

1985 March 16

[Pikis, J.]

IN THE MATTER OF ARTICLE 146
OF THE CONSTITUTION

J. N. CHRISTOFIDES TRADING LIMITED,

Applicants,

v.

THE REPUBLIC OF CYPRUS, THROUGH

1. THE MINISTER OF FINANCE,
2. THE TENDER BOARD,
3. THE MINISTER OF COMMUNICATIONS
AND WORKS,

Respondents.

(Case No. 119/83).

Tenders—Conditions of tender—Material breach—Consideration of the tender an act of bad faith involving abuse of power and violation of the principle of equality before the administration embodied in Article 28.1 of the Constitution—And an act in breach of the norms of sound administration.

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The applicants in this recourse challenged the validity of the decision of the respondents whereby they rejected their own tender and accepted the tender of the interested parties for the supply and installation of floodlighting services for the aircraft parking apron of Paphos International Airport.

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Applicants contended that the tender of the interested parties was improperly considered because it was submitted contrary to the conditions of tender invited by the Ministry of Communications and Works in that while Clause 11 of the Tender Invitation stipulated that “no tender will be considered unless all the above conditions are strictly fulfilled”, the tender of the interested parties was considered, notwithstanding failure on their part to com-

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ply with the specifications required by the invitation, namely Specification 316, requiring proof of the expected values of illuminance.

5 Respondents admitted that the tender of the interested parties failed to comply with the above specification and that without the proofs envisaged by Specification 116, the tender of the interested parties could not be evaluated at all.

10 *Held*, that the breach was material because it made impossible evaluation of the tender; that consideration of the tender in breach of specific conditions of the tender in relation to a substantial matter, was an act of bad faith on the part of the Administration, involving abuse of power and violation of the principle of equality before the
15 Administration, embodied in Article 28.1 of the Constitution; that the decision to consider the tender of the interested parties was taken in breach of the norms of sound administration and equality before the Administration; and that, in consequence, it must be set aside.

20 *Sub judice decision annulled.*

Cases referred to:

Medcon Construction and Others v. Republic (1968)
3 C.L.R. 548;

Papadopoulos v. Republic (1985) 3 C.L.R. 154;

25 *Papadopoulos v. Republic* (1984) 3 C.L.R. 332;

Droushiotis v. C.B.C. (1984) 3 C.L.R. 546 at p. 552.

Recourse.

30 Recourse against the decision of the respondents accepting the tenders of the interested parties for the supply and installation of floodlighting services for the aircraft parking apron of Paphos International Airport.

C. Emilianides, for the applicants.

A. Vassiliades, for the respondents.

Cur. adv. vult.

PIKIS J. read the following judgment. The tenders made for the supply and installation of floodlighting services for the aircraft parking apron of Paphos International Airport, and the acceptance of the tender of the interested parties. is the subject of review in this recourse. As the case progressed to the final stage of clarifications, it emerged the challenge to the decision is confined mainly, if not exclusively, to the propriety of acceptance and consideration of the tender of the interested parties. The case for the applicants is that the aforesaid tender was improperly considered because it was submitted contrary to the conditions of tender invited by the Ministry of Communications and Works.¹ Specifically, they complain that while Clause 11 of the Tender Invitation stipulated that "no tender will be considered unless all the above conditions are strictly fulfilled", the tender of the interested parties was considered, notwithstanding failure on their part to comply with the specifications required by the invitation, namely Specification 316, requiring proof of the expected values of illuminance. Respondents admit that the tender of interested parties failed to comply with the above specification and furnish computer analysis of illuminance' values but, nevertheless, contend the tender of interested parties was properly considered for the omission or failure did not concern the tender itself but its authentication and same could be furnished without hindrance at a subsequent stage. A preliminary objection to the justiciability of the proceedings, for lack of legitimate interest, was not pursued, rightly in my view for, the interest of the applicants in the review of the decision cannot be doubted.

The question that must be resolved is whether the respondents exceeded or abused their powers by considering the tender of the interested parties, admittedly defective to the extent it did not provide the verification of the adequacy of the tender required by Specification 316.

