

[TRIANAFYLLIDES, J.]

IN THE MATTER OF ARTICLE 146 OF THE
CONSTITUTION

MEDCON CONSTRUCTION AND OTHERS,

Applicants,

and

THE REPUBLIC OF CYPRUS, THROUGH
THE MINISTER OF FINANCE AND OTHERS,

Respondents.

(Case No. 68/66).

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Administrative Law—Tender—Contract—Award of contract—Decision to award a contract for the supply of crushed metal—Decision fatally defective due to the absence of any duly taken and reasoned decision of the Minister of Finance to refer the matter to the Council of Ministers for decision under Store Regulation 41D, and of any such decision of the Council of Ministers under the said regulation, or otherwise—An oral approval by the Council of Ministers of a decision of the Minister himself to award the contract is not a decision of the Council of Ministers as envisaged in the said Regulation 41D—All the more so, that such decision of the Minister is not embodied in any document—Moreover, the sub judice decision to award the contract to the Interested Party has to be annulled for an additional reason—It was taken in contravention of an express provision of term 13 of the invitation for tenders—Whereby the tender of the Interested Party ought not even to have been considered—Consequently, to award the contract to the Interested Party is tantamount to exempting him from compliance with the express provision of the aforesaid term 13 and from the sanction for such non-compliance—Which is not only contrary to the principles of good and proper administration and in abuse and excess of powers—But, also, contrary to the requirement of equal treatment laid down by Article 28.1 of the Constitution—Therefore, the sub judice decision (not the contract itself) has to be annulled—See, also, herebelow.

Administrative Law—Collective organs—Proceedings of public collective organs—Need to keep proper records of such proceedings—Instances where the total absence of any record is so inconsistent with the minimum of essential requirements

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of proper proceedings before a public collective organ that its relevant decision is vitiated by a basic defect and has to be annulled—All the above apply a fortiori to the supreme collective executive organ of the State, namely, the Council of Ministers—No effective decision can be taken at all, let alone validly taken by the Council of Ministers, unless there exists a written record thereof—This is so, not only for elementary reasons of good and proper administration—But, also, for constitutional purposes too, in view of the provisions of Article 57 of the Constitution.

Constitutional Law—Equality of treatment—Article 28.1 of the Constitution—Tenders—Government tenders—Tenderers are entitled to equality of treatment—See, also, above.

Administrative Law—Tender—Contract—Award—Decision to award contract annulled—Not the contract itself which is not and cannot be the subject of a recourse under Article 146 of the Constitution.

Contract—Award—Validity—See above.

Tenders—Government tenders—Contract—Award—Validity—See above.

Equality—Principles of—Article 28.1 of the Constitution—Tenderers are entitled to equality of treatment—See above.

Proper and good administration—Principles of—See above.

Abuse and excess of powers—See above.

Council of Ministers—The supreme executive organ of the State—No valid decision can be taken unless there exists a written record thereof—Need to keep proper records—Not only for elementary reasons of good and proper administration but, also, for constitutional purposes in view of Article 57 of the Constitution.

Collective Organ—Public collective organs—Need to keep proper records—See above.

Records—Written records—Need to keep such records—See above.

Delegation of powers—The Delegation of the Exercise of Powers Law 1962 (Law No. 23 of 1962)—Need of a written decision to that effect of the organ concerned—Section 3(1).

Administrative Law—Delegation of powers—See immediately above.

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By this recourse the Applicants complain, in effect that a contract for the supply of crushed metal, in respect of which tenders were invited on the 5th February, 1966 was awarded to the Interested Party, the United Quarries Ltd., in an invalid manner and that, therefore, the relative decision to award the contract to the Interested Party was null and void.

