ORDER OF THE PRESIDENT OF THE COURT OF FIRST INSTANCE

31 January 2005 *

In Case T-447/04 R,

Capgemini Nederland BV, established in Utrecht (Netherlands), represented by M. Meulenbelt and H. Speyart, lawyers,

applicant,

v

Commission of the European Communities, represented by L. Parpala, acting as Agent, with an address for service in Luxembourg,

defendant,

APPLICATION for suspension of operation, first, of the Commission's decision to reject the bid submitted by the applicant in response to a call for tenders (JAI-C3-2003-01) for the development and installation of a second-generation Schengen Information System (SIS II) and for the possible development and installation of a Visa Information System (VIS) in the field of justice and home affairs and of its decision to award the contract to another bidder and, secondly, of the Commission's decision to conclude a contract relating to the SIS II and VIS systems with another bidder,

* Language of the case: English.

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

makes the following

Order

Facts of the dispute

1 By a notice of tender published in the Supplement to the *Official Journal of the European Union* on 25 June 2003 (OJ 2003 S 119), the Commission invited bids in accordance with the restricted procedure under tendering procedure JAI-C3-2003-01 for the development and installation of a second-generation Schengen Information System (SIS II) and for the possible development and installation of a Visa Information System (VIS) in the field of justice and home affairs.

2 The bid submitted by the applicant was not selected at the end of the tendering procedure. The Commission decision rejecting its bid and selecting that of a third party was notified to it on 13 September 2004 (hereinafter 'the decision of 13 September 2004'). In that decision the Commission stated that it would observe a delay of two weeks before entering into the SIS II/VIS contract (hereinafter also 'the contract at issue') with the bidder who had submitted the best bid.

3 By facsimile dated 16 September 2004, the applicant requested the Commission to specify the grounds of the decision of 13 September 2004 in accordance with Article 100(2) of Council Regulation (EC, Euratom) No 1605/2002 of 25 June 2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ 2002 L 248, p. 1; hereinafter 'the Financial Regulation'). In it the applicant also challenged the Commission's expressed intention to award the contract within a two-week period and relied in that connection on the judgment in Case C-81/98 *Alcatel Austria and Others* [1999] ECR I-7671.

4 By letter dated 30 September 2004 the Commission confirmed its intention to award the contract to a third party on the basis of a report drawn up in August 2004 by the evaluation committee (hereinafter 'the evaluation report'), which was appended to that letter. According to the evaluation report, two bidders including the applicant satisfied the technical evaluation stages and were admitted to the financial evaluation stage.

5 By letter dated 8 October 2004 the applicant informed the Commission that it appeared to it that, in light of the evaluation report, rejection of its bid was contrary to Community law. Accordingly, it requested the Commission not to pursue the procedure and to await an analysis which it undertook to forward to the Commission within a period of a week.

6 On 15 October 2004 the applicant communicated the results of its analysis to the Commission and sought explanations concerning the method of calculating the total value of its bid. Again the applicant requested the Commission not to pursue the award procedure.

7 On 22 October 2004 the Commission entered into the contract at issue with a group of undertakings led by the companies, STERIA-France and HP-Belgium (hereinafter 'the decision of 22 October 2004').

8 On 26 October 2004 the Commission published press release No IP/04/1300 announcing signature of the contract at issue with a group of undertakings led by the companies STERIA-France and HP-Belgium (hereinafter 'Steria/HP') with a global budget amounting to EUR 40 million.

9 On 5 November 2004 the applicant pointed out to the Commission that the amount of EUR 40 million announced in the press release exceeded the total amount of its bid. It also requested the Commission to reply to its letter of 15 October 2004 and not to enter into the contract at issue with Steria/HP.

10 By a letter dated 11 November 2004 the Commission dismissed the objections raised by the applicant in its letters of 8 and 15 October 2004.

Procedure

11 By an application lodged at the registry of the Court of First Instance on 15 November 2004 the applicant brought an action for the annulment, first, of the decision of 13 September 2004 and, secondly, of the decision of 22 October 2004.

12 By a separate document the applicant applied for its action for annulment to be decided under an expedited procedure pursuant to Article 76a of the Rules of Procedure.

13 By a separate document lodged at the registry of the Court of First Instance on the same day the applicant brought the present application for interim relief in which it seeks:

— suspension of operation of the decision of 13 September 2004 and of the decision of 22 October 2004 pending a decision on the present claim;

— suspension of operation of those decisions pending a decision by the Court of First Instance on the main action;

— if it were to be the case that the contract at issue had already been entered into, suspension of operation of that contract pending a decision by the Court of First Instance on the main action;

— such other interim measure as may be deemed appropriate;

— an order for costs against the Commission.

14 In reply to a written question raised on 17 November 2004 by the President of the Court of First Instance, the Commission on the following day specified the date on which the contract at issue was entered into. It also indicated that it did not intend to suspend operation of it pending an order by the President.

