

1983 December 30

[Pikis, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

SILVESTROS AND KITROMELIDES,

Applicants.

v.

THE REPUBLIC OF CYPRUS, THROUGH

1. THE MINISTER OF FINANCE,
2. THE TENDER BOARD,

Respondents.

(Case No. 432/82).

Administrative Law—Tenders—Award of—Review of discretion of Tender Board—Principles applicable—Sufficiency of inquiry—Reasoning of sub judice decision supplemented by material in the file—Technical Committee, who had evaluated tenders, recommending tender of applicants but expressing doubts as to future risks—Reasonably open to Tender Board, on the totality of the material before them, to prefer the tender of the interested parties. 5

Following the invitation of tenders by the Water Development Department for the supply and installation of a sewage treatment plant for the equipment, inter alia, of a government housing estate established at Chryssospilotissa, Kato Deftera, the tenders, which were submitted, were evaluated by the Water Development Department aided by a technical Committee. Their evaluation and recommendations were submitted to the Chairman of the Tender Board in a report, in which detailed analysis was made of the tenders, with particular reference to the purchase cost and maintenance and running expenses. They recommended, for the reasons indicated in the report, acceptance of the tender of the interested parties, notwithstanding the acknowledgement that the plant of the applicants would be cheaper to run. They expressed reservations whether the plant and equipment of applicants satisfied minimum requirements essential for the viability of the project from certain 10
15
20

angles. In a subsequent report the Technical Committee overcame reservations originally entertained about the efficacy of the plant of applicants and possible threats to the environment, and recommended its acceptance but subject to important qualifications neutralising, to a degree, their recommendation of the tender of applicants. The respondents decided to accept the tender of the interested parties; and hence this recourse. The minutes of the Tender Board record that the decision was taken in view of the contents of the report of the Water Development Department and that of the Technical Committee.

Counsel for the applicants mainly contended:

- (a) That the sub judice decision was taken without proper inquiry, in contravention of the Tender Regulations and was not duly reasoned.
- (b) That the sub judice decision was taken in excess or abuse of power and was influenced by irrelevant considerations or materials.

Held, (1) that both the Water Development Department as well as the Technical Committee made a proper inquiry into the rival merits of the tenders submitted; and that the inquiry cannot be faulted either because of insufficiency or inadequacy; that the respondents appeared to have observed the provisions of the regulations at every stage of the process, including the elicitation of the specifications upon which tenders were invited; that the sub judice decision, though brief is not unreasoned; that, moreover, the reasoning of an administrative body may be supplemented from the material in the file of the case; the more so, where specific reference is made to such material in the decision itself; accordingly contention (a) should fail.

(2) That though it would be, in a case where the facts were unequivocal, an abuse of the powers of the Tender Board to accept a tender that was either more costly or less advantageous to the Republic; and that though any such decision would also be in excess of their powers that require them to accept the most advantageous, on a consideration of all relevant factors, tender for the Republic, it must not be overlooked that evaluation of the rival merits of tenders is primarily the responsibility of the Tender Board who have a discretion in the matter especially

in a case such as the present, when the recommendations of the experts are far from clear; that the ultimate question turns, as in every other case of review of administrative discretion, on whether it was reasonably open to the respondents to accept the tender of the interested parties; that given the material before the respondents it was, at the least, open to the respondents to arrive at the decision taken; that the recommendation of the Technical Committee for the applicants did not resolve the matter for them; and that in the light of the doubts expressed as to future risks, it was certainly open to the respondents, given the totality of the material before them, to prefer the interested parties; accordingly contention (b) should, also, fail.

Application dismissed.

Cases referred to:

Kounnas & Sons Ltd. and Others v. Republic (1972) 3 C.L.R. 542.

Recourse:

Recourse against the decision of the respondents to accept the tender of the interested party for the supply and installation of a sewage treatment plant for the equipment of a government housing estate instead of the tender of the applicants.

G. Triantafyllides, for the applicants.

M. Photiou, for the respondents.

Cur. adv. vult.

ΠΙΚΙΣ J. read the following judgment. On 7th August, 1981, the Water Development Department invited tenders for the supply and installation of a sewage treatment plant for the equipment, inter alia, of a government housing estate established at Chryssospiliotissa, Kato Deftera. Receipts of the tenders were acknowledged under standing procedures by the main Tender Board and referred to the appropriate department for study and evaluation (see Appendix B' to the opposition).

The tenders were evaluated by the Water Development Department, aided by a technical committee. Their evaluation and recommendations were submitted to the Chairman of the Tender Board in a report filed on 5.6.1982. Detailed analysis was made of the tenders, with particular reference to the pur-

chase cost and maintenance and running expenses. They recommended, for the reasons indicated in their report, acceptance of the tender of the interested parties, notwithstanding the acknowledgment that the plant of the applicants would be cheaper to run. They expressed reservations whether the plant and equipment of applicants satisfied minimum requirements essential for the viability of the project from certain angles.

In a subsequent report of 15.7.1982, the Technical Committee overcame reservations originally entertained about the efficacy of the plant of applicants and possible threats to the environment, and recommended its acceptance but subject to important qualifications neutralising, to a degree, their recommendation of the tender of applicants. To their recommendation they added a rider acknowledging that installation of the plant of the applicants might create risks to the environment because of "odours from gases evolved and the high loading of the biospiral" (see, Appendix 'D' to the opposition). In order to mitigate the risks from acceptance of the tender of applicants, the Technical Committee suggested that, in the event of its final acceptance, a bank guarantee should be sought from the applicants in respect of the following:-

- (a) The quality of effluent (20/30) as specified.
- (b) Environmental pollution, including objectionable odours and,
- (c) adequate supervision to ensure proper operation of the plant for the whole of the maintenance period specified.

