ORDER OF THE PRESIDENT OF THE COURT OF FIRST INSTANCE

22 December 2004 *

In Case T-303/04 R II,

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

* Language of the case: English.

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

1 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 The applicant is a member of a consortium consisting of European Dynamics, IRIS SA, Datacep SA, Primesphere SA and Reggiani SpA ('the ESP 5 consortium'), which is the contractor selected as first in the cascade for Lot ESP 5 and with which the Commission signed, on 5 November 2001, framework contract DI-02432-00 for the provision of services for Lot ESP 5.

4 With respect to Lot ESP 4, the contractor selected as first in the cascade is a consortium consisting of Trasys SA and Cronos Luxembourg SA, which later became Sword Technologies SA ('the ESP 4 consortium'), with which the Commission signed, on 16 October 2001, a framework contract under reference DI-02432-00 for the provision of services for Lot ESP 4.

5 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').

6 Following that call for tenders, the Commission services and the applicant engaged in correspondence and discussions regarding the applicant's concerns as to the implementation of Lot ESP 5 and Lot ESP 4 (the applicant considering in substance that Lot ESP 5 had been under-used to the advantage of Lot ESP 4) and the applicant's calls for the cancellation of the ESP-DIMA tender procedure. According to the applicant, that procedure had no raison d'être since, instead of using ESP-DIMA to replace ESP 4, whose budgetary ceiling had been reached, the Commission should have had recourse to Lot ESP 5 instead.

7 For a more detailed exposition of the facts underlying the dispute between the Commission and the applicant as to the raison d'être of ESP-DIMA and the implementation of Lot ESP 4 and Lot ESP 5, reference is made to the facts set out in the Order of the President of the Court of First Instance of 10 November 2004 in Case T-303/04 R *European Dynamics* v *Commission* [2004] ECR II-3889 ('the Order of 10 November'), dismissing the first application for interim measures made in this case.

8 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.

9 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.

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

11 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.

12 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 a letter of 30 January 2004 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').

13 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.

14 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 giving reasons.

15 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.

16 By separate document registered at the Registry of the Court on the same date, the applicant made an 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 first application').

17 On 30 July 2004, the Commission received the ED consortium's contract signed. Some missing powers of attorney were sent to the Commission on 4 August 2004. On that date the Commission was in possession of all the originals of the contracts relating to ESP-DIMA signed by all the contractors.

18 Since, however, 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.

19 Following the first application, the Commission submitted its observations on 26 August 2004. The applicant and the Commission were given the opportunity to present a second round of pleadings and submitted their observations, respectively, on 23 September 2004 and 15 October 2004.

20 It should be recalled that, in its observations of 23 September, the applicant 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').

21 On 2 November 2004 the applicant sent a letter to the Registry of the Court of First Instance 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 of First Instance to take them into account in his assessment. The applicant stated in particular that two reports annexed to the Commission's observations of 15 October 2004, one from EuroDB dated 22 March 2004 and one from Dun & Bradstreet dated 26 July 2004, discussing the applicant's financial situation were 'wrong and obsolete'. That letter was accepted as part of the file and was notified to the Commission in accordance with Article 105(1) of the Rules of Procedure.

22 By letter of 9 November 2004 the Registrar of the Court of First Instance informed the applicant that the Court had decided not to grant the applicant's request for adjudication under the expedited procedure.

23 By the Order of 10 November the President of the Court of First Instance dismissed the first application on the grounds that the evidence adduced by the applicant had not established to the requisite legal standard that it would suffer serious and irreparable damage if the interim measures sought were not granted and that, therefore, the applicant had not succeeded in proving that the condition of urgency was satisfied and, consequently, the application for interim measures had to be dismissed, without it being necessary to rule on its admissibility or examine whether the other conditions for the grant of interim measures were satisfied.

24 In the Order of 10 November, the President likewise dismissed the applicant's request concerning the documents at issue considering that those documents were of no relevance for the examination of the application for interim measures, and there was, therefore, no need to adopt the measures sought by the applicant concerning those documents.

25 It appears that on 18 November 2004, the Commission signed the contract with the ESP-DIMA consortium.

26 In those circumstances, by separate document registered at the Registry of the Court on 22 November 2004, the applicant made the present application for interim measures, pursuant to Article 242 EC and Articles 104, 108 and 109 of the Rules of Procedure, by which it seeks suspension of operation of the award decision and the letter giving reasons. The applicant reiterates its request that the President order the Commission to produce the documents at issue.