15 By order of 18 November 2004 the President ordered the immediate suspension of operation of the contract at issue under the second subparagraph of Article 105(2) of the Rules of Procedure pending the final order in these interim proceedings.

16 The Commission submitted written observations on the interim application on 25 November 2004.

17 The parties presented oral argument at the hearing before the President on 2 December 2004.

18 On 8 December 2004 the Court of First Instance granted the applicant's request for adjudication under the expedited procedure.

Law

19 Under the provisions of Articles 242 EC and 243 EC read 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 such interim measures as may be necessary.

20 Under Article 104(2) of the Rules of Procedure an application for interim measures must state the circumstances giving rise to urgency and the pleas of fact and law establishing a prima facie case (*fumus boni juris*) 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 in Case C-268/96 P(R) *SCK and FNK* v *Commission* [1996] ECR I-4971, paragraph 30).

Arguments of the parties

Prima facie case

21 In regard to the decision of 13 September 2004 the applicant claims that the bid submitted by Steria/HP was in conformity neither with the financial conditions nor the technical conditions set out in the tender documentation.

22 In the first place, the financial conditions were not observed in several respects.

23 First, the method of financial evaluation selected by the Commission was 'unusual', inasmuch as it was not based on a fixed price for the project, or the sum of the prices submitted for the 15 separate items comprising the project. It was based on price ratios, that is to say the ratio between the price offered by a tenderer and the lowest price offered by the other tenderers selected, calculated at the level of each of the 15 items. An overall price ratio was subsequently determined by calculating the average of the price ratios of all 15 items. In that regard, the applicant stresses that, whilst it is for the Commission to decide upon a price evaluation system, it is also clear that this system will generate inequitable outcomes unless the Commission checks with particular diligence whether the prices allocated by the candidates for each individual item are credible, accurate, and not abnormally low. An incorrect analysis, in particular of the most minor items, will have a disproportionate effect on the overall price ratio.

24 The applicant points out that, given this method of evaluation, the tender requires tenderers to identify a price for each of the 15 items of the project. In that regard it refers to several provisions in the tender documentation including Clause 5.4 of the administrative instructions. The obligation to indicate a price was all the more necessary since the financial evaluation was based not on the overall sum of prices offered for the 15 items of the project but on price ratios calculated in respect of each item.

25 In the present case, it is clear from the evaluation report that Steria/HP deliberately chose not to indicate any price or left the price blank in respect of item 6 (simulators), item 7 (national interfaces) and item 11 (optional VIS functionalities). Instead of rejecting Steria/HP's offer as non-compliant, the Commission accepted it by entering a price of EUR 0.01 under each of those items, which severely distorted the overall price ratio.

26 Secondly, the prices proposed by Steria/HP were abnormally low. In light of the method of financial evaluation selected by the Commission under which the 15 items had a significant impact on the overall price ratio, the rules relating to abnormally low offers ought to have been applied in respect of each of the 15 items. Indeed, apart from items 6, 7 and 11 of Steria/HP's offer, for which no price was indicated, the offer of that group of undertakings concerning items 1 (project management) and 2 (detailed design) ought to have given rise on the Commission's part to queries concerning the possibility of abnormally low prices. Yet it is plain from the Commission's letter of 11 November 2004 that it did not apply the rules relating to abnormally low offers in this case.

27 Thirdly, the Commission did not observe the principle that the economically most advantageous offer should be selected. This principle is laid down in Article 138(3) of Commission Regulation (EC, Euratom) No 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of the Financial Regulation (OJ

2002 L 357, p. 1; hereinafter the 'implementing regulation'). In fact it is apparent from the Commission's press release dated 26 October 2004 that the overall amount of Steria/HP's offer was clearly higher than the applicant's offer. As regards the overall amount of its offer, the applicant claims that the Commission took into account an incorrect amount in its initial bid, which was higher than the actual amount, owing to the fact that it improperly ignored a corrigendum sent to it on 26 May 2004.

28 In the second place, the technical conditions of the call for tenders were said not to have been complied with. First of all, Steria/HP's offer did not include the development of national interfaces in accordance with the technical specifications contained in the call for tenders, even though the technical specifications provided for the installation of national interfaces at national level. The evidence available to the applicant in fact indicates that the solution proposed by Steria/HP did not include the installation of national interfaces on the sites of users, that is to say the Member States. That evidence also suggests that Steria/HP did not offer the development or delivery of national simulators which were none the less necessary for verifying the proper functioning of national interfaces.

29 Yet, according to settled case-law, an offer which does not comply with the key technical requirements set out in the tender documentation must be rejected. That rule was expressly reproduced in Article 1.3 of the technical specifications under which the entire text of the tender documentation was made binding on the Commission. If Steria/HP proposed an alternative technical solution (variant), the Commission ought to have rejected its offer immediately.

