

1985 May 9

[LORIS, J.]

IN THE MATTER OF ARTICLE 146
OF THE CONSTITUTION

K.M.C. MOTORS LIMITED,

Applicants,

v.

THE REPUBLIC OF CYPRUS, THROUGH

1. THE TENDER BOARD,

2. THE ACCOUNTANT-GENERAL,

Respondents.

(Case No. 385/83).

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- 5 *Administrative Law—Misconception of material facts—And failure to make a due inquiry—Consideration of tenders by Tender Board—Applicants' tender rejected because they failed to submit constructional plans and because they did not state time of delivery— Submission of constructional plans not required under the specifications and applicants stated time of delivery—Tender Board acted under a misconception as to material facts and failed to carry out a due inquiry which would reveal these material facts—*
- 10 *Sub judice decision reached at in the course of a defective exercise of the discretionary powers vested in the respondent Board—Annulled on this ground and on the additional ground of absence of reasoning for ignoring the majority decision of the Technical Committee.*
- 15 *Tenders—Notices inviting tenders—Being “public instruments” within the definition of section 2 of the Interpretation Law, Cap. 1 could only be rescinded or revoked by the same authority and in the same manner by and in which they were made, in this case by the Cyprus Fire Service and*
- 20 *not by the Main Tender Board.*

Administrative Law—Competence—Act done by an organ having no competence—Is contrary to the principles of

Administrative Law and contrary to section 29(a) of the Interpretation Law, Cap. 1.

On the 19th March 1983 the Chief of the Fire Service Cyprus (Ministry of Interior) invited tenders for the supply, inter alia, of three Fire-Fighting vehicles and two Large Water carrying vehicles. The respondent Tender Board decided* to award the tenders regarding the three Fire-Fighting vehicles to Stellakis & Nicos Agapiou Ltd. and reject the tender of the applicants; and, also, decided to cancel the tenders regarding the supply of the two large Water carrying vehicles. In deciding to reject the tender of the applicants the respondent Board did not follow the recommendations of the Technical Committee, which by majority decided that the tenders should be awarded to the applicants and gave reasons for so deciding. The respondent Board did not give reasons for not following the recommendations of the Technical Committee and gave as reasons for rejecting applicants' tender the non-submission by them of constructional plans and the fact that they will deliver their vehicles "in time that cannot be foreseen". Though according to the specifications no constructional plans were required the President of the Tender Board stated in cross-examination that when the sub judice decision was reached he was under the impression that constructional plans were required to be submitted by the tenderers. Regarding time of delivery the applicants in their tender stated that they would deliver the vehicles in question within 12 to 16 weeks.

Held, (1) that the Tender Board in reaching at its decision acted under a misconception of a material fact i. e. the requirement of submission by tenderers of "constructional plans"; that, further, the Board by ignoring the precise undertaking of the applicants, regarding time of delivery, proves that they have failed to carry out due inquiry which resulted in the misconception as to a material fact contained in the tender of the applicants, who stated in clear and unambiguous words that the vehicles in respect of which tenders were submitted would be delivered within 12 to 16 weeks; that, therefore, it is clear that the decision of the respondent Tender Board is a de-

* The decision is quoted at pp. 1246-1250 post.

5 decision reached at in the course of a defective exercise of the discretionary powers vested in the Board the defects been misconception as to material facts and failure to make a due inquiry which would definitely reveal these material facts; that due to these defects the reasoning supporting the decision in question has been rendered incorrect; and that, accordingly, the decision in respect of the three Fire Fighting vehicles has to be annulled for the above reasons, and for the additional one notably absence of reasoning for ignoring the majority decision of the Technical Committee.

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15 (2) That the Notices inviting tenders being "public instruments" within the definition of s.2 of the Interpretation Law, Cap. 1, i.e. being notices issued under the provisions of regulations 19, 30 and 31 of the Government Stores Regulations, by the Cyprus Fire Service could only be rescinded or revoked by the same authority (the Cyprus Fire Service) and in the same manner by and in which they were made; and that, therefore, the withdrawal of the tenders by the Main Tender Board was an act not within its competence, made contrary to the principles of Administrative Law as well as contrary to the Interpretation Law, Cap. 1 s.29(a) and was therefore made in excess of powers; and that, accordingly, it must be annulled.

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Sub judice decision annulled.

Cases referred to:

Ioannides v. Republic (1972) 3 C.L.R. 318;

30 *Medcon Constructions and Others v. Republic* (1968) 3 C.L.R. 535 at p. 545;

Kounnas and Sons Ltd. and Another v. Republic (1972) 3 C.L.R. 542;

Zachariades v. Republic (1984) 3 C.L.R. 1193.

Recourse.

