

1972
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—
GEORGE D.
KOUNNAS AND
SONS LTD.
AND ANOTHER

v.

REPUBLIC
(CYPRUS
POTATO
MARKETING
BOARD)

[TRIANTAFYLLIDES, P.]

IN THE MATTER OF ARTICLE 146 OF THE
CONSTITUTION

GEORGE D. KOUNNAS AND SONS LTD.
AND ANOTHER,

Applicants.

and

THE REPUBLIC OF CYPRUS, THROUGH
THE CYPRUS POTATO MARKETING BOARD.

Respondent.

(Case No. 368/69).

Tenders for the sale of potatoes—Applicants' tenders not considered by the respondent Board through failure to take them out of the tender box—Sub judice decision of the Board accepting tenders of the interested parties (third persons) annulled—Because such decision was reached in an irregular manner affecting the outcome of the exercise of the relevant powers of the Board—In that the tenders of the applicants, which were the highest, were not considered at all by the Board—Moreover, the Board's said decision was taken without any knowledge of two material facts, namely the tenders of the two applicants—And it was reached in a manner inconsistent with the principles of free competition and with the right to equality of treatment which is safeguarded by Article 28.1 of the Constitution.

Tenders—A recourse lies against an administrative decision concerning tenders—An administrative decision such as the one in the instant case accepting the tenders in question is separable from any contract entered into by the Administration as a result thereof (Medcon's case (infra) followed).

Administrative acts or decisions—Which alone can be made the subject of a recourse under Article 146 of the Constitution—Act separable from contract—Administrative decision concerning tenders separable from the contract entered into by the Administration as a result

thereof—Therefore, a recourse under Article 146 lies against such separable act or decision

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Equality—Right to equal treatment—Article 281 of the Constitution—See supra

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Separable act—Act separable from contract—Tenders—Administrative decision whereby tenders are accepted—It is separable from the contract eventually entered into by the Administration as a result thereof—Consequently, a recourse under Article 146 of the Constitution is maintainable thereunder—See further supra

v
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This is a recourse against the decision of the respondent Board to accept the tenders of the interested parties for the sale to them of locally produced potatoes of the 1969/70 winter crop

Both the applicant companies were among those who put in tenders for the purchase of potatoes in response to a relevant invitation of the Board. In the circumstances fully explained *post* in the Judgment of the Court the tenders of the applicants were not considered at all and eventually the Board accepted the highest tenders (excepting those of the applicants) which were those of the interested parties. It is common ground (1) that the tenders put in by the applicants were the highest and (2) that they were not considered at all by the Board.

Annulling the *sub judice* decision the learned President of the Supreme Court -

Held, (1) A recourse can be made against an administrative decision concerning tenders. Such administrative decision is to be treated as separable from any contract entered into by the administration as a result thereof (See *Medcon Construction and Others v The Republic* (1968) 3 CLR 535)

(2) If the consideration of tenders takes place in a manner contrary to the principles of free competition or in an irregular manner affecting its outcome then the relevant decision has to be annulled (see *Decisions of the Greek Council of State* Nos 1965/1947, 2028/1947 and 2029/1947, see also *Conclusions from the Case Law of the Council of State of Greece 1929—1959* at pp. 430 and 431)

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(3) Now, it is not disputed that in the present case the tenders of the applicants—which were the highest—were not considered at all. Therefore, the *sub judice* decision whereby the respondent Board accepted the tenders of the interested parties was reached in an irregular manner, without the knowledge of two material facts (*viz.* the two tenders of the applicant companies) and in a manner inconsistent with the principles of free competition as well as with the right to equal treatment safeguarded under Article 28.1 of the Constitution.

Sub judice decision annulled with £40 costs in favour of the applicants.

Cases referred to :

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

Decisions of the Greek Council of State : Nos. 1965/1947,
2028/1947, 2029/1947, 531/49, 432/58 and
1828/67.

Recourse.

Recourse against the decision of the respondent Cyprus Potato Marketing Board to accept the tenders of the interested parties for the sale to them of locally produced potatoes of the 1969/1970 winter crop.

