

1986 November 21

[SAVVIDES. J.]

IN THE MATTER OF ARTICLE 146
OF THE CONSTITUTION

1. ETERIA FORTIGON AFTOKINITON LTD.,
2. METAFORIKI ETERIA FORTIGON
AMMOCHOSTOU LTD.,
3. NEA ETERIA METAPHORON AMMOCHOSTOU
LTD.,

Applicants,

v.

THE REPUBLIC OF CYPRUS, THROUGH
THE GRAIN COMMISSION OF CYPRUS,

Respondents.

(Case No. 40/86).

Tenders—Time fixed for their submission—Tender submitted one or two minutes after expiration of such time and after the submission of tenders was treated as finalised by the locking of the tender box—Not a valid tender—Such tender accepted on instructions of Manager of respondent—Violation of procedure relating to tenders—Failure by Manager, to inform members of respondent Commission of such a fact—Constitutes interference with the exercise of the discretionary powers of the respondent Commission.

In November, 1985, the respondents invited tenders for the transportation of grain for the years 1986-1987. It was an express term in the invitation that the tenders should be submitted at the offices of the respondent and be placed in the tender box not later than 10 a.m. of the 5th December, 1985.

The applicants submitted their tender in time. At 10 o'clock of the 5.12.85 the tender box was locked.

3 C.L.R. Eteria Fortigon Aftokiniton v. Grain Commission

One or two minutes later an employee of the interested party arrived with the latter's tender. The employee in charge of the respondents refused to accept it, but advised him to wait until the Manager of the Commission would arrive. The latter arrived at 10.25 a.m. He accepted the tender and gave instructions that the tender box be unlocked and the tender be placed therein. On the following day the Commission met to consider the tenders. The Commission accepted the tender of the interested party as being the lowest. There is nothing in the file indicating that the Manager disclosed to the members of the Commission the true facts.

As a result the applicants filed this recourse challenging the validity of the decision to accept the tender of the interested party.

Held, annulling the sub judice decision: (1) The question is not whether one or two minutes had elapsed or five ten or more minutes from the time fixed for the submission of tenders. The question is whether the time for submitting tenders had expired and whether the submission of tenders had been treated as finalised.

(2) The tender of the interested party was not a valid tender, because it was submitted after the expiration of the time limit and after the secretary of the respondent had by the locking of the box finalised the act. The intervention of the Manager was in violation of the procedure regulating the acceptance of tenders. Further, his failure to bring this fact to the knowledge of the respondent, amounts to interference with the exercise of the latter's discretionary powers, since all the facts were not placed before it.

*Sub judice decision annulled.
£100 costs in favour of applicant*

35 Recourse.

Recourse against the decision of the respondents to accept the tender of the interested party for the transport:

tion of grain during the years 1986-1987 instead of the tender of the applicants.

K. Talarides, for the applicants.

C. Velaris, for the respondents.

M. Christofides, for the interested party.

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Cur. adv. vult.

SAVVIDES J. read the following judgment. The applicants challenge, by this recourse, the decision of the respondent to accept the tender of K & M Transport Ltd. for the transportation of grain during the years 1986-1987, instead of that of the applicants.

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The facts of the case are briefly as follows:

The three applicants are transport companies and they own a number of motor-lorries for the transportation of goods. The respondent is a public body set up under section 4(2) of the Grain Control Law, Cap. 68, as amended by Law 83/66, presided over by one of its members, namely the representative of the Minister of Finance.

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It is within the functions of the respondent Commission to store and transport grain from its stores to various parts of the Island. The transportation of grain is effected by transport companies after invitation for tenders and the acceptance by the respondent of such tenders. As from the years 1970 till 1985, the applicants, in collaboration with four other companies, one from Larnaca, one from Nicosia, one from Limassol and one from Paphos, undertook the transportation of grain, on the basis of the terms of contracts entered into by them and the Commission after the acceptance of their tenders by the latter. All the said companies own about 150 lorries, specially converted for the transportation of grain.

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In November, 1985, the respondent invited tenders for the transportation of grain for the years 1986-1987 in accordance with the terms set out therein. It was an express term of the said invitation for tenders that the tenders

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should be submitted at the offices of the respondent and be placed in the tender box not later than 10 a.m. of the 5th December, 1985. The applicants submitted their tender in time.

5 The tenders were opened on the same day and the respondent considered them on the following day and accepted the tender of the interested party, which was the lowest. As a result, a contract was entered between the Commission and the interested party for the transportation
10 of grain for the years 1986-1987 and the applicants filed the present recourse.

The legal grounds on which the recourse is based, are the following:

15 (1) The sub judge decision was taken under an irregular procedure and in violation of the express terms of the invitation for tenders.

20 (2) The sub judge decision amounts to a violation of the law, the regulations which govern the procedure for acceptance of tenders and the principles of good administration.

(3) The sub judge decision was taken in violation of the principle of equality which is safeguarded under Article 28 of the Constitution.

25 (4) The sub judge decision was taken in excess or abuse of power.

The application was opposed by the respondent who, in support of its opposition, contended that the sub judge decision was taken in conformity with the law, was correct, just and impartial, and was reached in accordance with the
30 principles of good administration after all material facts had been taken into consideration. Counsel for the interested party adopted the opposition of the respondent.

35 By his written address counsel for the applicants expounded on the grounds of law setting out the material facts which, in his submission, amount to an irregularity of the procedure.