27 On 1 December 2004 the Commission submitted its observations on the present application. The Commission asks that the President dismiss the application as inadmissible or, in the alternative, as unfounded. As regards the application to produce the documents at issue, the Commission requests that it be dismissed on the basis that the applicant has not provided information indicating the relevance of those documents for the present proceedings.

Law

The application for interim measures

28 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.

29 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 of 14 October 1996 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 of 29 June 1999 in Case C-107/99 R *Italy* v *Commission* [1999] ECR I-4011, paragraph 59).

30 The measures sought must also be provisional, in that they must not prejudge 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 of 19 July 1995 in Case C-149/95 P(R) *Commission* v *Atlantic Container Line and Others* [1995] ECR I-2165, paragraph 22).

31 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).

32 Under Article 109 of the Rules of Procedure, '[r]ejection of an application for an interim measure shall not bar the party who made it from making a further application on the basis of new facts'.

33 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

34 The applicant asks the President of the Court of First Instance to declare the application well founded on the basis that new facts support its arguments in the first application.

35 The applicant claims that the Order of 10 November is based on assumptions and facts which are wrong, in particular because of the two reports by EuroDB and Dun & Bradstreet, dated 22 March 2004 and 26 July 2004 respectively ('the old reports'), which were produced as evidence by the Commission in the proceedings relating to the first application even though, according to the applicant, the Commission was in possession of new corrected versions of the reports and failed to inform the Court.

36 Regarding the conduct of the Commission, the applicant alleges, more generally, that the Commission is engaging in an 'undeclared war' which has taken the form of 'blacklisting' its company in Commission tenders. In this respect, the applicant alleges that figures pertaining to the amounts paid by the Commission for Lots 2, 4 and 7 of the ESP contracts reveal that all the lots controlled by consortia involving Trasys SA or Sword Technologies SA (both members of the ESP 4 consortium) present abnormally high levels of consumption. According to the applicant, these abnormally high levels of consumption can be revealed through the Requests for Quotation issued by the Commission in the context of ESP which the applicant demands be disclosed by the Commission.

37 The applicant finally alleges that the execution of ESP-DIMA entails in reality the end of Lot ESP 5, given that ESP-DIMA is the continuation of Lot ESP 4 which has, according to the applicant, been used incorrectly by the Commission to the detriment of Lot ESP 5.

38 Given this reality and its current financial situation, the applicant claims that it will suffer irreparable damage if interim measures are not granted.

39 In particular, according to the applicant, the Order of 10 November is based, inter alia, on incorrect assumptions as regards the applicant's financial situation, that is, that the applicant has a large number of clients, including European institutions, national public bodies and international companies, and that its financial situation is classified as good, with positive marks for sales, profitability and total assets (paragraph 79 of the Order of 10 November).

40 The applicant claims that the new versions of the reports, a report by Dunn and Bradstreet dated 2 November 2004 and a report by EuroDB, which are annexed to the present application ('the new reports'), reveal that, on the basis of data up to December 2003, its annual turnover had fallen from EUR 16 million in 2001 to EUR 14 million in 2002 to EUR 10 million in 2003. The new reports show, moreover, that several companies mentioned in the old reports are no longer suppliers or clients of the applicant. In this respect, the applicant stresses that its number of clients has dropped from 200 to 15, that it is not involved in 'large-scale projects', except in projects involving the Commission, such as the ESEM, Lot ESP 5 and the DG Budget framework contracts, and that it does not own any real estate.

41 The applicant further claims that the Commission's handling of Lot ESP 5 and other contracts it has signed with the Commission will lead the applicant to dismiss over 30% of its staff before the end of the year.

42 With regard to the fall in income and dismissal of its staff arising from the incorrect implementation of Lot ESP 5, the applicant claims that such a fall in income cannot

be easily overcome unless the company's financial situation improves. In any event, the damage is not only financial but irreparable. This is due to the magnitude of the damage, the enormous expenditure the applicant has incurred in order to perform Lot ESP 5 services, the fact that Lot ESP 5 is the largest part of its projects and of its budget, and the fact that its budget has been declining.

43 The Commission objects strongly to the applicant's allegations of biased conduct on the part of the Commission and suggestions that the Commission deliberately invoked false data as evidence in the context of the first application. According to the Commission those allegations, which are of an extremely serious nature and may constitute libel, are entirely unsubstantiated and untrue. In particular, the Commission denies in the strongest possible terms that it was in possession of the new reports when it submitted the old reports to the Court. In fact, the Commission only received the new reports when it received the present application on 24 November 2004. It is absurd for the applicant to make an allegation to the effect that the old reports contain data which are false or obsolete given that those reports were based on interviews with the applicant's representatives and were presented as evidence of the applicant's financial capacity in the ESP-DIMA call for tenders.