30 As regards the decision of 22 October 2004 the applicant maintains, first of all, that it should be set aside on the ground that the Commission infringed the principle of entitlement to effective judicial protection (Case 222/84 *Johnston* [1986] ECR 1651, paragraph 18, and Case C-50/00 P *Union de Pequeños Agricultores* v *Council* [2002] ECR I-6677, paragraph 39). As far as national public procurement cases are

concerned, that principle has been developed in Council Directive 89/665/EEC of 21 December 1989 on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (OJ 1989 L 395, p. 33), and has been upheld by the Court of Justice (judgment in *Alcatel Austria and Others*).

31 Under that principle, the awarding authority must allow for a reasonable period of time between the award of a contract and its conclusion, so that rejected tenderers can lodge an application, under national law, for interim measures against the award decision before the contract is concluded. Although neither the Financial Regulation nor its implementing regulation contain provisions on remedies before the Community courts, an obligation analogous to that flowing from Directive 89/665 applies in the present case under the general principle of the availability of an effective remedy.

32 In the present case the Commission decided to conclude the contract at issue without having set a realistic period in the 30 September 2004 letter which contained the first statement of reasons for the decision of 13 September 2004. That period would have enabled the applicant to prepare an effective remedy against that decision, through an application for interim measures following an application for annulment of the rejection decision. By setting a period of two weeks, the Commission de facto infringed the applicant's right to bring an action for annulment and an application for interim measures within the period of two months provided for in Article 230 EC and, consequently, infringed that provision.

33 Furthermore, in adopting the decision of 22 October 2004 the Commission infringed Article 103 of the Financial Regulation under which, where there is a possibility of an error or irregularity, there is an obligation on the institution concerned to suspend the procedure. Moreover, it is plain from Article 153(1) of the implementing regulation that the existence of a problem does not have to be established irrefutably in order for the first paragraph of Article 103 of the Financial Regulation to apply.

34 The Commission is of the view that the condition concerning a prima facie case is not satisfied.

35 As a preliminary point, the Commission points out that it has a broad discretion in assessing the factors to be taken into account for the purpose of deciding to award a contract following an invitation to tender. Moreover, the applicant accepted the price evaluation method. In that connection section 3.1 of the administrative instructions clearly states that 'the submission of a tender offer entails irrevocable agreement of the tenderers to participate in all evaluation procedures foreseen in this call for tender'.

36 As to the alleged non-compliance with the financial conditions, the Commission contends, first, that the applicant is calling in question Steria/HP's offer for not fixing the price of certain items or pricing certain items at zero, even though the applicant itself did exactly the same thing in regard to several items including item 8 (user deliveries).

37 Moreover, according to the Commission, even though section 2.8 of the administrative instructions of the tender specifications in fact asked tenderers to indicate prices for all items, a price equal to zero is also a price that has to be accepted. In fact, it continues, the possibility of zero-pricing certain items could flow directly from the nature of the contract and be entirely justified.

38 In that regard the Commission states that it was for the tenderers to propose the most apposite solutions for meeting the objectives and the strategic needs of the call for tenders. Accordingly, tenderers were expected to provide technical solutions. Thus, the zero–pricing of certain items does not constitute price manipulation.

39 In regard to the price alteration alleged to have been carried out by the Commission, the latter states that it entered the price of EUR 0.01 for the sole purpose of being able to carry out a mathematical calculation. That justificatory reason was also mentioned in the evaluation report and was applied to all items concerned and to all tenderers.

40 Secondly, the Commission considers that it in no way disregarded the rules concerning abnormally low offers. In fact, the overall contract value of SIS II and VIS was, according to the notice of tender, between EUR 28 and 38 million. The value of the contract signed being more than EUR 37 million, the tender could not be regarded as abnormally low within the meaning of Article 139 of the implementing regulation.

41 In regard, thirdly, to the alleged non-observance of the principle that the economically most advantageous offer must be selected, the Commission contends that the applicant did not submit an offer the overall value of which was lower that Steria/HP's offer. Whilst it was true that the applicant sent a corrigendum to the Commission on 26 May 2004, the Commission was under no obligation to take account of it. In fact, under Article 148(3) of the implementing regulation, the contracting authority may contact the tenderer, if obvious clerical errors in the tender must be corrected. In the present case the multiplication error by the applicant did not impose on the Commission any obligation to contact it.

42 As far as the alleged non-observance of technical criteria is concerned, the Commission contends that, in regard to national interfaces, it is important to distinguish between, on the one hand, a communication part and, on the other, a logical software part. Only the communication part which did not form part of the call for tenders, needs to be installed in Member States' premises, whereas the logical software part can be installed at central level. The definition of the national interface in the call for tenders does not specify whether it has to be installed, in all parts, at central level or national level but clearly states that the national interface remains under the responsibility of the central domain. The fact that it is possible to install the software part of a national interface centrally is confirmed by the study

which the Commission commissioned from Deloitte & Touche and which was annexed to the call for tenders as a technical input document. That study deals exclusively with the question of whether the software part of the national interfaces should be better installed at the central or the local level. Had it been decided that it would be mandatory to install all parts of the national interface in the Member States, it would obviously have made no sense to provide the study as a technical input document.

