65-66, 70)

2. Pecuniary damage cannot in principle be regarded as irreparable, or even reparable only with difficulty, if it may be the subject of subsequent compensation by means, for example, of an action for compensation under Article 288 EC.

(see para. 72)

3. The decision not to award a public contract does not necessarily have the consequence of causing irreparable harm to the reputation and credibility of the tenderers which are not successful. Taking part in a public tender procedure, by nature highly competitive, necessarily involves risks for all the participants and the elimination of a tenderer under the tender rules is not in itself in any way prejudicial.

ORDER OF THE PRESIDENT OF THE COURT OF FIRST INSTANCE
10 November 2004⁽¹⁾

(Public service contracts – Community tender procedure – Interim measures –
Application for suspension of operation – Urgency – None)

In Case T-303/04 R,
European Dynamics SA, established in Athens (Greece), represented by
S. Pappas, lawyer,

applicant,

v

Commission of the European Communities, represented by L. Parpala and
E. Manhaeve, acting as Agents, and J. Stuyck, lawyer, with an address for
service in Luxembourg,

defendant,

APPLICATION for suspension of operation of, first, the Commission's decision
of 4 June 2004 (DIGIT/R2/CTR/mas D(2004) 324) to rank only in second place
the offer submitted by the consortium of which the applicant is a member
following a call for tenders for the provision of informatics services and,
second, the Commission's decision of 14 July 2004 (DG DIGIT/R2/CTR/mas
D(2004) 811) rejecting the applicant's complaints of 21 June, 1, 5 and 8 July
2004 against the award of the contract to another consortium,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES

makes the following

Order

Facts of the dispute

European Dynamics SA is active in the field of information and communications technology, inter alia for the European institutions.

2

Following call for tenders ADMIN/DI/0005 ESP ('External Service Providers') of 16 March 2001, the Commission concluded a number of framework contracts, applying the award system laid down for awards of multiple contracts in Article 1.4 of the *General Terms and Conditions for Informatics Contracts* published by the Commission on 11 June 1998 (the 'cascade' system), for the provision of external services relating to information systems. The overall contract was divided into nine lots, among which were Lot 4, for the provision of external services relating to data management applications and information systems ('Lot ESP 4'), and Lot 5, for the provision of external services relating to internet and intranet applications ('Lot ESP 5').

3

On 16 October 2001 a framework contract under reference DI-02432-00 was concluded with the contractor selected as first in the cascade for Lot ESP 4, a consortium consisting of Trasys SA and Cronos Luxembourg SA, which later became Sword Technologies SA ('the ESP 4 consortium').

4

On 5 November 2001 framework contract DI-02432-00 was concluded with the contractor selected as first in the cascade for Lot ESP 5, a consortium consisting of European Dynamics, IRIS SA, Datacep SA, Primesphere SA and Reggiani SpA ('the ESP 5 consortium').

5

On 23 November 2001 the Commission published the budgetary ceilings based on the volume estimates announced for Lots ESP 4 and ESP 5, fixed at totals of EUR 42 885 318 and EUR 34 656 804 respectively, for the duration of the contracts, namely until October 2006.

6

Since the actual use of the contracts covered by Lot 4 had proved substantially greater than expected – according to the case-file, by the end of March 2003, which was after less than one third of the maximum total duration of the contract covered by Lot ESP 4, more than three quarters of the credits provided for had already been spent – the Commission decided to raise the budgetary ceiling of Lot ESP 4 and to prepare a fresh call for tenders for services of the same kind as those under Lot ESP 4 for the period ending in October 2006.

7

By decision of 28 April 2003, the Commission raised the budgetary ceiling of Lot ESP 4 by EUR 20 million, and on 10 May 2003 an award notice was published in the *Official Journal of the European Union* under reference ADMIN/PN/2003/105.

8

On 23 May 2003 the ESP 5 consortium wrote to the director of the Informatics Directorate (now Directorate-General (DG) Informatics) to inform him of its concerns about the increase in the budgetary ceiling for Lot ESP 4, claiming that the Commission should have made more intensive use of Lot ESP 5, use of which was said to have been lower than the initial forecasts.

9

It is apparent from the case-file that the letter of 23 May 2003 was followed by correspondence between the Commission and the ESP 5 consortium, in particular a letter from the Commission of 4 July 2003 explaining the implementation of Lots ESP 4 and ESP 5, meetings between the parties, and a workshop arranged by the Commission on 6 November 2003, at which the ESP 5 consortium was able to explain the potential of the services covered by Lot ESP 5 to the Commission's Directorates-General.

