

1988 November 24

[DEMETRIADES, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

COLAKIDES AND ASSOCIATES AND OTHERS,

Applicants.

THE REPUBLIC OF CYPRUS, THROUGH

1. THE CHAIRMAN OF THE TENDER BOARD,

2. THE CYPRUS TOURISM ORGANIZATION,

Respondents.

(Case No. 429/85).

Reasoning of an administrative act—Tenders—Tenderer with an impressive list of projects carried out by him submitting tender for pre-qualification in respect of the tourist development of Paphos—Committee set up by Council of Ministers excluded said tenderer—No reasoning as to why the criteria established by such Committee were not satisfied by the said tenderer—Decision annulled for failure to carry out a due inquiry as to such tenderer's projects and for lack of due reasoning.

Tenders were invited for the prequalifications of firms, which were to be invited to submit tenders for the tourist development of Paphos. The Council of Ministers set up a special committee, which, although there is nothing to show what the Council decided in respect of the procedure to be followed, proceeded and determined criteria applicable in respect of the tenders, which would be submitted.

Applicants 1 and 4 submitted a tender. There was an impressive list of projects carried out by applicants 4. However, applicants 4 were not included among the 16 firms, which were thought to satisfy such criteria. As a result of adoption of the recommendations of the special committee, applicants 1, a local firm of architects and civil engineers—having as partners applicants 2 and 3—were invited to co-operate, in submitting a tender for

the project, with any of the other 16 prequalified, as aforesaid, foreign firms. Hence this recourse.

Held, *annulling the sub judice decision*: (1) There is nowhere to be found a reasoning in the decision of the Special Committee why the applicants, who gave an impressive list of projects carried out by them, did not meet the criteria set by them. 5

(2) There was no material before the Court as to what the terms of reference of the Special Committee were, and if they were entitled to set the criteria they decided to apply for the selection of the consulting firms for pre-qualification. 10

(3) There was no indication that criteria, as those applied, were to be applied in determining the preselection.

(4) It follows that the sub judice decision must be annulled on the grounds that the respondents failed to (a) carry out a proper inquiry as regards the projects that had been carried out by the applicants, and (b) give their reasoning for reaching their decision to exclude them for prequalification once no notice or information was given to them as to the criteria on which their application was to be considered. 15

Sub judice decision annulled.

£100. - costs against respondents.

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Recourse.

Recourse against the decision of the respondents whereby the applicants were informed that they were prequalified for submission of tenders for the Paphos Tourism Development Plan on the condition that they should cooperate with one of the prequalified 16 foreign firms. 25

G. Cacoyannis, for the applicants.

N. Charalambous, Senior Counsel of the Republic, for the respondents.

Cur. adv. vult. 30

DEMETRIADES J. read the following judgment. The first applicants are a partnership of Architects and Civil Engineers. The second and third applicants, who are an Architect and a Civil Engineer respectively, are the partners of the first applicants. The
5 fourth applicants in this recourse are a body incorporated in Greece, which carries, inter alia, the profession of Engineers, Architects and Consultants for tourism development and planning.

As it appears from the documents in the file of the case, the facts of the present recourse are:

10 At its meeting of the 4th January, 1984, the Council of Ministers, by their decision No. 24.053, decided to approve the procedure for the prequalification of firms which were to be invited to submit tenders for the preparation of a technoeconomic study for the tourist development of the District of Paphos. As a result, an
15 invitation for tenders was published in the Official Gazette of the Republic on the 3rd February, 1984, and the local press. At the same time, notice of the invitation was given through the Ministry of Foreign Affairs to the Embassies of a number of countries and to firms that were suggested by International Organizations. The
20 notification published and circulated appears in Appendix 2 to the Opposition and reads:

"NOTIFICATION

PAPHOS TOURISM DEVELOPMENT PLAN
PREQUALIFICATION OF CONSULTANTS

25 The Government of Cyprus, the Cyprus Tourism Organization and the Cyprus Development Bank invite applications from consulting firms qualified and experienced in undertaking comprehensive tourism development plans and interested in being prequalified for tendering for the captioned project. The
30 prequalified firms will subsequently be furnished with the Terms of Reference and will be invited to give a full proposal of their services including quotations of their fees.

Consulting firms interested in being prequalified may obtain general information of the study to be undertaken and on the items to be included in the prequalification application from:

Director - General
Cyprus Tourism Organization 5
P.O.Box 4535, TLX 2165 CYTOUR
Tel.: 021-43374
Nicosia - CYPRUS.