43 Moreover, in reply to an argument by the applicant, the Commission states that Steria/HP's offer clearly states that the pricing for the development of simulators (item 6) was located under item 5 (central domain).

44 As regards the arguments deployed in support of the alleged illegality of the decision of 22 October 2004, the Commission contends that it in no way infringed the principle of entitlement to an effective remedy, since Directive 89/665 and the judgment in *Alcatel Austria and Others* were not relevant to the case. Moreover, the decision of 13 September 2004 and the letter of 30 September 2004 addressed to the applicant fully complied with the Commission's obligations under the first sentence of Article 100(2) of the Financial Regulation to provide a statement of reasons. In fact the reasoning contained in the letter of 30 September 2004 manifestly enabled the applicant to take legal proceedings.

45 As to Article 103 of the Financial Regulation invoked by the applicant, that provision is not applicable in the present case.

Urgency

46 The applicant claims that, if the interim measures sought are not granted, it is likely to suffer serious and irreparable damage.

47 The damage suffered would be serious because the only offers considered in the final round of the tendering procedure were its and Steria/HP's. Rejection of Steria/HP's bid would have resulted in the award to it of the contract.

48 Since, moreover, the SIS II/VIS project is an exceptionally high-profile project, the loss suffered by the applicant includes the loss of a major reference in the public sector as well as the loss of an opportunity to demonstrate its capacity to develop large-scale IT systems on an international scale.

49 In that connection the applicant adds that the companies involved in the implementation of the project will be in a very advantageous position to compete for future SIS II and VIS related contracts that will be awarded by the Commission, for example for the extension of the system to other Member States, and by the countries and the local authorities of the Schengen area, for example for updating their national information systems. The total value of these follow-up contracts is significantly higher than the value of the 'central system' put to tender by the Commission.

50 The damage suffered would also be irreparable. The award of the contract, and, a fortiori, the execution and performance of this contract, even for the duration of the interim measures proceedings, would make it impossible for the Commission to go back on the disputed decision. The only way to avoid a fait accompli would be an immediate suspension of the operation of those decisions. If no interim measures were adopted, an annulment judgment by the Court of First Instance would be devoid of effectiveness. As the Community judicature has held, a decision on the merits after performance of the contract cannot reverse the damage suffered by the Community legal order and by the rejected tenderers (order of the President of the Court in Case C-87/94 R *Commission* v *Belgium* [1994] ECR I-1395, paragraph 31). Accordingly, an award of damages would not constitute appropriate reparation.

51 At the hearing the applicant maintained that the present case may be distinguished from the orders of the President of the Court of First Instance in Case T-148/04 R *TQ3 Travel Solutions Belgium* v *Commission* [2004] ECR II-3027 and Case T-303/04 R *European Dynamics* v *Commission* [2004] ECR II-3889, inasmuch as unlike the contracts in those cases the contract at issue is very narrow owing to its unique character in Europe and perhaps in the whole world. Access to the market at issue may be secured only by the successful bidder in the tendering procedure at issue.

52 The Commission stresses that the applicant has no entitlement to the award of the contract even were the decision of 13 September 2004 and the decision of 22 October 2004 to be annulled. Moreover, it notes that, if the Court of First Instance were to establish that an error was committed in the course of the financial evaluation, the same error also affected the offer submitted by the applicant since it entered a zero price for certain items.

53 It is settled case-law that the loss of a reference or opportunity to demonstrate a certain capacity does not have the consequence of causing such damage as to justify the adoption of urgent interim measures. In particular, the loss of a reference does not prevent the applicant from successfully participating in future calls for tenders. Moreover, damage which is purely hypothetical in so far as it is based on the occurrence of future and uncertain events cannot justify the grant of the interim measures sought.

54 As to the allegedly irreparable nature of the damage, the Commission emphasises as a preliminary matter that the order in *Commission* v *Belgium* is in no way relevant to the present case inasmuch as Article 226 EC and the fourth paragraph of Article 230 EC pursue different objectives. More specifically, one of the reasons why the grant of interim measures could be envisaged in the case giving rise to the order in *Commission* v *Belgium* was the absence of any other measure protective of tenderers' interests.

55 Moreover, damage cannot be deemed irreparable, or even be deemed to be damage in respect of which reparation is difficult, if compensation may subsequently be obtained by means of an action for compensation under Article 288 EC.

56 Finally, the extent and reality of the damage suffered owing to rejection of the applicant's bid have not been demonstrated, nor has its seriousness and irreparable nature. Nor has the applicant shown that its very existence would be likely to be compromised or that its position in the market would be irremediably altered.

