ORDER OF THE COURT OF FIRST INSTANCE (Third Chamber)

14 September 2005 *

In Case T-140/04,

Adviesbureau Ehcon BV, established in Reeuwijk (Netherlands), represented by M. Goedkoop, lawyer,

applicant,

v

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

defendant,

APPLICATION for damages for the loss allegedly suffered by the applicant as a result of the rejection of its tender submitted in response to an invitation to tender, published on 10 August 1996 (OJ 1996 C 232, p. 35), for services in relation to Council Directive 80/778/EEC of 15 July 1980 relating to the quality of water intended for human consumption (OJ 1980 L 229, p. 11),

* Language of the case: Dutch.

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES (Third Chamber),

composed of M. Jaeger, President, V. Tiili and O. Czúcz, Judges,

Registrar: H. Jung,

makes the following

Order

Facts

1 On 10 August 1996, the Commission published in the *Official Journal of the European Communities* (OJ 1996 C 232, p. 35) an invitation to tender for services in relation to Council Directive 80/778/EEC of 15 July 1980 relating to the quality of water intended for human consumption (OJ 1980 L 229, p. 11) ('the invitation to tender'). The procedure was to lead to the conclusion of an initial one-year contract with the possibility of an extension for another two years if the service provider gave full satisfaction. The subject of the contract was the supply of technical and scientific support to the 'Drinking water' team of the 'Water protection, soil conservation and agriculture' unit of the Directorate-General for the Environment, Nuclear Safety and Civil Protection, in connection with the proposal aimed at the revision of the aforementioned directive.

2 In accordance with the technical annex to the invitation to tender, the tender procedure was to be completed in two stages.

3 The first stage consisted in selecting the tenderers who fulfilled the following criteria. They were required:

— to be individuals or legal entities, and provide evidence of this by supplying official registration documents or registration numbers;

— to provide evidence of their financial and economic position by supplying bank statements and/or balance sheets or extracts therefrom;

— to provide evidence that they had the necessary experience in the field of water research, as attested by qualifications, references to previous work and the composition of the proposed team, including curricula vitae;

— to have the network necessary to cover all the Member States of the Union.

4 At the end of the second stage, the contract was then awarded, on the basis of the following criteria, to one of the tenderers previously selected:

— presentation, clarity and quality of the tender;

— awareness and understanding of the technical requirements of such work (evidence of the necessary experience in water science on the basis of qualifications, references to earlier work and the composition of the proposed team, including curricula vitae);

— the price.

5 The applicant submitted its tender in September 1996.

6 By letter of 7 January 1997, the Commission informed the applicant that its tender had not been selected.

7 By letters of 13 and 31 January 1997 and 15 February 1997, the applicant asked the Commission to inform it of the reasons for the rejection of its tender.

8 By letter of 13 March 1997, the Commission replied to that request, stating that the applicant's tender had been rejected on the ground that the applicant did not have the necessary experience in the field of water research, which was a condition laid down in the technical annex, and adding that the Commission was looking for tenderers with experience in the research, development and design of water treatment facilities. Furthermore, although that factor was not conclusive, the applicant had only slight knowledge and coverage of the Union as a whole.

9 By letter of 20 March 1997, the applicant informed the Commission that the documents submitted showed that it did indeed have extensive experience in the field of water research and drinking water purification systems, and that experience in the research, development and design of water treatment facilities was not one of the criteria mentioned in the technical annex.

10 By letter of 10 April 1997, the Commission informed the applicant that the expression 'necessary experience in the field of water research' was to be taken as meaning experience in the design of water treatment facilities. The Commission expected tenderers to put down the experience their staff already had in water management and control, in particular with respect to the technical and financial impacts of the standards proposed by the Commission for certain chemical substances and with regard to the design and operation of water treatment facilities. Furthermore, the Commission pointed out that the applicant's tender was very weak as regards the criterion relating to knowledge and coverage of the European Union.

11 During 1997, the applicant submitted a complaint to the European Ombudsman. That complaint was rejected by decision of 3 December 1997. By letters of 7 December 1997 and 20 February 1998, the applicant requested the Ombudsman to reconsider his view. That request was rejected on 24 March 1998. By letters of 30 March 1998 and 12 January 1999, the applicant again requested the Ombudsman to reconsider his view. That request was rejected on 6 May 1999.