10

On 27 December 2003 the Commission launched a call for tenders under reference ADMIN/DI2/PO/2003/192 ESP-DIMA for the 'provision of on- and off-site IT services for data/information management systems at the European Commission including development, maintenance and other related activities' ('the ESP-DIMA call for tenders').

11

By letter of 19 January 2004, the legal adviser of the ESP 5 consortium called on the Commission to cancel the ESP-DIMA call for tenders, claiming that instead of awarding a new service contract to replace Lot ESP 4 the Commission should use Lot ESP 5.

12

That request was rejected by letter of 30 January 2004, in which DG Informatics stated that the use of Lot ESP 5 instead of Lot ESP 4 or the ESP-DIMA contract was not possible, as Lot ESP 5 on the one hand and Lot ESP 4 and the ESP-DIMA contract on the other had different objects, the former concerning internet and intranet applications and the latter data management applications and information systems.

13

On 20 February 2004 European Dynamics, IRIS, Datacep and Reggiani (in other words the companies forming the ESP 5 consortium minus Primesphere, 'the ED consortium') submitted a joint tender in response to the ESP-DIMA call for tenders.

14

On 2 June 2004 the Commission awarded the ESP-DIMA contract. The tenderer selected to be first in the cascade was a consortium of Trasys and Sword Technologies with Intrasoft International SA and TXT SpA (in other words the ESP 4 consortium plus two additional partners, 'the ESP-DIMA consortium'). The ED consortium was selected as second contractor in the cascade, followed by other tenderers in third and fourth places in the cascade.

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Those results were notified to all the tenderers, including the ED consortium, by letter of 4 June 2004 ('the award decision').

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By fax of 8 June 2004, European Dynamics requested further details of the award decision. The Commission replied by letter of 9 June 2004, giving fuller information on the results of the technical evaluation in respect of each of the relevant criteria.

17

By letter of 21 June 2004, European Dynamics asked DG Informatics to provide a copy of the evaluation report for all the tenders submitted following the ESP-DIMA call for tenders, in particular the sections relating to its

consortium and to that of the successful tenderer, and the names of the persons responsible for the evaluation.

18

On 29 June 2004 a meeting took place between European Dynamics and DG Informatics, at which the parties discussed the evaluation of the tenders and the concerns of European Dynamics as to the comparative implementation of Lots ESP 4 and ESP 5. A minute of the meeting was sent to European Dynamics by the Commission on 6 July 2004. Also on that date, the Commission confirmed that no contract had yet been concluded following the award in respect of the ESP-DIMA market.

19

Following that meeting, European Dynamics sent several letters to the Commission, inter alia on 1, 5 and 8 July 2004, in which it contested the lawfulness of the ESP-DIMA call for tenders and the award decision. European Dynamics argued in particular that the ESP-DIMA tender procedure had no *raison d'être*, since Lot ESP 5 should have been used instead of Lot ESP 4. It said that there was a conflict of interests in the case of one member of the evaluation committee, the marking scale used for the technical evaluation was inadequate, and the successful tender was of lower quality and offered a very limited informatics system. In those letters European Dynamics asked for a copy of the evaluation report and to be told the names of the members of the evaluation committee. It also requested that signature of the contracts be postponed until all the points raised had been satisfactorily resolved.

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By letter of 14 July 2004 ('the letter giving reasons'), the Commission replied to the points raised by European Dynamics in the above letters and refused to send it a copy of the evaluation report, stating that that would involve communicating confidential commercial information on other tenderers. As regards the doubts raised concerning the need to launch the ESP-DIMA call for tenders and the suggestion that Lot ESP 5 should be used for the provision of services covered by Lot ESP 4, the Commission said that DG Informatics had stated in its letter of 30 January 2004, cited above, that as the two lots represented separate and distinctly different markets it was not possible to switch from one to the other simply because one lot had not yet reached its budgetary ceiling. Launching a call for tenders for the lot whose budgetary ceiling could no longer be increased was therefore the only appropriate means, and was in line with 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, 'the Financial Regulation').

21

On 15 July 2004 the Commission sent the contracts resulting from the award decision to the four selected consortia at the same time, including the ED consortium as second contractor (framework contract DIGIT-04551-00), stating that the contracts were to be returned signed by 30 July 2004.

