1986 September 16

[SAVVIDES, J.]

IN THE MATTER OF ARTICLE 146
OF THE CONSTITUTION

K.M.C. MOTORS LTD.,

Applicant,

v.

THE MUNICIPALITY OF LARNACA,

Respondent.

(Case No. 441/83).

Reasoning of an administrative act—Purpose of—Decisions of collective organs unfavourable to the subject—Requirement of reasoning should be more strictly observed in such a case—Reasoning can be supplemented by the material in the file—Acceptance of tender on ground, inter alia, that it is the "most profitable"—Absence of any material to show in what respect was such tender the "most profitable"— Sub judice decision not duly reasoned.

Administrative Law—Due inquiry—Acceptance of tender on the ground, inter alia, that interested party had "a great stock of spare parts"—Absence of material showing whether relevant inquiries were made of other tenderers, or whether there was such condition in the invitation to submit tenders and absence of material showing wherefrom respondent obtained such information—Respondent failed to carry out a due inquiry.

Administrative Law—General principles—Principles of good administration—Tenders—Acceptance of tender submitted after expiration of time limit and not opened together with other tenders, but after the other tenders had been opened—Flagrant violation of principles of good administration.

The applicant and the interested party were among the

6 persons, who submitted tender for a sewage motor tanker to the respondent. Considerable time after the expiration of the relevant time limit for submitting the tenders and after the opening of the tenders the applicant reduced its previous tender by £1,000, whereas on the same day the interested party reduced its previous tender by £400. As a result the tender of the applicant appeared lower than the other tenders.

The relevant minutes of the Municipal Council state that "after a thorough examination of the tenders and after the Health Inspector had made an oral report" the Council approves the tender of the interested party, i.e. of K. P. Ioannou Ltd., "because it considers same as the most profitable for the Municipality and also because the said firm has available a great stock of spare parts".

As a result applicant filed the present recourse. Counsel for the respondent sought to justify the sub judice decision by giving a number of reasons, which according to his contention were orally explained by the Health Inspector to the Municipal Council.

Held, annulling the sub judice decision: (1) It is surprising how both the applicant and the interested party obviously came to know of the various tenders so that each one of them hurried to reduce its previous tender. The acceptance of a new tender out of time and not opened at the same time with other tenders but after the other tenders had been opened amounts to a flagrant violation of the principles of good administration. The Court will not expand further on the point as this is not a recourse by any tenderer who might have a grievance in this respect.

(2) Administrative decisions have to be duly reasoned. Due reasoning is essential to enable the Courts to carry out properly their functions of judicial control of administrative action. The requirement of reasoning must be more strictly observed in a case of a decision of a collective organ unfavourable to the subject. The reasoning may be supplemented from records in the file of the case.

(3) In this case no particulars of the oral report of the

Health Inspector were recorded in the minutes and, furthermore, the contentions of counsel as to the contents of such report were not substantiated by evidence.

(4) The only reasons given in support of the sub judice decision is that the tender of the interested party was the "most profitable" and because the interested party "has available a great stock of spare parts".

(5) In what respect such offer was the "most profitable"? Was it in respect of price, make, horsepower, construction, fuel economy? Nothing of this sort is mentioned in the minutes.

(6) Wherefrom did the respondents derive the information as to "spare parts"? Did they inquire of other tenderers and in particular of the applicant in relation to them? Was it a condition that the tenderers should satisfy them that they had available sufficient spare parts? Again there is nothing to show what did in fact take place. The conclusion is that no due inquiry was carried in this respect.

(7) In the light of the above the sub judice decision has to be annulled for lack of due reasoning and lack of due inquiry.

Sub judice decision annulled.
£70 costs in favour of applicant.

Cases referred to:

Matsouka (No. 2) v. *The Republic* (1985) 3 C.L.R. 686;

Kazamias v. *The Republic* (1982) 3 C.L.R. 239;

Eleftheriou v. *The Central Bank* (1980) 3 C.L.R. 85;

Sevastides v. *The Republic* (1968) 3 C.L.R. 309;

Oryctaco Ltd. v. *The Republic* (1981) 3 C.L.R. 174;

Vassiliou v. *The Republic* (1982) 3 C.L.R. 220;

Michael and Another v. *P.S.C.* (1982) 3 C.L.R. 726;

Savva and Another v. *The Republic* (1985) 3 C.L.R. 694;

Kartapanis v. *The Republic* (1985) 3 C.L.R. 526;

Karagiorghis v. *C.B.C.* (1985) 3 C.L.R. 378.

