ORDER OF THE PRESIDENT OF THE COURT OF FIRST INSTANCE

20 July 2006 *

In Case T-114/06 R,

Globe SA, established in Zandhoven (Belgium), represented by A. Abate, lawyer,

applicant,

v

Commission of the European Communities, represented by M. Wilderspin and G. Boudot, acting as Agents,

defendant,

APPLICATION for suspension of the operation of the Commission's decision to reject the applicant's bid in the tendering procedure for supplies to various countries in Central Asia (EuropeAid/122078/C/S/Multi),

* Language of the case: French.

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

makes the following

Order

Facts of the dispute and procedure

1 Globe SA provides specialised services to network operators (gas and electricity) and to the petrochemical industry. Its core activity, surveying, has been extended to include the taking of measurements in three dimensions (by means of a laser scanning process), data conversion (Globe DD) and computer-aided-design (CAD).

2 In the field of gas pipelines, the applicant developed in 2004, from a software programme called 'SIG' ('système d'information géographique', geographical information system), a new version of that software called 'Pipe Guardian' designed to assist managers of such installations in all aspects of their work.

3 On 20 October 2005, the Commission published an invitation to tender for the EuropeAid/122078/C/S/Multi project calling for the supply of a gas pipeline information system to gas companies in Central Asia (Kazakhstan, Kyrgyzstan, Turkmenistan and Uzbekistan). Those contracts are part of the TACIS 2002 programme.

4 The subject of the contract was the integration, configuration, delivery, installation, commissioning and after-sales service, in a single lot, of three pipeline network information systems, as well as the corresponding application programs and the related ancillary services, that is to say training and after-sales service, as defined in the technical specifications set out in the tender.

5 According to Article 1.1 of the Instructions to tenderers, published only in English, a pipeline information system is a data base system intended for the management of all construction and inspection data of a pipeline network and its geographical environment.

6 The Commission points out that although it initiated the invitation to tender itself, it entrusted the drafting of the substantive details of the tender to an outside consulting firm.

7 Section 2 of the Instructions to tenderers laid down the following timetable:

— deadline for requests for any clarifications from the contracting authority: 18 November 2005;

— last date on which clarifications are issued by the contracting authority: 29 November 2005;

— deadline for submission of tenders: 5 December 2005;

— tender opening session: 8 December 2005;

— notification of award to the successful tenderer:16 December 2005;

— signature of the contract 30 December 2005.

8 By letter of 10 November 2005 to the Commission, the applicant asked several questions on various subjects connected with the invitation to tender, of which one concerned the number of toner cartridges required by the specification in the contract documents (75 black toner cartridges and 25 colour toner cartridges). The applicant wished to know, in particular, whether those quantities were specified for each individual printer or for the whole contract.

9 On 14 November 2005, the Commission published Corrigendum No 1, it which it stated that the last date on which clarifications would be issued by the contracting authority was 24 November 2005.

10 On 22 November 2005, the Commission published a series of clarifications, one of which, No 23, concerned the number of toner cartridges involved in the invitation to tender and indicated that the figures of 75 and 25 toner cartridges referred to the number of cartridges required for each printer. The Commission also stated that the number of printers to be supplied under the contract was 16.

11 On 24 November 2005, the Commission published Corrigendum No 2, it which it stated that the precise number of toner cartridges was five black and two colour cartridges per printer.

12 IGN France International ('IGN') submitted its tender on 2 December 2005, that is to say, eight days after the publication of Corrigendum No 2. That tender made mention of a total of 1 600 toner cartridges, namely 1 200 black toner cartridges (that is to say, 75 cartridges for each of the 16 printers) and 400 colour toner cartridges (that is to say, 25 cartridges for each of the 16 printers).

13 The applicant's bid was submitted on 5 December 2005 and took account of Corrigendum No 2.

14 The two other tenderers, Asia Soft and Geomagic, also submitted bids taking account of the information provided by the Commission in Corrigendum No 2.

15 In accordance with Article 20.6 of the Instructions to tenderers, the sole award criterion was to be the price and the contract would be awarded to the lowest compliant tender.

16 The tender opening session was held by the committee for the evaluation of tenders, as planned, on 8 December 2005. It was determined at that time that the bids of the four tenderers were as follows:

— Globe: EUR 545 215;

— IGN: EUR 592 400;

— Asia Soft: EUR 865 143;

— Geomagic: EUR 934 964.

17 The Commission awarded the contract to IGN. The contract was signed by the Commission on 19 December 2005 and by IGN on 30 December 2005 without the applicant being informed.

18 By letters of 6 January 2006 and 3 February 2006, the applicant and its lawyer wrote to the Commission to enquire as to what further steps had been taken in the tendering procedure.

19 By letter of 1 March 2006, the Commission informed the applicant's lawyer:

'... although it is true that at the tender opening session, it was found that Globe's bid was the lowest, it was discovered subsequently that another tenderer's bid was based on the quantities set out in the original publication in the Official Journal rather than on those contained in the corrigendum published on the EuropeAid web site. Since the corrigendum was published at a late stage, leaving very little time for potential tenderers to take note of its contents and because, in an invitation to tender for the supply of equipment, it is not possible to identify the potential tenderers in advance, the evaluation committee decided to take that bid into

consideration and make the adjustments necessary to take account of the quantities indicated in the corrigendum published on the internet. As a result of those adjustments (reduction of the quantities and, consequently, reduction in the price), it appeared that Globe's bid was not the lowest. The contract was therefore awarded to [IGN]'.

20 By letter of 2 March 2006 ('the contested decision'), the Commission informed the applicant that its tender was not the least expensive of those tenders which were technically compliant and that the contract had been awarded to IGN for an amount of EUR 531 600.

21 In response to a letter to the Commission of 6 March 2006 from the applicant's lawyer, the Commission forwarded, on 17 March 2006, a copy of the report drawn up by the evaluation committee. In that report, under the heading of technical compliance, the evaluation committee states, in essence, that, at the request of the contracting authority IGN's bid had to be re-calculated to take into account the changed number of toner cartridges, as modified by Corrigendum No 2, and that the bid had been amended to that effect. Under the same heading, the evaluation committee confirmed that the revised bid and the confirmation had been received within 24 hours by e-mail and fax.

22 By an application lodged at the registry of the Court of First Instance on 14 April 2006 the applicant brought an action for the annulment of the contested decision.

