

1987 Januar 21

[SAVVIDES J]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

ANDRONIKOS NICOLAOU

Applicant,

v

THE REPUBLIC OF CYPRUS THROUGH
1 THE MINISTER OF FINANCE
2 THE TENDER BOARD

Respondents

(Case No 647/85)

Tenders — Violation of condition in the relevant invitation for tenders — Effect

Constitutional Law — Equality — Constitution Art 28 1 — Acceptance of tender violating a condition of the relevant invitation for tenders — Amounts to infringement of Art 28 1

Recourse for annulment — Tenders — Awards — Award of contract to interested party annulled — Matter has to be re-examined by the Tender Board — It follows that the refusal to award the tender to the applicant cannot, also, be annulled

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The applicant and the interested party were among the tenderers for the supply of shingle for the construction of Strovolos Avenue

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Term 6 of the relevant invitation for tenders provided that «every tenderer must accompany his tender by a certificate of fitness » and that «any offer not accompanied by a certificate of fitness will not be taken into consideration»

Though the tender of the interested party was not accompanied by a certificate of fitness, but only with a certificate that the sample was under examination, and though such sample was later found to be unfit, the tender was awarded to the interested party

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As a result the applicant filed this recourse seeking (a) The annulment of the said decision and (b) The annulment of the refusal to accept the tender of applicant and assign the contract to him

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Held (1) It is clear that the tender of the interested party was not in

5 compliance with the special conditions of the invitation for tenders: such tender could not have been accepted. The decision of the Tender Board was reached in an irregular manner and in a manner inconsistent with the principle of free competition and the right of equality of treatment. It follows that the decision to award the tender to the interested party has to be annulled.

10 (2) Prayer (b) cannot be granted, because in the light of the annulment of the decision to accept the tender of the interested party, the matter has to be re-examined. It is for the respondent Board to decide which tender it should accept.

*Sub judice decision annulled
£50 costs in favour of applicant.*

Cases referred to

15 *Etena Fortigon Aftokinton Ltd and Others v The Republic* (1986) 3 C.L.R. 2014.

K.M.C. Motors Ltd v. Municipality of Lamaca (1986) 3 C.L.R. 925.

Georghios Kounnas and Sons Ltd. and another v The Republic (1972) 3 C.L.R. 542

20 *Medcon Construction and Others v The Republic* (1968) 3 C.L.R. 535.

J.N. Chnstofides Trading Ltd. v The Republic (1985) 3 C.L.R. 546

Recourse.

25 Recourse against the decision of the respondents to accept the tender of interested party, for the supply of shingle for the construction of Strovolos Avenue, instead of the tender of the applicant.

K. Talarides, for the applicant.

M. Photiou, for the respondent.

Cur. adv. vult.

30 SAVVIDES J. read the following judgment. By this recourse the applicant seeks the annulment of the decision of respondent 2 to accept the tender of the interested party.

Papalazarou Bros. for the supply of shingle for the construction of Strovolos Avenue (prayer (a)) He further prays for a declaration that the refusal of respondent (2) to accept the tender of applicant and assign the contract to him is null and void, (prayer (b))

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The facts of the case are briefly as follows -

On the 18th April, 1985 the District Engineer of the Public Works Department of Nicosia invited tenders for the supply of 10,000 c m of shingle for the construction of the foundations of Strovolos Avenue It was an express term of the invitation for tenders that they should reach the office of the Accountant-General of the Republic not later than 9 a m of the 24th May, 1985 Under the special terms of the said invitation and in particular term 6, the tenders were subject to the following

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«Every tenderer must accompany his tender with a certificate of fitness issued by the laboratories of the Public Works Department of Nicosia in accordance with the sample of the material offered which has to be delivered for examination in time *any offer not accompanied by a certificate of fitness will not be taken into consideration*»

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(The underlining is mine)

Both the applicant and the interested party were amongst those who submitted tenders for the supply of shingle All the tenders were considered by respondent 2 on the 24th of May, 1985 and the tender of the interested party was the one finally accepted by respondent 2 It is common ground that the tender of the interested party was not accompanied by a certificate of fitness in compliance with term 6 of the special terms of the invitation for tenders Instead, a certificate was attached to the tender mentioning that the sample was under examination The decision of respondent 2 was communicated to the Director of the Public Works Department on the 27th May, 1985 On the same date a letter was addressed by the applicant to the chairman of respondent 2 protesting against the acceptance of the offer of the interested party on the ground that his tender was not accompanied by a certificate of fitness in accordance with paragraph 6 of the special terms of the invitation for tenders By such letter he also alleged that the sample

