

1984 April 26

[LORIS, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

SA ENGINEERING MARKETING CO.,

Applicants.

v.

THE REPUBLIC OF CYPRUS, THROUGH
THE ACCOUNTANT-GENERAL PRESIDENT OF
THE TENDER BOARD, MINISTRY OF FINANCE,

Respondents.

(Case No. 471/82).

Time within which to file a recourse—Doubt whether applicants had sufficient notice of the sub judice decision enabling them to vindicate their rights—Must be resolved in their favour—Article 146.3 of the Constitution.

- 5 *Tenders—Successful and unsuccessful tenderer—Must be informed of the decision of the Tender Board—Regulation 42 of the Government Store Regulations—Applicants failing to submit a proper tender—Reasonably open to the respondents to reject their tender.*

10 This was a recourse against the decision of the respondents rejecting applicants' tender for the supply of surveying instruments and other materials for the Department of Lands and Surveys. The decision rejecting applicants' tender and accepting the tenders of the interested parties was taken on the 3rd July, 1982 and was posted on the notice board on the next
15 day. On the 6th July 1982 the applicants applied for a re-examination of the matter and the respondent replied by letter dated 24.8.1982. Regulation 42 of the Government Store Regulations provides that the successful and the unsuccessful tenderer must be informed of the decision of the Tender Board; and though applicants were conversant with the rejection
20 of their tender as early as 6.7.1982 they were officially informed

by respondents by means of a registered letter dated 9.8.1982 which allegedly reached them by the end of August. The recourse was filed on the 5th of August, 1983. Under para. 9 of the invitation of Tenders "no Tender shall be taken into consideration unless all the terms of the invitation are complied with" and it was abundantly clear from para. 6 of the invitation of tenders that delivery of the articles in question should be CIF Cyprus whereas the tender of the applicants, as admitted by them, was FOB Cyprus. 5

On the Questions: 10

- (a) Whether the recourse was out of time;
- (b) The merits of the recourse.

Held, that as there is a doubt, and such doubt must be resolved in favour of the applicant (see *Neophytou v. The Republic*, 1964 C.L.R. 280 at p. 290), whether the applicants received sufficient notice to enable them to vindicate their rights through the legal process before the 24.8.1982 when the relevant decision was communicated by the respondents to the counsel for applicants, the matter must be resolved in favour of the applicants as even if the letter was received by the applicants on 24.8.1982 that would have been within the time limit provided by Article 146.3 of the Constitution; and that, therefore, the preliminary objection of the respondents as regards the time limit which goes to the jurisdiction of this Court is hereby dismissed. 15 20

(2) That the respondents' invitation for tenders was not complied with as it ought to; that in substance, therefore, the applicants failed to submit a proper tender and the one submitted could have been ignored, whereas the tender of the applicants was properly examined by the respondents, who after exercising their discretion properly, reached a decision which was reasonably open to them; accordingly the recourse must fail. 25 30

Application dismissed.

Cases referred to:

- Holy See of Kitium v. Municipal Council of Limassol*, 1 R.S.C.C. 15; 35
- Megalemou v. Republic* (1968) 3 C.L.R. 581;
- Ploussiou v. Central Bank of Cyprus* (1982) 3 C.L.R. 250.

Recourse.

Recourse against the decision of the respondents to award the tenders for the supply of surveying instruments and other materials for the Department of Lands and Surveys to the interested parties instead of awarding the tenders to the applicants.

Ch. Ierides, for the applicants.

M. Photiou, for the respondents.

N. Panayiotou, for interested party No.1.

Ph. Valiandis for *L. Papaphilippou*, for interested party No. 2.

Cur. adv. vult.

LORIS J. read the following judgment. Following the invitation for tenders for the supply of surveying instruments and other materials for the Department of Lands and Surveys, which was published in the Official Gazette on the 5th April, 1982, the applicants as well as the interested parties, submitted relevant tenders.

The tender of the applicants was submitted on 22.5.82. As it appears from para. 3 of the opposition the respondent Tender Board, has decided to reject applicants' tender and accept the tenders of the two interested parties on 3.7.82. Their said decision was posted on the Notice-board on the next day that is on 4.7.82.