23 On the same day, the applicant lodged an application for interim measures in which it seeks, essentially, suspension of the operation of the contested decision by the President of the Court of First Instance and an order for costs against the Commission.

24 On 27 April 2006, the Commission submitted its observations on the application for interim measures. In those observations, it asked the Court to dismiss that application and order the applicant to pay the costs.

25 The parties presented oral argument at the hearing on 16 May 2006.

Law

26 Article 104(2) of the Rules of Procedure of the Court of First Instance provides that applications for interim measures must specify the subject matter of the dispute, the circumstances giving rise to urgency as well as the pleas of fact and law prima facie justifying the grant of the provisional measure sought (*fumus boni juris*). Those conditions are cumulative so that an application for interim measures must be rejected if 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). In an appropriate case the President has also to weigh up the interests at stake (order of the President of the Court in Case C-445/00 R *Austria* v *Council* [2001] ECR I-1461, paragraph 73 and the case-law cited therein).

27 Moreover, in the context of that overall examination, the President enjoys a wide margin of discretion and remains free to determine, in light of the particular features of the case, the way in which those different conditions have to be verified and the order of priority of that examination since there is no rule of Community law imposing on him a predetermined analytical model for assessing the need for an interim decision (order of the President in Case C-149/95 P(R) *Commission* v *Atlantic Container Line and Others* [1995] ECR I-2165, paragraph 23).

28 The present application for interim measures must be considered in the light of the principles set out above.

29 Before ruling on the application for interim measures, the subject matter of the application should be made clear. The applicant, in its application, is seeking suspension of the operation of the contested decision.

30 It should be pointed out that a decision relating to the award of a contract to a single tenderer inevitably and inseparably entails a corresponding decision not to award the contract to the other tenderers. It must therefore be held that the formal communication of the result of the tendering procedure to the rejected tenderers does not mean that a decision other than the decision awarding the contract will be adopted for the express purpose of stating a rejection (judgment of the Court of First Instance in Case T-183/00 *Strabag Benelux* v *Council* [2003] ECR II-135, paragraph 28).

31 It must therefore be considered that the applicant is seeking suspension of the operation both of the decision not to award it the contract and of the decision to award the contract to IGN.

32 Moreover, it was confirmed at the hearing that the contract was concluded by the Commission on 19 December and by IGN on 30 December, that performance has begun but is not yet completed. The contract is thus the immediate extension of the Commission's decision to award the contract to IGN.

33 However, as was made clear at the hearing, the applicant puts forward claims for damages arising from performance of the contract and is therefore seeking to prevent serious and irreparable damage which would result, in its view, from such performance.

34 It must be considered therefore that the applicant is also seeking suspension of performance of the contract.

1. *Prima facie case*

Arguments of the parties

The applicant's arguments

35 The applicant puts forward, essentially, four pleas in law in support of its application in the main proceedings which concern the compliance of the bids, infringement of the right to be heard, breach of the Commission's duty to give reasons and of the principle of sound administration.

— The first plea in law

36 In its first plea in law, the applicant claims that the Commission committed three errors of assessment which vitiate the procedure under which the contract was awarded to IGN.

37 In the first place, the applicant argues, on the one hand, that its bid was the lowest and that, consequently, in accordance with Article 20.6 of the Instructions to tenderers, which provided that the sole award criterion was to be the price and that

the contract would be awarded to the lowest compliant tender, the Commission should have awarded it the contract and had no discretion in that regard. It considers that in not awarding it the contract, the Commission disregarded its legitimate expectations.

38 On the other hand, the applicant argues that IGN's bid did not comply with the technical specifications contained in the contract documents.

39 Firstly, according to the applicant, the contract documents provided that the printers were to be of type 'A3 max' so as to be able to print on paper of size 297 x 420 mm. In its view, the indication 'A3 max' means that the printers should be able to print in that format and that larger sizes (A2, A1, A0) were not required. It adds that in the field concerned, larger formats are sometimes used and that, therefore, 'A3 max' expresses a requirement that it should be possible to print on A3 size paper. The printers offered by IGN are A4 size (210 x 297 mm). The applicant claims, therefore, that those printers do not comply with the format called for in the contract documents.

40 Secondly, the applicant claims that the contract documents provide that the print speed of the first page in colour should be 26 seconds whereas, in the case of the printers offered by IGN, it is only 29 seconds.

41 In the applicant's view, those technical differences result in significant price differences between the printers it offered and those offered by IGN, the latter costing EUR 379, whereas the printers offered by the applicant cost EUR 3 719.10. The decision to accept IGN's bid therefore infringed the principle of non-discrimination.

42 Thirdly, the applicant argues, in essence, that the Commission should have rejected IGN's bid since it did not fulfil the requirements of the invitation to tender inasmuch as it was based on the supply of 1 600 cartridges, the number initially set out in the contract documents, and not 112 cartridges, the number finally established by Corrigendum No 2.

43 In the second place, the applicant claims essentially that the Commission granted IGN an extension of the deadline for submission of tenders inasmuch as it permitted IGN to amend and correct its bid after the deadline fixed by the invitation to tender, even though IGN was aware of the prices offered by the other tenderers, having been present, along with them, at the tender opening session.

44 In the third place, the applicant argues, in substance, the Commission permitted IGN to amend its tender contrary to the applicable rules and, in particular, to the provisions of Articles 15, 19.5, 20.3, and 20.4 of the Instructions to tenderers.

— The second plea in law

45 The applicant argues, essentially, that the Commission should have informed it of the reasons why it proposed to invert the order of precedence of the tenders so as to permit it to submit it views in accordance with its right to be heard.

— The third plea in law

46 The applicant claims, in essence, that the statement of the reasons on which the Commission's decision is based is insufficient and contradictory, all the more so as application of the Instructions to tenderers should have led to its being awarded the contract. The decision also does not mention the matters of fact or of law which led the Commission to change the order of tenders fixed by the evaluation committee on 8 December 2005.

— The fourth plea in law

47 The applicant claims that the Commission demonstrated negligence in the context of the procedure for the award of the contract. It considers, essentially, that the time which it took for the Commission to reply to it infringes the Code of good administrative behaviour, which requires the Commission to reply within 15 days from the date of receipt of the request for information.