Applications for prequalification must reach the Director-General, Cyprus Tourism Organization by the 31.3.1984." 10

On the 30th March, 1984, the first and fourth applicants, in response to the above notification and after they were supplied by the second respondents with a document which is headed:

"PAPHOS TOURISM DEVELOPMENT PLAN
INVITATION FOR PREQUALIFICATION 15
OF CONSULTANTS"

applied for prequalification. This document is appended to my judgment as Appendix "A" and it contains instructions and other information to consulting firms interested in being prequalified.

The "Paphos Tourism Development Plan" shall be referred to, hereinafter, as the "project". 20

The application of the applicants was addressed to the second respondents. It is Appendix "B" to the recourse and for the purpose of my judgment I consider it necessary to copy it in its full text. It reads: 25

"With reference to notification No. 286, published in the Cyprus Gazette of February 3, 1984, we would like to apply, on behalf of ourselves and our associates, Messrs. Frank E. Basil, Inc. - Consulting Engineers, Athens, Greece, for pre-qualification for the Paphos Tourism Development Plan. 30

The experience of Messrs. Frank E. Basil, Inc. in the execution of studies of similar nature in several parts of Greece and other countries, as detailed in the enclosed pamphlet, with the title 'Paphos Tourism Development Plan', combined with
5 our experience in the design and construction supervision of some of the biggest tourist projects in Cyprus, is, we believe, a recommendation for such a prequalification.

Messrs. Frank E. Basil, Inc. have undertaken and completed the following studies:

- 10 1. The Tourist Development of the Island of Crete.
2. The Tourist Development of the Alentejo Region in Southern Portugal.
3. Master Plan and General Development for the Tourist and Economic Development of the Island of Crete.
- 15 4. Master Plan and Feasibility Study for the Tourist Development of Fleves Island (off the Attica Coast) in Greece.
5. Master Plan for the Development of the Afandou Area, on the island of Rhodes, Greece.
- 20 6. Project Olympia (a regional conservation and development programme for the general and economic development of the Olympic area in Western Peloponnissos).
7. Porto Carras Resort, Development Plan.
8. Tourist Development Study of the Cassiopi Area in Corfu, Greece.
- 25 9. Tourist Development Study, Zopheria, Spetsai, Greece.
10. Tourist Development Kakouri, Corinth, Greece.

11. Various Hotel studies.
12. Other studies such as urban planning, infrastructure, sports facilities, utilities, etc.

Some of the Tourist projects which we have studied are:

1. Amathus Beach Hotel, Limassol. A 5-star, 440 bed hotel built in 1973 at a cost of C£1,800,000.- 5
2. Extension of Amathus Hotel, Limassol. An addition of 132 beds, built in 1980 at a cost of C£1,200,000.-
3. Lotus-Ashok hotel, Limassol. A 5-star 428 bed hotel under construction at a cost of C£7,800,000.- 10
4. Union Nationale Tourist Development, Limassol. A 5-star, 400 bed hotel plus 72 bungalows. Estimated cost C£9,000,000.- Construction will commence in two months time.
5. Limassol Sheraton Hotel. A 5-star, 500 bed hotel and 40 Hotel Apartments with private marina. Estimated costs C£12,000,000.- Construction will start later this year. 15

The qualified Architects-Engineers-Planners of our firm are 11 in number and the other staff are 10.

Frank E. Basil Inc. team for this study is described in the enclosed pamphlet which has the title 'Paphos Tourism Development Plan'. 20

On page 17 of this same pamphlet it is stated that a detailed plan of work, which is called for by the invitation for Prequalification of Consultants, will be prepared after the terms of reference are known and the scope of Work firmly established. Based, however, on previous experience from similar projects we propose, as a general approach, the fol- 25

Following plan of work:

1. Investigation of existing conditions and resources.

5 A team consisting of one Architect/Planner, a Civil Engineer, an Economist and by AD-HOC Specialists will investigate and determine existing conditions and available resources in:

- 10 A. Geography of the area physical characteristics, prevailing climatic conditions, flora, coastline and beaches, sea condition (temperature and currents) population, demography, urban and rural areas, etc.
- B. Infrastructure and utilities road network, airport, ports, power and telephones, sewage, water, in correlation with the overall infrastructure system of the island.
- 15 C. Environmental characteristics inventory of particularly sensitive areas, and regions to be protected, locations of particular interests, archaeological sites, significant buildings, traditional villages, handicrafts, etc.
- 20 D. Tourist infrastructure hotel facilities, all other tourist facilities (food, recreation, cultural, etc.) correlation with the balance of the tourist infrastructure of the island.
- E. Analysis of the present tourist market of Cyprus in relation to the market for the entire Mediterranean area, and more particularly of the Eastern Mediterranean.