35 Recourse against the decision of the respondents awarding the tender of three Fire-Fighting vehicles to the interested party instead of the applicants.

L. Papaphilippou, for the applicants.

M. Photiou, for the respondents.

Cur. adv. vult.

LORIS J. read the following judgment. On the 19th March 1983 the Chief of the Fire Service Cyprus (Ministry of Interior) invited tenders for the supply, inter alia, of three Fire-Fighting vehicles and two Large Water carrying vehicles (vide Appendix 1 attached to the opposition.) 5

General conditions connected with the said invitation for tenders as well as specifications in respect of the vehicles sought to be supplied are attached to the aforesaid appendix. 10

On 13.5.83 the applicants submitted their tender in compliance with the general conditions of the invitation, attaching thereto pro forma invoices and specification sheets of even date. (Vide ex. B, ex. Γ, ex. Δ, ex. E and ex. Z attached to the recourse.) 15

Eighteen tenders in all were submitted to the Main Tender Board including the tenders of the applicant and that of Messrs Stellakis & Nicos Agapiou Ltd., the eventual successful tenderers (vide Appendix 2 attached to the opposition.) 20

All the tenders in question were placed subsequently before the Chief of the Fire Service, obviously as the Head of the Department inviting tenders, and the latter expressed his views in writing on 28.5.83 (vide Appendix 3 attached to the opposition); I shall have the opportunity later on in this judgment to express my reservations as to the correctness of this particular procedure followed in the present case in view of the provisions of regulation 34(c) of the Government Stores Regulations; suffice it to say at this stage, that the views submitted by the Deputy of the Fire Service in the aforesaid letter of 28.5.1983 were to the effect that the tender of the applicants should be rejected and the tenders of Messrs Stellakis & Nicos Agapiou Ltd. in respect of both of vehicles should be preferred. 25
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The Technical Committee appointed by the President of the Main Tender Board (obviously pursuant to the provisions of regulation 34(a) of the Government Stores Regulations), examined all the tenders having before it at
5 the time of such examination the views of the Deputy of the Fire Service set out in the aforesaid letter of 28.5.1983; in connection with the views of the Deputy of the Fire Service the Technical Committee required explanations and information from the applicants with whom the Com-
10 mittee had a meeting on 30.6.1983; furthermore the applicants furnished such explanations and information to the Committee in writing (vide ex. H dated 5.7.1983 attached to the recourse).

The decision of the Technical Committee which appears
15 in two defferent documents produced before me, (a matter which will be dealt with more extensively later on in the present judgment) i.e. Appendix 4 attached to the opposition and Appendix Z1 produced by Mr. Achilleas Kallimachos, a member of the technical Committee, when giv-
20 ing evidence before me, on the 12.10.1984.

According to the aforesaid decision dated 12.7.1983, the Technical Committee by a majority of 3 to 1 (as stated in Appendix 4) by a majority of 4 to 1 (as stated in Appendix Z1) recommended the acceptance of the tenders of
25 the applicants in respect of both sets of vehicles.

On 12.8.83 the Main Tender Board examined the tenders submitted, as above stated, having before it

(a) the views of the Deputy of the Fire Service contained in his letter dated 28.5.1983;

30 (b) The decision of the Technical Committee dated 12.7.1983. Its decision reached at on the same day was twofold;

A. It decided to accept the tender of Messrs Stellakis & Nicos Agapiou Ltd. in respect of the three Fire-
35 Fighting vehicles.

B. It decided to withdraw the tenders regarding the two Large Water-carrying vehicles for the reasons stated in their decision.

The applicants who came to know about the decision of respondent No. 1 on or about the 22nd July 1983, after submitting several letters of protest to respondent No. 2, the Minister of Finance, etc. (vide ex. Θ, ex. I ex. K and ex. A attached to the recourse) filed the present recourse on 22.9.1983 praying in effect: 5

A. For the annulment of the sub judice decision awarding the tender of the three Fire-Fighting vehicles to Messrs. Stellakis & Nicos Agapiou Ltd., in preference to and instead of the applicants. 10

B. For the annulment of the sub judice decision for the withdrawal of tenders in respect of the two Large Water-carrying vehicles.

The grounds of Law on which the applicants rely are numerous and touch 4 main issues; 15

- (a) abuse or excess of power.
- (b) Wrongfulness of the award in view of the fact that the applicants' tender was the lowest.
- (c) Discrimination.
- (d) Undue Reasoning. 20

The opposition of the respondents is based on the following grounds of Law:

“Regarding prayer (A) of the application:

- 1. The act and/or decision complained of was properly and lawfully taken after a thorough inquiry into all relevant facts and circumstances of the case. 25
- 2. The act and/or decision complained of is duly reasoned.