The relevant tenders were opened at the meeting of the Government Board on March, 5, 1966, and were handed over to a representative of the Ministry of Communications and Works who was present, so that they might be studied by him. There were three tenders: One from the Applicants, one from the Interested Party, and one from a certain A.T. The Tender Board never took a decision in this matter; they were simply informed, by letter dated the 12th March, 1966, and addressed to them by the Director of the Department of Public Works that "the decision of the Minister of Finance"—who was at the time acting, also, as Minister of Communications and Works—was that the contract should be awarded to the said Interested Party whose tender was much lower—to the extent of £10,000—than that of the Applicants. There were attached to the said letter of the 12th March, 1966, the minutes of a meeting held for the purpose at the Ministry of Finance on the 10th March, 1966 at which the Minister of Finance was present. It appears from the said minutes, *inter alia*, that the Interested Party had failed to comply with terms 11 and 13 of the invitation for tenders. Term 13 provided that any tender which would not be accompanied by certificate of fitness of the material offered given by the District Engineer of the Public Works Department, would not be taken into account. However it is stated in the said minutes that, in view of the saving of the aforementioned £10,000, it was required in the public interest to overlook the non-compliance by the Interested Party with the terms 11 and 13 of the invitation for tenders referred to above, provided that certain steps would be taken later on by the Interested Party to the satisfaction of the Director of the Public Works Department.

As it appears from subsequent official correspondence in July and August 1967, the Minister of Finance acting at the time (*i.e.* March, 1966) "pursuant to Store Regulation 41D had referred the matter" in question on the 16th March, 1966, "to the Council of Ministers" and he obtained the Council's "oral approval of his proposed action on the 16th March, 1966".

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The Regulations governing the procedure regarding tenders are Store Regulations 20-41D. Regulation 41D provides: "The Minister of Finance may suspend consideration"—by the Tender Board—of any tender and refer it to the Council of Ministers for a decision". But, as it has been conceded by counsel for the Respondents, there does not appear to exist any document embodying such a decision of the Minister of Finance to refer the matter to the Council of Ministers under Regulation 41D.

Annuling the decision to award the tender to the Interested Party—but not the contract itself—the Court:—

Held, (1). Regulation 41D (*supra*), by its nature, must be resorted to only in special circumstances and for good reasons, to be explicitly stated in the Minister's decision to refer the matter to the Council of Ministers. It definitely does not enable the Minister of Finance to take a decision on the tenders himself, and submit it for covering oral approval to the Council of Ministers, as it was done in the present case. All that the Minister is empowered to do is to refer the matter to the Council of Ministers, according to the proper procedure, "for a decision" to be taken by the Council, instead of by the Government Tender Board.

(2) In the present case, there is neither a document embodying a decision of the Minister of Finance to refer the matter to the Council of Ministers under Regulation 41D (*supra*), nor a written submission made to the Council of Ministers for a decision by the latter under Regulation 41D. The matter was raised only orally before the Council, the Minister of Finance having obtained from them only their oral approval.

(3) (a) It is essential for the propriety of proceedings of public collective organs that they should keep such written records of such proceedings as are required for purposes of good and proper administration. This was stressed in relation to the Tender Board in *Petri v. The Police* (1968) 2 C.L.R. 40 at p. 80; and in *Georghiadēs and The Republic* (1966) 3 C.L.R. 252 at p. 283, it was held that the total absence of any written record regarding a step in the handling of a matter by the Public Service Commission was "so inconsistent with the minimum of essential requirements of proper proceedings before a public collective organ" that its relevant decision was vitiated by a basic defect and had to be annulled.

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(b) All the above apply a *fortiori* to decisions of the supreme collective executive organ of the State, namely, the Council of Ministers. I do not think that one can conceivably speak of an effective decision of the Council having been taken at all, let alone validly taken, unless a written record thereof does exist; this is so required not only for elementary reasons of good and proper administration, but for constitutional purposes too, in view of the letter and spirit of Article 57 of the Constitution.