57 According to the settled case-law of the Court of First Instance, the fact that the contract at issue is in course of performance on the date of judgment in the main proceedings, is not a valid argument for proving urgency (*TQ3 Travel Solutions Belgium*, paragraph 55). Indeed, the rejection of the applicant's bid, were it not justified, could be repaired: the costs of participating in the tender procedure could be quantified and made good, a pecuniary compensation envisaged and the applicant would be free to take part in a fresh call for tenders. At the hearing the Commission stated in that regard that, where a decision is annulled, it is for the institution concerned under Article 233 EC to take such consequential action as may be necessary, whilst observing the operative part of the judgment. None the less, neither the applicable rules nor the case-law of the Community courts make provision in regard to such consequences where a contract has been signed and is in course of performance. The present case concerns a contract which is valid under Belgian civil law. Moreover, annulment of the contract at issue would entail lengthy delays in the accomplishment of the SIS II/VIS project, which would prejudice the development and maintenance of an area of freedom, security and justice (Article 2 EU).

Balance of interests

58 The applicant claims, first, that the infringement of Community procurement law and the damage that such infringement inflicts upon the Community legal order,

and on the rights of other tenderers, in themselves, constitute a serious interest to be protected by the Community courts (order in *Commission* v *Belgium*).

59 Second, a limited delay in the implementation of the SIS II/VIS project would not disproportionately harm the interests of the Commission and the Member States. The current Schengen Information System does not need to be replaced by the future system before the end of 2007; nor does provisional acceptance of the SIS II system have to take place before 31 March 2007. There is no indication at all that a limited delay beyond this date would cause harm of great significance or, alternatively, that such harm could not be mitigated to an acceptable degree by slightly increasing the speed of implementation. Conversely, performance of the contract at issue would create or contribute to a fait accompli representing serious and irreparable harm both to the applicant and to the Community legal order.

60 Third, rejection of Steria/HP's offer, and award of the contract to the applicant could be implemented within a very short time. Alternative measures to redress the infringements of Community law are available, for example allowing the applicant to submit a bid on the criteria that were apparently accepted for award of the contract to Steria/HP, or re-tendering the contract.

61 Fourth, even on the assumption that the suspension of operation of the decision of 13 September 2004 and the decision of 22 October 2004 would cause damage to the Commission or the Member States, the potential damage to the Commission is self-inflicted. The applicant consistently acted with great speed, which is a relevant factor in determining the balance of interests (order in *Commission* v *Belgium*, paragraph 34).

62 Fifth, the applicant submitted at the hearing that the Commission's assertions concerning the timetable for accomplishment of the project carried little conviction. Those assertions were, moreover, contradicted by a document of the Council dated 23 November 2001 exchanged between the delegations of the Member States responsible for implementation of the SIS system from which it appeared that it would be possible to continue with the current SIS system, even with 30 Member States.

63 Sixth, the applicant also referred at the hearing to the fact that the Council had already in 2001 entrusted the Commission with the task of developing the SIS II system. Moreover, the applicant maintained that provision was initially made for commencement of the SIS II/VIS project in January 2004. It cannot be accepted that the Commission can belatedly organise a tendering procedure at the same time as alleging that there is such a degree of urgency as to preclude the grant of interim measures.

64 The Commission contends that the grant of interim measures would occasion damage to the Community, the Commission, the Member States, non-member States, and indeed to the incumbent contractor, and that such damage far outweighs any potential damage to the applicant if interim measures are not granted.

Findings of the President

Prima facie case

65 It must be observed that, in its application for interim measures, the applicant makes a distinction between, on the one hand, the grounds of annulment of the decision of 13 September 2004 (paragraphs 21 to 29 above) and, on the other, the grounds of annulment referring to the decision of 22 October 2004 (paragraphs 30 to 33 above).

66 On that point the President considers that, were the decision of 13 September 2004 rejecting the applicant's bid and accepting the bid of a third party to be annulled, the decision of 22 October 2004 would be deprived of its legal basis. The latter decision would consequentially be vitiated by illegality and would therefore also have to be annulled.

67 It is therefore sufficient at an initial stage to examine whether the grounds of annulment of the decision of 13 September 2004, as set out in the application for interim measures, appear prima facie to be well founded.

68 As a preliminary matter it should be pointed out, first of all, that under Article 89(1) of the Financial Regulation all public contracts financed in whole or in part by the budget have to comply with the principles of transparency, proportionality, equal treatment and non-discrimination. Next, under Article 97(1) of the Financial Regulation the selection criteria for evaluating the capability of candidates or tenderers and the award criteria for evaluating the content of the tenders are to be defined in advance and set out in the call for tender. Finally, it is settled case-law that the award criteria must be formulated, in the contract documents or the contract notice, in such a way as to allow all reasonably well-informed and normally diligent tenderers to interpret them in the same way (see, by analogy, judgment in Case C-19/00 *SIAC Construction* [2001] ECR I-7725, paragraph 42).