Regarding prayer (B) of the application:

- 1. Respondents' act or decision to withdraw the tenders regarding the two water-carrying vehicles is not an act or decision of an executory nature that can be made the subject-matter of the recourse. 30

2. Without prejudice to the above objection, respondents' act or decision to withdraw the aforesaid tenders was properly and lawfully taken after all relevant facts and circumstances of the case were taken into consideration."

As need may arise, in the course of this judgment for reference to matters which are connected with proceedings in the present recourse, the following may be added at this stage in order to complete the picture of the present proceedings: The applicants filed with their recourse an application for a provisional order which was later withdrawn during the hearing of same. Thereafter both sides filed written addresses pursuant to relevant directions of this Court. At a subsequent stage the following witnesses were called and gave evidence before me: Achilleas Kallimachos (A.W.1) a member of the Technical Committee, Georghios Contolemis (A.W.2) a member of the Main Tender Board, Costas Polemidhiotis (A.W.3) one of the officials of Applicant Company, P. Zachariades (R.W.1) the Chief of the Fire Service and Pogos Paltayan (R.W.2), the Deputy Accountant General who presided over the Main Tender Board which took the sub judice decision. There followed oral clarifications by counsel on both sides.

Before proceeding to examine the sub judice decision of the Main Tender Board I feel duty bound to deal in the first place with certain preliminary matters which are in effect interwoven with the sub judice decision itself.

These matters concern mainly (a) the views of the Deputy of the Fire Service expressed in his letter dated 28.5.83 addressed to the President of the Main Tender Board (b) the Technical Committee appointed by the President of the Tender Board.

In paragraph 3 of the opposition the following are stated verbatim with regard to the views of the Fire Service in connection with the tenders submitted:

"The said tenders were placed before the Fire Brigade Service which was the appropriate Department for which the said motor vehicles would be supplied, which expressed its views by their letter dated 28.5.1983 (Appendix 3). The Tender Board in turn have

placed the tenders and the views of the Fire Brigade before the Technical Committee for their opinion.”

The letter in question is signed by Mr. Kiles, Superintendent B., the Assistant Chief of the Fire Service and was addressed to the Accountant General, President of the Tender Board, through the Chairman of the Technical Committee. Independently of the contents of this letter I must state at the outset that the said letter was obviously *addressed on behalf of the Fire Service and according to the presumption of regularity it must be taken to express the views of the Fire Service and not those “of a certain Mr. Kiles” as alleged by the applicants.* On the other hand I have my reservations, as already stated earlier on in the present judgment, as to the correctness of this particular procedure, followed in the present case, in view of the provisions of regulation 34(c) of the Government Stores Regulations, the relevant part of which reads as follows:

“34(c)... Heads of Departments inviting tenders should assist the Committee by nominating a representative.”

No doubt the Fire Service, the Department which invited tenders was the appropriate Department which should assist the Committee by nominating a representative. I lay stress on the word “Committee” because the letter of 28.5.83 was not addressed to the “Committee” (which was the one envisaged by regulation 34(a), as amended) but to the President of the Main Tender Board. It is true that the President of the Main Tender Board placed the letter in question before the technical committee but nevertheless the fact remains that the letter was addressed to him; this fact coupled with the absence of direct evidence to the effect that Supt. Kiles was nominated by the Head of Fire Service “as a representative to assist the Committee” undoubtedly gave rise to the objection raised by the applicants.

Although I have expressed my reservations as to the correctness of the procedure followed, in the sense that the letter of article 34(c) of the Government Stores Regulations was not complied with, yet I am satisfied that substantially the purpose of regulation 34(c) was achieved as the

views of the Fire Service were communicated to the technical committee by the placing of such letter before them by the President of the Main Tender Board, and the Technical Committee had in time before them these views which they did in fact examine and reject by majority, for the reasons stated in appendix 4 attached to the opposition.

I do not intend at this stage to deal with the contents of the letter of 28.5.83 expressing the views of the Fire Service; I shall have the opportunity of referring to them later on, in dealing with the sub judice decision which is the decision of the Main Tender Board, which had the aforesaid letter before it when reaching at its decision.

The other topic I shall now proceed to examine is the Committee appointed by the President of the Main Tender Board, and its decision.

The Committee in question, which was referred to in the present proceedings as the "Technical Committee" was obviously set up under the provisions of regulation 34(a) and 34(b) of the Government Stores Regulations, as amended by Decision of the Council of Ministers under No. 20305 dated 7th May, 1981, which read as follows:

"34(a) Tender Specifications for the purchase of plant, machinery and equipment should be submitted to the President of Main Tender Board prior to calling of tenders for consideration and approval by the appropriate Committee appointed for this purpose by the President of the Tender Board."