2. Concept Study - Basic Guidelines:

25 On the basis of the above analysis, the project team, supplemented by other professionals and specialists in tourism, and in collaboration with the appropriate services of the Cyprus Tourism Organization and other entities will establish the study guidelines, which will determine:

- A. The role of the Paphos region within the framework of the overall tourist development plan of Cyprus.
 - B. The type of tourists aimed to be attracted to Paphos.
 - C. Determination to the maximum capacity of the region, considering all pertinent factors, including the proposed image to be established (exclusive, or mass tourism). 5
 - D. Type of facilities desired, traditional hotels, camping sites, motels, holiday villages, flats/villas for rent or for sale, time-sharing units, etc.
3. Market Analysis: 10
- A. Origin - Destination analysis of Mediterranean tourism.
 - B. Present tourism traffic to Cyprus.
 - C. Types of tourists, mode of transport, types of desired accommodations.
 - D. Comparison with the tourist flow pattern in the islands of Crete, Rhodes and Corfu. 15
 - E. Preparation of a probable tourist market profile for the Paphos region within the context of tourism to Cyprus in general.
4. Preparation of the Development Programme: 20
- A. Preparation of an overall master plan which will determine:
 - (1) Type, capacity and location of hotel facilities.
 - (2) Type, capacity and location of other type of tourist accommodations.

(3) Type, capacity and location of recreational facilities.

(4) Basic infrastructure requirements, including roads, ports, power, telecommunications, water and sewage installations.

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(5) Ancillary facilities, such as Marinas, additional airport facilities, shopping areas, health facilities and other support services.

(6) Priority areas and schedule of implementation.

B. Evaluation of environmental hazards and determination of design criteria, legislative policy and protection standards.

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C. Cost estimate for the realization of the above programme, within a pre-determined time frame and evaluation of local and national benefits cost/benefit evaluation.

51 Preparation of a master plan for a priority development area.

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To include:

A. Selection, in collaboration with the appropriate Government authorities, of an area to be developed first.

B. Establishment of the proposed development programme.

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C. Preparation of the master plan for the proposed area.

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D. Preparation of concept plans for all major facilities.

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E. Establishment of design criteria and parameters.

F. Preparation of a basic feasibility study and preinvestment study for this particular project

The criteria set out by the Committee were that firms -

G. Identification of particular bankable projects within the pri-

ority area for which detailed feasibility studies will have to be prepared.

6. Identification of projects throughout the region, which may be implemented by the private sector, preparation of pre-investment studies. 5

7. Implementation programme.

We are enclosing the following material in triplicate:

1. The pamphlet 'Paphos Tourism Development Plan' providing the background of Messrs. Frank E. Basil, Inc.

2. The brochure of our firm. 10

3. The C.V. 's of our staff.

We trust that the information supplied will enable our team to prequalify, in which case we shall be pleased to submit to you our detailed proposals on the Paphos Tourism Development Plan. 15

Yours sincerely,
COLAKIDES & ASSOCIATES"

For the purpose of the selection of the firms that had applied for prequalification, the Council of Ministers had appointed a Special Committee presided by Mrs. Fr. Michael, who held the post of First Tourism Officer of the Cyprus Tourism Organization. Although there is nothing in the file of the administration as to what the Council of Ministers decided to be the procedure to be followed by the Special Committee in the selection of the firms, the Committee set out its own criteria as to which firms were eligible for prequalification for tendering for the project. 20 25

The criteria set out by the Committee were that firms -

5 (a) had to show that the studies that they had carried out related to plans/programs of Touristic Development - and not simply to Town Planning or general Development - on a national or peripheral area or an area which was comparable to the Paphos District and which has to include the element of an integrated development approach;

(b) had to have prepared at least two (2) similar studies, one of which after 1977.

10 The Committee considered criterion (b) as an advantage, as it considered it indicative of the recent experience and quality of the study of the firm and, also, as an indication of demand for its services.

15 Sixty-nine (69) Consulting firms interested in being prequalified applied but the Committee decided that only nineteen (19) of them satisfied the above criteria. The Committee then considered these nineteen (19) firms in more detail and it further evaluated them on the basis of certain other criteria after a number of marks was allocated to each one of them. These criteria and the number of marks corresponding to each one of them appear in detail in
20 part 4 of Appendix C' to the Opposition. In this respect, five marks were allocated to firms which had prepared three studies or more in 1977 or after. On the basis of this evaluation, the Special Committee suggested to the Tender Board the selection for pre-qualification of seven (7) firms which concentrated more than 70
25 marks. All of them were foreign firms, and their names appear in part 5 of Appendix C' to the Opposition. Three of these firms had Cypriot associates whilst the remaining 4 were foreign firms applying on their own.