12 By letter of 20 September 1999, the applicant contacted the President of the Commission seeking compensation for the loss it claimed to have suffered and requested access to the documents relating to the invitation to tender. Those requests were refused by letter of 11 January 2000.

13 Having managed to obtain, by its own efforts, the tender of one of the tenderers, the company EDC, selected at the end of the first stage, which did not show evidence of experience in the design of water treatment facilities, the applicant submitted a further complaint to the Ombudsman on 22 July 2000. By letter of 15 February 2001, the Ombudsman informed the applicant that he had requested the Commission to supply certain information by 31 March 2001. The Commission acceded to that request.

14 On 22 October 2001, the Ombudsman gave his decision on the applicant's complaint of 22 July 2000 ('the Ombudsman's decision'). In that decision, the Ombudsman found that, in view of the fact that the Commission had acted on the basis of a criterion which was not included in the invitation to tender, the selection procedure had not been conducted with transparency, and that, by selecting at the end of the first stage the tenders of two tenderers (EDC and Eunice) which did not show their experience in the design of water treatment systems, the Commission had also not accorded the applicant equal treatment. The Ombudsman concluded that those two cases of improper administration were open to criticism.

15 By letter of 12 November 2001, the applicant submitted a further claim for compensation to the Commission. The Commission rejected that claim by letter of 31 January 2002.

16 By application lodged at the Court Registry on 25 March 2002, the applicant applied for legal aid under Article 94(2) of the Rules of Procedure of the Court of First Instance with a view to bringing an action for compensation against the Commission.

17 That application was rejected by order of the President of the Second Chamber of the Court of First Instance of 13 December 2002 in Case T-90/02 AJ *Ehcon* v *Commission*, not published in the ECR.

Procedure and forms of order sought by the parties

18 By application lodged at the Court Registry on 8 April 2004, the applicant brought the present action.

19 By separate document lodged at the Court Registry on 29 July 2004, the Commission raised an objection of inadmissibility pursuant to Article 114(1) of the Rules of Procedure.

20 The applicant submitted its observations on that objection on 30 August 2004.

21 In its application, the applicant claims that the Court should:

— order the Commission to pay the sum of EUR 243 900, together with interest at the statutory rate;

— in the alternative, order the Commission to pay the sum of EUR 40 400, together with interest at the statutory rate;

— order the Commission to pay the costs.

22 In its objection of inadmissibility, the Commission contends that the Court should:

— dismiss the application as inadmissible;

— order the applicant to pay the costs.

23 In its observations on the objection of inadmissibility, the applicant claims that the Court should:

— declare the objection of inadmissibility unfounded;

— in the alternative, dismiss it;

— order the Commission to pay the costs of the preliminary objection.

Law

24 Under Article 114(1) of the Rules of Procedure, the Court may, if one of the parties so requests, rule on admissibility without going to the substance of the case. Under Article 114(3), the remainder of the procedure is to be oral, unless the Court of First Instance otherwise decides.

25 Furthermore, under Article 111 of the Rules of Procedure, where it is clear that the Court of First Instance has no jurisdiction to take cognisance of an action or where the action is manifestly inadmissible or manifestly lacking any foundation in law, the Court of First Instance may, without taking any further steps in the proceedings, give a decision on the action by reasoned order.

26 In the present case, the Court considers that it has sufficient information from the documents before it and will therefore give its decision without taking any further steps in the proceedings.

Arguments of the parties

27 The Commission raises an objection of inadmissibility against the whole application on the ground that the action brought by the applicant is time-barred for the purposes of Article 46 of the Statute of the Court of Justice.

28 It points out that, according to the case-law, the event which gives rise to the action is the materialisation of the damage (order in Case C-136/01 P *Autosalone Ispra dei*

Fratelli Rossi v *Commission* [2002] ECR I-6565, paragraph 30). Moreover, the period of limitation is interrupted only if proceedings are instituted before the Court or an application is made to the competent institution of the Community; however, in the latter case, interruption only occurs if the application is followed by proceedings within the time-limit determined by reference to Articles 230 EC or 232 EC (Case 11/72 *Giordano* v *Commission* [1973] ECR 417, paragraph 6; Case T-167/94 *Nölle* v *Council and Commission* [1995] ECR II-2589, paragraph 30; and order in Case T-332/99 *Jestädt* v *Council and Commission* [2001] ECR II-2561, paragraph 47).