Recourse.

Recourse against the decision of the respondent whereby the tender for the supply of a sewage motor tanker was awarded to the interested party instead of the applicant.

Ph. Valiantis, for the applicant.

G. Nicolaides, for the respondent.

Cur. adv. vult.

SAVVIDES J. read the following judgment. Applicant is a company of limited liability engaged in the manufacture and trading of motor vehicles. The respondent is the Municipality of Larnaca.

On 9th February, 1983, the respondent Municipality invited tenders for the supply of a sewage motor tanker. The applicant company was amongst the six tenderers who submitted their tenders within the time limit for the submission of tenders.

The respondent met on 11.6.1983 to examine the tenders submitted. The minutes of such meeting read as follows:

> "For the supply to the Municipality of a motor vehicle for sewage, right hand steering, 11 tons, diesel engine, the Municipality invited tenders through the press and also directly from 28 trading firms, as a result of which 6 tenders were received.
>
> The Municipal Council took notice of the tenders submitted from a comparative table prepared by the Health Inspector of the Municipality and unanimously decided that the whole matter be re-considered at the next meeting of the Municipal Committee for the taking of a final decision."

The comparative table mentioned in the above decision has also been produced. It gives particulars of the tenders

submitted with full details as to the terms of each tender and the amount of the tender.

The applicant by letter dated 4th July, 1983, considerable time after the time limit for submitting a tender had expired, and after the tenders had been opened and were brought up for consideration before the respondent, reduced its previous offer by £1,000.- which made its tender appear lower than the other tenders and in particular that of the firm K. P. Ioannou Ltd. which also, on the same day, reduced its previous tender by £400.-.

The respondent met once again on 5.7.1983 to take a final decision on the matter. The minutes of such meeting read as follows:

"The Municipal Council according to its decision of 11.6.83, re-examines the 6 tenders submitted for the purchase of a sewage vehicle as well as the relative letter of K.M.C. Ltd. and K. P. Ioannou Ltd. dated 4.7.1983 concerning the tenders submitted by them.

The Municipal Council after a thorough examination of the tenders submitted and after the Health Inspector had made an oral report approved the tender of the firm of K. P. Ioannou as follows: .....".

Then it goes on to describe the particulars of the tender and concludes as follows:

"The aforesaid sewage vehicle which should be delivered at the Municipal garage at Larnaca will cost totally about £15,135 without duty.

The Municipal Council approves the above tender of the firm K. P. Ioannou because it considers same as the most profitable for the Municipality and also because the said firm has available a great stock of spare parts.

The Municipal Council further decides and authorises its chairman to negotiate with the above firm the reduction of the aforesaid price of £15,135.-."

Pausing there for a moment, I wish to express my surprise how, after the opening of the tenders and on the eve of the meeting when a final decision on the matter was to be taken, both applicant and K. P. Ioannou Ltd. obviously came to know about the various tenders so that in such a hurry each one of them rushed one day prior to the meeting of the respondent, to reduce their previous tenders to make them more antagonistic and submit them to the respondent in such a way as to reach it before the time of the meeting. And what is also surprising, is that the respondent took cognizance of this fact and mentioned it in the minutes of the meeting without recording whether such reduced tenders, which in fact amounted to new tenders, influenced them and to what extent such new tenders operated to the prejudice of all other tenderers who might have also submitted new tenders if new tenders were invited. As I observed in *Matsouka (No. 2)* v. *The Republic* (1985) 3 C.L.R. 686 the acceptance of any new tender out of time and not opened at the same time with other tenders but after the other tenders had already been opened is an act amounting to a flagrant violation of the principles of good administration. As, however, I am not dealing with a recourse by any of the other tenderers who might have a grievance in this respect I shall not expand further on this matter, but I conclude by observing that conduct of such a nature is not a matter which can be left uncriticised.

As a result of the decision of the respondent of 5.7.83, the applicant, having felt aggrieved, filed the present recourse challenging such decision as null and void and of no legal effect.

The legal grounds advanced by counsel for applicant in support of this recourse, are that the respondent failed to carry out a due inquiry, it did not take into consideration that the sewage vehicles of the applicant were superior both in respect of quality, as well as operation compared to those of the firm K. P. Ioannou Ltd., it did not choose the best in quality and cheapest vehicle, it did not evaluate properly and did not make a comparison of applicant's tender to the other tenders, it acted instigated by prejudice against the applicant and that it failed to act in accordance with the established principles of good administration.