22

On 27 July 2004 a meeting took place between the representatives of the ED consortium and those of DG Informatics, at which the latter restated the Commission's position that it would not agree to the suggestion of European

Dynamics that it should be allowed to play an active role in monitoring the distribution of projects between Lot ESP 4 and Lot ESP 5.

23

On 28 July 2004 the ED consortium requested the Commission to defer for one month conclusion of the contracts resulting from the ESP-DIMA call for tenders, on the ground that the members of the consortium needed more time to take various administrative steps. The Commission immediately replied that those administrative steps could be taken after signature of the contract and that no postponement was necessary. The ED consortium's contract was returned signed on 30 July 2004. Some missing powers of attorney were sent to the Commission on 4 August 2004.

24

On 4 August 2004 the Commission was therefore in possession of all the originals of the contracts relating to ESP-DIMA signed by all the contractors.

Procedure and forms of order sought by the parties

25

By application registered at the Registry of the Court of First Instance on 29 July 2004, the applicant brought an action under the fourth paragraph of Article 230 EC seeking, first, annulment of the ESP-DIMA tender procedure, that is, contract notice 2003/S249-221337 ESP-DIMA and the ESP-DIMA call for tenders, and, second, annulment of the Commission's decisions relating to the order in which the tenders were ranked, that is, the award decision and the letter stating reasons.

26

By separate document registered at the Registry of the Court on the same date, the applicant made an application under Article 76a of the Rules of Procedure of the Court of First Instance for the Court to adjudicate under an expedited procedure.

27

By separate document registered at the Registry of the Court on the same date, the applicant made the present application for interim measures, seeking suspension of operation of the award decision and the letter giving reasons, so as to prevent the contract being concluded by the ESP-DIMA consortium, until the Court's decision in the main proceedings. The applicant also asks for the Commission to be ordered to pay the costs.

28

On 4 August 2004 a copy of the application for interim measures was served on the Commission in accordance with Article 105(1) of the Rules of Procedure, and the Commission was given until 19 August 2004 to submit its observations.

29

Since the applicant had made an application for interim measures seeking suspension of operation of the award decision, the contracting authority decided on 4 August 2004 to postpone the signature of the four contracts relating to the ESP-DIMA market.

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On 12 August 2004 the Commission requested an extension of the period for submitting observations until 26 August 2004. That request was granted by decision of 16 August 2004.

31

On 26 August 2004 the Commission submitted observations on the application for interim measures, in which it contended that the application should be dismissed as inadmissible and, in the alternative, as unfounded.

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On 31 August 2004 the Registry of the Court transmitted the Commission's observations to the applicant.

33

On 8 September 2004 the applicant requested leave to submit observations on the Commission's observations.

34

By decision of 14 September 2004, the President of the Court granted that request and set a deadline of 24 September 2004 for the submission of the applicant's observations on the Commission's observations.

35

On 23 September 2004 the applicant submitted its observations on the Commission's observations, with a large number of additional documents annexed. In its observations the applicant also asked for the Commission to be ordered to produce a number of documents, namely the requests for quotations and the statistics relating to the implementation of Lot ESP 4 ('the documents at issue').

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On 29 September 2004 the President of the Court set a deadline of 8 October 2004 for the submission by the Commission of observations on the applicant's observations.

37

On 6 October 2004 the Commission requested an extension of the period for submitting observations until 15 October 2004, and that request was granted by decision of the President of the Court of the same date.

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On 15 October 2004 the Commission submitted observations in reply to the applicant's observations.

39

On 2 November 2004 the applicant sent a letter to the Registry of the Court in which it made a number of additional observations on the Commission's observations of 15 October 2004 and requested the President of the Court to take them into account in his assessment. That letter was notified to the Commission in accordance with Article 105(1) of the Rules of Procedure.

Law

The application for interim measures

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Pursuant to Articles 242 EC and 243 EC in conjunction with Article 225(1) EC, the Court of First Instance may, if it considers that circumstances so require, order that application of the contested act be suspended or prescribe any necessary interim measures.

41

Article 104(2) of the Rules of Procedure prescribes that applications for interim measures must state the subject-matter of the proceedings, the circumstances giving rise to urgency and the pleas of fact and law establishing a prima facie

case for the interim measures applied for. Those conditions are cumulative, so that an application for interim measures must be dismissed if any one of them is absent (order of the President of the Court of Justice in Case C-268/96 P(R) *SCK and FNK v Commission* [1996] ECR I-4971, paragraph 30). The judge hearing an application for interim measures must also, where appropriate, balance the interests concerned (order of the President of the Court of Justice in Case C-107/99 R *Italy v Commission* [1999] ECR I-4011, paragraph 59).