29 With the exception of the costs incurred in obtaining evidence of the alleged unlawfulness of the Commission's conduct, the damage for which the applicant claims compensation materialised at the moment the Commission notified it of the formal decision to reject its tender, that is, 7 January 1997. With regard to those costs, the Commission points out, however, that the applicant had already indicated, by fax of 25 March 1997, that it had sufficient evidence to support a finding that the Commission was liable. The Commission therefore considers that costs incurred after that date cannot be the subject of compensation.

30 Since this action was lodged on 8 April 2004, that is, more than two years after expiry of the five-year limitation period, the Commission considers that it should be dismissed as inadmissible. The Commission also points out that, although the applicant lodged a request for compensation with its services on 21 September 1999, the rejection of that request on 11 January 2000 was not followed by an action within the time-limits laid down in Articles 230 EC and 232 EC, so that request cannot have interrupted the limitation period. The same applies to the second request for compensation made by the applicant on 12 November 2001 and rejected by the Commission on 31 January 2002.

31 Finally, the Commission points out that the applicant was aware that it was subject to the limitation period, as is clear from the letters sent to the Ombudsman on 12 January and 10 May 1999.

32 The applicant considers that the action is admissible in its entirety.

33 It maintains, first, that the limitation period starts to run only on the day on which the party concerned becomes aware of the events giving him entitlement to compensation. In response to the applicant's numerous requests to the Commission for clarification regarding its decision not to accept the applicant's tender at the end of the first selection stage, the Commission always maintained that the applicant did not have sufficient experience in the field of water research, a criterion which must also be regarded as including the design of water treatment facilities. It follows that the applicant was misled by the Commission and could not have been aware of the unequal treatment initiating the Commission's decision until the year 2000, when it finally managed, through its own efforts, to obtain the tender of a tenderer admitted to the second stage.

34 The Court of Justice has moreover stated that a person who supplies incorrect information to an opposing party may not invoke the limitation of the action against that party. Accordingly, the strict application of a limitation period cannot reasonably be justified on the basis of the principles of legal certainty and the sound administration of justice (Case C-326/96 *Levez* [1998] ECR I-7835).

35 According to the applicant, logic and fairness therefore support the conclusion, in accordance with the principle of *non valentem agere non currit praescriptio*, that the limitation period was suspended until 22 October 2001, the day on which the Ombudsman concluded, in his decision on the applicant's complaint, that the Commission appeared to have discriminated between the tenderers. Before that date, in the absence of evidence, an action against the Commission could not have succeeded, as is shown by the fact that the applicant's previous complaints were rejected by the Ombudsman.

36 Secondly, the applicant maintains that the loss for which it claims compensation had not yet materialised on the day on which its tender was rejected by the Commission. It was only during the subsequent years that it suffered continual loss because it was unable to exploit and extend its expertise. Similarly, the loss suffered because the second public services contract was awarded to another tenderer materialised only when that contract was awarded, on 30 November 2000. Finally, the costs incurred in gathering evidence against the Commission and in submitting the complaint to the Ombudsman were not incurred until 2000.

37 Thirdly and lastly, the applicant points out that, on 25 March 2002, it applied for legal aid in order to bring an action for compensation against the Commission. Since that application was refused by the Court, the applicant did not have the funds to bring an action before the date on which it brought the present one.

Findings of the Court

38 Article 46 of the Statute of the Court of Justice provides:

'Proceedings against the Communities in matters arising from non-contractual liability shall be barred after a period of five years from the occurrence of the event giving rise thereto. The period of limitation shall be interrupted if proceedings are instituted before the Court or if prior to the proceedings an application is made by the aggrieved party to the relevant institution of the Communities. In the latter event the proceedings must be instituted within the period of two months provided for in Article 230 of the EC Treaty and Article 146 of the EAEC Treaty; the provisions of the second paragraph of Article 232 of the EC Treaty and the second paragraph of Article 148 of the EAEC Treaty, respectively, shall apply where appropriate.'

39 According to the case-law, it is apparent from the second paragraph of Article 288 EC that the existence of the non-contractual liability of the Community and the enforceability of the right to compensation for damage suffered depend on the satisfaction of a number of requirements: the conduct of the institution must be unlawful, there must be actual damage and there must be a causal relationship between the conduct of the institution and the damage alleged (Joined Cases 256/80, 257/80, 265/80, 267/80 and 5/81 *Birra Wührer* v *Council and Commission* [1982] ECR 85, paragraph 9, and order in Case T-106/98 *Fratelli Murri* v *Commission* [1999] ECR II-2553, paragraph 25), and that the five-year limitation period which applies to proceedings alleging Community liability therefore cannot begin before all the requirements governing the obligation to provide compensation are satisfied and in particular before the damage to be made good has materialised (see, to that effect, *Birra Wührer* v *Council and Commission*, paragraphs 9 and 10).