The Commission's arguments

— The first plea in law

48 On the one hand, the Commission argues that IGN's bid was already the lowest at the time at which it submitted its tender on 2 December 2005. It justifies that claim by pointing out that if the correction of the number of toner cartridges required by the invitation to tender, as set out in Corrigendum No 2, had been carried out by the evaluation committee itself, IGN's bid would have been lower than that of Globe.

49 Consequently, the Commission considers that the applicant has no basis for alleging an infringement of its legitimate expectations having regard to the fact that the evaluation committee had only commenced its consideration of the tenders and had not yet adopted any decision, notwithstanding the fact the committee considered, from the very start, that Globe's bid fulfilled the requirements of the invitation to tender.

50 On the other hand, with regard to the compliance of IGN's tender, the Commission relies on the fact that the expression 'A3 max' was interpreted by the evaluation committee as including the A4 format, the A3 format being an upper threshold beyond which the printers which were required did not need to go.

51 Secondly, the Commission emphasises that the evaluation committee considered that the print time of 26 seconds for the first page in colour laid down in the contract documents was a threshold and that the committee considered that a difference of 3 seconds was not a major technical weakness justifying automatic rejection of IGN's tender.

52 Thirdly, the Commission points out, essentially, that the reason for its invitation to IGN to submit a corrected version of its tender was the late appearance of Corrigendum No 2. The Commission adds that it was not just reasons of equity which led the evaluation committee to adopt that decision, but the fear that if it excluded IGN, that firm might bring an action for annulment or for damages.

— The second plea in law

53 The Commission considers that it has already replied to that plea in its argument concerning the lowest tender and refers back to that argument and it also claims

that a period of two months was needed to permit its departments to draw up a reasoned decision in a matter which it considered complex and which, in its view, had encountered technical difficulties during the tendering procedure.

— The third plea in law

54 The Commission argues, in essence, that the contested decision is perfectly clear and it fulfils the requirements of the settled case-law of the Court of Justice and the Court of First Instance to the effect that the extent of the obligation to state reasons, as required by Article 253 EC, depends on the nature of the measure in question and on the context in which it was adopted. The statement of reasons must disclose in a clear and unequivocal fashion the reasoning of the institution which adopted the decision, in such a way as to permit the persons concerned to ascertain the reasons for the measure and thus enable them to defend their rights, and to enable the Community judicature to carry out its review of the measure (judgment of the Court of First Instance in Case T-282/02 *Cementbouw Handel & Industrie* v *Commission* [2006] ECR II-319, paragraph 85). It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 253 EC must be assessed with regard not only to the wording of the measure at issue but also to its context (judgments of the Court of Justice in Case 203/85 *Nicolet Instrument* [1986] ECR 2049, paragraph 10; Case 240/84 *NTN Tokyo Bearing and Others* v *Council* [1987] ECR 1809, paragraph 31; Case 255/84 *Nachi Fujikoshi* v *Council* [1987] ECR 1861, paragraph 39; and Case C-76/00 P *Petrotub and Republica* v *Council* [2003] ECR I-79, paragraph 81).

55 The Commission also points out that it took care, in the first two paragraphs of its letter of 1 March 2006, to explain the reasons which led it to suggest to IGN that it reformulate its tender in accordance with Corrigendum No 2.

— The fourth plea in law

56 The Commission merely states that this plea is unfounded.

Assessment of the President of the Court

57 As a preliminary matter it should be pointed out, first of all, that under Article 89(1) 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, '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 (Order of the President of the Court of First Instance in Case T-447/04 R *Capgemini Nederland* v *Commission* [2005] ECR II-257, paragraph 68).

58 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 (judgment of the Court in Case 56/77 *Agence Européenne d'Interims* v *Commission* [1978] ECR 2215, paragraph 20, and judgment of the Court of First Instance in Case T-19/95 *Adia Interim* v *Commission* [1996] ECR II-321, paragraph 49).

59 Having formulated those preliminary observations, the President considers that, having regard to the documents in the case concerning this application for interim measures, the applicant's first plea in law is of a serious nature.

60 It is not disputed that at the tender opening session on 8 December 2005, the evaluation committee determined that the bids of the four tenderers were as follows:

— Globe: EUR 545 215;

— IGN: EUR 592 400;

— Asia Soft: EUR 865 143;

— Geomagic: EUR 934 964.

The applicant's bid was thus the lowest at the time that the tenders were opened.

61 However, the Commission claims that IGN's bid was the lowest even at the time that the tenders were opened. In its view, if the evaluation committee had itself corrected the number of toner cartridges required by the invitation to tender, as provided for in Corrigendum No 2, IGN's bid would have been lower than that of the applicant.

62 Clearly, the Commission thereby admits that in the absence of any correction by IGN of its tender, it had not submitted the lowest bid at the time that the tenders were opened.

63 It must therefore be determined whether, prima facie, the Commission was entitled to permit IGN to correct its tender.

64 Article 15 of the Instructions to tenderers provides that no tender was to be altered after 5 December 2005.

65 In addition, Article 19.5 of the Instructions to tenderers provides that in the interests of transparency and equal treatment and without being able to modify their tenders, tenderers may be required, at the written request of the evaluation committee, to provide clarifications within 48 hours. Any such request for clarification must not seek the correction of formal errors or of major 'restrictions' affecting performance of the contract or distorting competition.

66 Article 20.3 of the Instructions to tenderers provides that to facilitate the examination, evaluation and comparison of tenders, the evaluation committee may ask each tenderer for clarification of his tender, including breakdowns of prices. The request for clarification and the response must be in writing only, but no change in the price or substance of the tender may be sought, offered or permitted except as required to confirm the correction of arithmetical errors discovered during the evaluation of tenders.

67 In addition, Article 20.4 of the Instructions to tenderers provides that tenders found to be technically compliant are to be checked for any arithmetical errors in computation and summation. According to that provision, errors will be corrected by the evaluation committee as follows: on the one hand, where there is a discrepancy between amounts in figures and in words, the amount in words will be the amount taken into account. On the other, except for lump-sum contracts, where there is a discrepancy between a unit price and the total amount derived from the multiplication of the unit price and the quantity, the unit price as quoted will be the price taken into account.

68 Although the correction of arithmetical errors is clearly possible under those provisions, that possibility is strictly limited; the provisions in question do not, prima facie, permit a correction that amounts to a modification of the tender.

69 In this case, IGN, at the Commission's request, did not correct arithmetical errors but rectified certain erroneous parameters of its bid, something the Commission does not deny, inasmuch as it admits that the number of toner cartridges mentioned in IGN's original tender was not the number required by Corrigendum No 2.