"34(b) For the above purpose two committees are appointed. The one committee will deal with civil engineering machinery and the other with general mechanical and electrical machinery."

It must be noted here that the wording of the substituted 34(a) and 34(b) regulation, was somewhat different, and in particular reg. 34(b) which was mentioning exhaustively the posts of officers to be appointed in the (i) Civil Engineering and Architectural Committee (ii) the General Mechanical and Electrical Machinery Committee.

The combined effect of Appendix 4 attached to the opposition, Appendix Z1 produced by Mr. Kallimachos and the oral evidence of Mr. Kallimachos before me, indicates that in the case under consideration the Committee appointed by the President of the Main Tender Board was constituted of the following: 5

1. Ph. Ektorides, Director of Electrical and Mechanical Services, as Chairman.
2. A. Kallimachos (A.W.1) Chief Inspector of Factories.
3. M. Christodoulides, Civil Engineer from the Ministry of Communications and Works. 10
4. S. Theodossiou, Mechanical Engineer of the Water Development Department and
5. A. Pittas, Engineer of the Main Tender Board, who was acting as the Secretary of the Committee, as well. 15

In this connection it must be stated now that Appendix 4 attached to the opposition is somewhat confusing; in the first place it does not mention who were present. From perusal of the whole document (two pages) the only reasonable inference that can be drawn is that only the 4 out of the 5 members were present; and if that is correct, the one absent was the President thereof (Mr. Ektorides, who is nowhere mentioned), and without the President there could be no quorum in view of the provisions of regulation 34(d) of the Government Stores Regulations which provides that "three members of the Committee, including the President shall form a quorum." 20 25

Appendix 4 bears date 12th July 1983. On the other hand Appendix Z1, produced by Mr. Kallimachos (A.W.1) in re-examination, purports to contain the minutes of the Committee convened on the same day i.e. 12.7.83. In Appendix Z1 all 5 members of the Committee including the President thereof are recorded as present. 30

I have looked into the matter with anxiety and concern and I hold the view that the answer to the problem is to be found in the evidence of Mr. Kallimachos (A.W.1) who was himself one of the members of this Technical Committee; he stated inter alia, that the Committee had two 35

meetings: the first one was held on 6.7.83 and the final one on 12.7.83. Mr. Kallimachos explained that at the meeting of 6.7.83 Mr. Ektorides was absent whilst on 12.7.83 all the members of the Committee including Mr. Ektorides, the President thereof, were present. Mr. Kallimachos added that on 12.7.83 the President of the Committee Mr. Ektorides agreed with the majority of the members that the tender should be awarded to the applicants and that the only member who disagreed was Mr. Theodossiou. The evidence of Mr. Kallimachos, whom I have no reason to disbelieve, is in line with Appendix Z1 produced by him. Appendix Z1, makes reference to the minutes of 6.7.83; there are no minutes of the Technical Committee before me for the 6.7.83; as the facts stated in appendix 4 coincide with the evidence of Mr. Kallimachos as to what transpired at the meeting of 6.7.83, one may be led to the conclusion that the date appearing on appendix 4 is wrong and it should read 6.7.83.

Be that as it may, it is apparent from both appendices (4 and Z1) that only one member of the said Committee disagreed with the majority, notably Mr. Theodossiou of the Water Development Department; his reasons for disagreeing with the majority are recorded in appendix 4.

I shall now examine the effect of the absence of unanimity in this decision of the Technical Committee in view of the provisions of regulation 34(d) of the Government Stores Regulations, which reads as follows:

“34 (d) Any three members of the above committees, including the President shall form a quorum at the meetings convened either for the purpose of approving specifications or examining tenders received. If the specifications are not unanimously approved by the Committee the members shall record their views and the President of the Main Tender Board shall refer these views together with the specifications to an expert in the Republic or abroad for advice. In the light of this advice the Tender Board shall decide accordingly.”

It was submitted by learned counsel for applicants that, in view of the fact that the decision was not unanimous

it was the duty of the President of the Main Tender Board to refer the views of the members together with the specifications to an expert in the Republic or abroad for advice as envisaged by regulation 34(d) above.