40 In the present case, it should be pointed out that the applicant seeks compensation for damage of a different kind.

41 In essence, it seeks compensation for:

— the loss suffered as a result of not being awarded the initial contract, equal to the net profit which that contract would have generated, estimated at EUR 158 400 ('the loss suffered as a result of not being awarded the contract in question');

— the loss suffered as a result of the damage caused to its reputation as an expert in the field of water research, of the reduction in its workload, of its inability to extend its expertise in water-related research and of the need to develop its

expertise in a new area, estimated at EUR 60 000 at least ('the loss suffered as a result of the damage caused to its reputation, of the reduction in its workload, of its inability to extend its expertise in water-related research and the development of its expertise in a new area');

— the loss of the chance of securing a later contract, awarded on 30 November 2000 to Haskoning, estimated at 10% of the net profits received by that company on that occasion, that is EUR 25 500 ('the damage suffered as a result of the loss of the chance of securing the next contract').

42 In the alternative, the applicant seeks compensation for:

— the loss of the chance of securing the contract in question, estimated, having regard to the fact that six companies were selected at the end of the first selection stage, at 1/6 of the net profits generated by the contract, that is EUR 26 400 ('the loss suffered as a result of the loss of the chance of securing the contract in question');

— the costs incurred in participating in the initial tendering procedure, estimated at EUR 10 000 ('the costs of the tendering procedure');

— the costs incurred in bringing the various complaints before the Ombudsman and in obtaining evidence against the Commission, estimated at EUR 4 000 ('the costs incurred in bringing the matter before the Ombudsman and in obtaining evidence').

Concerning the loss which materialised on the day on which the applicant's tender was rejected

43 It must be held that the loss suffered as a result of not being awarded the contract in question, the damage suffered as a result of the loss of the chance of securing the contract in question, the costs of the tendering procedure and the loss suffered as a result of the damage to its reputation, of the reduction in its workload, of its inability to extend its expertise in water-related research and of the development of its expertise in a new area materialised on the day on which the Commission rejected the applicant's tender. That rejection also constitutes the event giving rise to these proceedings to establish liability, within the meaning of Article 46 of the Statute of the Court of Justice.

44 Furthermore, it is common ground that the rejection occurred on the date of the Commission's decision, 7 January 1997, and that, at the applicant's request, the Commission set out the reasons for its decision in a letter of 13 March 1997. It must also be stated that the applicant knew those reasons by, at the latest, 20 March 1997, the date on which it wrote to the Commission referring to the Commission's letter of 13 March 1997.

45 It follows that, in respect of those losses, all the conditions for the applicant to assert its right to compensation were satisfied on 20 March 1997 at the latest and that, therefore, the five-year limitation period expired on 20 March 2002 at the latest.

46 The fact that the applicant submitted two claims to the Commission, on 20 September 1999 and 12 November 2001, for compensation for the loss it claims to have suffered does not lead to a different result, since it is not disputed that those claims were not followed by proceedings under Article 230 EC or 232 EC.

47 In accordance with Article 46 of the Statute of the Court of Justice, the period of limitation is interrupted only if proceedings are instituted before the Court or if prior to the proceedings an application is made to the relevant institution of the Community; however, in the latter case, interruption only occurs if the application is followed by proceedings within the time-limit determined by reference to Article 230 EC or 232 EC (*Giordano* v *Commission*, paragraph 28 above, paragraph 6; Case T-222/97 *Steffens* v *Council and Commission* [1998] ECR II-4175, paragraphs 35 and 42; and order in *Jestädt* v *Council and Commission*, paragraph 28 above, paragraph 47).

48 Consequently, since the application was lodged on 8 April 2004, that is, more than seven years after 20 March 1997, the point from which the five-year limitation period started to run, this action, in so far as it seeks compensation for those losses, must be declared time-barred and therefore inadmissible.