42

The measures sought must also be provisional, in that they must not prejudice the points of law or fact at issue or neutralise in advance the effects of the decision subsequently to be given in the main action (order of the President of the Court of Justice in Case C-149/95 P(R) *Commission v Atlantic Container Line and Others* [1995] ECR I-2165, paragraph 22).

43

Moreover, in the context of that overall examination, the judge hearing the application enjoys a broad discretion and is free to determine, having regard to the specific circumstances of the case, the manner and order in which those various conditions are to be examined, there being no rule of Community law imposing a pre-established scheme of analysis within which the need to order interim measures must be assessed (order in *Atlantic Container Line*, paragraph 23).

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Having regard to the documents in the case-file, the President considers that he has all the material needed to decide the present application for interim measures, without there being any need first to hear oral argument from the parties.

Arguments of the parties

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Admissibility

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The applicant submits that it has an interest in bringing proceedings against the acts it seeks to have suspended, and that it made the application in due time, so that its application is admissible.

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The Commission submits that the application serves no purpose, as the applicant has not sought suspension of the decision to launch the ESP-DIMA tender procedure but suspension of decisions awarding the contract. The interim measures sought cannot therefore have the effect of suspending the ESP-DIMA tender procedure, contrary to what the applicant really seeks to obtain. The Commission adds that the application is inadmissible because the main application is also inadmissible. In its view, the applicant has not shown that it is directly concerned by the contested acts, and in any event it has not demonstrated the existence of a personal interest in bringing proceedings, since the acts concern the ED consortium and not the applicant individually.

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Prima facie case

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The applicant, referring to its main application, submits that the ESP-DIMA contract should be annulled, on the grounds of erroneous assessment of the facts, breach of essential procedural requirements and an insufficient

statement of reasons. It is apparent from the account of the facts in the application that the applicant considers that the launching of the ESP-DIMA call for tenders was unnecessary, since the Commission could have recourse to Lot ESP 5 instead of replacing Lot ESP 4 by the ESP-DIMA contract. The applicant further considers that the award of the ESP-DIMA contract is unlawful because at least one member of the evaluation committee was in a situation of serious conflict of interests, the Commission did not use the same scale for assessing the various tenderers, the successful tender offered only an informatics system of very limited value and restricted scope, and, finally, the Commission did not provide it with a copy of the evaluation report, contrary to the requirements of the Financial Regulation.

48

The Commission considers that the applicant has not put forward pleas of fact and law making a prima facie case for granting the interim measures, and that it is only incidentally that it mentions the grounds on which the main application is based. It asserts that the allegations are unfounded, as may clearly be seen from the letter giving reasons of 14 July 2004, that they are not substantiated, and that they should not even be examined in the context of the present application for interim measures.

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Urgency

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The applicant submits that the condition of urgency is satisfied. It states that it cannot wait for the outcome of the procedure in the main action without suffering serious and irreparable harm, consisting in extremely heavy pecuniary damage such that the applicant will no longer be able to survive in the market, the loss of a substantial part of its business leading to the dismissal of half of its staff, and particularly serious damage to its reputation.

50

As regards pecuniary damage, the applicant alleges that the harm would flow from the distorted implementation of Lot ESP 4 instead of Lot ESP 5 and from the continuation of Lot ESP 4 by the ESP-DIMA contract, which has been awarded to another tenderer. The applicant considers that that situation will put an end to implementation of Lot ESP 5, since Lot ESP 4 will be extended by the ESP-DIMA contract and it is to be expected that a large number of existing contracts will be extended immediately after signature of contracts relating to the ESP-DIMA market, for several years. Consequently, the decision to award the ESP-DIMA contract to another tenderer and the continuation of the incorrect implementation of that contract in place of Lot ESP 5 will deprive the applicant of the income normally linked to implementation of Lot ESP 5, which constitutes the largest part of its activity.