By his opposition counsel for the respondent rejected the above contentions and contended that the respondent carried out a due inquiry into the matter and chose the tender which, in the circumstances, was in its opinion, the most beneficial to the Municipality.

It is a well established principle of Administrative Law that administrative decisions have to be duly reasoned. Due reasoning is essential to enable the Courts to carry out properly their function of judicial control of administrative actions (see *Kazamias* v. *The Republic* (1982) 3 C.L.R. 239, and the cases referred to therein). The requirement of reasoning must be more strictly observed in the case of a decision of a collective organ unfavourable to the subject. *(Elejtheriou* v. *The Central Bank* (1980) 3 C.L.R. 85).

It is also well settled that the reasoning may be supplemented from records in the file of the case (see, inter alia, *Sevastides* v. *The Republic* (1968) 3 C.L.R. 309, *Oryctaco Ltd.* v. *The Republic* (1981) 3 C.L.R. 174; *Vassiliou* v. *The Republic* (1982) 3 C.L.R. 220; *Michael and Another* v. *P.S.C.* (1982) 3 C.L.R. 726; *Savva and Another* v. *The Republic* (1985) 3 C.L.R. 694; *Kartapanis* v. *The Republic* (1985) 3 C.L.R. 526; *Karageorghis* v. *C.B.C.* (1985) 3 C.L.R. 378.

Useful reference on the matter may, also, be made, to the Greek Case Law and Greek authors on this matter. Thus, in Economou "The Judicial Control of the Discretionary Power in the Public Administration" 1965 Edition, at p. 225, we read:-

«Τὸ αὐτὸ ἰσχύει καὶ περὶ τῆς διακριτικῆς ἐξουσίας, διὰ τὴν ἄσκησιν τῆς ὁποίας ἡ αἰτιολογία ἀποτελεῖ μεθόδευσιν καὶ ἔκφρασιν τῆς ἐλευθερίας κρίσεως ἢ προκρίσεως τοῦ διοικητικοῦ ὀργάνου, μέσω τῆς ὁποίας ὁ Δικαστὴς δύναται νὰ εἰσέλθῃ εἰς τὸν ἔλεγχον τῶν ὁρίων τῆς διακριτικῆς ἐξουσίας τοῦ ἐλεγχομένου διοικητικοῦ ὀργάνου, καὶ μόνον, ἐφ' ὅσον ἡ αἰτιολογία ἐξασφαλίζει τὸ ἀντικείμενον ἐλέγχου, καὶ δή ἡ πραγματικὴ *τοιαύτη ἡ συνιστῶσα τὴν ἐλάσσονα πρότασιν τοῦ* κατηγορικοῦ συλλογισμοῦ, τὴν ὑπαγομένην εἰς τὴν μείζονα καὶ ἄγουσαν εἰς τὸ συμπέρασμα. Ὡς παρατη-

ρεῖται σχετικῶς 'ἐπειδὴ ὁ δικαστὴς ἀδυνατεῖ νὰ εἰσέλθη εἰς τὸν οὐσιαστικὸν ἔλεγχον περὶ τῆς ἐπιτυχοῦς ἢ μὴ χρήσεως τῆς διακριτικῆς ἐξουσίας, ἐπιζητεῖ ὅπως ἡ πρᾶξις παρέχη τυπικήν τινα ἀπόδειξιν περὶ τοῦ ὅτι ἡ διακριτικὴ ἐξουσία ἠσκήθη πράγματι ἐντὸς τῶν νομίμων ὁρίων.' "

("The same applies in respect of the discretionary power, for the exercise of which the reasoning constitutes the method and expression of the free judgment or conclusion of the administrative organ through which the Judge is enabled to control the boundaries of the discretionary power of the administrative organ concerned, and only, if the reasoning safeguards the object of the control, and in particular the factual reasoning, which comprises the minor proposition of the positive syllogism, which, when subjected to the major proposition leads to the conclusion. As it has been observed 'As the Judge is unable to exercise substantive control as to the successful or unsuccessful exercise of the discretionary power, he requires that the act should give a formal proof that the discretionary power was in fact exercised within its legal limits' ").

and at p. 226.