49 None of the applicant's arguments can affect that conclusion.

50 In the first place, the applicant claims that it could not have known of the alleged illegality committed by the Commission until 2000, that is to say, when it managed to obtain another tenderer's tender, which was accepted at the end of the selection stage and which shows that that tenderer did not have experience in the design of water treatment facilities. Without specifying the day on which it actually managed to obtain that document, the applicant considers that logic and fairness call for the point from which the limitation period started to run to be set at 22 October 2001, the day on which the Ombudsman gave his decision on the basis of that document and of the inquiries made at the Commission, because before that date the applicant had no evidence and its action would therefore have failed.

51 It should be pointed out that the unlawfulness of the conduct for which the applicant criticises the Commission and of which it became aware only belatedly, consists essentially in the alleged application of a selection criterion, namely experience in the design of water treatment facilities, which was not included among the criteria contained in the invitation to tender and which was applied to the applicant in a discriminatory manner.

52 As regards the unlawfulness resulting from the application of the criterion at issue, a study of the documents before the Court shows that the applicant knew that its tender had been rejected on the basis of that criterion since the Commission's letter of 13 March 1997. It must further be stated that, in its letter of 20 March 1997, the applicant challenged the Commission's arguments, saying that it had extensive experience in water-related research and that experience in the design of water treatment facilities was not one of the selection criteria. The applicant therefore concluded that it had been wrongly excluded from the award procedure, reported a case of improper administration and threatened to bring proceedings if it had not received a reply by 10 April 1997. The applicant repeated those arguments in its claim for compensation sent to the President of the Commission on 20 September 1999, in which it stated that, if that claim were rejected, it would bring the matter before the Court of First Instance.

53 As regards the claim that the criterion in question was also applied in a discriminatory manner, the applicant submits that it was not aware of that fact until 2000, when it managed to obtain, through its own efforts, the tender of another tenderer, namely the company EDC, whose tender was selected at the end of the first stage even though that tenderer likewise did not satisfy that criterion.

54 Apart from the fact that the applicant does not adduce proof of that fact, it should first be pointed out again that, in its letter of 20 September 1999, it was already complaining that the criterion in question was not applied to the other tenderers, as

is apparent from the report of the Advisory Committee on Procurement and Contracts ('the ACPC'), and that the Commission had thus infringed the principle of non-discrimination laid down in Article 3(2) of Council Directive 92/50/EEC of 18 June 1992 relating to the coordination of procedures for the award of public service contracts (OJ 1992 L 209, p. 1). It should also be pointed out that, in its letter to the Ombudsman of 30 March 1998, to which it refers in its letter of 12 January 1999, the applicant already complained of fraud, favouritism and improper administration on the part of the Commission. Therefore, the applicant's assertion that it had not been aware until 2000 of the discriminatory application by the Commission of the criterion in question is incorrect.

55 In any event, it is apparent from paragraph 52 above that the applicant had known since 1997 the fundamental reason for the rejection of its tender, namely, its lack of experience in the design of water treatment facilities, a reason which it has always disputed, both before the Commission and the Ombudsman as well as in these proceedings, inasmuch as that criterion was not included in the invitation to tender.

56 Therefore, even if the applicant could not have known until 2000, or even 22 October 2001, that the criterion in question was allegedly applied in a discriminatory manner, that fact cannot postpone until that date the point from which the limitation period for the action for compensation started to run.

57 It should be pointed out that the function of the limitation period is to reconcile protection of the rights of the aggrieved person and the principle of legal certainty. The length of the limitation period was thus determined by taking into account, in particular, the time that the party who has allegedly suffered harm needs to gather the appropriate information for the purpose of a possible action and to verify the facts likely to provide the basis of that action (order in *Autosalone Ispra dei Fratelli Rossi* v *Commission*, paragraph 28 above, paragraph 28).

58 Thus, it has been held that the argument that the limitation period cannot begin until the victim has specific and detailed knowledge of the facts of the case is misconceived, since knowledge of the facts is not one of the conditions which must be met in order for the limitation period to run (order in *Autosalone Ispra dei Fratelli Rossi* v *Commission*, paragraph 28 above, paragraph 31).

59 Similarly, in the present case, the fact that the applicant allegedly became aware of additional information in support of its action after the rejection — for which the Commission stated its reasons on 13 March and 10 April 1997 — of its offer, even though it had since the beginning disputed the fundamental reason for that rejection, which also constitutes the event giving rise to the damage, cannot place the point from which the limitation period started to run at the date on which the applicant became aware of that information.