(c) In view of the foregoing no question could arise, either of the Council of Ministers having validly and effectively decided to delegate the handling of the case to the Minister of Finance, under the provisions of the Delegation of the Exercise of Powers Law, 1962, (Law No. 23 of 1962); and in any case, the very letter and spirit of the relevant provisions of that Law (section 3(1)) appear to require a written decision of the Council of Ministers for the purpose; and no such decision exists in the present instance.

(4) In the circumstances the subject decision has to be annulled.

(5) Moreover, it has to be annulled for another reason:

(a) Term 13 of the invitation for tenders (*supra*) provides that any tender which would not be accompanied by a certificate of fitness of the material offered, given by the District Engineer of the Public Works Department, *would not be taken into account*; and it is common ground that the tender of the Interested Party was not accompanied by any such certificate. Thus, the Interested Party was treated as having submitted a valid tender, when by express provision this could not be done; and it was not possible to put things right, *ex post facto* (see Decisions of the Greek Council of State 531/1949 Vol B. p. 13 and 1403/1960 in Zacharopoulos Digest 1953-1960 Vol. I a-k, p. 489).

(b) Moreover, tenderers were entitled to equality of treatment; and to exempt the Interested Party from the compliance with the express provision of the aforesaid term 13 of the invitation for tenders, and from the sanction for such non-compliance, was, not only contrary to good and proper administration and in abuse and excess of powers, but also contrary to the requirement for equality of treatment laid down by Article 28.1 of the Constitution.

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(c) In the result, I have no hesitation in finding for the Applicants. The decision to award the tender to the Interested Party has to be, and is hereby annulled. But only such decision is annulled, because it is this decision itself, which is part of public administration and subject to a recourse; this Judgment, therefore, cannot affect the contract granted as a result of such decision (see *Decision of the Greek Council of State 531/1949, supra*).

I order that the Applicants be paid by the Respondents £50 against their costs.

Order, and order as to costs, in terms.

Cases referred to:

Petri v. The Police (1968) 2 C.L.R. 40 at p. 80 ;
Georgiades and The Republic (1966) 3 C.L.R. 252 at p. 283;
Decisions of the Greek Council of State 531/1949 Vol. B p. 13;
1403/1960 in *Zacharopoulos Digest 1953-1960* Vol. I a-k,
p. 489.

Recourse.

Recourse against the decision of the Respondents concerning a contract for the supply of crushed metal in respect of which tenders were invited on the 5th February, 1966.

A. *Triantafyllides*, for the Applicants.

L. *Loucaides*, Counsel of the Republic, for the Respondents.

Cur. adv. vult.

The following Judgment was delivered by:-

TRIANTAFYLLIDES, J.: By this recourse Applicants 2 and 3 (Applicants 1 having withdrawn the recourse, in so far as it concerned them, on the 13th January, 1967) complain, in effect, that a contract for the supply of crushed metal, in respect of which tenders were invited on the 5th February, 1966, was awarded to the Interested Party, the United Quarries Ltd., in an invalid manner.

After the invitation for tenders (see *exhibit 1*) had been handed out to prospective tenderers, on the 5th February, 1966, it was amended in such a manner as to render the execution of the prospective contract more difficult, from

the point of view of quantities to be delivered; therefore, the Applicants decided to submit a joint tender, and they did so on the 5th March, 1966 (see *exhibit 2*).

According to the evidence of Mr. Stavros Nathanael, an Accountant, in the Accountant-General's Office, who, in 1966, was presiding over the meetings of the Government Tender Board, the relevant tenders were opened at a meeting of the Tender Board on the 5th March, 1966, and were handed over to a representative of the Ministry of Communications and Works, who was present, so that they might be studied by him. There were three tenders: one from the Applicants, one from the Interested Party, and one from a certain Achilleas Tomazos.

The Tender Board never took a decision in this matter; they were informed, by letter dated the 12th March, 1966, and addressed to them by the Director of the Department of Public Works (see *exhibit 7*) that "the decision of the Minister of Finance"—who was at the time acting, also, as Minister of Communications and Works—was that the contract should be given to the Interested Party.