70 It should also be made clear that the other three tenderers, namely the applicant, Asia Soft and Geomatic, submitted tenders in accordance with the requirement laid down in Corrigendum No 2.

71 The Commission argues that the reason for its invitation to IGN to submit a corrected version of its tender was the late appearance of Corrigendum No 2. The Commission adds that it was not just reasons of equity which led the evaluation committee to adopt that decision, but the fear that if it excluded IGN, that firm might bring an action for annulment or for damages.

72 None the less, the last date initially fixed on which clarifications were to be issued by the contracting authority was 29 November 2005. On 14 November 2005, the Commission published Corrigendum No 1, indicating that the last date on which clarifications would be issued by the contracting authority was 24 November 2005. It should be pointed out that that correction to the time-limit for the publication of clarifications seems to have been made necessary in order to comply with the period of 11 days between the last date on which clarifications were to be issued by the Commission and the deadline for submission of tenders, required by Article 2 and the third paragraph of Article 13 of the Instructions to tenderers. Those articles provide that the last date on which clarifications might be issued constituted the beginning of a period of 11 days during which tenderers could draw up and transmit their bid, knowing that the contract documents would not undergo any further modification.

73 Clarifications were issued on 22 November 2005 and a corrigendum to those clarifications was issued on 24 November 2005. Consequently, the Commission cannot, prima facie, argue that Corrigendum No 2 was issued late, since it was issued within the time-limit fixed by the Commission itself.

74 With regard to whether IGN's tender was compliant, which, according to Article 20.4 of the Instructions to tenderers, was an essential pre-condition if arithmetical errors were to be corrected, the applicant argues that the contract documents specified that the print speed of the first page in colour should be 26 seconds, whereas the printers offered by IGN had a speed of 29 seconds.

75 The Commission claims that the evaluation committee regarded the print time of 26 seconds for the first page in colour, fixed in the contract documents as a threshold. Moreover, it argues that the committee considered that the difference of three seconds did not constitute a major technical weakness justifying an automatic rejection of IGN's tender.

76 Leaving aside the fact that, at first glance, the Commission's line of reasoning concerning the print speed is unconvincing since if the speed was in fact a threshold, the slower a printer was, the more it would fulfil the conditions laid down in the specification in the contract documents, the fact is that those documents specified that the print speed was to be 26 seconds. Furthermore, the latitude to which the Commission refers is not set out expressly in the contract documents and the evaluation committee does not, prima facie, seem to have any legal basis for considering that it was entitled to depart from the technical specifications contained in those documents. Consequently, the compliance of IGN's tender in that regard must be regarded with circumspection since the broad discretion which the Commission enjoys as to the factors to be taken into account when awarding a contract following an invitation to tender does not, prima facie, permit it to depart from the criteria which it has itself strictly defined, as it will otherwise have failed to maintain the equal treatment to which the tenderers are entitled.

77 Moreover, the applicant's arguments concerning the print format required for the printers to be delivered by the successful tenderer can also not be dismissed without further consideration.

78 It is not contested that the printers are to be used, in particular, to print plans of the route followed by gas pipelines and of the areas around them.

79 The applicant argues, essentially, that the reference to 'A3 max' format is a technical specification which requires printers meeting it to be able to print, in the A3 format, geographical plans and maps of areas ranging from 2 to 40 000 kilometres, in accordance with the requirements of Annex TS4.2 of the Instructions to tenderers, whereas printers capable of producing larger formats, such as A2, A1 or even A0, frequently used in cartography, were not required.

80 The Commission argues that the evaluation committee decided unanimously to interpret the expression 'A3 max' as an 'upper threshold' and to consider printers which printed only in A4 format to fulfil the requirements of the contract documents.

81 First of all, it must be determined, on the one hand, whether the expression 'A3 max' was open to interpretation by the evaluation committee if, as the applicant claims, it was a technical specification and, on the other, whether the Commission was entitled to interpret that expression, particularly since the tenderers were not informed of that interpretation.

82 Secondly even supposing that the evaluation committee was entitled to interpret the expression 'A3 max' and that it was not a technical specification which was not subject to interpretation, it should be pointed out that the Commission's interpretation seems, prima facie, unconvincing. According to the Commission's argument to the effect that the A3 format was an upper limit, print formats equal to or smaller than A4 (such as A5 or even smaller formats) would have fulfilled the conditions of the contract documents, even though such formats seem ill adapted to printing geographical plans and maps covering areas from 2 to 40 000 kilometres. If, on the other hand, the evaluation committee's interpretation merely regarded the A4 format as acceptable, to the exclusion of smaller formats, that would imply that the format laid down in the Instructions to tenderers contained not merely an 'upper threshold' ('A3 max') but a lower limit (A4) which was not mentioned therein and which, it would appear, was not made known to the tenderers.

83 In addition, it should be pointed out that the applicant argued in its written pleadings, without being contradicted by the Commission, that the computer programme in question requires the A3 print format.

84 It is not contested that the differences in print format give rise to particularly significant differences in the price of the printers — those offered by IGN cost EUR 379 each whereas those offered by the applicant cost EUR 3 719.10 each — which, if the Commission was right, ought logically to have led the tenderers not to offer printers with the A3 format and to limit themselves to smaller print formats in order to reduce the amount of their tenders.

85 Moreover, it should be pointed out that the total cost of the 16 printers offered by IGN was EUR 6 064, whereas the total cost of the printers offered by the applicant was EUR 59 504, which is a difference of EUR 53 440. If IGN had complied with the A3 print format requirement for the printers it offered, there is every reason to believe that its price would have been increased by approximately the same amount and would then have been considerably above that of the applicant, even after correction of the number of toner cartridges, provided that such correction was possible.

86 Consequently, the question whether the printers chosen by IGN corresponded or not to the technical specifications in the contract documents concerning the print format required require a detailed consideration which it is not for the President to enter into, his role being merely to determine, in the course of considering whether a prima facie case has been made out, that the applicant's arguments are not, prima facie, without any foundation.

87 In the light of the foregoing and having regard to the information at the disposal of the President, the arguments of fact and law put forward by the applicant in the context of its first plea in law give rise to serious doubts as to the lawfulness of the award of the contract to IGN. Under those circumstances, this application cannot be rejected for want of having made a prima facie case, and it must be considered whether the application satisfies the condition relating to urgency (see, to that effect, the order in *Austria* v *Council*, cited above at paragraph 26, paragraphs 100 and 101).

