

1985 February 22

[L. LOIZOU, J.]

IN THE MATTER OF ARTICLE 146  
OF THE CONSTITUTION

COSTAS PAPADOPOULOS,

*Applicant,*

v.

THE REPUBLIC OF CYPRUS, THROUGH

1. THE MINISTER OF FINANCE,
2. THE ACCOUNTANT—GENERAL AS CHAIRMAN  
OF THE TENDER BOARD,

*Respondents.*

(Case No. 97/70).

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*Tenders—Hire of machinery—Conditions of tenders—One such condition providing for production of circulation permit—And another condition providing that no payment shall be made if machinery is not licensed for circulation—Latter condition not only safeguards the object of the previous condition but it, also, envisages a situation where the tender may be awarded to a tenderer whose machine has no circulation permit at the time.* 5

*Administrative Law—Collective Organ—Rule that members must be the same during the whole procedure—Object to ensure that all members are aware and in a position to weigh all matters that have arisen—Tenders for hire of machinery—Tender Board—Two meetings with different composition—First meeting dealing only with the opening of the tenders—Consideration of the tenders and taking of sub judice decision at the second meeting—Change in the composition has not affected the validity of the sub judice decision in any way—No misconception regarding the h.p. of the machinery.* 10 15

The Ministry of Communications and Works, Public Works Department, invited tenders for the hire of machin- 20

ery of 200 h.p. and above for work in the Paphos district. At a meeting held by the main tender board the tenders were opened and the originals were forwarded to the Public Works Department for study and copies thereof were retained by the main tender board. There followed a second meeting of the Board, with a different composition, in the course of which the sub judge decision awarding the tender to the interested parties was taken. It was stated before the tender Board that the tractor of the interested parties had been offered in the past and was described as of 235 h.p. and that it was probable that the horse power of this tractor was only 235 h.p. and not 270 h.p. as described by the tenderers; and the board having considered the tenders decided that even if the tractor of the interested parties was only 235 h.p. it was still the lowest tender and since it was reported that it was in good condition decided to accept it and awarded the tender to the interested parties. Hence this recourse by the applicants whose tender was not accepted

Counsel for the applicant mainly contended:

- (a) That there was no compliance with term No. 13\* of the instructions to tenderers in that the interested parties did not produce a circulation permit for the reason that their tractor was not yet registered at the time.
- (b) That the procedure followed by the tender board was irregular in that there was a difference in the composition of the tender board at the two meetings which took place for the award of the tender; and
- (c) That there was a misconception regarding the lowest tender because of an alleged difference in the horse power rating of the tractors of the parties.

On the other hand counsel for the respondent contended

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\* Term No. 13 is to the effect that the tenderer must give a full description of his machine i.e. horse power etc and accompany his tender with information sheets, as well as the circulation permit for the purpose of the issue of the relative certificate which must indispensably be enclosed in the tender

that term 13 was not a substantial prerequisite and that the respondents could waive strict compliance with it on the wording of the condition immediately following it i.e. term 14\*\*.

*Held*, (1) that term 14 not only safeguards the object of term 13 but it also envisages a situation where the tender may be awarded to a tenderer whose machine has no circulation permit at the time. 5

(2) That the object of the rule that the members of the collective organ must be the same during the whole procedure is to ensure that all members are aware and in a position to weigh all matters that have arisen (see Conclusions from the Jurisprudence of the Greek Council of State 1929-1959 at p. 112); that since there is no dispute at all that what took place at the first meeting was merely the opening of the tenders and the forwarding of the originals thereof to the Public Works Department which was a mere formality preparatory to the consideration of the tenders; and that since it is equally clear that the consideration of the tenders took place from beginning to end at the second meeting when the decision was taken, the change in the composition of the main tender board has not affected the validity of the decision in any way. 10  
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(3) That the Board took its decision on the assumption that the tractor of the interested parties was 235 h.p. and not 270 h.p. and that even on this assumption it was found to be the lowest tender; therefore, it cannot be said that the main tender board acted under any misconception; accordingly the recourse must fail. 30

*Recourse dismissed.*

\*\* Term 14 provides as follows:

«No payment shall be made if the machinery brought for work either whether it is privately owned or hired by the tenderer, is not duly licensed for circulation»

**Recourse.**

Recourse against the decision of the respondent not to accept applicant's tender for the hire of machinery.