69 It should further be observed, also as a preliminary matter, that, in accordance with settled case-law, the Commission has a broad discretion in assessing the factors to be taken into account for the purpose of deciding to award a contract following an invitation to tender and the Court's review should be limited to checking that there has been no serious and manifest error (Case 56/77 *Agence européenne d'interims* v *Commission* [1978] ECR 2215, paragraph 20, and Case T-19/95 *Adia interim* v *Commission* [1996] ECR II-321, paragraph 49).

70 Having formulated those preliminary observations, the President considers that two of the grounds raised by the applicant are of a serious nature.

71 The first ground alleges a manifest error in the assessment of the financial evaluation of the offer submitted by Steria/HP, stemming from the fact that it did not state a price for each of the 15 items of its bid.

72 The question arises as to whether the applicant has adduced evidence from which it may be concluded that prima facie it cannot be precluded that the Commission manifestly erred in its assessment, inasmuch as it applied the financial evaluation system provided for in the call for tenders in such a way that the financial bids did not reflect their actual value in that connection.

73 In the context of these proceedings the Commission asserted, on the one hand, that section 2.8 of the administrative instructions of the tender documentation asked tenderers to indicate prices for all items and that a zero price was also a price that had to be accepted. In that regard Steria/HP's offer did not indicate a price or indicated a zero price for item 6 (simulators), item 7 (national interfaces) and item 11 (optional VIS functionalities) but the prices of each of these items were included in the valuation of the amount of other items with which they were inextricably linked from a technical point of view. Thus, the prices for items 6, 7 and 11 were respectively included in items 4 (central system), 3 (system environments) and 2 (detailed design).

74 The question therefore arises as to whether prima facie the Commission manifestly erred in its assessment by accepting as compliant with the tender specification the lack of indication of a price or the indication of a zero price for one or more items of the offer, where the solution proposed for that item or those items and the prices relating to them were included in one or several other items of that offer.

75 It should be noted on this point that section 2.8 of the administrative instructions of the tender specification provided that, for the purposes of the financial evaluation, tenderers had to indicate prices for all items and that, as regards the financial sheets, all prices had to be expressed in euros, be clearly stated and, where appropriate, indicate all pricing elements for all items and sub-items.

76 It is clear from this provision that the price had to be indicated for each item proposed in the bid and that it could not be included under another item.

77 That conclusion is corroborated by the very purpose of the financial evaluation system selected in the context of the procedure for the call for tenders at issue.

78 Thus, section 5.4 of the administrative instructions of the tender documentation entitled 'financial evaluation' opted for a system based on 15 separate items. For the purposes of financial evaluation offers were assessed not on the basis of the global sum of the prices offered for the fifteen separate items but in relation to the price ratios calculated in respect of each item. In fact, for each item the method of evaluation employed by the Commission was based on a score awarded to each tenderer on the basis of the ratio between, on the one hand, the price offered by the tenderer and, on the other, the lowest price offered by the other tenderers selected for the purposes of financial evaluation. As the applicant emphasises, without being contradicted by the Commission, the score in respect of each item was therefore accorded equal weight, whatever the scope and complexity of the various items.

79 Accordingly, to accept the Commission's argument that a zero price could be indicated for an item in respect of a technical solution would be to concede that a tenderer could artificially improve his overall price ratio and, thereby, obtain the best overall price ratio even though his overall bid value was not the lowest. In fact, as the applicant correctly observed, that system enabled a tenderer artificially to improve

his overall price ratio, for example by taking EUR 500 000 from two items worth EUR 1 million each, and adding these amounts to an item worth EUR 10 million. A tenderer could also achieve an unbeatable overa11 ratio by offering an artificial price of less than half the price of its competitor for five or six smaller items. Thus the best overall price ratio could be obtained even though the overall bid value was manifestly higher than that of all the other bids. The President notes that the Commission has not explained how the detailed rules governing application of the financial evaluation system selected by it enabled such a risk to be avoided.

80 That finding is in no way affected by the Commission's argument to the effect that it did not wish to deprive tenderers of the opportunity of proposing their technical solutions in an unrestricted way. Apart from the fact that that argument relates to the technical evaluation and not the financial evaluation, it is not even argued that it would not have been possible to indicate an approximate price for each bid item, though the technical solution was included under another item.

81 The interpretation of the financial instructions of the tender specification proposed by the Commission in no way guarantees that the economically most advantageous offer has been selected, contrary to the principle, applicable in this case, that the most economically advantageous tender should be accepted (section IV.2 of the contract notice).

82 In those circumstances, it must be considered, prima facie, that the Commission disregarded the technical specification and committed a manifest error of assessment by accepting the absence of any indication of a price or the indication of a zero price for certain items of Steria/HP'S offer, even though it cannot be precluded that the latter's offer ought to have been rejected because it did not observe the conditions of the call for tenders.