51

In this respect, the applicant states that it is a company of medium size employing about 200 workers, that it is developing a number of projects, among which those falling within Lot ESP 5 are by far the most substantial, and that Lot ESP 5 covers the major part of its budget and occupies about half of its employees, who were recruited precisely for the requirements of Lot ESP 5. The accompanying infrastructure has also grown, thus constituting a system which altogether owes its existence and its survival to Lot ESP 5 and is designed and put into practice to ensure implementation of a contract in the

amount of EUR 35 million. The award of Lot ESP 5 obliges the applicant to maintain expensive infrastructure, assign employees to that project and set up for those employees a continuous training structure necessitated by the technological changes adopted by the Commission at intervals of a few months. The applicant's activities connected with Lot ESP 5 represent the sum of approximately EUR 4 million a year and constitute a substantial part of its entire activities in the field of informatics services. The applicant's income fell from EUR 16 million in 2001 to EUR 14 million in 2002 and EUR 10 million in 2003, and is likely to continue falling during 2004 and 2005 to EUR 5 million, precisely because of the inadequacy of the orders placed within the framework of Lot ESP 5. Many of its employees have already left the company for that reason. With such a loss of employees, the applicant asserts that it will not be possible to regain the lost share of the market.

52

The applicant alleges that the possible non-implementation or reduction of orders of Lot ESP 5 would thus be fatal for it. It says that an entire infrastructure provided specially for implementation of Lot ESP 5 will disappear, with irreparable consequences for the applicant, which will no longer be in a position to survive in the highly competitive market in which it operates.

53

As regards the harm to its reputation, the applicant states that this situation will be liable to damage its relations with other operators in the market and other customers who will interpret the situation as demonstrating its inability to meet the Commission's expectations.

54

Finally, the applicant considers that the interim measures sought are necessary since, if the acts against which it has brought the present application for interim measures are implemented before being annulled, the Commission will sign the corresponding contracts and thus clear the way for the absorption by the ESP-DIMA contract of a large proportion of the remaining credits. According to the applicant, EUR 120 million will be allocated to the ESP-DIMA contract, which would make it the Commission's largest investment in this field and definitively tie the Commission to the ESP-DIMA consortium.

55

The Commission contends that the damage alleged by the applicant is neither serious nor irreparable within the meaning of the case-law of the Court of First Instance.

56

As regards the alleged pecuniary damage, the Commission begins by stating that the applicant's arguments show that there is no causal link between, on the one hand, the act suspension of whose operation is sought (the award of the ESP-DIMA contract to another tenderer) and, on the other, the loss the applicant is allegedly liable to suffer, namely a reduction in its turnover from the contract relating to Lot ESP 5.

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In this respect, the Commission submits that the damage allegedly liable to be caused proceeds from the applicant's argument that the Commission should have had recourse more intensively to Lot ESP 5 instead of following the

tender procedure for replacing the former Lot ESP 4 contracts by the ESP-DIMA contract. The Commission states that the applicant's approach is in fact based on the – completely incorrect – hypothesis that, if the Commission is unable to sign the contracts resulting from the ESP-DIMA call for tenders, it will have to have recourse to Lot ESP 5 to provide the kind of services previously covered by Lot ESP 4, which will increase the applicant's turnover. According to the Commission, that argument is simply wrong, since the contracting authority will continue in any event to apply the distinction between Lots ESP 4 and ESP 5 which it has applied since the conclusion of those contracts and which derives from the definitions of those contracts in the relevant contract notices.

58

In any event, the Commission also submits that the damage allegedly incurred if the interim measures were not granted would be neither serious nor irreparable. The financial damage is clearly reparable, according to settled case-law, since it could be the subject of subsequent financial compensation. The applicant has not shown that there are exceptional circumstances which would allow that damage to be classified as serious and irreparable. The Commission emphasises in that regard that the applicant confines itself to making general assertions and has not demonstrated either that the market loss in question would endanger its existence or that its position in the market would be irretrievably changed.

59

On the contrary, according to the Commission, it is clear that the applicant can continue to exist until the Court's decision in the main action. The Commission refers in this respect inter alia to two reports, one from EuroDB dated 22 March 2004 and one from Dun & Bradstreet dated 26 July 2004, annexed to the Commission's observations of 15 October 2004, which indicate that the applicant's financial situation is good. In its letter of 2 November 2004, the applicant asserts that those reports are out of date and incorrect.

60

As regards the non-pecuniary damage alleged by the applicant, namely an especially serious impairment of its reputation as a result of the market loss in question, the Commission observes that taking part in a call for tenders obviously carries a risk for tenderers that the contract may not be awarded to them. That situation does not therefore involve any damage to reputation, as the Court has already found in its case-law.