There were attached to the said letter of the 12th March, 1966, the minutes (see *exhibit 7(a)*) of a meeting held for the purpose at the Ministry of Finance on the 10th March, 1966, at which there were present the Minister of Finance, the Director-General of the Ministry of Finance, the Director-General of the Ministry of Communications and Works, the Director of the Public Works Department and the Senior Roads Engineer of such Department.

It appears from the said minutes that it was found that the tender of the Interested Party was much lower than that of the Applicants—to the extent of £10,000—but that, on the other hand, it was a fact that the Interested Party had failed to comply with terms 11 and 13 of the invitation for tenders. It is stated, further, in such minutes, that it was decided that the saving which would result from the acceptance of the tender of the Interested Party was an important factor in the circumstances, and that it was required in the public interest to overlook the non-compliance by the Interested Party with the aforementioned terms of the invitation for tenders, provided that the Director of the Public Works Department and the Senior Roads Engineer would be satisfied that the Interested Party possessed a suitable quarry and

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suitable crushing equipment, and that the Interested Party would make the required banking arrangements as soon as the contract would be signed.

As it appears from a letter addressed, on the 23rd August, 1967, by the Director-General of the Ministry of Finance, to the Attorney-General of the Republic, and to which there was attached a letter of the Accountant-General to the Attorney-General, dated 12th July, 1967 (see *exhibits* 8, 8(a)) the Minister of Finance, acting at the time “pursuant to Store Regulation 41D had referred the matter” in question on the 16th March, 1966, “to the Council of Ministers” and he obtained the Council’s “oral approval of his proposed action on the 16.3.66”.

The Regulations governing the procedure regarding tenders are Store Regulations 20–41D (see *exhibit* 6); regulation 41D reads; “The Minister of Finance may suspend consideration”—by the Tender Board—“of any tender and refer it to the Council of Ministers for a decision”.

In my opinion, this Regulation, by its very nature, is a measure to be resorted to in special circumstances and for good reasons, to be explicitly stated in the Minister’s decision for the purpose. It definitely, does not, in my opinion, enable the Minister of Finance to take a decision on the tenders himself, and submit it for covering oral approval to the Council of Ministers, as it was done in the present instance. All that the Minister is empowered to do is to refer the matter to the Council of Ministers, according to the proper procedure, “for a decision” by the Council, instead of by the Tender Board.

It has been conceded by learned counsel for the Respondents—who has acted with absolute and commendable fairness in this case—that there does not appear to exist any document embodying a decision of the Minister of Finance to refer the matter to the Council of Ministers under Regulation 41D.

Counsel for Respondents has, further, told the Court that no written submission was made to the Council of Ministers, by the Minister of Finance, for a decision by the Council under regulation 41D, but that the matter was raised only orally, before the Council, and that the Minister of Finance obtained only the oral approval of the Council.

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Mr. A. Afxentiou, who is a Senior Economic Officer in the Ministry of Finance, and who was called as a witness by the Respondents, has told the Court that he remembers an occasion when, in his presence, the Director-General of the Ministry of Finance had asked the Minister of Finance whether the matter had been referred to the Council of Ministers, in accordance with Store Regulation 41D, and the Minister had replied that he had mentioned the matter to the Council of Ministers and that he had been authorized to handle it himself.

It is not clear whether the occasion to which the Minister was referring was the one when, on the 16th March, 1963, he obtained the oral approval of the Council of Ministers (see *exhibit 8*)—which was after the meeting in the Ministry of Finance, on the 10th March, 1966, when it was decided to award the contract to the Interested Party (see *exhibit 7(a)*)—or whether the Minister was referring to another occasion prior to the 10th March, 1966. In any case whenever that took place, no recorded decision of the Council of Ministers, to that effect, has been produced.