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produced for examination by the interested party was found unfit and therefore, his tender should have been rejected on this ground as well

5 The Director of the Public Works Department by his letter dated 28th May, 1985, addressed to the Accountant-General as chairman of respondent 2 informed him as follows

10 «I refer to the aforesaid tender which was granted to PapaLazarou Brothers on 24 5 85 and I wish to inform you that the sample which the tenderer has produced has been found as unfit

The aforesaid tenderer produced a second sample which again was found unfit. For this reason I request that the tender should be granted to the next tenderer, Mr Andronikos Nicolaou »

15 By letter dated the 21st June 1985 respondent 2 informed the applicant that his tender could not be accepted by the Tender Board. As a result, applicant filed the present recourse challenging the sub judice decision. The application was based on the following grounds of law

20 1 The sub judice decision was taken in violation of the regular procedure for the examination and acceptance of tenders

25 2 The Tender Board acted in violation of term (6) of the special terms on the basis of which the invitation for tenders was made

3 The sub judice decision and/or omission is contrary to law and was taken in excess and/or abuse of power

4 The sub judice decision and/or omission is illegal in that it violates the principles of good administration

30 The question which poses for consideration in this case is whether there was an irregularity in the process of consideration of the tenders, affecting their outcome

35 It is well settled that if the consideration of the tenders took place in a manner contrary to the principle of free competition or in an irregular manner affecting its outcome, then the relevant administrative decision has to be annulled (*Etena Fortigon Aftokinton Ltd & others v Republic* (Case No 40/

86) in which judgment was delivered on 21 11 86* *K M C Motors Ltd v Municipality of Larnaca* (Case No 441/83) in which judgment was delivered on 16 9 1986) * (both still unreported) Also *Georghios Kounnas & Sons Ltd and another v The Republic* (1972) 3 CLR 542 in which reference is made inter alia to the Conclusions from the Case Law of the Council of State in Greece (1929 - 1959) at pp 430 - 431 Case 1965/47 and Cases 2028/47 and 2029/47 at p 431) 5

Counsel for the respondents admitted that the acceptance of the tender of the interested party was made in violation of special term 6 which was a material one as the special terms were a substantial prerequisite of the tenders and not a mere formality but objected to prayer (b) of the relief which, in his submission, could not be granted 10 15

In *Medcon Construction & Others v Republic* (1968) 3 CLR 535, the Court in annulling the decision of the respondent accepting the tender of the interested party which was not in compliance with certain conditions of the invitation for the tenders one of which was that the tender should be accompanied by a certificate of fitness of the material, had this to say at pp 544, 545 (per Triantafyllides, J, as he then was) 20

«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 25 30 35

* Reported in (1986) 3 CLR 2014

** Reported in (1986) 3 CLR 1925

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.»

In the case of *J. N. Christofides Trading Ltd. v. Republic* (1985) 3 C.L.R. 546, the Court annulled the decision of the Tender Board on the ground that the tender was not accompanied by a certificate that it complied with certain prerequisites.

It is clear in the circumstances of the present case that the Board accepted the tender of the interested party which was not in compliance with the special conditions of the invitation for tenders: such tender could not have been accepted. The decision of the Board was reached in an irregular manner which affected the outcome of the exercise of its relevant powers, and in a manner inconsistent with principles of free competition and the right of equality of treatment which is safeguarded by Article 28.1 of our Constitution, has been violated. Therefore, the sub judice decision has to be annulled.

As to the prayer under paragraph (b), I find that such prayer cannot be granted, in view of the fact that by the annulment of the decision for the acceptance of the tender in question the matter has to be re-examined in the light of this decision and it is for the respondent Board to decide which tender it should accept.

In the result the sub judice decision is annulled.

In the circumstances of the case I allow £50. - against costs in favour of the applicant.

*Sub judice decision
annulled. Respondents to
pay £50.- costs.*