44 According to the Commission, the present application is manifestly inadmissible.

45 First, the application is devoid of purpose given that the applicant is not seeking suspension of performance of the contract signed with the ESP-DIMA consortium.

46 Second, the present application amounts effectively to an appeal against the Order of 10 November and not a new application for interim measures.

47 Third, the application does not fulfil the conditions of Article 104 of the Rules of Procedure as it does not mention the conditions required for an application for interim measures, namely urgency, a prima facie case and a balance of interests in favour of the applicant.

48 Fourth, while the application is based on Articles 108 and 109 of the Rules of Procedure, there are no new facts or change in circumstances within the meaning of those provisions which could justify the admissibility of the present application. The Commission observes that the new reports do not constitute 'new facts' or a 'change in circumstances'. Given that those reports are made in 'real time', that is at the client's request, if they were considered to be 'new facts' or a 'change in circumstances' within the meaning of Articles 108 and 109 of the Rules of Procedure, litigants could reopen closed cases simply by requesting the creation of such new reports.

49 The Commission points out that, in any event, the reports cannot constitute new facts since they are not dated after the Order of 10 November (the Dunn and Bradstreet report is dated 2 November 2004 and the EuroDB report is undated), they are based on financial data up to the end of 2003 and, in any case, they do not contain new facts that could change the conclusion on urgency contained in the Order of 10 November. The Commission observes that, on the contrary, the new reports continue to show that the financial situation of the applicant is not such as to endanger its existence. The fact that the new reports show a diminution in its client base does not change the fact that the applicant continues to have a large client base as indicated on its website. Finally, the applicant's allegation regarding dismissal of its staff is contradicted directly by the fact that its website shows that it is actively seeking to recruit a large number of new staff, inter alia, 'to work on latest European Commission projects'.

50 In the alternative, the Commission claims that, were the Court to find the application admissible, the above facts clearly show that there continues to be no urgency, as the President of the Court of First Instance rightly held in the Order of 10 November.

51 Finally the Commission claims that the balance of interests leans clearly in its favour given that suspension would damage the interests of the other tenderers with whom contracts have been signed.

Findings of the President

52 It should be observed at the outset that, in the present application, which constitutes a new application in the context of the same main action as the first application, the applicant invokes Articles 108 and 109 of the Rules of Procedure and seeks interim measures which are identical to those sought in the first application, that is suspension of the operation of the award decision and the letter giving reasons.

53 However, the first application was dismissed by the Court of First Instance by the Order of 10 November.

54 To the extent that in the present application the applicant invokes, without explaining why, Article 108 of the Rules of Procedure, it should be noted that, according to that provision, on application by a party, an order may at any time be varied or cancelled on account of a change in circumstances. This provision is, however, applicable in situations where an order prescribing interim measures is in place. It cannot be applied to situations where an application has been dismissed, such situations being governed by Article 109 of the Rules of Procedure (see to that effect the order of the Court of Justice of 14 February 2002 in Case C-440/01 P(R) *Commission* v *Artegodan* [2002] ECR I-1489, paragraphs 62 to 64).

55 According to Article 109 of the Rules of Procedure, 'rejection of an application for an interim measure shall not bar the party who made it from making a further application on the basis of new facts'.

56 Since the first application was dismissed and the present application is based on the alleged existence of new facts, it follows that it can be declared admissible only if the conditions prescribed in Article 109 of the Rules of Procedure are met (see to that effect the order of the President of the Court of First Instance of 8 October 2001 in Case T-236/00 R II *Stauner and Others* v *Parliament and Commission* [2001] ECR II-2943, paragraph 46).

57 It is for the applicant to show that the conditions allowing the making of a further application, set out in Article 109 of the Rules of Procedure, are met.

58 The applicant has not, however, shown that those conditions are met in the present case.

59 It should be observed, as a preliminary point, that the applicant does not attempt to show clearly why the facts presented in the present application should be considered as 'new facts' within the meaning of Article 109 of the Rules of Procedure.