«Πέραν αὐτοῦ τοῦ ρόλου της, ἡ αἰτιολογία ἐπιτελεῖ καὶ ἄλλην ἀποστολήν. Συνιστᾶ, κατ' ἐπιτυχῆ ἔκφρασιν τοῦ κ. Μ. Δ. Στασινοπούλου, τὸν δείκτην ὅστις κατευθύνει τὴν προσοχὴν τοῦ Δικαστοῦ, καὶ ἐπὶ παντὸς ἑτέρου νομικοῦ ἐλαττώματος τῆς ἐλεγχομένης διακριτικῆς πράξεως, ἐν τῷ πλαισίῳ τῆς φύσεώς της, ὡς ἐκφράσεως τοῦ ὅλου ἢ μέρους τῶν προσδιοριστικῶν τῆς βουλήσεως ὀργάνου τινός παραγόντων, τῶν συνιστώντων τὴν ὑποδομὴν οὕτως εἰπεῖν τῆς ἀποφασιστικῆς διαδικασίας. Διὰ τοῦτο ὀρθῶς διαπιστοῦται ὅτι τὸ Συμβούλιον τῆς 'Επικρατείας διὰ τοῦ ἐλέγχου τῆς αἰτιολογίας 'ἔφθασεν εἰς τὸ σύνορον τοῦ οὐσιαστικοῦ ἐλέγχου τῶν διοικητικῶν πράξεων, πέραν τοῦ ὁποίου συνόρου, ἡ περαιτέρω διείσδυσις εἰς τὴν ἐκτίμησιν τῆς Διοικήσεως εἶναι ἀδύνατος.' »

("Beyond such purpose, the reasoning accomplishes another mission. According to the successful phrase of Mr. M. D. Stasinopoulos, it is the pointer, which guides the attention of the Judge, to any other legal default of the discretionary act under review, within the limits of its nature, as an expression of all or any of the factors, which determined the will of the administrative organ and which constitute the substratum of the process leading to the decision. For this reason it is rightly considered that the Council of State reached the limits of the substantive control of the administrative acts, beyond which any further interference with the evaluation of the administration is not possible").

Counsel for the respondent by his written address sought to justify the decision of the respondent by giving a number of reasons which according to his contention were orally explained by the Health Inspector at the meeting of the 5th July, 1983, at which the sub judice decision was taken. No particulars of the oral report of the Health Inspector appear in the minutes. Furthermore, such contentions are not substantiated by any evidence before me or any material in the relevant files. The only matter which appears as recorded in the minutes is that "the oral report of the Health Inspector" was heard, without mentioning any of the particulars of such report that led the respondent to prefer the tender of the firm of K. P. Ioannou Ltd.

In fairness to counsel for the respondent he conceded that nowhere in the file of the Municipality there exists any report of the Health Inspector as to the reasons why the tender of the firm of K. P. Ioannou Ltd. should be chosen.

The only reason given for preferring the tender of K. P. Ioannou Ltd. is that such tender was the "most profitable" and because the said firm "has available a great stock of spare parts".

In what respect was such tender the "most profitable"? Was it in respect of price, make, horsepower, construction, fuel economy? Nothing of this sort is mentioned in the

minutes and the contention of counsel for respondent, in his written address, that the tender of the firm of K. P. Ioannou Ltd. was better in the above respects is not substantiated by anything in the file or the minutes or by any report of the Health Inspector on whose oral, unrecorded comments, the respondent relied. Once the Municipality accepted the new tenders of applicant and K. P. Ioannou Ltd., then from the financial point of view the tender of the applicant appears to be lower, irrespective of the fact that the respondent was not bound to accept the lower tender but the best one on its totality.

A further reason is given by respondent for preferring the tender of K. P. Ioannou Ltd.: that such firm "has available a great stock of spare parts". The following question poses for answer in this respect. Wherefrom did the respondent derive such information? Nothing of this sort appears in the tenders submitted or in the material before me to justify such reasoning. Furthermore, did the respondent inquire from the other tenderers and in particular the applicant, which was a local manufacturer of such vehicles as to whether they had available sufficient stock of spare parts? Or did they make it a condition of the tenders that the tenderers should satisfy the respondent that they had available sufficient stocks of spare parts? There is nothing anywhere in the material before me and in the minutes of the respondent that such process did in fact take place which leads to the conclusion that no due inquiry was carried out in this respect.

On the material before me I have come to the conclusion that in the circumstances of the present case the sub judice decision is lacking of due reasoning and also that it was taken without due inquiry into the rival merits of the tenders and their proper evaluation.

For the above reasons, this recourse succeeds and the sub judice decision is annulled with £70.- costs in favour of applicant.

Sub judice decision annulled with £70.- costs in favour of applicant.