L. Papaphilippou, for the applicant.

J. Mavronicolas, for the respondent.

Cur adv. vult.

The following judgment was delivered by :-

TRIANTAFYLIDES, P. : In this case the applicants seek the annulment of a decision of the respondent Potato Marketing Board to accept the tenders of the interested parties, SEDIYEP Nicosia—Kyrenia Ltd. and K. Georgallides, for the sale to them of locally produced potatoes of the 1969/1970 winter crop.

Both the applicant companies were among those who put in tenders for the purchase of potatoes in response to a relevant invitation of the Board.

All the tenders were to be considered at a meeting of the Board on the 11th November, 1969.

All the tenders were, in accordance with the established practice, placed, through a slot, into a box at the office of the Board. The box could be opened only by the simultaneous use of two keys, one of which was being kept by the Chairman of the Board and the other by the Assistant Manager and Accountant of the Board. About a week before the 11th November, 1969, the Chairman of the Board went abroad and before leaving he sent a key to the office of the Board; he intended to send his key of the tenders' box, but unfortunately he sent the wrong key and so on the 11th November, 1969, the box could not be opened.

In the presence of representatives of all those who had put in tenders the box was turned upside-down and the envelopes containing tenders were brought out one by one through the slot by an official of the Board.

When it appeared that all the tenders had been brought out the Board held a meeting and reached its *sub judice* decision by means of which it accepted the highest tenders, which were those of the interested parties.

When the applicants were informed of the decision of the Board they protested on the ground that their tenders, which were higher, had not been accepted and it was then that it was discovered that the tenders of the applicants had not been brought out, like the others, through the slot and as a result had not been considered at all.

The Board met on the 12th November, 1969, with representatives of the applicants and made certain proposals to them in an effort to reach a settlement with them in relation to the applicants' complaint that their tenders were not examined together with the other tenders, on the 11th November, 1969; however, no agreement was reached.

Though in the invitation for tenders it was stated that the Board was not bound to accept the highest or any other tender, it is not in dispute that the applicants had put in the highest tenders and that—as very fairly stated by counsel for the Board—had their tenders been before the Board on the 11th November, 1969, they would, most probably, have been accepted.

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It is well-settled in Administrative Law that a recourse can be made against an administrative decision concerning tenders and that such an administrative decision is to be treated as separable from any contract entered into by the administration as a result thereof (see *inter alia*, the Decisions of the Greek Council of State in cases 531/49, 432/58 and 1828/67, as well as the judgment of this Court in *Medcon Construction v. The Republic* (1968) 3 C.L.R. 535).

If the consideration of tenders takes place in a manner contrary to the principles of free competition or in an irregular manner affecting its outcome then the relevant administrative decision has to be annulled (see, *inter alia*, the Conclusions from the Case Law of the Council of State in Greece—«Πορίσματα Νομολογίας του Συμβουλίου της Ἐπικρατείας»—1929—1959 case 1965/47 at p. 430 and cases 2028/47, 2029/47 at p. 431).

It is clear, in the light of the particular circumstances of this case, that the *sub judice* decision of the Board was reached, on the 11th November, 1969, in an irregular manner which affected the outcome of the exercise of the relevant powers of the Board, because the tenders of the applicants, which were the highest, were not considered at all by the Board before it reached its said decision; and yet such tenders, since the time when they were placed in the tenders' box, were in the possession of the Board. Moreover, the Board's decision was taken without any knowledge of two very material facts, namely the tenders of the applicants; and it was reached in a manner inconsistent with the principles of free competition and with the right to equality of treatment which is safeguarded by Article 28.1 of our Constitution. It follows inevitably that the *sub judice* decision has to be annulled; and it is so declared.

That the Board acted in good faith and that the applicants failed to accept compromise proposals, made by the Board, in an effort, according to the Board, to enable the applicants to mitigate, or even avoid, any damage to be suffered by them, are not considerations which could affect the outcome of these proceedings, but

they are to be taken into account in case any claim is made by the applicants on the basis of this judgment under Article 146.6 of the Constitution.

The respondent to pay to the applicants £40 costs.

*Sub judice decision annulled;
Order for costs as above.*

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