30 At its meetings which were held on the 16th and 24th August, 1984, the Central Tender Board discussed the matter and decided to adopt the recommendations of the Special Committee as to the selection of the 7 firms which concentrated over 70 marks. It also decided to refer the matter to the Ministerial Committee of Tenders for final decision, suggesting that a decision had to be made

as to whether the prequalified foreign firms had to cooperate with local firms (See Appendices D' and E' to the Opposition).

The problem of the Cypriot consultants, none of whom was preselected, was put before the Ministerial Committee by letter of the Chairman of the Tender Board dated the 27th August, 1984, addressed to the Minister of Finance, in which it was suggested that it should be brought to the attention of the preselected firms that their co-operation with Cypriot Consultants would be considered as an advantage.

At its meeting of the 11th September, 1984, the Ministerial Committee decided that the following were eligible for prequalification:

- (a) All foreign firms which concentrated over 60 marks (16 in number) on condition that they co-operate with Cyprus Consultants.
- (b) The Cypriot firms which showed interest provided that they co-operate with one of the foreign prequalified firms (Appendix Z).

The Director-General of the Cyprus Tourism Organization was informed of the aforesaid decision by letter dated the 13th September, 1984, and he then, by letter dated the 19th December, 1984, informed the first applicants that they were prequalified for submission of tenders on condition that they should cooperate with one of the 16 prequalified foreign firms (amongst which applicant No. 4 was not included).

By their letter dated the 9th January, 1985, the first applicants asked the second respondents to inform them why their joint application with the fourth applicants was separated whilst other joint applications were approved jointly, and why their partners' (fourth applicants) were not preselected. They also informed the second respondents that it was difficult for them to co-operate with the preselected foreign firms since many of them had already

local co-operates.

joint one

By their letter dated the 23rd January, 1985, the second respondents informed the first applicants of the procedure that had been followed by the Special Committee; that the decision was reached by the Tender Board and the Ministerial Committee and referred them to those bodies for further information. The applicants were by this letter also informed that they had been pre-selected together with three other Cypriot Consultants on the same condition and that it was possible that not all of the 16 foreign firms had Cypriot associates.

By letter dated the 14th February, 1985, addressed to the second respondents, the first applicants reverted to the matter again requesting for an answer to their question since their application for prequalification was addressed to them and requested, once again, to know the reasons why their partners were rejected. The second respondents replied that the joint application of the applicants had been repeatedly considered by the Special Committee and its report, which was confidential, had been submitted to the Tender Board. The first applicants finally, by telegram informed the Chairman of the Tender Board that if they had no clear answer to their questions before the 15th March, 1985, (which was the last date for submitting tenders) they would take legal action.

As there was no reply to their telegram, the applicants filed the present recourse on the 8th April, 1985, and, at the same time, applied for a provisional order for the stay of the operation of the sub judice decision until final determination of the matter. The application for provisional order was dismissed by me on the 3rd July, 1985, and the decision is to be found as *Colakides & Associates and Others v. The Republic and Others*, (1985) 3 C.L.R. 1780.

If I have correctly understood the prayers to the recourse of the applicants, these can be summarized as follows:

- (a) The respondents failed to consider their application as a

joint one.

- (b) That in failing to do so, the respondents acted under a misconception of fact.
- (c) That the decision of the respondents not to treat their application as a joint one is not duly reasoned, and 5
- (d) That the respondents, in failing to treat the application as a joint one, acted in violation of the principle of equality.

Regarding the complaint of the applicants that their application was not treated as a joint one, I find that there is no merit in it as it is clear from the contents of the letter of the second respondents, dated the 19th December, 1984, that the Special Committee did consider the application submitted by all the applicants but did not select them for prequalification and that the decision for the selection of the first applicants on condition that they co-operate with one of the foreign firms that had been selected for prequalification was taken by the Ministerial Committee. 10 15

However, I feel that the matter cannot rest here.

It has repeatedly been decided by the Supreme Court that the reasoning of an administrative act or decision may be supplemented from the material in the files of the administration and that this Court will not interfere with an administrative act or decision if it finds that on the material before it it was reasonably open to the administration to reach the sub judice decision. 20

In the present case, having carefully gone through the documents that are attached to the recourse and the opposition to it as Appendices, I find that- 25

- (a) there is nowhere to be found a reasoning in the decision of the Special Committee why the applicants, who in their letter of the 30th March, 1984, gave an impressive list of projects carried out by them, did not meet the criteria set by 30

them;

5 (b) there is no material before me as to what the terms of reference of the Special Committee were, and if they were entitled to set the criteria they decided to apply for the selection of the consulting firms for prequalification; and,

(c) there was no indication either in the Notification which is earlier mentioned in this judgment, or in the pamphlet giving information to applicants that criteria as those decided by the Committee were to be applied for their preselection.