On 6.7.82 the applicants submitted to the President of the Tender Board Nicosia, a letter (which appears in appendix A of the written address of the respondents) by virtue of which they were substantially applying for re-examination of their case. A letter of even date was also addressed on behalf of applicants by their advocate which appears in Appendix '1' of the written address of the applicants. The respondents replied to the counsel for applicants by virtue of letter dated 24.8.82 (appearing in appendix II attached to the written address on behalf of the applicants).

It is apparent from the prayer in the present recourse that the applicants impugn the decision of the respondents contained in the aforesaid letter dated 24.8.82 praying for

“(a) a declaration of this Court to the effect that the decision in question is null and void and of no effect whatsoever.

- (b) a declaration of the Court that the decision of the respondents to make the award for the tenders to interested parties 1 and 2 is null, void and of no effect whatsoever.
- (c) a declaration of the Court that the decision of the respondents referred to above is null and void and of no effect whatsoever being in excess and/or abuse of powers and contrary to the general principles of law and/or the Constitution.” 5

The applicants based the present recourse on the following grounds of Law. 10

- “1. The consideration of the tenders took place in a manner contrary to the principles of free competition and/or in an irregular and/or invalid manner.
2. The decision is not duly reasoned. 15
3. The decision was taken in the absence of sufficient inquiry, without ascertainment of the full facts and without taking into account all relevant considerations.
4. The decision was taken in a manner inconsistent with the right to equal treatment safeguarded by Article 28.1 of the Constitution. 20
5. The decision was taken in excess of power in that no proper inquiry of the Applicants’ tender had taken place and without the Respondents providing the opportunity to the applicants to make their representations to experts who could evaluate their tender. 25
6. The decision was taken in abuse of the Respondents’ power in wilfully favouring the Interested Parties to whom they awarded the tender.
7. The respondents did not exercise reasonable discretion in awarding the tender.” 30

The respondents filed an opposition and in para. 1 thereof allege “that the present recourse has been filed out of time”. In the remaining paras of their opposition the respondents allege that the decision in question was reached at lawfully and correctly after full and proper inquiry of all the relevant facts and circumstances of the case. 35

Following directions of this Court, the applicants filed written addresses to which they have attached several appendices which appear in the file. The respondents filed their written address attaching thereto a letter of the applicants dated 6.7.82 addressed to the respondents which is marked Appendix A. Counsel appearing for interested party No. 1, namely the Cyprus Pharmaceutical Organization of Nicosia, stated before me on 22.12.83 that he was not intending either to file an opposition or written address on behalf of his client and that he was adopting the stand on the matter taken by the respondents.

Counsel for interested party No. 2, namely, P. C. Orinos Ltd., filed written address on their behalf. Written address in reply was also filed by the applicants. On 10.4.84 when this case was fixed for clarification and evidence, learned counsel appearing for applicants had the opportunity of making oral clarifications which appear on record and I need not repeat them at this stage. Learned counsel for respondents made oral clarifications in connection with certain matters pertaining this case and also produced two documents: (a) the relevant page of the minutes of the Tender Board which took the sub judge decision on 3.7.82 (exh. 1) and (b) a document evidencing the posting of a registered letter dated 9.8.82 addressed by the respondents to the applicants informing them that their said tender was rejected.

Before proceeding into the merits of the case I intend to examine first the crucial issue of time, the strict observance of which renders a recourse justiciable (*The Holy See of Kitium v. Municipal Council of Limassol*, 1 R.S.C.C. 15) and it has to be elucidated even by the Court acting ex proprio motu (*Megalemou v. The Republic* (1968) 3 C.L.R. 581).

Learned counsel for the respondents submitted that the decision taken by the respondents on the 3.7.82 came to the knowledge of applicants at least as early as 6.7.82 by whatever means - counsel submitted - is immaterial and this can be clearly inferred from the letter of the applicants themselves dated 6.7.82 which is attached as appendix A to the written address of the respondents, wherein, inter alia, it is clearly stated that "we understand that one of main reasons for rejecting our offer....." Counsel for respondents maintained that once the applicants were aware at least as from the 6.7.82 that their tender was rejected, then definitely the recourse which was filed on 5.11.82 was out of time.