Having carefully gone through the reasoning of all the members of the Committee I find myself unable to agree with learned counsel appearing for the applicant as it is clear to my mind that the disagreement of Mr. Theodossiou was referring to the tenders received and not to the specifications which were unanimously approved by all the members of the Committee, as conceded by learned counsel appearing for respondents. 5 10

This decision of the Technical Committee containing not only the reasons given by the majority in support of their decision but also the reasons given by the dissenting member was placed before the Main Tender Board, presided over by Mr. Pogos Paltayan, the Deputy Accountant General of the Republic, which was convened on 12.8.1983: the Main Tender Board which had also before it the views of the Fire Service (letter of 28.5.83 in Appendix 3 attached to the opposition) reached at its decision which appears in Appendix 5 attached to the opposition. 15 20

In view of the voluminous record and the great number of documents in the file of the present recourse. I feel that the decision of the Main Tender Board should be reproduced here for easy reference; it reads as follows: 25

«ΚΕΝΤΡΙΚΟ ΣΥΜΒΟΥΛΙΟ ΠΡΟΣΦΟΡΩΝ

Πρακτικά της συνεδρίας του Κεντρικού Συμβουλίου Προσφορών που έγινε στο Γενικό Λογιστήριο στις 9.00 π.μ. της 12ης Αυγούστου, 1983. 30

Τ.268/56/50/6 Προμήθεια οχημάτων της Πυροσβεστικής Υπηρεσίας (Πυροσβεστική Υπηρεσία):- Αρ. Φακ. 107, ημερ. 19.3.83. 35

Μελετήθηκε η έκθεση του Βοηθού Διευθυντή της

Πυροσβεστικής Υπηρεσίας με αρ. Φακ. 107, ημερ. 28.5.83.

Το Συμβούλιο Προσφορών αποφάσισε όπως πιο κάτω:

5 Είδος 1: Πυροσβεστικά οχήματα (3)

Το Συμβούλιο άκουσε τις εισηγήσεις της Τεχνικής Επιτροπής. Η έκθεση της Τεχνικής Επιτροπής δεν ήταν ομόφωνη, εφόσον ο κ. Σ. Θεοδοσίου διαφωνούσε γιατί τα πυροσβεστικά οχήματα είναι ειδικά οχήματα και πρέπει να γίνονται από ειδικούς κατασκευαστές. Οι κ.κ. K.M.C. δεν είναι ειδικοί στην κατασκευή πυροσβεστικών οχημάτων. Επίσης το Συμβούλιο Προσφορών έλαβε υπόψη τα ακόλουθα σημεία:

- 15 (i) Τη μικρή διαφορά στη τιμή μεταξύ της προσφοράς των κ.κ. K.M.C. και του οχήματος που θα εισαχθεί από το εξωτερικό που είναι κατασκευασμένο από αναγνωρισμένους κατασκευαστές πυροσβεστικών οχημάτων.
- 20 (ii) Οι κ.κ. K.M.C. στην προσφορά τους δήλωσαν ότι τα οχήματα που θα κατασκευάσουν θα ήταν ακριβώς σύμφωνα με τις προδιαγραφές αλλά η δήλωση αυτή δεν ήταν πειστική, αφού δεν υπόβαλαν κατασκευαστικά σχέδια, και δεν κατασκεύασαν στο παρελθόν ολοκληρωμένο πυροσβεστικό όχημα. Επίσης στην προσφορά τους δεν ανέφεραν βασικά στοιχεία όσον αφορά την ποιότητα της βοηθητικής και βασικής αντλίας, τις θέσεις των ερμαριών, τη θέση και ποιότητα του βυτίου, καθώς και την ποιότητα των τυλικτήρων.
- 25 (iii) Τα εισαγόμενα οχήματα θα παραδοθούν σε 3—4 μήνες ενώ οι κ.κ. K.M.C. θα τα παραδώσουν σε απρόβλεπτο χρόνο, με μεγάλη καθυστέρηση όπως έγινε στο παρελθόν.
- 30 (iv) Όταν στο παρελθόν έγινε κατακύρωση στους κ.κ. K.M.C. για μερική κατασκευή πυροσβεστικών οχημάτων, μετά την παραλαβή τους δημιουργήθηκαν πολλά προβλήματα που καθιστούσαν την λειτουργία τους δύσκολη.
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Τα τελευταία οχήματα που παραγγέλθηκαν δεν παραλήφθηκαν ακόμη και δέν είναι γνωστό αν θα υπάρχουν προβλήματα στη λειτουργία τους.

Το Συμβούλιο προσφορών αφού έλαβε υπόψη όλα τα πιο πάνω σημεία αποφάσισε να κατακυρώσει τα πυρσβεστικά οχήματα όπως πιο κάτω:

Στους κ.κ. Στελλάκης & Νίκος Αγαπίου πρὸς £35,777.- το ένα όπως εισηγείται ο Βοηθός Διευθυντής της Πυρσβεστικής Υπηρεσίας στην πιο πάνω έκθεση του. Με την απόφαση αυτή διαφώνησε ο κ. Γ. Κοντολαίμης, ο οποίος υποστήριξε κατακύρωση στους κ.κ. Κ.Μ.Σ. Ατδ., επειδή είναι επιτόπια βιομηχανία.