60 This applies a fortiori because in 2000, on the day on which the applicant claims to have received the tender documents of one of the tenderers accepted at the end of the selection stage, and even on the day on which the applicant itself considers that it had enough evidence to bring proceedings for compensation, that is, when the Ombudsman adopted his decision of 22 October 2001 which was critical of the Commission, the five-year limitation period had not yet expired.

61 It follows that, in this case, unlike the situation in which an applicant is prevented from bringing proceedings within a reasonable time because he only belatedly became aware of the event giving rise to the damage, expiry of the limitation period cannot be fixed at a date later than the normal date of expiry of that period (see, to that effect, Case 145/83 *Adams* v *Commission* [1985] ECR 3539, paragraphs 50 and 51, and the order in *Autosalone Ispra dei Fratelli Rossi* v *Commission*, paragraph 28 above, paragraph 32).

62 In the second place, the applicant's argument that the Commission is responsible for the limitation of the action inasmuch as it provided the applicant with incorrect information in order to conceal the alleged unlawfulness of the tendering procedure likewise cannot be accepted.

63 It is true that the Court of Justice has already held, in connection with the implementation of Council Directive 75/117/EEC of 10 February 1975 on the approximation of the laws of the Member States relating to the application of the principle of equal pay for men and women (OJ 1975 L 45, p. 19) that Community law precludes the application of a rule of national law which time-bars an action brought by an employee for arrears of remuneration or damages for breach of the principle of equal pay, there being no possibility of extending that period, where the delay in bringing a claim is attributable to the fact that the employer deliberately supplied the employee with incorrect information (*Levez*, paragraph 34 above, paragraph 34).

64 However, even assuming that the Court of Justice has thus laid down a general rule, the rule is not applicable in the present case.

65 Indeed, contrary to the situation in the above case, the fact that, in the present case, the Commission may have deliberately misled the applicant by informing it that the main reason that its tender had been rejected was that it did not have experience in the design of water treatment facilities, if proved, was not such as to prevent the applicant from bringing proceedings in good time.

66 First, it is clear from the foregoing that the applicant knew, from the time the Commission gave the reasons for its decision on 13 March 1997, that its tender had been rejected on the ground that it did not satisfy the criterion relating to experience

in the design of water treatment facilities and that it has from the beginning disputed the lawfulness of the application of that criterion, a complaint which it maintains in these proceedings. Second, even if it were conceded that the Commission's conduct might have prevented the applicant from being fully aware that the Commission had allegedly treated it differently, it must be stated that the applicant was already making that complaint, on the basis of the ACPC report, in its letter to the Commission of 20 September1999, and itself acknowledges that it became aware of the fact in 2000 after obtaining EDC's tender. By that time at the latest, the applicant therefore had the evidence it claims it needed in order to bring its action. It therefore cannot be accepted that the delay in bringing this action is solely, or even largely, due to the Commission's attitude, because the applicant still had an opportunity to bring its action, within the time-limit, after the Ombudsman's decision.

67 In the third place, contrary to what the applicant claims, it cannot be considered that the loss allegedly suffered as a result of the damage caused to its reputation, of the reduction in its workload, of its inability to extend its expertise in water-related research and of the development of its expertise in a new area was suffered continuously. Although, according to settled case-law, the time bar applies only to the period preceding by more than five years the date of the act stopping time from running and does not affect rights which arose during subsequent periods (see, to that effect, Case T-20/94 *Hartmann* v *Council and Commission* [1997] ECR II-595, paragraph 132, and Case T-201/94 *Kustermann* v *Council and Commission* [2002] ECR II-415, paragraph 64), this is only in the exceptional situation in which it is established that the damage in question was repeated on a daily basis after the occurrence of the event which caused it. That is not the position in the present case, in which the loss described above, if proved, even though its full extent may not have been appreciated until after the rejection of the applicant's tender for the contract in question, was nevertheless caused instantly by that rejection.

68 Finally and in the fourth place, the applicant's argument that it was not in a financial position to bring an action against the Commission before it initiated these proceedings obviously does not support the conclusion that this action is admissible.

69 Indeed, it should be pointed out that, under Article 94(1) of the Rules of Procedure, a party who is wholly or in part unable to meet the costs of the proceedings may at any time apply for legal aid. The applicant's alleged poverty cannot therefore be a reason justifying the late submission of the application.