2. *Urgency*

Arguments of the parties

The applicant's arguments

88 Although it accepts that failure to obtain the contract will not jeopardise its existence, the applicant contends that the damage resulting from the loss of the contract cannot be fully compensated for by a money payment and its application is therefore aimed at obtaining compensation in kind.

89 The applicant argues that its core activity, surveying, has gradually been extended to include the taking of measurements in three dimensions (by means of a laser scanning process), data conversion (Globe DD) and computer-aided-design (CAD) and that in the field of gas pipelines, that expertise permitted it to develop a software programme called 'SIG' ('système d'information géographique', geographical information system), designed to assist managers of such installations in all aspects of their work. In 2004, Globe developed a new version of that software called 'Pipe Guardian'.

90 The applicant points out that that software represents a considerable investment and is part of a strategy to internationalise the company, which at the moment, does business essentially in Belgium and the Netherlands. It emphasises that internationalisation is necessary in a highly specialised technology market on which a limited number of traders are present. It points out that there are five traders present worldwide on this market, including the four tenderers.

91 The applicant contends that the commercial progress of its Pipe Guardian software is closely linked to its participation in international invitations to tender and that most potential customers select their new software programmes by way of pre-selections and invitations to tender. One of the most important factors in that process is the submission of a list of representative references. It points out that the Commission itself requires such references before giving consideration to a bid submitted in the context of one of its invitations to tender, in particular in the case of the contract which is the subject of the contested decision, in regard to which the applicant was able to produce references from Shell and the North Atlantic Treaty Organisation (NATO).

92 Furthermore, the applicant observes, in substance, that, having been set up 16 years ago, it is an operator on the market for whom a contract such as that offered by the Commission would permit it to make itself better known, to compete with other traders in the context of international invitations to tender and to carve out a place on the international market.

93 At the hearing, the applicant also pointed out, in essence, that it considered that, in this case, it had not lost an opportunity to obtain a contract but that it had failed to obtain a contract that it should have been awarded if the rules for making such awards had been complied with by the Commission and consequently, it had also lost the opportunity to obtain references on which it could have relied if the Commission had awarded it the contract. That, in its view, constitutes irreparable damage.

94 According to the applicant, there is also urgency because, before the judgement on the substance of the case is delivered, the contract at issue will have been largely, if not entirely, performed. The judgment in the main proceedings would therefore be ineffective. It relies in that regard on the order of the President of the Court of Justice of 22 April 1994 in *Commission* v *Belgium* (Case C-87/94 R [1994] ECR I-1395, paragraph 31), made in the course of an action for failure to fulfil obligations.

The Commission's arguments

95 The Commission argues that Globe has produced no evidence showing that performance of the contract by IGN would cause it damage. The Commission also contends that the damage is not irreparable since the applicant itself estimated its loss at EUR 492 000 in its application in the main proceedings, although it acknowledges that the applicant argued that such compensation would only be an imperfect remedy.

96 It adds that that is all the more true inasmuch as the applicant claims not to have lost an opportunity but the contract itself.

97 It also stated, in essence, at the hearing that although it is true that the applicant lost an opportunity to obtain references, it is accepted that tendering procedures are highly competitive and the fact of not having been awarded the contract is not in any way a negative reflection on the capacities of the disappointed tenderer.

98 Finally, the Commission contends that the applicant's argument to the effect that the contract concluded between the Commission and IGN would be largely performed before the judgment in the main proceedings was delivered is irrelevant in this case. The applicant has based its argument on case-law referring to applications for failure to fulfil obligations. That is a special category of actions which cannot give rise to proceedings for damages before the Community courts. Moreover, the facts at issue in the case which gave rise to the order in *Commission* v *Belgium*, mentioned in paragraph 93, above, are not comparable to those in the present case.

Assessment of the President of the Court

99 As regards the condition of urgency, it must be remembered that the purpose of the procedure for interim relief is to guarantee the full effectiveness of the definitive future decision, in order to ensure that there is no lacuna in the legal protection provided by the Court (orders in Case 27/68 R *Renckens* v *Commission* [1969] ECR 255; Case C-399/95 R *Germany* v *Commission* [1996] ECR I-2441, paragraph 46; Case C-393/96 P(R) *Antonissen* v *Council and Commission* [1997] ECR I-441, paragraph 36; and *Commission* v *NALOO*, paragraph 52). For the purpose of attaining that objective, urgency must be assessed in the light of the need for an interlocutory order in order to avoid serious and irreparable damage to the party seeking the interim relief (orders in Case C-65/99 P(R) *Willeme* v *Commission* [1999] ECR I-1857, paragraph 62, *Commission* v *NALOO*, cited above, paragraph 52, and Case C-156/03 P(R) *Commission* v *Laboratoires Servier* [2003] ECR I-6575, paragraph 35).

100 The applicant contends that if the contested decisions are annulled and if interim relief is not granted, the contract at issue in the invitation to tender could not be awarded to it or performed by it and it would therefore be deprived of certain benefits in terms of references and access to the international market for the services concerned.

101 It should be pointed out that if the contested decisions were annulled by the Court, the Commission would be required, under the first paragraph of Article 233 EC, to take the necessary measures to comply with the judgment, without prejudice to any obligations resulting from the application of the second paragraph of Article 288 EC (order of the President of the Court of First Instance in Case T-195/05 R *Deloitte Business Advisory* v *Commission* [2005] ECR II-3485, paragraph 128).

102 It addition, it should be borne in mind that under Article 233 EC, it is the institution whose act has been declared void which is required to take the necessary measures to comply with the judgment of the Court. It follows that the court which declares the measure void has no jurisdiction to issue directions to the institution whose act has been declared void as to the manner in which it is to comply with the Court's judgment (order of the Court of Justice in Joined Cases C-199/94 P and C-200/94 P *Pevasa and Inpesca* v *Commission* [1995] ECR I-3709, paragraph 24) and that the President of the Court of First Instance cannot pre-judge measures which might be adopted as a result of the annulment. The measures necessary in order to comply with a judgment annulling a measure depend not merely on the measure which has been annulled and the scope of the judgment, which is to be assessed on the basis of the grounds which led to it (judgments of the Court of justice in Joined Cases 97/86, 99/86, 193/86 and 215/86 *Asteris and Others* v *Commission* [1988] ECR 2181, paragraph 27, and Joined Cases C-442/03 P and C-471/03 P *P&O European Ferries (Vizcaya)* v *Commission* [2006] ECR I-4845, paragraph 44) but also on the circumstances of each case, such as the time frame in which the annulment of the contested measure takes place or the interests of third parties.