60 'New facts' within the meaning of Article 109 of the Rules of Procedure should be taken to mean facts which appear after the order rejecting the first application for interim measures was made or which the applicant was not capable of invoking in the first application or during the proceedings leading to the first order and which are relevant to the appreciation of the case in question (see to that effect the order in

Stauner and Others v *Parliament and Commission*, cited above, paragraph 49; see also the order of the Court of Justice of 14 February 2002 in Case C-440/01 P(R) *Commission* v *Artegodan* [2002] ECR I-1489, paragraphs 63 and 64, the order of the President of the Court of First Instance of 4 April 2002 in Case T-198/01 R *Technische Glaswerke Ilmenau* v *Commission* [2002] ECR II-2153, paragraph 123, and the order of the President of the Court of First Instance of 21 January 2004 in Case T-245/03 R *FNSEA and Others* v *Commission* [2004] ECR II-271, paragraph 129, discussing the meaning of 'change in circumstances' in Article 108 of the Rules of Procedure of the Court of First Instance).

61 None of the data put forward by the applicant in the present application can be regarded as new facts within the meaning of Article 109 of the Rules of Procedure.

62 In essence, the applicant relies on the new reports and, in addition, reiterates certain arguments, already put forward in the first application, regarding the importance of Lot ESP 5 for its overall operations and budget and the effects that the allegedly incorrect implementation of Lot ESP 5 could have on its operations, staff and budget.

63 The arguments in paragraph 3 of the present application regarding the fall in revenue of the applicant from EUR 16 million in 2001 to EUR 10 million in 2003, were already contained in the first application and were expressly rejected in the Order of 10 November as evidence supporting the allegation that the applicant's existence could be put in danger (paragraphs 51 and 75 to 76). Apart from the fact that, as in the first application, the applicant does not even attempt to show how such a fall in revenue could put its existence in danger, it is obvious that financial data dating from 2003 and already produced in the first application cannot constitute new facts within the meaning of Article 109 of the Rules of Procedure.

64 The same considerations apply as regards the arguments in paragraphs 3, 5 and 6 of the present application relating to the implementation of Lot ESP 5 and the consequences it could have on the applicant's operations, staff and budget, such as in particular the alleged forthcoming dismissal of a large number of the applicant's staff. These arguments do not present any new facts. They were already made in the first application and expressly rejected in the Order of 10 November (paragraphs 49 to 52 and 81).

65 The data presented in paragraph 4 of the present application are not relevant to an analysis of the condition of urgency and cannot therefore cast doubt on the conclusions reached in the Order of 10 November. In any event, those data relate to historical levels of consumption of various lots in the ESP markets. The applicant does not allege and it does not appear from the file that such data contain new facts which came into being after the Order of 10 November or which the applicant could not have invoked during the proceedings leading to that order. They cannot therefore constitute new facts within the meaning of Article 109 of the Rules of Procedure.

66 As regards the new reports annexed to the present application, the applicant claims that they show that its financial situation was worse than it was painted in the old reports, in particular that its revenue up to 2003 had declined, that the list of customers and suppliers presented in the old reports was wrong and that the applicant does not own any real estate.

67 However, as the Commission rightly points out in its observations, the new reports cannot be considered 'new facts' within the meaning of Article 109 of the Rules of Procedure nor even a change in circumstances.

68 It should first be observed that the reports are not new, since the applicant could have invoked the new reports during the proceedings leading to the Order of 10 November. The Dunn and Bradstreet report of 2 November 2004 pre-dates the Order of 10 November while the EuroDB report is of unspecified date, and both reports are based on data pre-dating the Order of 10 November, in particular interviews with the applicant's management which took place on 1 November 2004 (page 2 of the Dunn and Bradstreet report) and financial data presenting the situation of the company as of the end of the calendar year 2003 (page 4 of the Dunn and Bradstreet report and page 3 of the EuroDB report). The applicant was therefore capable of invoking the new reports when it wrote to the Court on 2 November 2004. It should be recalled that the applicant's letter of 2 November was taken into account by the Court at the applicant's request.

69 Second, the new reports do not contain data which the applicant could not have invoked during the proceedings leading to the Order of 10 November. Financial reports such as the reports in question merely discuss the financial situation of a company on the basis of data collected by the authors of the reports. They may constitute additional evidence relating to the financial situation of the applicant but they do not change the actual facts pertaining to that situation. As the Commission rightly points out in its observations, if the mere existence of those reports (as opposed to the actual financial situation which they discuss), which are made in 'real time' at the request of a client and based largely on data provided by that client, were regarded as 'new facts' within the meaning of Article 109 of the Rules of Procedure, a litigant would be given the possibility of creating endless new facts by simply ordering a new report without any real change in its financial situation.

70 In this respect, the applicant was perfectly capable of presenting data regarding the actual state of its own financial situation at the time of the first application or in response to the Commission's observations on the first application. It did not need external financial reports in order to prove that it has a certain number of clients or

that it does not own real estate. In addition, given that the reports can be obtained in real time at the request of a client, it cannot be considered that the applicant was incapable of invoking updated reports in order to support its allegations with regard to urgency in the first application.