70 It should also be noted that the applicant was familiar with that procedure and that it has not established that it is entitled to legal aid, since, on 25 March 2002, it submitted an application for legal aid which the Court of First Instance dismissed by order of 13 December 2002.

71 It follows that, in accordance with paragraphs 43 and 48 above, the action is time-barred and therefore inadmissible, in so far as it seeks compensation for the loss suffered as a result of the applicant's not being awarded the contract in question, the damage suffered as a result of the loss of the chance of securing the contract in question, the costs of the tendering procedure and the loss suffered as a result of the damage to its reputation, of the reduction in its workload, of its inability to extend its expertise in water-related research and of the development of its expertise in a new area.

The other losses

72 As regards the damage suffered as a result of the loss of the chance of securing the next contract and the costs incurred in bringing the matter before the Ombudsman and in obtaining evidence, the Court considers that it is first necessary to examine the substance of the applicant's claim (see, to that effect, Case C-23/00 P *Council* v *Boehringer* [2002] ECR I-1873, paragraphs 51 and 52, and Case C-233/02 *France* v *Commission* [2004] ECR I-2759, paragraph 26).

73 In the first place, the applicant claims that the allegedly unlawful rejection of its tender for the contract in question caused it damage owing to the fact that it lost the chance, during the tendering procedure in which it participated, to secure a subsequent contract, which was awarded on 30 November 2000 to the company Haskoning ('the renewal contract'). It maintains that that contract followed on from the contract which was the subject of the invitation to tender of 10 August 1996 ('the first contract') and that it was therefore at an unfair disadvantage in relation to Haskoning, which had already been awarded the first contract.

74 In the second place, the applicant claims that it also suffered loss as a result of the costs incurred in obtaining evidence against the Commission, inter alia the tender submitted by EDC, and in presenting the complaints to the Ombudsman.

75 It is settled case-law that in order for the Community to incur non-contractual liability, a number of conditions must be met: the conduct of the Community institutions in question must be unlawful; there must be real and certain damage; and a direct causal link must exist between the conduct of the institution concerned and the alleged damage (see, inter alia, Case T-231/97 *New Europe Consulting and Brown* v *Commission* [1999] ECR II-2403, paragraph 29). If any one of those conditions is not satisfied, the application must be dismissed in its entirety without it being necessary to examine the other preconditions for such liability (Case C-146/91 *KYDEP* v *Council and Commission* [1994] ECR I-4199, paragraph 81, and Case C-104/97 P *Atlanta* v *European Community* [1999] ECR I-6983, paragraph 65).

76 With regard, first, to the loss allegedly suffered owing to the loss of the chance of securing the renewal contract, it should be pointed out that the applicant furnishes no information regarding the subject of the invitation to tender which it claims

followed, in 2000, the invitation to tender of 10 August 1996, or regarding the connection between those two invitations to tender. It is therefore impossible to establish the existence of any causal link between the allegedly unlawful rejection of the applicant's tender during the first tendering procedure and the loss which the applicant suffered owing to the loss of the chance of securing the renewal contract.

77 In any event, the loss of the chance of securing the renewal contract can be regarded as real and certain damage only if, in the absence of the allegedly improper conduct by the Commission, there would be no doubt that the applicant would have been awarded the first contract. However, it should be pointed out that, in a public tendering system such as the one in this case, the awarding authority has a broad discretion in deciding to award a contract. Consequently, the applicant could not be sure of securing the first contract even if it had been selected to participate in the second stage of the tendering procedure (see, to that effect, *New Europe Consulting and Brown* v *Commission*, paragraph 75 above, paragraph 51), and that is so even without it being necessary to ascertain whether it satisfied the conditions laid down by the invitation to tender.

78 It follows that even if the applicant might have lost the chance of securing the first contract owing to the fact that it did not participate in the second stage of the first tendering procedure, damage which is in any event time-barred, that single loss of a chance could not be regarded as sufficient to cause the applicant real and certain damage as a result of the loss of the chance of securing the renewal contract, if it were accepted that there was a sufficient link between that contract and the first one.