61

Finally, the Commission considers that the fact that the contract may be concluded with the successful tenderer and a large part of the budget allocated to it before the Court gives judgment in the main action is not a factor which shows that the condition of urgency is satisfied, in accordance with settled case-law. In the event of annulment the Commission would be able to restore the applicant's rights.

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Balance of interests

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Although the applicant has not expressly addressed the balance of interests in its application, the Commission states that the balance tilts in its favour, given that the damage the applicant is liable to suffer if interim measures are not

granted does not exceed the damage the Commission and the other tenderers concerned could suffer if they are granted. The other tenderers have a legitimate expectation that the Commission will continue with the awarding of the contracts. The interim measures would prevent those contracts from being concluded, so that the informatics activities of the Commission would be impeded. Moreover, the Commission considers that, since the validity of the tenders expires on 19 November 2004, suspension would put an end to those tenders, so that the measures could not be regarded as provisional. The applicant rejects those last two assertions on the ground that the Commission has other ways of replacing the contracts at issue, in particular by seeking an extension to the validity of the tenders or by using other contracts. In this respect, the Commission considers that such an extension, while possible, is uncertain, and that the other means of obtaining the services in question would be less satisfactory than conclusion of the ESP-DIMA contract.

Findings of the President

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Preliminary remarks

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It is settled case-law that the conditions laid down in Article 104(2) of the Rules of Procedure require that the essential elements of fact and law on which an application is founded are set out in a coherent and comprehensible fashion in the application for interim measures itself (orders of the President of the Court in Case T-175/03 R *Schmitt v EAR* [2003] ECR-SC I-A-175 and II-883, paragraph 18; Case T-236/00 R *Stauner and Others v Parliament and Commission* [2001] ECR II-15, paragraph 34; and Case T-306/01 R *Aden and Others v Council and Commission* [2002] ECR II-2387, paragraph 52).

64

Even though, as the Commission rightly points out, the application contains few elements to enable the judge hearing the application to examine whether there is a *prima facie* case for granting the measures sought, the Commission's observations and the second round of observations of the parties have shed light on the subject-matter of the application in such a way as to allow the judge to examine it. The condition relating to urgency should be examined first.

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The condition of urgency

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It is settled case-law that the urgency of an application for interim measures must be assessed in relation to the need for an interim order in order to avoid serious and irreparable damage being caused to the party seeking the interim measure. It is for that party to adduce proof that it cannot await the outcome of the main action without suffering such damage (see orders of the President of the Court in Case T-169/00 R *Esedra v Commission* [2000] ECR II-2951, paragraph 43, and Case T-148/04 R *TQ3 Travel Solutions Belgium v Commission* [2004] ECR II-0000, paragraph 41 and the case-law cited).

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It must be stated at once that, as the Commission rightly points out, the applicant has not shown a link between the alleged damage and the acts suspension of whose operation is sought.

67

The applicant essentially complains of the way in which the contract relating to Lot ESP 5 was implemented, a lot which in its view was underused in comparison with Lot ESP 4. The applicant contests that allegedly improper implementation and the Commission's decision to start the tender procedure for the ESP-DIMA market for the purpose of renewing Lot ESP 4. However, the applicant has not challenged the Commission for improper implementation of its contract relating to Lot ESP 5, and has not sought suspension of operation of the tender procedure for the ESP-DIMA market. It should be recalled here that the ESP-DIMA call for tenders was published on 27 December 2003 and that the applicant's complaints against the very principle of that call for tenders were rejected by the Commission's letter of 30 January 2004.

68

This approach of the applicant has a direct effect on the value of its arguments relating to the condition of urgency. The applicant alleges only indirectly that serious and irreparable harm would flow from the award of the ESP-DIMA contract to another tenderer or from the very existence of that contract. On the contrary, it clearly states that it considers that the damage would flow from the 'possible non-execution or decrease of [Lot] ESP 5', which would be 'fatal' for it. The applicant attempts to show the existence of a causal link between the incorrect implementation of Lot ESP 5 and the award of the ESP-DIMA contract by saying, in its application, that 'it is more than obvious that the distorted implementation of [Lot] ESP 4 if it is prolonged by ESP-DIMA will mean the end of [Lot] ESP 5', that if the suspension sought is not granted 'the Commission will sign the relevant contracts opening thus the way for ESP-DIMA', and that 'as from this moment [Lot] ESP 5 will have no more room for services'.