*L. Papaphilippou*, for the applicant.

- 5        *L. Loucaides*, Deputy Attorney-General of the Republic for the respondents.

*Cur: adv. vult.*

10        *L. LOIZOU J.* read the following judgment. By this recourse the applicant challenges the validity of the decision of the respondents in rejecting his tender for the hire of machinery and prays for the following relief:

- 15        (a) A declaration of the Court that the decision and/or act of the respondents dated 18th March, 1970, by which they did not accept applicant's tender for the hire of machinery is void and of no legal effect.
- (b) A declaration of the Court that the acceptance of the tender of Demos Sofocleous and Nearchos Eliades for the hire to the Republic of similar machinery is void and of no legal effect.

20        The facts of the case are briefly as follows:

      The Ministry of Communications and Works, Public Works Department, invited tenders for the hire of machinery of 200 h.p. and above for work in the Paphos district. The tender notice was published in the Gazette of the 6th February, 1970, under Notification 207.

30        By the 28th February, which was the closing date, 21 tenders were received including those of the applicant and the interested parties. At a meeting held by the main tender board on the same day the tenders were opened and the originals were forwarded to the Public Works Department for study and copies thereof were retained by the main tender board. The minutes of this meeting are part of exhibit 1. The decision challenged was taken at the second meeting of the main tender board held on the 14th March, 1970. The minutes of this meeting are part of exhibit 2.

35        The composition of the board at the second meeting included

Mr. Iordanous of the Public Works Department, who had studied all the tenders, in the place of the representative of the Planning Department who was present at the first meeting. This officer submitted a tabulation showing that the lowest offers were:

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i) Tender No. 6 belonging to the interested parties for caterpillar-tractor D8H serial No. 68A-1209 purported to be of 270 h.p. at £3.350 mils per hour and

ii) Tender No. 9 belonging to the applicant for a caterpillar-tractor under serial No. 22A-1188 which also purported to be of 270 h.p. at £3.750 mils per hour.

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Notes obtained from the manufacturers' information sheets showed that the tractor under serial No. 68A-1209 offered by the interested parties was of 270 h.p. whilst that under serial No. 22A-1188 offered by the applicant of 235 h.p. Mr. Iordanous, however, stated that the tractor of the interested parties (tender No. 6) had been offered in the past and was described as of 235 h.p. and that it was probable that the horse power of this tractor was only 235 h.p. and not 270 h.p. as described by the tenderers. The board having considered the two tenders decided that even if the tractor of tender No. 6 was only 235 h.p. it was still the lowest tender and since it was reported that it was in good condition decided to accept it and awarded the tender to the interested parties. The applicant was accordingly informed that his tender had not been accepted and his deposit was returned to him. As a result the present recourse was filed.

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It is significant to note that, after the award of the tender the applicant produced a certificate from the agents of the manufacturers to the effect that his tractor D8H serial No. 22A-1188 was of 270 h.p. and protested against the decision of the board. Shortly afterwards, however, the agents, The Cyprus Trading Corporation, forwarded a letter dated 31st March, 1970 (exhibit 3) to the Accountant-General with copy to the applicant stating that their certificate was given in error as a result of erroneous information contained in the manufacturers' information sheets in one of

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which it was shown to develop 270 h.p. and in another 235 h.p. and that they had in fact ascertained from their principals that the correct rating of the tractor in question was 235 h.p.

5 The application is based on the following grounds of law:

- 10 a) The decision and/or act of the respondents was taken under a misconception of fact in that when they were taking the decision or act they had in mind that the caterpillar-tractor of the interested parties was 270 h.p. whereas in fact it was 232 h.p.
- 15 b) The respondents failed to ask the interested parties for the production of the certificate of registration of the tractor and/or they acted contrary to the special terms of the tender.
- c) The respondents failed to take into account the difference in the horse power of the two machines.
- 20 d) The decision and/or act of the respondents was taken in excess and/or abuse of powers because they had exercised their discretionary powers improperly.