Learned counsel appearing for the applicants submitted relying on *Ploussiou v. Central Bank of Cyprus* (1982) 3 C.L.R. 250 that the burden of establishing the preconditions for the setting in motion of the time provisions of Article 146.3 of the Constitution rests on the decision-taking body and maintained that the respondents do not even allege that the applicants were informed that their tender has been unsuccessful, as they ought to have been informed, pursuant to regulation 42 of the Government Stores Regulations. On the contrary, counsel for applicant submitted - respondents conceded that the only notice emanating from them, to applicants, on the issue of rejection of their tender was posted as late as 9.8.82. In this respect it must be noted that counsel for respondents, in spite of his insistence that the applicants were conversant with the contents of the decision of the respondents rejecting applicants' offer as early as 6.7.82, conceded that the written notice to that effect was only posted to the applicants on 9.8.82 (exh. 2) whilst it was maintained by counsel for applicants that the aforesaid letter was received in fact by the applicants "by the end of August at least".

Regulation 42 of the Government Store Regulations provides as follows:

"42. The name of the successful tenderer and the prices at which the tender has been awarded shall be announced by an appropriate notice on the respective Notice Board. The successful and the unsuccessful tenderers shall be informed accordingly."

It is abundantly clear from the provisions of the above cited regulation that whilst the name of the successful tenderer and the prices at which the tender has been awarded shall be announced by appropriate notice on the respective Notice-board the successful as well as the unsuccessful tenderer "shall be informed accordingly." It is also clear from the facts before me that in spite of the fact that applicants were conversant with the rejection of their tender at least as early as 6.7.82 (as it transpires from appendix A to the written address on behalf of the respondents) they have not been so informed by the respondents, such information having been forwarded to them officially by the registered letter of 9.8.82 which might have reached the respondents as alleged at least by the end of August 1982. In any event, as I am in doubt, and such doubt must be resolved in favour of the applicant (*Neophytou v. The Republic*, 1964 C.L.R. 280 at p.

290), whether the applicants received sufficient notice to enable them to vindicate their rights through the legal process before the 24.8.82 when the relevant decision was communicated by the respondents to the counsel for applicants, I am duty bound to
5 resolve the matter in favour of the applicants as even if the letter was received by the applicants on 24.8.82 that would have been within the time limit provided by Article 146.3 of the Constitution. Therefore, the preliminary objection of the respondents as regards the time limit which goes to the jurisdiction of this
10 Court is hereby dismissed.

Turning now to the substance of this case I feel duty bound to mention straight away that under para. 9 of the invitation of Tenders "no Tender shall be taken into consideration unless all the terms of the invitation are complied with" and it is abundantly
15 clear from para. 6 of the invitation of tenders that delivery of the articles in question should be CIF Cyprus whereas the tender of the applicants, as admitted by them, was FOB Cyprus. In this respect I have noted that applicants have submitted in para. 3 of their written address in reply that "this is not a material
20 reason because it was very easy to calculate the difference of expenses between FOB and CIF". With respect I cannot agree with this submission of learned counsel for applicants, because as learned counsel for interested party No. 2 has indicated in his
25 written address "It is not only the cost of the insurance and carriage but also the risks which follow the goods as FOB implies that ownership passes upon shipment, whereas in CIF cases the ownership passes on arrival."

From the above it is abundantly clear that the respondents' invitation for tenders was not complied with as it ought to; in
30 substance, therefore, the applicants failed to submit a proper tender and the one submitted could have been ignored, whereas the tender of the applicants was properly examined by the respondents, who after exercising their discretion properly, reached a decision which was reasonably open to them.

35 In view of the above I do not feel that I should deal with the present case any further. The recourse is accordingly dismissed and it is very reluctantly I have reached the decision not to make any order as to the costs thereof.

Recourse dismissed with no order as to costs.