Είδος 2: Βυτιοφόρα (2)

Η πιο φθηνή προσφορά είναι ασαφής και ατελής χωρίς λεπτομέρειες ή σχέδια κατασκευής. Οι επόμενες προσφορές είναι πολύ ακριβές και γι' αυτό οι προσφορές ακυρώνονται.

Με την απόφαση αυτή διαφωνεί ο κ. Γ. Κοντολαίμης που εισηγείται κατακύρωση στους κ.κ. Κ.Μ.Σ. που είναι οι χαμηλότεροι προσφοροδότες πρὸς υποστήριξη της Κυπριακής Βιομηχανίας, αλλά η εισήγηση του δεν γίνεται αποδεκτή».

("MAIN TENDER BOARD

Minutes of the meeting of the Main Tender Board held at the Treasury at 9 a.m. of 12th August, 1983.

.....

T. 268/56/50/6 Supply of vehicles to the Fire Service (Fire Service):- File No. 107 dated 19.3.83.

.....

The report of the Deputy Chief of the Fire Service under File No. 107 dated 28.5.83 was studied.

The Tender Board decided as hereunder:

Item 1: Fire Fighting vehicles (3)

The Board heard the suggestions of the technical committee. The report of the technical committee was not unanimous, since Mr. S. Theodossiou dis-

agreed because fire fighting vehicles are special vehicles and must be manufactured by special manufacturers Messrs. K.M.C. are not specialists in the manufacture of fire service vehicles.

5 The Tender Board has also taken into consideration the following points:

- 10 (i) The small difference in the price of the tender of Messrs. K.M.C. and the vehicle to be imported from abroad which is manufactured by recognised manufacturers of fire fighting vehicles.
- 15 (ii) Messrs. K.M.C. in their tender stated that the vehicles they will manufacture would have been exactly in accordance with the specifications but this statement was not convincing, since they did not submit constructional plans and they did not construct in the past a complete fire fighting vehicle. Also in their tender they did not mention basic elements in respect of the quality of the auxiliary and the basic pump, the position of the closet, the position and the quality cask, as well as the quality of the roller.
- 20 (iii) The imported vehicles will be delivered in 3—4 months whereas Messrs. K.M.C. will deliver them in an unforeseen time, with a long delay as in the past.
- 25 (iv) When in the past tender was awarded to Messrs. K.M.C. for partial manufacture of fire fighting vehicles, after their delivery many problems were created which rendered their operation difficult.
- 30 The last vehicles ordered have not yet been received and it is not known if there will be problems in their operation.

35 The Tender Board after taking into consideration all the above points decided to award the fire fighting vehicles as hereunder:

To Messrs. Stellakis & Nicos Agapiou at £35,777.- each as suggested by the Deputy Chief of the Fire Service in his above report. Mr. G. Kontolemis, who supported the award to Messrs. K.M.C. Ltd. because

it is a local industry, disagreed with this decision.

Item 2: Large Water Carrying Vehicles (2)

The lowest tender is vague and incomplete without details or constructional plans. The next tenders are very expensive and for this reason the tenders are cancelled. 5

With this decision Mr. G. Kontolemis disagrees and he suggests award to Messrs. K.M.C. who are the lowest tenderers in order to support Cyprus Industry, but his suggestion cannot be accepted"). 10

As it appears from the above decision of the Main Tender Board, the Board refused to follow the majority decision of the Technical Committee and in the case of the 3 Fire Fighting Vehicles accepted the tender of Messrs Stellakis & Nicos Agapiou Ltd., whilst it decided to withdraw the tenders regarding the two Large Water-carrying vehicles; this decision of the Tender Board in respect of both sets of vehicles was not unanimous, Mr. Kontolemis (A.W.2) one of its members, having disagreed as stated in the decision. 15 20

The first part of the decision of the Main Tender Board, as I understand it, states that the Main Board did not follow the recommendations of the Technical Committee because same were not unanimous as one of the members thereof disagreed. It is true that one of the members of the Technical Committee disagreed but it is equally true that 4 other members thereof, including the President, agreed that the tender in question should be awarded to the applicants; and furthermore these members gave their reasons which were ignored by the Main Tender Board, without special reasoning been given in this connection. 25 30

Further down the Board enumerates in four separate paragraphs the "points" it has taken into consideration in reaching at its decision.

I shall deal first with paragraph (ii): "Messrs. K.M.C. (the applicants) in their tender declared that the vehicles they are going to construct will be exactly consonant to the specifications but this statement is not convincing as they 35

did not submit constructional plans (κατασκευαστικά σχέδια)....”.