103 In this case, if the contested decisions were annulled, it would be for the Commission, in the light of the circumstances of the case, to take the measures necessary to provide appropriate protection for the applicant's interests (see, to that effect, the orders in *Capgemini Nederland* v *Commission*, cited above at paragraph 57, paragraph 96, and *Deloitte Business Advisory* v *Commission*, cited above at paragraph 101, paragraph 130).

104 The President may not therefore pre-judge the measures that the Commission might take to comply with a judgment annulling the contested decisions.

105 None the less, the general principle of the right to full and effective judicial protection means that parties before the courts must be granted interim protection if this is necessary to ensure the full effectiveness of the subsequent definitive judgment, in order to prevent a lacuna in the legal protection afforded by the Community courts (see, to that effect, the order in *Renckens* v *Commission*, cited above at paragraph 99; the judgments of the Court of Justice in Case C-213/89 *Factortame and Others* [1990] ECR I-2433, paragraph 21, and Joined Cases

C-143/88 and C-92/89 *Zuckerfabrik Süderdithmarschen and Zuckerfabrik Soest* [1991] ECR I-1415, paragraphs 16 to 18; and the orders in *Germany* v *Commission*, cited above at paragraph 99, paragraph 46, and *Austria* v *Council*, cited above at paragraph 26, paragraph 111).

106 It must therefore be considered whether it has been shown with a sufficient degree of probability that the applicant is likely to suffer serious and irreparable damage if the interim relief applied for is not granted (see, to that effect, the order in *Commission* v *NALOO*, cited above at paragraph 99, paragraph 53).

107 It must first therefore be considered whether, following a judgment annulling the contested decisions, the fact that the Commission could organise a new tendering procedure would repair the damage caused to the applicant and if the answer to that question is in the negative, to assess whether the applicant could be compensated.

108 With regard to the possibility of the Commission organising a new tendering procedure, it must be pointed out that the Commission awarded the contract to IGN and it was signed in December 2005, without the applicant being informed previously that it had not been awarded the contract. The Commission ultimately informed it of that fact, after several requests, only by letter of 1 March 2006.

109 In addition, in reply to a question at the hearing, the Commission initially indicated that although it could confirm that performance of the contract commenced after it was signed by the parties and that some of the equipment provided for under the contract, such as the printers and toner cartridges, were to be delivered at the end of April 2006, it was unaware of the stage which performance of the contract had reached, then, without any further explanation, it indicated that the equipment provided for under the contract had already been delivered.

110 For its part, the applicant indicated, without being contradicted by the Commission, that the final date fixed by the Commission for provision of the other services under the contract, in particular, the placing in service of the software, was 15 March 2007.

111 Thus, the inevitable conclusion is that the judgment which will close the main proceedings will probably not be delivered until after the contract, or at least, a large part of the contract, has been performed.

112 It is therefore highly unlikely that, following a judgment in which the contested decisions are annulled, which would probably be delivered after performance of the contract has been completed, a new tendering procedure would be organised by the Commission. The damage suffered by the applicant could not therefore be repaired by that means.

113 It must therefore be considered whether, and how, the damage suffered by the applicant could be repaired by an action under Article 235 EC.

114 It should be pointed out the applicant contends that compensation in the form of money damages would make good the loss it has suffered only in a very imperfect way whereas suspension of the contract until the judgment in the main proceedings has been delivered would preserve the possibility of its obtaining compensation in kind, that is to say, in this case, performance of the contract and consequently, the competitive advantages it believes would flow from being awarded such a contract.

115 As the principle that the damage actually suffered must be made good in its entirety is a principle of law upheld by the Community judicature (judgment of the Court of Justice in Joined Cases C-104/89 and C-37/90 *Mulder and Others* v *Council and Commission* [2002] ECR I-203, paragraph 227), it must be considered whether the damage which the applicant alleges it has suffered can be made good in its entirety by an equivalent means.

116 The first paragraph of article 101 of Regulation No 1605/2002 provides that '[t]he contracting authority may, before the contract is signed, either abandon the procurement or cancel the award procedure without the candidates or tenderers being entitled to claim any compensation'. Thus, contrary to the applicant's claim, it did not lose a contract but rather an opportunity, and, in this case, a particularly favourable one, to obtain the contract which was the subject of the Community tendering procedure.

117 Although the chances of obtaining the contract were good, it is none the less very difficult, if not impossible, to quantify them and consequently to determine with sufficient accuracy the damage resulting from failure to obtain it. It is settled case-law that damage which, once it has occurred, cannot be quantified with sufficient accuracy is to be regarded as difficult to repair (see, to that effect, the order of the President of the Court of Justice in Joined Cases C-51/90 R and C-55/90 R *Comos-Tank and Others* v *Commission* [1990] ECR I-2167, paragraph 31; and the orders of the President of the Court of First Instance in Case T-41/97 R *Antillian Rice Mills* v *Council* [1997] ECR II-447, paragraph 47, and in Case T-65/98 R *Van den Bergh Foods* v *Commission* [1998] ECR II-2641, paragraph 65; see also the order in *Deloitte Business Advisory* v *Commission*, cited above at paragraph 101, paragraph 147 and the case-law cited therein).

118 That loss of opportunity may therefore be regarded as difficult to repair in an equivalent form (see, to that effect, the order in *Deloitte Business Advisory* v *Commission*, cited above at paragraph 101, paragraph 148).

119 In addition, the applicant contends, in essence, that the loss, properly so called, resulting from the failure to obtain the contract at issue is in addition to the loss of the competitive advantage attached to the award of the contract and that that advantage would have permitted it to enter the international market by allowing it to refer to the contract awarded by the Commission in the context of other invitations to tender.

120 It should be pointed out that, according to the applicant, there are only five traders present worldwide on this market, something which the Commission does not contest. It also does not contest the applicant's claim that references likely to advance the position of tenderers on the market in question constitute an important factor for potential customers of such tenderers.