69

The applicant has not, however, challenged either the defective implementation of Lots ESP 4 and ESP 5 which is essentially the source of its concerns or the foreseeable conditions of implementation of the ESP-DIMA contract. It is therefore clear that the applicant cannot show that the grant of the interim measures would bring about increased recourse to the Lot ESP 5 contracts, given that the Commission has clearly stated that in no circumstance would it use the Lot ESP 5 contracts to obtain services falling within the original Lot ESP 4 field or the ESP-DIMA contract. The applicant has not therefore shown that there is a causal link between, on the one hand, the acts suspension of whose operation is sought (the decision to award the ESP-DIMA contract to another tenderer and the letter giving reasons) and, on the other, the damage it is allegedly liable to suffer, namely a reduction in its turnover from Lot ESP 5. It thus appears that the interim measures sought will have no effect on the implementation of Lot ESP 5.

70

It follows that the interim measures sought are neither relevant nor necessary for avoiding the occurrence of the alleged damage.

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In any event, even supposing that the alleged damage would flow from the contested acts, it is clear that that damage cannot be regarded as serious and irreparable as defined in the Court's case-law.

72

As regards the pecuniary damage alleged by the applicant, it must be observed that, as the Commission has submitted, it is settled case-law that such damage cannot in principle be regarded as irreparable, or even reparable only with difficulty, if it may be the subject of subsequent compensation (see the order in *Esedra*, paragraph 44 and the case-law cited). The applicant has not shown or even alleged that it would be unable to obtain such compensation by means of an action for compensation under Article 288 EC (see, to that effect, the order in *Esedra*, paragraph 47, and the order of the President of the Court in Case T-230/97 R *Comafrika and Dole Fresh Fruit Europe v Commission* [1997] ECR II-1589, paragraph 38).

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In the light of the foregoing, the interim measures sought could be justified in the circumstances of the present case only if it were apparent that in the absence of such measures the applicant would be in a situation which could endanger its very existence or irretrievably alter its position in the market (see, to that effect, the order in *Esedra*, paragraph 45).

74

The applicant has not, however, adduced proof that in the absence of the interim measures sought it is liable to be placed in such a situation.

75

It is clear in this respect that the applicant has not produced evidence concerning its financial situation from which the President could conclude that its existence would be endangered pending the Court's judgment in the main action.

76

In particular, it must be observed that the applicant's arguments concerning falling income are not supported by evidence and, in any event, that the applicant has not shown that such a fall in income will be such as to endanger its existence before the Court's decision in the main action.

77

It must be considered, on the contrary, that the elements in the case-file indicate that the applicant will continue to pursue sufficient activity to exist until the Court gives judgment in the main action.

78

As the applicant itself emphasises in its application, it regularly takes part successfully in calls for tenders by the Commission, and has developed a number of projects for the European institutions, not only the Commission.

79

That is also confirmed by the reports by EuroDB of 22 March 2004 and Dun & Bradstreet of 26 July 2004, annexed to the Commission's observations of 15 October 2004, which indicate that the applicant has a large number of clients, including European institutions, national public bodies and international companies. Moreover, those reports show that the applicant's financial situation is classified as 'good', with positive marks for sales, profitability and total assets. With respect to those reports, it must be stated that the applicant's assertion in its letter of 2 November 2004 that those reports are out of date and incorrect is in very general terms, and the applicant has not produced the slightest evidence to demonstrate the truth of that assertion.

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It should be observed, finally, that the applicant will continue to take part in the ESP 5 consortium, as first contractor for Lot ESP 5, and will also take part in the ED consortium, as second contractor for the ESP-DIMA contract, precisely because it demonstrated to the Commission, in the context of taking part in the ESP-DIMA call for tenders, that it had the financial and technical capacity required for such a project.

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As to the possibility that in the absence of the interim measures sought the applicant's position in the market would be irretrievably altered, while the applicant alleges in this respect that it will be forced to terminate half its activity and dismiss half its staff and that all the infrastructure intended for the implementation of Lot ESP 5 will have to disappear with 'fatal' consequences, the applicant has not supported those arguments and, moreover, has not shown or even attempted to show that structural or legal obstacles would prevent it from regaining a substantial proportion of the lost market (see, to that effect, the order of the President of the Court in Case T-369/03 R *Arizona Chemical and Others v Commission* [2004] ECR II-0000, paragraph 84). In particular, the applicant has not shown that it would be prevented from winning other contracts, including the contract at issue following a fresh call for tenders, or from taking on employees or recreating a technical infrastructure capable of supporting large projects such as those implemented in the framework of Lot ESP 5, if that proved to be necessary for regaining the lost market shares. In this respect, it should be noted that Lot ESP 5 will continue to exist, and also that the fact that the applicant takes part, and will be able to continue taking part, in other projects for European institutions and other clients ensures that its technical capacity will not disappear.