5 But the Deputy Accountant General, Mr. Paltayan, the President of the Main Tender Board in giving evidence viva voce before me stated in clear and unambiguous words that according to the specifications approved by the Accountant General, appended to appendix 1 attached to the opposition (Nos. 224-226) “no constructional plans were required” (δεν απαιτούντο κατασκευαστικά σχέδια). I must stress in this connection that Mr. Paltayan frankly admitted
10 in cross-examination that on 12.8.83, when the sub judice decision was reached at, he was under the impression that “κατασκευαστικά σχέδια” were required to be submitted by tenderers.

15 So according to paragraph (ii) of the decision the applicants were not convincing as they did not submit “κατασκευαστικά σχέδια”. In view of the contents of the decision, the contents of Appendix 1 attached to the opposition and the relevant evidence of Mr. Paltayan, whom
20 I have no reason whatever to disbelieve, I am satisfied beyond any doubt that the Tender Board in reaching at its decision acted under a misconception of a material fact i.e. the requirement of submission by tenderers of “constructional plans” (κατασκευαστικά σχέδια).

25 In paragraph (iii) of the decision it is stated that “the imported vehicles will be delivered within 3—4 months” whilst the applicants will deliver their vehicles “in time that cannot be foreseen....”.

30 But the applicants in their “Pro Forma Invoice ex. Γ attached to the recourse) state inter alia that they will deliver the vehicles in question within 12 to 16 weeks”.

The Board by ignoring this precise undertaking of the applicants, proves that they have failed to carry out due inquiry which resulted in the misconception as to a material
35 fact contained in the tender of the applicants, who stated in clear and unambiguous words that the vehicles in respect of which tenders were submitted would be delivered within 12 to 16 weeks.

So it is clear from my above findings that the decision

of the respondent Tender Board is a decision reached at in the course of a defective exercise of the discretionary powers vested in the Board, the defects been misconception as to material facts and failure to make a due inquiry which would definitely reveal these material facts Due to these defects the reasoning supporting the decision in question has been rendered incorrect (Vide *Ioannides v The Republic* (1972) 3 C.L.R 318) 5

In the result the decision in respect of the three Fire Fighting vehicles has to be annulled for the above reasons, and for the additional one notably absence of reasoning for ignoring the majority decision of the Technical Committee 10

Of course "only such decision is annulled, because it is the decision itself, which is part of public administration and subject to a recourse, this judgment cannot affect the contract granted as a result of such decision " (vide *Med-con Constructions and others v The Republic* (1968) 3 C.L.R. 535 at p 545. 15

Before concluding with the first part of the decision of respondent No. 1 (in connection with the tenders in respect of the three Fire-fighting vehicles) I think that it is proper to make the following observations in respect of paragraphs (i) and (iv) of the sub judge decision 20

The contents of paragraph (i) are vague and unsatisfactory; if the insinuation is that the Board did not examine the tender of the applicants as the tender did not emanate from "outstanding constructors of Fire-Fighting vehicles" then I must observe that 25

(a) the invitation for tenders did not provide for submission of tenders by foreign outstanding constructors of Fire-Fighting vehicles, therefore the Board would be acting again on another misconception as to a material fact 30

(b) The non-examination of the tender of the applicants would mean that the decision was reached at in an irregular manner. . and in a manner inconsistent with the principles of competition as well as with the right to equal treatment safeguarded under Article 28 1 of the Consti 35

tution (vide *Kounnas and Sons Ltd., and Another v. The Republic* (1972) 3 C.L.R. 542).

5 As regards paragraph (iv) all the allegations therein contained have not been established; these specific allegations were examined and rejected by the Technical Committee, the decision and reasoning of which was absolutely ignored by respondent No. 1. But even if such allegations were correct, as counsel for applicants rightly submitted, the applicants were never blacklisted as envisaged by regulation 28 of the Government Stores Regulations, so that 10 the Tender Board might exclude them from the privilege of tendering either permanently or for a limited period.

15 I shall now proceed to examine the second part of the decision of the Main Tender Board, that is the decision in connection with tenders in respect of the two Large Water carrying vehicles.

The decision in this connection, which was reached at by the majority of the Tender Board, Mr. Contolemis disagreeing, reads as follows:

20 «Η πιό φθηνή προσφορά είναι άσαφής και άτελής χωρίς λεπτομέρειες ή σχέδια κατασκευής. Οι επόμενες προσφορές είναι πολύ άκριβές και γι' αυτό οι προσφορές άκυρώνονται».

25 (“The lowest tender is vague and incomplete without details or without constructional plans. The next tenders are very expensive and for this reason the tenders are cancelled”).

So we have the decision and the reasoning in the above few lines.

30 The decision is that “the tenders are cancelled.” In paragraph 6 of the opposition the following are stated verbatim in this respect:

35 “...Respondent No. 1 (the Main Tender Board) decided to withdraw the tenders regarding the two water-carrying vehicles for the reasons stated in Appendix 5.”