121 In accordance with paragraph 11.8 of the Instructions to tenderers, references are one of the factors to be taken into account in assessing whether tenders are compliant in the procedure for awarding the contract laid down by the Commission.

122 It should be pointed out that such references represent, however, only one of many criteria taken into account by the Commission in the qualitative selection of service providers (Article 137 of Commission Regulation (EC, Euratom) No 2342/2002 of 23 December 2002 laying down detailed rules for the implementation of Council Regulation (EC, Euratom) No 1605/2002 on the Financial Regulation applicable to the general budget of the European Communities (OJ 2002 L 357, p. 1); see also, to that effect, the orders of the President of the Court of First Instance in Case T-169/00 R *Esedra* v *Commission* [2000] ECR II-2951, paragraph 49, and in Case T-148/04 R *TQ3 Travel Solutions Belgium* v *Commission* [2004] ECR II-3027, paragraph 51).

123 However, in this case, having regard to the extremely limited number of traders on the world market, it cannot be excluded out of hand and without any further consideration that such references could represent a real competitive advantage, something which the Commission does not deny. Moreover, the references are being sought not with a view to obtaining contracts from the Commission — for which

they represent only one of many criteria taken into account — but to obtain contracts from other customers for whom such references could be the determining factor, something which the Commission does not contest either.

124 In this case, having regard to the special circumstances of the contract at issue, which concerns very specific software programmes for which the number of potential customers is relatively limited, and to the extremely limited number of suppliers, the alleged damage appears to be certain or, at least, established with a sufficient degree of probability (order of the President of the Court of First Instance in Case T-241/00 R *Le Canne* v *Commission* [2001] ECR II-37, paragraph 34) and does not appear to be hypothetical and based exclusively on the unpredictable probability of future and uncertain events (see, to that effect, the order of the President of the Court of First Instance in Joined Cases T-195/01 R and T-207/01 R *Government of Gibraltar* v *Commission* [2001] ECR II-3915, paragraph 101 and the case-law cited therein).

125 The fact that the applicant would be able to point to a contract awarded by the Commission of the European Communities in a such a specialised market with such a limited number of suppliers, after being selected by Shell and NATO, could well represent a competitive advantage which could have been of benefit to the applicant if it had been awarded the contract.

126 It should also be noted that by failing to be selected, the applicant was placed at a competitive disadvantage in regard to IGN, which obtained the contract, and could use that fact for competitive purposes, although there are serious grounds for thinking that the contract should not have been awarded to it.

127 It would also be very difficult to quantify the value of that competitive advantage and, consequently, to determine with sufficient accuracy the damage resulting from

failure to obtain it or to compensate for it fully and completely by an award of damages (see, to that effect, the order in *Deloitte Business Advisory* v *Commission*, cited above at paragraph 101, paragraphs 147 and 148).

128 Clearly, the applicant is therefore fully entitled to argue that damages would constitute only an imperfect remedy for the loss it has suffered.

129 The damage relied on by the applicant could thus be regarded as difficult to repair unless operation of the contested decision was suspended.

130 However, in order to justify interim relief, the damage relied on by the applicant must be serious (order in *Deloitte Business Advisory* v *Commission*, cited above at paragraph 101, paragraph 149).

131 The loss of an opportunity to be awarded, or to perform, a public contract is inherent in the exclusion from the tendering procedure at issue and cannot be regarded as constituting, in itself, serious damage independently of a concrete assessment of the specific damage alleged in each case (order in *Deloitte Business Advisory* v *Commission*, cited above at paragraph 101, paragraph 150).

132 Consequently, the applicant's loss of the opportunity to obtain and perform the contract at issue will constitute serious damage only if the applicant can prove to the requisite legal standard that it would have obtained a sufficiently significant advantage from the award and performance of the contract concluded on the basis of the invitation to tender (order in *Deloitte Business Advisory* v *Commission*, cited above at paragraph 101, paragraph 151).

133 A concrete assessment must therefore be made of the various advantages which would accrue to the applicant from the award and performance of the contract concluded on the basis of the invitation to tender.

134 When the applicant is an undertaking, the seriousness of material damage must be assessed in the light, in particular, of the size of the undertaking (see, to that effect, the order in *Comos-Tank and Others* v *Commission*, cited above at paragraph 117, paragraphs 26 and 31; and the order of the President of the Court of First Instance in Case T-201/04 R *Microsoft* v *Commission* [2004] ECR II-4463, paragraph 257). The President considers in this case that documents in the case do not permit him to assess the seriousness of the damage having regard to the size of the undertaking.

135 However, it is possible that the seriousness of the damage should also be assessed on the basis of other criteria, such as the seriousness of the effect on market shares or of the change in the competitive position of the undertaking (see, by analogy, the orders of the President of the Court of First Instance in Case T-13/99 R *Pfizer Animal Health* v *Council* [1999] ECR II-1961, paragraph 138; Case T-392/02 R *Solvay Pharmaceuticals* v *Council* [2003] ECR II-1825, paragraph 107; and Case T-369/03 R *Arizona Chemical and Others* v *Commission* [2004] ECR II-205, paragraph 76).

136 As regards, first, financial advantages flowing from performance of the contract, it is clear that failure to perform the contract would deprive the applicant of the income it would have received if the contract had been awarded to it and loss of the opportunity to obtain the income that would have accrued to it under the contract would, having regard to the amounts at stake, seem likely to cause fairly serious damage to the applicant.

137 Secondly, the possibility that the applicant would be able to point to a contract awarded by the Commission of the European Communities in such a specialised market with such a limited number of suppliers could well represent a competitive advantage which could have been of benefit to the applicant if it had been awarded the contract.

138 Even if its precise value is difficult to estimate, the loss of such a competitive advantage is, in the light of the circumstances of the case, likely to cause serious damage to a company such as the applicant which develops very specific software intended for customers who, prima facie, are limited in number, in a highly competitive market in which there is a limited number of suppliers. That is all the more true inasmuch as IGN, one of its direct competitors, could rely, for competitive purposes, on the fact that it had obtained the contract, even though there are good reasons for thinking that it should not have been awarded to it.

139 It must therefore be concluded, in the light of the particular circumstances of the case and the characteristics of the market on which the applicant and IGN do business, that the damage suffered by the applicant may be regarded as serious.