83 The second ground considered serious by the President relates to non-observance of the technical condition of the bid relating to national interfaces (item 7). In fact, the applicant criticises the solution proposed by Steria/HP because it did not involve installation of national interfaces on the sites of users, that is to say the Member States, although that was a requirement under the contract notice.

84 In that connection it must be stated that the requirements of the tender documentation prima facie support the analysis that the national interfaces must be installed on user sites (section 2.2 of the SIS II module; sections 2.1.2, 4.1 and 4.3 of the common requirements; section 2.5.2 of the administrative instructions). In particular, under section 4.1 of the common requirements national interfaces 'must be installed on the User's own premises'. Under section 2.5.2 of the administrative instructions 'the places of delivery for deliverables destined for users (e.g. national interfaces) [would] be defined at signature of the contract'.

85 Moreover, both in its application and at the hearing the applicant explained in greater detail the reasons why the installation of national interfaces at national level is crucial.

86 At this stage the replies by the Commission to those arguments do not dispel the lack of precision concerning the technical specifications in regard to the location in which the national interfaces are to be installed.

87 Consequently, it cannot be precluded that the interpretation of the technical specifications put forward by the applicant is correct and that, accordingly, Steria/HP's bid contravened the technical specifications in the call for tenders.

88 In light of the foregoing it must be concluded that the condition relating to a prima facie case is satisfied.

Urgency

89 As was held in the order of the President of the Court in Case C-65/99 P(R) *Willeme* v *Commission* [1999] ECR I-1857, the purpose of interim proceedings is not to secure reparation of damage but to guarantee the full effectiveness of the judgment on the substance. In order that the latter objective may be attained, the measures sought must be urgent in the sense that, in order to avoid serious and irreparable damage to the applicant's interests, they must be ordered and become effective even before the decision in the main proceedings (paragraph 62). It is for the party applying for interim measures to adduce proof that it cannot await the outcome of the main action without suffering serious and irreparable damage (order of the President of the Court of First Instance in Case T-169/00 R *Esedra* v *Commission* [2000] ECR II-2951, paragraph 43).

90 In the present case the applicant maintains that the damage suffered owing to the fact that the contract at issue was not awarded to it is of an irreparable nature, inasmuch as annulment of the decision of 13 September 2004 and the decision of 22 October 2004 would, in the absence of any interim measure, produce no useful effect.

91 That argument cannot be upheld.

92 First of all, on the supposition that the Court of First Instance annuls those decisions it is in no way established, contrary to the applicant's assertions, that the contract would be awarded to it. In that regard, just as the successful bidder, the applicant proposed a zero price for an item of the project, namely item 8. Accordingly, the applicant's bid is prima facie affected by a lacuna analogous to the lacunae affecting the successful tenderer's bid.

93 Next, there is no warrant for concluding that, as is maintained by the applicant, its interests would not be adequately protected in the event of annulment by the Court of First Instance of the decision of 13 September 2004 and the decision of 22 October 2004.

94 It must first be noted that it is not correct to assert that compensation constitutes the sole means of compliance with an annulment judgment.

95 Under Article 233 EC it is the institution whose act has been declared void which is required to take the measures necessary for compliance with the judgment of the Court of First Instance. It follows, first, that the court annulling an act has no jurisdiction to direct the institution whose act it has annulled as to the manner in which a judgment is to be complied with (order of the Court of Justice of 26 October 1995 in Joined Cases C-199/94 P and C-200/94 P *Pevasa and Inpesca* v *Commission* [1995] ECR I-3709, paragraph 24). Secondly, the judge hearing the interim application cannot prejudge the measures which might be adopted following a judgment annulling an act. The manner in which a judgment annulling an act may be complied with depends not only on the provision annulled and the scope of the judgment in question, which must be appraised by reference to the grounds thereof (Joined Cases 97/86, 193/86, 99/86 and 215/86 *Asteris and Others* v *Commission* [1988] ECR I-2181, paragraph 27, and Joined Cases T-305/94, T-306/94, T-307/94, T-313/94 to T-316/94, T-318/94, T-325/94, T-328/94, T-329/94 and T-335/94 *Limburgse Vinyl Maatschappij and Others* v *Commission* [1999] ECR II-931, paragraph 184), but also on other factors specific to each case such as the period within which the annulment of the contested act comes into effect or the interests of third parties concerned.

96 In the present case in the event of annulment of the decision of 13 September 2004 and of the decision of 22 October 2004, it would be for the Commission, in light of the specific circumstances of this case, to adopt the necessary measures for ensuring appropriate protection of the applicant's interests (order of the President of the Court of First Instance in Case T-108/94 R *Candiotte* v *Council* [1994] ECR II-249, paragraph 27; and orders in *Esedra* v *Commission*, paragraph 51, and *TQ3 Travel Solutions Belgium* v *Commission*, paragraph 55).