The first question which arises is this: Can the Main Tender Board withdraw Tenders?

The "Main Tender Board" which was set up by virtue of regulation 21 of the Government Store Regulations is an administrative body which after exercising properly its discretion decides on public tenders which fall within the ambit of its Competence (i.e. they are not excluded either by regulation 19A or regulation 20 or 22). 5

The Main Tender Board can in the due exercise of its discretion award a tender to a particular tenderer or in a proper case it may refuse to award the tender for good reason to any one of the tenderers. And I do bear in mind that in this particular instance before me, Condition 10 of the invitation for tenders provides that "the Government is not bound to accept the lowest or any tender". 10 15

Deciding to award a tender or refusing all the tenders is a decision within the competence of this Administrative organ. But withdrawing the tenders for any reason is not within its competence for the simple reason that the invitation for tenders does not emanate from the "Main Tender Board" but from another organ i.e. the Cyprus Fire Service in this particular instance, which has invited the tenders. And no withdrawal of the tenders in question by the Cyprus Fire Service appears in the documents before me or was ever submitted by the respondents. 20 25

Furthermore section 29 of the Interpretation Law, Cap. 1 provides as follows:

"29. Where any Law confers power on any authority to make any appointment or to make or issue any public instrument, the following provisions shall, unless the contrary intention appears, have effect with reference to the making, issue and operation of such instrument.- 30

(a) the instrument may be at any time amended, varied, rescinded or revoked by the same authority and in the same manner by and in which it was made; 35

. " "

In this particular case, therefore, the Notices inviting tenders being "public instruments" within the definition of s.2 of the Interpretation Law Cap. 1, i.e. being notices issued under the provisions of regulations 19, 30 and 31 of the Government Stores Regulations, by the Cyprus Fire Service could only be rescinded or revoked by the same authority (the Cyprus Fire Service) and in the same manner by and in which they were made.

Therefore the withdrawal of the tenders by the Main Tender Board was an act not within its competence, made contrary to the principles of Administrative Law as well as contrary to the Interpretation Law, Cap. 1 s. 29(a) and was therefore made in excess of powers (vide *Zachariades v. The Republic* (1984) 3 C.L.R. 1193).

Independently of the incompetence of the Main Tender Board to withdraw the tenders in respect of the two Water-carrying vehicles the reasoning behind such withdrawal is defective. They say "The lowest tender (the tender of the applicants) is vague and incomplete without details or constructional plans (σχέδια κατασκευής)".

In the first place this "vague" tender was examined by the Technical Committee and was found unanimously within the specifications and by a majority of 4 to 1, as the tender which should succeed; all members of the majority gave their reasons in support of their recommendation and the Main Tender Board had a duty to give its special reasons for non adhering to the recommendations of the Technical Committee: instead the Board gave no reasoning whatever why they did not follow the recommendations of the majority of the Technical Committee and this affords another ground for the annulment of their decision.

The Tender Board states further that the tender of the applicants is "incomplete without details and constructional plans".

I fail to see what do they mean "details" because no other explanation is given by the Board. As regards "constructional plans" (σχέδια κατασκευής) I shall confine myself in what I have already stated in connection with this matter, in respect of the decision as regards the 3 Fire-Fighting vehicles i.e. in view of the contents of Appendix 1

attached to the opposition and the relevant evidence of Mr. Paltayan, which are equally applicable in the case of the decision of the two large Water-carrying vehicles. no constructional plans (κατασκευαστικά σχέδια) were required or demanded and thus the Tender Board by ignoring this fact, due to their failure to carry out a due inquiry acted under a misconception as to a material fact and thus their decision in respect of the two Large Water-Carrying vehicles is incorrect and should be annulled.

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For all the above reasons the part of the sub judice decision by virtue of which the tender of the three Fire-Fighting vehicles was awarded to Messrs. Stellakis & Nicos Agapiou Ltd. is hereby annulled on the grounds of failure to make a due inquiry which resulted in the misconception as to material facts as well as to incorrect reasoning; furthermore it is annulled on the ground of absence of special reasoning for ignoring the majority decision of the Technical Committee.

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15

The remaining part of the sub judice decision by virtue of which Tenders have been withdrawn by the Board in respect of the 2 Large Water Carrying vehicles, is hereby annulled on the following grounds (a) Incompetence of the Board to take the decision in question.

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(b) Absence of reasoning for ignoring the recommendations of the majority of the Technical Committee.

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(c) Failure to make due inquiry which resulted to a misconception of material fact, as well as to incorrect reasoning.

Respondents to pay £50.- towards the costs of the applicants.

30

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