In the course of the hearing learned counsel for the applicant based his argument on three points:

- 25 i) That there was no compliance with condition No. 13 of the instructions to tenderers, exhibit 5, in that the interested parties did not produce a circulation permit for the reason that their tractor was not yet registered at the time.
- 30 ii) That the procedure followed by the tender board was irregular in that there was a difference in the composition of the tender board at the two meetings which took place for the award of the tender; and
- iii) That there was a misconception regarding the lowest tender because of an alleged difference in the horse power rating of the tractors of the parties.

35 In arguing his first point learned counsel for the applicant submitted that the respondents should not have consi-

dered the interested parties' tender at all since it did not comply with term 13 of the instructions as no circulation permit was enclosed.

This term of the instructions is to the following effect:

The tenderer must give a full description of his machine i.e. horse power etc. and accompany his tender with information sheets, as well as the circulation permit for the purpose of the issue of the relative certificate which must indispensably be enclosed in the tender. 5

The fact that the machine tendered by the interested parties, as well as those of the majority of other tenderers, did not have a circulation permit is admitted but it was contended by learned counsel for the respondents that there is a distinction between substantial prerequisites of an act and non-substantial formalities and that in the latter case non-compliance with such prerequisites does not lead to annulment; and the question whether a term is substantial or not is a question of fact in each particular case to be decided by the Court. (See Kyriakopoulos on Greek Administrative Law, 4th ed., Vol. B at p. 380). 10 15 20

Learned counsel based his contention that term 13 was not a substantial prerequisite and that the respondents could wave strict compliance with it on the wording of the term immediately following it i.e. term 14 which provides that:

"No payment shall be made if the machinery brought for work either whether it is privately owned or hired by the tenderer, is not duly licensed for circulation." 25

In the submission of counsel this last cited term effectively safeguards term 13. I am inclined to agree with the submission of learned counsel for the respondents. It seems to me that term 14 not only safeguards the object of term 13 but it also envisages a situation where the tender may be awarded to a tenderer whose machine has no circulation permit at the time. 30 35

Equally without merit I find the second point raised. As a general rule the procedure for consideration and decision of any particular matter by a collective organ must take

place from beginning to end before the same members; and in case it lasts for more than one session the collective organ cannot take a valid decision at the last session if there has been a change in the composition, unless the whole procedure is repeated ab initio so that the consideration of the matter can be regarded as having commenced and been concluded on such last session. The object of the rule that the members of the collective organ must be the same during the whole procedure is to ensure that all members are aware and in a position to weigh all matters that have arisen. (See Conclusions from the Jurisprudence of the Greek Council of State 1929-1959 at p. 112).

There is no dispute at all that, in the present case, what took place at the first meeting was merely the opening of the tenders and the forwarding of the originals thereof to the Public Works Department which, in my view, was a mere formality preparatory to the consideration of the tenders. It is equally clear that the consideration of the tenders took place from beginning to end at the second meeting when the decision was taken. In the light of the above the change in the composition of the main tender board has not, in my opinion, affected the validity of the decision in any way.

The last point raised on behalf of the applicant was that there was a misconception regarding the lowest tender because of an alleged difference in the horse power of the tractors of the parties. In support of his case learned counsel for the applicant called an expert witness in order to establish that applicant's tractor was 270 h.p. and not 235 h.p. I do not propose to go into the evidence of this witness as it is quite apparent to me that it fell far short of establishing this fact. Quite obviously he mainly relied on one of the manufacturers' information sheets, exhibit 7, which gave the rating of the machine as 270 h.p. and which the manufacturers admitted to have been wrong. As to the tractor of the interested parties, as stated earlier on, the board took its decision on the assumption that it was 235 h.p. and not 270 h.p. and that even on this assumption it was found to be the lowest tender. In the light of



these circumstances it cannot be said that the main tender board acted under any misconception.

In the result this recourse fails and it is hereby dismissed. There will be no order as to costs.

*Recourse dismissed.*  
*No order as to costs.*

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