It was his allegation that till 10 a.m., the time fixed as the latest for the submission of tenders, only two tenders were submitted, that of the applicants and of another company, namely, E. Kyriacou & Sons Ltd. At 10 o'clock the tender box was locked in an indication that no other tenders could be submitted. After the locking of the box and in fact after 10 a.m., an employee of the interested party arrived there, intending to put the tender of the interested party into the tender box which he found closed. The said employee went to the offices of the Commission where the secretary of the Commission told him that his tender could not be accepted as being out of time, but advised him to wait till the Manager of the Commission would arrive to make his complaint to him. When the Manager arrived and the facts were explained to him by the secretary, he gave instructions to him to unlock the box and allow the tender to be placed in it. The tender box was subsequently opened, on the same day, and three tenders were found therein, in this respect, that of the applicants, the interested party and E. Kyriacou & Sons Ltd. The Commission met on the following day and examined the tenders irrespective of the fact that the tender of the interested party was submitted out of time and was placed in the tender box in the way described. It is further contended by the applicants that the fact that the tender of the interested party was submitted out of time, was not brought to the notice of the members of the respondent Commission and there is nothing in the file indicating that the Manager disclosed to the members the true facts.

Counsel for the respondent and the interested party, on the other hand, submitted that the whole case turns on the question as to whether, in the circumstances, the tender of the interested party was improperly considered and that same could not have been taken into consideration.

The facts, as submitted by counsel for the respondent in his address, are:

The tenders should have been submitted till 10 a.m. of the 5th December, 1985. About one or two minutes after 10 a.m. an employee of the interested party came to the office of the responsible officer of the Commission, bring-

ing with him a sealed envelope containing a tender. Such employee insisted that the time was 9.58 a.m. and not 10.02 a.m., as indicated by the watch of the responsible officer. The responsible officer considered prima facie that such tender was out of time and refused to accept it, and after the persistence of the former, he asked him to wait till the arrival of the Manager to take a decision on the matter. The Manager arrived at 10.25 a.m. and after the facts were explained to him, he decided that the tender should be accepted. All tenders were contained in sealed envelopes, and were opened by the respondent at the same time, when it was ascertained that the tender of the interested party was lower by £300,000 from the next tender which was that of the applicants.

The question, counsel submitted, that the Court has to answer, is whether the tender of the interested party is void, in view of the fact that it was submitted one or two minutes after 10 a.m., notwithstanding the fact that it was cheaper by £300,000.- and it was the most profitable for the respondent and the public interest at large.

Although the material facts were not in dispute, the applicants called four witnesses, three being the members of the Managing Committees of the applicants and the other one the secretary of the Grain Commission who was the responsible officer in charge of the tender box. The respondent, on the other hand, called as a witness the Manager to give his reasons why he gave instructions for the acceptance of this tender and, also, the employee of the interested party who took the tender to the office of the respondent.

I shall not deal at length with the evidence of these witnesses, as the facts are not in dispute in the present case. The only comment I wish to make is in respect of the evidence of the employee of the interested party, concerning the sequence of events after his arrival at the offices of the respondent which is in full contradiction with the facts as stated in the written address of counsel for the respondent and with all other evidence and, in particular, that of the responsible officer and the Manager of the

respondent. The witness alleged that when he arrived at the tender box the secretary of the respondent was still in the process of locking the box and he told him that he had an offer with him to place in the box and the secretary refused to delay the locking for the placing of such tender in it. This is an untrue exposition of the facts, as it is abundantly clear from the evidence and the admissions made that when this person arrived there, the tender box had already been locked and the secretary had gone into his office and it was there that he met him and told him that he had a tender to make which the secretary refused to accept as being out of time.

It is common ground in this case that it was an express term of the invitation for tenders that such tenders should have been submitted before 10 a.m. It is also an admitted fact that the secretary of the respondent Commission who was in charge of the tender box, after having ascertained both from the clock which was at his office and also from the public clock which was on a nearby round-about, that the time was 10 a.m., he took the key of the tender box and proceeded and locked same, as the time for submitting tenders had expired. The tender of the interested party was brought there one or two minutes later, after the tender box was locked and as the time for submitting tenders had already expired, the secretary of the respondent refused to accept it on the ground that it was out of time. It was only after express instructions from the Manager of the respondent that such tender was accepted, irrespective of the fact that it was made out of time, because, in his opinion, one or two minutes could not affect the validity of the tenders.

There is not the least doubt that the tender of the interested party was submitted after the time for submitting tenders had expired, which was manifested by the locking of the tender box. This is further manifested by a letter drafted by the Manager and signed by the Chairman of the respondent, dated the 23rd January, 1986, addressed to the Director-General of the Ministry of Finance (exhibit 1) which affirms the fact that the tender of the interested party was submitted out of time.

5 In the light of the above facts, I have come to the conclusion that once the tender was submitted after the expiry of the time fixed for the submission of tenders and after the secretary of the respondent had by the locking of the tender box finalised the act, denoting that the time for submitting tenders had expired, such tender was not a valid one. Therefore, the intervention by the Manager in allowing the tender box to be opened and the tender to be placed out of time, was an act in violation of the procedure regulating the acceptance of tenders. Further, his failure to bring this fact to the notice of the respondent, amounts to an interference with the exercise of the discretionary powers of the latter, since all the facts were not placed before it.

15 The question is not whether one or two minutes had elapsed or five, ten or more minutes. The question is whether the time for submitting tenders had expired and that the submission of tenders had been treated as finalized.

20 In the result, this recourse succeeds and the sub judice decision is annulled with £100- costs in favour of the applicants.

25 *Sub judice decision annulled with £100.- costs in favour of applicants.*