82

As to the non-pecuniary damage alleged by the applicant, with respect to its argument that the interim measures are urgent because of the irreparable harm which would be caused to its reputation and credibility, it must be observed that the award decision does not have the consequence of causing such damage. According to settled case-law, taking part in a public tender procedure, by nature highly competitive, necessarily involves risks for all the participants and the elimination of a tenderer under the tender rules is not in itself in any way prejudicial (order of the President of the Court of Justice in Case 118/83 R *CMC v Commission* [1983] ECR 2583, paragraph 51, and order in *Esedra*, paragraph 48).

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Similarly, the applicant's arguments intended to show that urgency derives from the fact that the contract with the ESP-DIMA consortium will be concluded and the budget corresponding to the ESP-DIMA contract fixed, before delivery of the decision putting an end to the main action, at an amount liable to tie the Commission permanently to that consortium cannot be accepted. Such a situation does not constitute a circumstance establishing urgency, since if the Court were to consider the main action well founded, the Commission would have to take the measures necessary to ensure appropriate protection of the applicant's interests. In that event, the institution would be able, without encountering great difficulties, to organise a new call for tenders in which the applicant could take part. Such a measure might be combined with the payment of compensation. The applicant has not referred to

any circumstance which could prevent its interests from being safeguarded in such a way (see, to that effect, the order in *Esedra*, paragraph 51, and the order of the President of the Court in Case T-108/94 R *Candiotte v Council* [1994] ECR II-249, paragraph 27).

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In those circumstances, it must be concluded that the evidence adduced by the applicant has not established to the requisite legal standard that it would suffer serious and irreparable damage if the interim measures sought were not granted.

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It follows that the applicant has not succeeded in proving that the condition of urgency is satisfied. Consequently, the application for interim measures must be dismissed, without it being necessary to rule on its admissibility or examine whether the other conditions for the grant of interim measures are satisfied (order of the President of the Court in Joined Cases T-38/99 R to T-42/99 R, T-45/99 R and T-48/99 R *Sociedade Agrícola dos Arinhos and Others v Commission* [1999] ECR II-2567, paragraph 48).

The application for measures of inquiry seeking production of documents by the Commission

Arguments of the parties

86

In its observations of 23 September 2004, the applicant requests the President of the Court to order the Commission to produce the documents at issue, on the ground that they might show that the implementation of Lot ESP 4 was incorrect and that it would therefore be of assistance to the Court, and even decisive for the Court's judgment, to obtain them.

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The Commission contends that the application for measures of inquiry must be dismissed on the ground that the applicant has not shown that there would be any purpose in producing the documents at issue, contrary to the requirements of the case-law of the Court of Justice. The Commission further states that those documents contain confidential information and cannot be disclosed, as production of them would run counter to the protection of the tenderers' legitimate business interests.

Findings of the President

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The applicant's request for production of the documents at issue can be understood only as an application for measures of inquiry or measures of organisation of procedure.

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It must be recalled that under the first subparagraph of Article 105(2) of the Rules of Procedure the President of the Court assesses whether a preparatory inquiry should be ordered. Article 65 of the Rules of Procedure specifies that measures of inquiry include inter alia the production of documents. Article 64 of the Rules of Procedure allows the Court to adopt measures of organisation of procedure, including inter alia the production of documents or any papers relating to the case.

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Since the application for interim measures must be dismissed for want of urgency, without there being any need to examine whether the other

conditions for granting interim measures are satisfied, in particular the condition relating to a prima facie case, the President considers that the documents at issue are of no relevance for the examination of the present application for interim measures, and that the measures sought by the applicant concerning those documents should not therefore be adopted.

On those grounds,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE

hereby orders:

- 1.**
The application for interim measures is dismissed.
- 2.**
Costs are reserved.

Luxembourg, 10 November 2004.

H. Jung
Registrar

B. Vesterdorf
President

[1](#) –

Language of the case: English.