97 In that context it is important to emphasise the fact that the applicant brought its main application and its application for interim measures after the conclusion of the contract at issue and that therefore the application for interim measures did not enable the President of the Court of First Instance to prevent signature of the contract, whereas the applicant could have brought an action for annulment of the decision of 13 September 2004, at the same time as an application for interim measures, within the period of three weeks which elapsed between the date on which the Commission communicated to it the evaluation report (30 September 2004) and the date of signature of the contract (22 October 2004). It is none the less pointed out, first, that the stay ordered by way of a protective measure by the President (see paragraph 15 above) had the effect of suspending the operation of the contract at issue. Second, the Court of First Instance agreed to adjudication of the main action under the expedited procedure (see paragraph 18 above). Consequently, judgment will be given within a short period of time (see, in regard to an analogous situation, the judgment in Case T-211/02 *Tideland Signal* v *Commission* [2002] ECR II-3781). In those circumstances it can in no way be precluded that the Commission may be directed to bring the contract at issue to an end and to organise a fresh procedure for the award of the public contract at issue in which the applicant could take part.

98 It must be noted, second, that even if the Commission decided to make a payment of damages in reparation of the loss suffered by the applicant, such manner of compliance with any annulment judgment could, under settled case-law, be regarded as constituting adequate reparation. Consequently, the potential loss suffered by the applicant cannot be regarded as irreparable once it can be the subject of subsequent financial compensation (see order in *Esedra* v *Commission*, paragraph 44 and case-law cited; and order in *TQ3 Travel Solutions Belgium* v *Commission*, paragraph 43).

99 In any event, even in the absence of voluntary reparation on the part of the Commission, it cannot but be noted that the applicant could, in the absence of indications to the contrary, bring an action for damages before the Court of First Instance, given that loss of a contract is a loss in respect of which financial reparation may be afforded by way of an action under Article 288 EC (order in *Esedra* v *Commission,* paragraph 47; order of the President of the Court of First Instance in Case T-132/01 R *Euroalliages and Others* v *Commission* [2002] ECR II-777, paragraphs 51 to 53; and order in *TQ3 Travel Solutions Belgium* v *Commission,* cited above, paragraph 45).

100 In light of those considerations it cannot but be noted that the situation giving rise to the present dispute is fundamentally different to that in *Commission* v *Belgium* on which the applicant places reliance. Contrary to the finding in that case, it cannot be concluded in this case that a decision on the substance, even if made during the course of performance of the contract, would be unable to afford reparation of the damage to both the Community legal order and the applicant.

101 In light of the foregoing the interim measures sought would therefore be justified only in exceptional circumstances, that is to say if it appeared that, in the absence of such measures, the applicant would be in a situation likely to jeopardise its very existence or irremediably alter its position in the market (see, to that effect, orders in *Esedra* v *Commission,* paragraph 45, and *TQ3 Travel Solutions Belgium* v *Commission,* paragraph 46).

102 In that regard it cannot but be noted that, whilst the applicant maintains that the award to it of the contract at issue would be beneficial, it is not maintaining that the decisions of 13 September 2004 and 22 October 2004 entail financial consequences

such as to jeopardise its very existence. In fact, the applicant has in no way argued to that effect and has adduced no item of evidence concerning its financial situation which might lead the President to conclude that its existence was imperilled.

103 The only actual effects which the applicant associates with execution of the decision of 13 September 2004 and with the decision of 22 October 2004 are the loss of a major reference and the alleged difficulty of usefully tendering in the future in the context of projects connected with the contract at issue. To the extent to which those effects may be regarded as seeking to establish the irreparable nature of the alleged damage, the evidence in the case-file none the less does not permit an appraisal of their actual impact on the applicant's situation. In particular, the applicant has not demonstrated that that reference was essential to it or that it would be prevented in the future from accomplishing other projects of the same scale. Nor, moreover, has it adduced evidence from which it might be concluded that serious and irreparable damage has been done to its reputation or, a fortiori, that such damage prevents it from taking part in future calls for tenders by the Commission in connection with the SIS II and VIS systems. In that context, it should be added that, in any event, participation in a public call for tender procedure, which is by its nature highly competitive, necessarily entails risks for all the participants and the elimination of a tenderer under the tender rules is not in itself in any way prejudicial and cannot therefore, as a matter of principle, be regarded as damaging its reputation (see, in that connection, order of the President of the Court in Case 118/83 R *CMC* v *Commission* [1983] ECR 2583, paragraph 51, and the order in *Esedra* v *Commission*, paragraph 48).

104 In those circumstances it must be concluded that the evidence adduced by the applicant does not enable it to be established to the requisite legal standard that, failing the grant of the interim measures sought, the applicant would suffer serious and irreparable damage.

105 In light of the foregoing, it must be concluded that the condition relating to urgency is not satisfied and that therefore the application for interim measures must be rejected.

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, 31 January 2005.

H. Jung — Registrar

B. Vesterdorf — President