71 However, as the Order of 10 November makes clear, the applicant failed, in the first application, to provide data supporting its arguments that in the absence of the requested interim measures its financial situation was such that its existence would be put in danger. The mere existence of the new reports does not change the underlying financial situation of the applicant at the time of the first application or of the adoption of the Order of 10 November. In this respect, it is hard to imagine that the financial situation of the applicant changed sufficiently in the short period of two weeks between the date of the Order of 10 November and the date the present application for interim measures was made or even in the period following the first application. The applicant does not even claim that this is the case.

72 In the light of the above considerations, it can be concluded that the two reports cannot be regarded as new facts within the meaning of Article 109 of the Rules of Procedure.

73 It should be observed in addition that, in any event, an examination of the content of the new reports, which it should be recalled discuss the applicant's financial situation at a time pre-dating the Order of 10 November, reveals that the overall evaluation of its financial situation is not substantially different from that painted by the old reports. It cannot thus constitute evidence putting into question the conclusion reached in the Order of 10 November that the applicant had not shown that it would be in a situation which, in the absence of interim measures, could endanger its very existence or irretrievably alter its position in the market (paragraph 73 of the Order of 10 November).

74 As the Commission rightly points out in its observations, the Dunn and Bradstreet report of 26 July 2004 and the new Dunn and Bradstreet report of 2 November 2004 classify the overall financial situation of the applicant in identical terms as being 'fair' with a financial rating of 2A3. (The old EuroDB report characterised the financial situation of the applicant as 'good' whereas the new EuroDB report does not contain any such description.) The new Dunn and Bradstreet report of 2 November 2004 adds that the applicant 'can be characterised as self-financed [to] a satisfactory degree'. Nor does the content of these reports change the conclusion reached in the Order of 10 November that the applicant has a large number of clients and participates in a variety of projects. Despite referring to a smaller client base, the new reports continue to indicate that the applicant has a range of 27 clients (see page 3 of the new Dunn and Bradstreet report) including major clients such as the European Commission, EUROSTAT, OPOCE and Cedefop (see page 2 of the EuroDB report). The applicant itself acknowledges that it continues to participate in major projects for the European Commission. As the Commission points out in its observations, such facts are corroborated by the applicant's own website.

75 Finally, it should also be noted that, in any event, neither the existence nor the content of the new reports is such as to have any bearing on the conclusions reached in the Order of 10 November.

76 The existence of the reports cannot cast doubt on the conclusion reached in the Order of 10 November, that the applicant had failed to prove to the requisite legal standard that the alleged damage would flow from the contested acts, or that any such damage could be regarded as serious and irreparable as defined in the Court's case-law (see, to that effect, in particular, the orders of the President of the Court of First Instance of 20 July 2000 in Case T-169/00 R *Esedra* v *Commission* [2000] ECR II-2951, paragraph 43, and of 27 July 2004 in Case T-148/04 R *TQ3 Travel Solutions Belgium* v *Commission* [2004] ECR II-3027, paragraph 41, and the case-law cited). That order was not based primarily on the content of the old reports but, inter alia, first, on the failure of the applicant to show a link between the alleged damage and

the acts suspension of whose operation was sought (paragraphs 66 to 70 of the Order of 10 November) and, second, on the failure of the applicant to produce 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 (paragraphs 75 to 76) or evidence that the applicant's position in the market would be irretrievably altered (paragraph 81).

77 In the light of the above, it cannot be considered that the present application provides new facts within the meaning of Article 109 of the Rules of Procedure or, in any event, facts which could cast doubt on the conclusions reached in the Order of 10 November.

78 It follows that in the absence of such new facts the present application should be dismissed as inadmissible.

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

Arguments of the parties

79 In the present application, the applicant reiterates its request, made in its observations of 23 September 2004 in the context of the first application, that the President of the Court of First Instance order the Commission to produce the documents at issue, on the ground that they might show that the implementation of Lot ESP 4 and Lot ESP 5 was incorrect and biased in favour of the ESP 4 consortium and that it would therefore be essential for the applicant's rights of defence, would be of assistance to the Court, and would even be decisive for the Court's judgment, to obtain those documents.

80 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.

Findings of the President

81 As was already held in the Order of 10 November, 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.

82 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.

83 Since the present application for interim measures must be dismissed for failure to meet the conditions of Article 109 of the Rules of Procedure, 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, 22 December 2004.

H. Jung — Registrar

B. Vesterdorf — President