At best, the recommendation of the Technical Committee was equivocal as to the acceptance of the tender of the applicants. Certainly, it was not an outright recommendation but an uncertain one because of the risks identified, particularly to the environment—a factor of very great importance in planning the establishment of housing estates.

The respondents decided in their meeting of 24.7.1982 to accept the tender of the interested parties. The minutes of the Board record the decision was taken in view of the contents of the report of the Water Development Department and that of the Technical Committee. Conflicting oral evidence was received

at the hearing, concerning the date of notification of the decision to the applicants and the reasons orally disclosed to them. The conflict does not bear on the nature of the issues arising for consideration, nor does it in any way alter the complexion of the issues. We have before us the decision as well as the facts upon which the respondents based it. The pertinent question affects the validity of the decision in the light of the discretion vested in the respondents and the facts before them. 5

It has not been doubted that decisions of the Tender Board are subject to judicial review under Article 146 of the Constitution. In *Kounnas & Sons Limited And Others v. The Republic* (1972) 3 C.L.R. 542, Triantafyllides, P., surveyed the legal position bearing on the reviewability of decisions of the Tender Board and the principles pertinent to the review. Following the guidelines of the Greek Council of State, the learned Judge decided that decisions of the Tender Board are amenable to the revisional jurisdiction of the Supreme Court. Only the decision to allocate or refusal to accept a tender are subject to judicial review; not the contracts resulting therefrom—a matter evidently in the domain of private law. Consideration of the objects that the Tender Board is designed to serve, obviously casts its decisions in the domain of public law. The public has a vital interest in the propriety of public expenditure and in the equal treatment of tenderers by public bodies. With this background in mind, I shall proceed to review the decision in the light of the material before me. 10 15 20 25

Applicants list five grounds in their application that render the decision of the respondents null, justifying the Court to set it aside. Below, I shall enumerate and examine them, not necessarily in the order in which they are enumerated, in the light of the decision, the regulations bearing on tenders and, the material before the respondents. 30

A) *The Decision was taken without proper inquiry:*

The nature and extent of an inquiry depend on the subject-matter and its ramifications. To begin with, the specifications for the tender were approved in accordance with the provisions of regulation 34 of the Government Stores Regulations. No suggestion to the contrary was made. The department and 35

committee consulted, notably the Water Development Department and the Technical Committee, were, it appears to me, the proper bodies to refer the tenders for examination and evaluation. The report of the Water Development Department
5 examines the tenders from every relevant viewpoint and ends up with a recommendation for the tender to be preferred, as required by reg. 40. Likewise, the Technical Committee examined technical matters with proper awareness of their responsibilities. That their recommendation was subject to
10 qualifications does not detract from its value. I hold the view that both the Water Development Department as well as the Technical Committee made a proper inquiry into the rival merits of the tenders submitted. The inquiry cannot be faulted either because of insufficiency or inadequacy.

15 B) *The Decision was taken in contravention of Tender Regulations and/or the terms upon which tenders were invited:*

The attention of the Court was not drawn to any breach of the regulations governing the procedures of the Tender Board or any irregularities in their enforcement. On the contrary,
20 from what can be gathered from the material before me, the respondents appear to have observed the provisions of the regulations at every stage of the process, including the elicitation of the specifications upon which tenders were invited.

C) *The Decision is not duly reasoned:*

25 The decision incorporated in Appendix 'E', though brief, is not unreasoned. It makes specific reference to the reports and recommendations of the Water Development Department and the Technical Committee, that furnished the background for their decision. The reasoning of an administrative body, as
30 it is well known, may be supplemented from the material in the file of the case. More so, where specific reference is made to such material in the decision itself. There is nothing before me to indicate or suggest that the respondents either misconceived or misconstrued the report of either the Water Development
35 Department or the Technical Committee. Consequently, this ground must be dismissed as well.

D) *The Decision was taken in excess or abuse of power.*

E) *The Decision was influenced by irrelevant considerations or materials:*

40 The last two grounds upon which, in the contention of

applicants, the decision must be annulled, may be grouped and dealt with together. There is no doubt in my mind that it would be, in a case where the facts were unequivocal, an abuse of the powers of the Tender Board to accept a tender that was either more costly or less advantageous to the Republic. Any such decision would also be in excess of their powers that require them to accept the most advantageous, on a consideration of all relevant factors, tender for the Republic. On the other hand, it must not be overlooked that evaluation of the rival merits of tenders is primarily the responsibility of the Tender Board. They have a discretion in the matter. Especially in a case such as the present, when the recommendations of the experts are far from clear. The ultimate question turns, as in every other case of review of administrative discretion, on whether it was reasonably open to the respondents to accept the tender of the interested parties. Given the material before the respondents it was, at the least, open to the respondents to arrive at the decision taken. The recommendation of the Technical Committee for the applicants did not resolve the matter for them; and in the light of the doubts expressed as to future risks, it was certainly open to the respondents, given the totality of the material before them, to prefer the interested parties.

In the result, the recourse is dismissed. There will be no order as to costs.

Recourse dismissed with no order as to costs.