It is essential for the propriety of proceedings of public collective organs that they should keep such written records of such proceedings as are required for purposes of good and proper administration. This was stressed in relation to the Tender Board in *Petri v. The Police* (1968) 2 C.L.R. 40 at p. 80; and in *Georghiades and The Republic* (1966) 3 C.L.R. 252 at p. 283 it was held that the total absence of any written record regarding a step in the handling of a matter by the Public Service Commission was “so inconsistent with the minimum of essential requirements of proper proceedings before a public collective organ” that its relevant decision was vitiated by a basic defect and had to be annulled.

All the above apply, too, and *a fortiori*, to decisions of the supreme collective executive organ of the State, namely, the Council of Ministers. I do not think that one can conceivably speak of an effective decision of the Council having been at all taken—let alone validly taken—unless a written record thereof does exist; this is so required, not only for elementary reasons of good and proper administration, but for constitutional purposes too, in view of the letter and spirit of Article 57 of the Constitution.

In view of the foregoing no question could arise, either,

of the Council of Ministers having validly and effectively decided to delegate the handling of the case to the Minister of Finance, under the provisions of the Delegation of The Exercise of Powers Law 1962 (Law 23/62); and, in any case, the very letter and spirit of the relevant provision in such Law (section 3(1)) appear to require a written decision of the Council for the purpose; and no such decision exists in the present instance.

I have, therefore, reached the conclusion that the whole administrative process leading up to the decision to award the contract to the Interested Party, is fatally defective due to the absence of any duly taken and reasoned decision of the Minister of Finance to refer the matter to the Council of Ministers under the aforementioned regulation 41D, and of any such decision of the Council of Ministers under the said regulation, or otherwise.

In the circumstances the *sub judice* decision to award the said contract to the Interested Party has to be declared to be null and void and of no effect whatsoever.

Moreover, such decision would have to be annulled, in any case, for another reason, too:-

It was not possible, or permissible, to treat the Interested Party as a tenderer at all, because, though the initial non-compliance by the Interested Party with term 11 of the invitation for tenders could have been waived—as it was done—it was expressly provided by term 13 that any tender which would not be accompanied by a certificate of fitness, of the material offered, given by the District Engineer of the Public Works Department, would not be taken into account; and it is common ground that the tender of the Interested Party was not accompanied by a certificate of fitness. Thus, the Interested Party was treated as having submitted a valid tender, when by express provision in the invitation for tenders this could not be done; and it was not possible to put things right, *ex post facto*, by deciding that the contract would be awarded to the Interested Party provided that the quarry and crushing plant of the Interested Party would be inspected and found to be fit for the purpose (see *exhibit 7(a)*)—see, also, Decisions of the Greek Council of State 531(49) vol. B, p. 13, and 1403(60) in Zacharopoulos Digest 1953-1960 vol. 1 a-k, p. 489. Moreover, tenderers were entitled to equality of treatment, and to exempt the Interested Party

from compliance with the express requirement of term 13 of the invitation for tenders, and from the sanction for such non-compliance, was, not only contrary to good and proper administration and in abuse and excess of powers, but also contrary to the requirement for equality of treatment laid down by Article 28.1 of the Constitution.

If the Government had found that out of the valid tenders before it none was acceptable, all it had to do was to resort to inviting tenders afresh.

I have not the slightest doubt that the Minister of Finance has acted, as he did, in this case, in all good faith, and in an effort to expedite matters and make a saving of public funds, but where good and proper administration and the Rule of Law are concerned, the end can never justify the means, however worthwhile such end may be.

In the result, I have no hesitation in finding for Applicants in this case, and, as already stated, the decision to award the tender to the Interested Party has to be annulled. But only such decision is annulled, because it is this decision, itself, which is part of public administration and subject to a recourse; this Judgment cannot affect the contract granted as a result of such decision (see Decision of the Greek Council of State 531(49), *supra*).

I order that the Applicants be paid by the Respondents £50 against their costs.

*Order, and order as to costs,
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