10 In the light of my above findings, I have come to the conclusion that the present recourse must succeed and the sub judice decision must be annulled on the grounds that the respondents failed to (a) carry out a proper inquiry as regards the projects that had
15 been carried out by the applicants, and (b) give their reasoning for reaching their decision to exclude them for prequalification once no notice or information was given to them as to the criteria on which their application was to be considered.

In the result, the recourse succeeds.

20 The respondents to pay £100.- towards the costs of the applicants.

*Sub judice decision annulled.
Respondents to pay £100- costs.*

25 **PAPHOS TOURISM DEVELOPMENT PLAN
INVITATION FOR PREQUALIFICATION
OF CONSULTANTS**

Introduction

The Government of Cyprus wishes to engage a firm of Consultants to prepare a Tourism development study for the Paphos region.

Paphos is the second largest district of Cyprus located on the Western and South-western part of the island. With a population of about 50,000 inhabitants it is an area with a long coastal belt and an upland hinterland with a mainly rural character and an economy supported mainly by agriculture. In the last few years many new hotels and hotel apartments as well as other residential buildings have been constructed mainly in the coastal area and there is much pressure for further tourist development. The purpose of the study is to establish the basis for tourism development of the area up to 1996 by ensuring that tourist development is in complete harmony with the natural environment and cultural heritage of the area and it enhances the quality of life.

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The basic objectives of the study would be to appraise the impact of existing tourist development, undertake an investigation of market prospects, assess the potential absorption capacity of the region, set desired development targets, policies and strategies, propose appropriate type of accommodation, prepare a tourism development programme, identify priority areas, prepare a master plan for a priority area and identify and suggest bankable projects to be undertaken by the public or private sector or jointly and formulate and assess specific project to be selected to full feasibility stage.

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The study will be financed with Cyprus Government funds.

Applications for prequalification shall be prepared and submitted in accordance with the following:

25

Name and Address of Applicant:

The applicant shall indicate his full and proper name and address to which all correspondence is to be sent. Information of the company should be included, as well as a CV of the Managing Director, members of the Board of Directors and Associates.

30

Studies of similar extent and nature.

Only applications from consultants experienced in the execution of studies of a similar nature will be considered. The appli-

cant shall submit with his application a list of studies of similar nature which he has carried out and state in the case of each one:

- (a) the nature of the services provided,
 - (b) the scope of the study (incl. market orientation, enrichment of the tourist product, protection and enhancement of the environment and cultural heritage, integrated planning)
 - (c) the clients' names and addresses,
 - (d) date of preparation,
 - (e) country for which the studies have been carried out.
- Similar information should be given in respect of any other consulting firms which the applicant proposes to employ for the execution of part(s) of the study.

Applicant's personnel.

The applicant should submit with his application a list giving the names of professional personnel which will be involved in the study with their curriculum vitae. Similar studies in the preparation of which the above personnel has been involved should be indicated with details regarding scope and date of preparation.

Research and support facilities

A brief account of research and support facilities of the applicant should be submitted.

Proposed study team and plan of work.

The applicants should submit their proposals on how they intend to carry out work required by the clients giving details of the team structuring and composition.

Other information

- Year of establishment of the firm, as well as of other consulting firms which the applicant proposes to employ for the preparation of part(s) of the study.
- Annual reports for the last 3 years, if available or any other publication on the activities of the firm/s.

— Bankers from whom references can be obtained.

Language

The study is to be prepared in the english language. All correspondence and communications in connection with the prequalification, tendering and execution of the study and all material accompanying them must be in the english language. 5

Evaluation of applications

Promptly after the closing date applications for prequalification will be assessed and evaluated. Prequalified applicants will be invited to submit detailed proposals for the Paphos Tourism Development Plan. 10

Invitation to bid

Prequalified firms will subsequently be furnished with the Terms of Reference for the above mentioned study, for submission of detailed proposals to the Central Tender Board. 15

Submission of applications

A set of three copies of the application together with all appendices and supplementary information shall be enclosed in a sealed envelope and should reach by the 31.3.1984, the Director-General, Cyprus Tourism Organisation, P.O.Box 4535, Nicosia, Cyprus. 20

The sealed envelope shall bear the following inscription:

"Application for Prequalification for the Paphos Tourism Development Study".

The Client will not be responsible for, nor pay for any expenses or loss which may be incurred by any applicant in the preparation and submission of his application. 25