For the applicants it was argued that non compliance with the specification, constituted a material breach of the conditions of tender, making it incompetent for the respondents to consider it. The defect was not remedied by the submission, twenty days later, of the required proof—a

¹ See, Tender Invitation and Specification—Blue 103 et seq.

course unwarranted by the conditions of tender. Reliance was placed on the decision in *Medcon Construction And Others v. The Republic* (1968) 3 C.L.R. 548; as a guide to the implications of failure to comply with the conditions of tender. Triantafyllides. J., as he then was, decided that omission to accompany the tender with the specified certificate of fitness, envisaged in the conditions of tender, rendered the tender abortive, as well as subsequent consideration of it by the appropriate authority. Consideration of it in breach of the conditions of tender invalidated the decision for-

- (a) Non observance of standards of good and proper administration;
- (b) abuse and excess of power, and
- 15 (c) inequality before the Administration in breach of the provisions of Article 28.1 of the Constitution.

For like reasons, counsel for the applicants argued it was also incompetent for the respondents to consider the tender of the interested parties.

20 The essence of the answer of counsel of the respondents to the above, is that deviation from the conditions of tender in this case, related to an insubstantial matter and, as such, could be waived or cured by subsequent remedial action. Reference was made to an opinion of the Deputy Attorney-General, published in the *Cyprus Law Review*¹, dealing with the principles of administrative Law, relevant to the consideration of tenders. Unless we regard the breach in this case as insubstantial, I fail to see in what respect the opinion of the Deputy Attorney-General advances the case for the respondents. Mr. Loucaides explains that a tender submitted in breach of material terms respecting specifications ought to be rejected, a course warranted by the general principles of administrative Law and the need to ensure equal treatment of all tenderers.

35 The distinction between the observance of "substantial prerequisites" and "non substantial formalities" in the consideration of tenders, is examined by L. Loizou. J., in a

¹ 1983, p. 180.

recent decision, that is, *Papadopoulos v. The Republic*¹. Relying on the exposition of the Law on the subject, in *Kyriacopoulos on Greek Administrative Law*, 4th ed., Vol. B'2, the learned Judge concludes, it is competent for the Tender Board, or other authority, to consider a tender, notwithstanding non compliance with terms of the tender, provided such conditions are of an inessential nature. Consequently, lack of a circulation permit for the machine tendered, was held not to invalidate the tender. In the relevant chapter quoted in the aforesaid judgment, Kyriacopoulos explains it is not an easy task to distinguish between substantial and insubstantial formalities. As a general rule, observance of a formality required by Law or administrative practice, is regarded as an essential prerequisite. The learned author discerns the following test, from Decisions of the Greek Council of State, to determine whether a term is an essential or inessential condition. It is this:

If compliance with a formality is a factor influential for the content of the decision, it may be regarded as essential. In this case, counsel for the Republic acknowledged that without the proofs envisaged by Specification 316, the tender of the interested parties could not be evaluated at all. This is a correct factual assessment and one that throws light on the effect of Specification 316. At the time of its submission the tender of the applicants was incomplete and failed to meet the conditions of the tender. The breach was material because it made impossible evaluation of the tender. Non compliance with the terms of the tender was no less significant than the certificate of fitness envisaged by the conditions of tender in the *Medcon* case, supra. The results of this review cannot be different either, for consideration of the tender in breach of specific conditions of the tender in relation to a substantial matter, was an act of bad faith on the part of the Administration,³ involving abuse of power and violation of the principle of equality before the Administration, embodied in Article 28.1 of the Constitution. The decision to consider the tender of the interested parties was taken in breach of the norms of

¹ Reported in (1985) 3 C.L.R. 154.

² p. 380.

³ See, inter alia, *Papadopolou v. The Republic* (1984) 3 C.L.R. 332; and *Drousiotis v. C.B.C.* (1984) 3 C.L.R. 546 at 552.

sound administration and equality before the administration.

In consequence, the decision must be set aside and I order accordingly. Let there be no order as to costs.

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*Sub judice decision
annulled. No order as
to costs.*