79 As regards, next, the loss suffered as a result of the costs incurred in gathering evidence, inter alia the tender submitted by EDC, it should be noted that the costs incurred by the parties for the purpose of the judicial proceedings cannot as such be regarded as constituting damage distinct from the burden of costs (see, to that effect, Case C-334/97 *Commission* v *Montorio* [1999] ECR I-3387, paragraph 54). Furthermore, the Court of First Instance has held that, even though, as a rule,

substantial legal work is carried out in the course of the proceedings prior to the judicial phase, it must be pointed out that by 'proceedings' Article 91 of the Rules of Procedure refers only to proceedings before the Court of First Instance, to the exclusion of the prior stage. That follows in particular from Article 90 of the Rules of Procedure, which refers to 'proceedings before the Court of First Instance' (see, to that effect, the order in Case T-38/95 DEP *Groupe Origny* v *Commission* [2002] ECR II-217, paragraph 29 and the case-law cited). Therefore, to regard such costs as a loss for which compensation may be claimed in an action for damages would be inconsistent with the fact that costs incurred during the phase before the judicial proceedings are not recoverable, as is evident from the case-law cited above.

80 It follows that the applicant is not entitled to claim, in an action for damages, compensation for loss suffered as a result of costs allegedly incurred in obtaining evidence prior to these proceedings.

81 Similarly, if it were to be understood that what the applicant is in fact claiming is that the costs incurred in obtaining sufficient evidence were caused by the Commission's alleged unlawful failure to send a notice concerning the outcome of the tendering procedure to the Office for Official Publications of the European Communities, under Articles 16, 17(2) et seq. of Directive 92/50, the fact remains that the applicant does not show in what respect sending the notice to the Publications Office would have saved it from incurring the costs in question.

82 Furthermore, as has already been stated, the applicant was under no obligation to acquire the tender submitted by EDC in order properly to bring an action for compensation before the Court of First Instance.

83 Finally, with regard to the loss as a result of the costs allegedly incurred in bringing the matter before the Ombudsman, it should be pointed out that, in the institution of the Ombudsman, the Treaty has given citizens of the Union an alternative remedy to that of an action before the Community judicature in order to protect their interests. That alternative non-judicial remedy meets specific criteria and does not necessarily have the same objective as judicial proceedings (Case T-209/00 *Lamberts* v *Ombudsman* [2002] ECR II-2203, paragraph 65).

84 Moreover, as is clear from Article 195(1) EC and Article 2(6) and (7) of Decision 94/262/ECSC, EC, Euratom of the European Parliament of 9 March 1994 on the regulations and general conditions governing the performance of the Ombudsman's duties (OJ 1994 L 113, p. 15), the two remedies cannot be pursued at the same time. Indeed, although complaints submitted to the Ombudsman do not affect time-limits for bringing actions before the Community judicature, the Ombudsman must none the less cease consideration of a complaint and declare it inadmissible if the citizen simultaneously brings an action before the Community judicature based on the same facts. It is therefore for the citizen to decide which of the two available remedies is likely to serve his interests best (*Lamberts* v *Ombudsman*, paragraph 83 above, paragraph 66).

85 It follows that the applicant's decision to bring the complaints in question before the Ombudsman was its own independent choice and that it was under no obligation to proceed in that way before properly bringing its action before the Court of First Instance.

86 Consequently, the applicant has not managed to establish the existence of a direct causal relationship between the alleged costs incurred before the Ombudsman and the alleged illegalities. A citizen's free choice to refer a matter to the Ombudsman cannot appear to be the direct and necessary consequence of cases of improper administration which may be attributable to Community institutions or bodies.

87 It is apparent from the above that the applicant's claim for compensation for damage suffered as a result of the loss of the chance to secure the renewal contract and of the costs incurred before the Ombudsman and in obtaining evidence must be dismissed as manifestly unfounded, without there being any need to give a ruling on its admissibility.

88 Accordingly, the application must be dismissed in its entirety, as in part inadmissible and in part manifestly unfounded.

89 It is therefore unnecessary to grant the applicant's request that Mr Trouwborst, Mr Brinkman and Mr Söderman be called as witnesses. In any event, it must be stated that that request does not state precisely about what facts or for what reasons those witnesses should be examined, and that it therefore does not fulfil the requirements laid down in the second subparagraph of Article 68(1) of the Rules of Procedure.

Costs

90 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful, and the Commission has applied for costs, the applicant must be ordered to pay the costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber)

hereby orders:

1. **The application is dismissed as in part inadmissible and in part manifestly unfounded.**

2. **The applicant shall pay the costs.**

Luxembourg, 14 September 2005.

H. Jung — Registrar

M. Jaeger — President