140 Lastly, the urgency which the applicant may consequently invoke must be taken into consideration a fortiori by the President of the Court because, as is apparent from paragraphs 54 to 84 of this order, the arguments of fact and law put forward by the applicant in the context of its first plea in law appear to be of a particularly serious nature (see, to that effect, the order in *Austria* v *Council*, cited above at paragraph 26, paragraph 110).

141 Having regard to all those factors, in order to guarantee the full effectiveness of the definitive future decision and, in particular, to preserve the possibility of obtaining compensation in kind, as the applicant has requested and which may well be the only means of making good, at least partially, the damage suffered, the application for suspension of the operation of the contested decision and of performance of the contract must be granted in so far as the balance of interests is in its favour. That is the matter which must now be considered.

3. *The balance of interests*

Arguments of the parties

The applicant's arguments

142 The applicant contends, essentially, that the balance of interests is in its favour inasmuch as it has been deprived of the income from a contract which should have been awarded to it and IGN cannot claim protection for interests which arise from a measure which must be regarded as unlawful. The applicant also considers that IGN should not enjoy greater protection than is accorded to it, all the more so as proper application of the rules for awarding contracts should have led the Commission to exclude IGN's tender as not fulfilling the conditions laid down in the Instructions to tenderers.

143 It also argues that relief is required by the public interest in ensuring that the procedures followed by the Community institutions in awarding public contracts comply with the principles of legality, transparency, equal treatment, legitimate expectations and sound administration.

The Commission's arguments

144 The Commission contests that line of argument and contends, in substance, that even if it committed a fault for which it is liable towards the applicant, the contract with IGN remains valid since the hopes and legitimate expectations of that company must be protected, in so far as it was entitled to rely on the apparent lawfulness of the decision awarding the contract to it.

145 The Commission also argues that the contract is particularly important for the development of gas pipeline networks in Central Asia and that suspension of performance of the contract for a lengthy period would have a negative effect in the region, in particular, on the Commission's relations with the Kazakh authorities. It considers that the public interest in the timely performance of the contract should take precedence over the applicant's purely private interests, which can be protected by the judgment in the main proceedings. It stated at the hearing that that factor also played a role in the Commission's decision not to terminate the invitation to tender in order to initiate it again later so that there would be no delay in the performance of the contract and, from a budgetary perspective, so that the credits allocated to the contract would not be lost. In its view, that factor should also be taken into account in assessing the applicant's interest in obtaining suspension, at this time, of the performance of the contract.

146 At the hearing, the Commission also pointed out, in essence, that it wished to avoid legal proceedings being brought against it by IGN, which could occur if the contract which it had entered into with that company was suspended.

Assessment of the President of the Court

147 Where, on an application for interim measures, the judge before whom the applicant claims that it will sustain serious and irreparable harm weighs up the various interests involved, he must consider whether the annulment of the contested decision by the court dealing with the main application would make it possible to reverse the situation that would have been brought about in the absence of interim measures and, conversely, whether suspension of the operation of that decision would be such as to prevent its being fully effective in the event of the main application being dismissed (see, to that effect, the order of the President of the Court of Justice in Joined Cases C-182/03 R and C-217/03 R *Belgium and Forum 187* v *Commission* [2003] ECR I-6887, paragraph 142, and the order of the President of the Court of First Instance in *Pfizer Animal Health* v *Council*, cited above at paragraph 135, paragraph 167 and the case-law cited therein).

148 Account must be taken, first of all, of the applicant's interest in suspension of the operation of the decision awarding the contract to IGN, secondly, of IGN's interest in performing the contract and thirdly of the public interest, and the Commission's interest, in the performance of the contract.

149 Firstly, the President considers that continued performance of the contract awarded to IGN would cause the applicant to sustain serious and irreparable harm (see paragraphs 104 to 140, above).

150 Secondly, there are serious grounds for believing that IGN's tender did not comply with the specifications laid down in the Instructions to tenderers and should have been rejected by the Commission. Contrary to the latter's contention at the hearing, the lawfulness of the contested decision and the lawfulness of the contract entered into on the basis of it are not separate from each other; if the contested decision is annulled by the Court in the main proceedings and performance of the contract is suspended, the annulment decision could lead the Commission to terminate its contract with IGN.

151 Accordingly, IGN, as the Commission has pointed out, would probably be entitled to sue the Commission for damages arising out of the fault it had committed, bringing their action in the Belgian courts, which, according to the Commission, have jurisdiction under a choice-of-jurisdiction clause in the contract. It must therefore be concluded that IGN's interests could be protected by legal proceedings.

152 Consequently, the balance of interests cannot be in IGN's favour and to the applicant's disadvantage. There are serious grounds for believing that IGN's tender did not comply with the specifications laid down in the invitation to tender, whereas the Commission does not deny that the applicant's tender did comply with those specifications. Under those circumstances, IGN's interest in carrying on with the

contract cannot take precedence over the applicant's interest in being awarded that contract, which would be possible, at least in part, if the contract was suspended until judgment has been delivered in the main proceedings.

153 Thirdly, the Commission has not substantiated its claim that further performance of the contract cannot be delayed if good relations are to be maintained with the Kazakh authorities as the Commission has submitted no evidence on that subject to the President.

154 Moreover, the arguments put forward by the Commission at the hearing seem to indicate that it was aware that the award of the contract to IGN could, or would, cause difficulties but that, for budgetary reasons, it preferred not to act on that possibility but to take the risk of being sued subsequently by tenderers whose bids had been improperly rejected.

155 Even supposing that budgetary considerations could justify such a course of action, the Commission has not shown that such considerations which, by its own account, lead it to conclude the contract with IGN before 31 December 2005 so as not to lose the credits available to it for that purpose, are such as to make it impossible to suspend performance of the contract at this point in time.

156 The Commission also cannot rely on its interest in the continued performance of the contract in order to avoid legal action by IGN in support of a claim that the President should refuse to accord judicial protection to the applicant.

157 Accordingly, in the particular circumstances of the present case, the grant of interim measures is justified and adequately meets the need to guarantee effective provisional legal protection to the applicant.

On those grounds,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE

hereby orders:

1. **The operation of the Commission's decision to award the contract to IGN France international in the tendering procedure for supplies to various countries in Central Asia (EuropeAid/122078/C/S/Multi) and the performance of the contract concluded by the Commission with IGN France international are suspended until the Court of First Instance has ruled on the application in the main proceedings.**

2. **Costs are reserved.**

Luxembourg, 20 July 2006.

E. Coulon — Registrar

B. Vesterdorf — President