

1985 December 7

[DEMETRIADES, J.]

IN THE MATTER OF ARTICLE 146
OF THE CONSTITUTION

S. M. VOUNIOTIS AND SONS LTD.,

Applicants,

v.

THE REPUBLIC OF CYPRUS, THROUGH
THE MINISTRY OF DEFENCE AND OTHERS,

Respondents.

(Case No. 62/79).

5 *Tenders—Persons or firms submitting tenders in response to a relevant invitation are entitled to equal treatment—In this respect strict compliance with the terms of the invitation is essential—The award of the contract for the supply of pork for the needs of the National Guard to the interested party (the Pig Breeders Association) who did not submit a tender violates Article 28 of the Constitution and the rules of free competition and proper administration.*

Constitutional Law—Article 28 of the Constitution.

10 In response to an invitation for tenders for the supply of pork meat for the needs of the National Guard the applicants submitted a tender which reached the Tender Board before the expiration of the period limited for the submission of tenders (9 a.m. of the 25.11.78).

15 Before the said Board reached their decision the Ministry of Commerce and Industry requested the Board to refrain from taking a decision as they intended to make recommendations for the better protection and promotion of pig breeding. On 9.12.78 the Board decided to refer the matter to the Council of Ministers as per Reg. 41D
20 of the Store Regulations. On the 14.12.78 the Chairman of the Board informed the Minister of Finance that the Pig

Breeders Association, i.e. the interested party in this recourse, did not submit a tender because some of its members were absent abroad, but after the close of the tenders they requested to award them the contract and the price offered by them was, after pressure exerted on them, reduced from £0.700 mils to £0.680 mils per oke. The Chairman recommended acceptance of the offer by the Council of Ministers. Finally and after a submission of the Minister of Finance, the Council of Ministers by its decision 17.556 awarded the tender to the interested party. Hence the present recourse.

Held, annulling the sub judice decision:

(1) Respondents have acted in a discriminatory way against all the tenderers vis a vis the interested party who had not submitted a tender. Persons or firms who submitted tenders were entitled to equality of treatment and in this respect strict compliance with the terms of the relevant invitation was essential.

(2) Therefore, the sub judice decision is null and void as it was reached contrary to Article 28 of the Constitution and in violation of the rules of free competition and proper administration.

*Sub judice decision annulled.
No order for costs.*

Cases referred to:

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

George D. Kounnas and Sons v. The Republic (1972) 3 C.L.R. 542.

Recourse.

Recourse against the decision of the respondents to award the tenders made by the Ministry of Defence, for the supply, amongst other food stuffs, of pork meat for the needs of the National Guard to the interested party.

L. Papaphilippou with Ph. Valiandis, for the applicants.

Cl. Antoniadēs, Senior Counsel of the Republic, for the respondents.

S. Yiordamlis, for the interested party.

Cur. adv. vult.

5 DEMETRIADES J. read the following judgment. The applicants, who, in the address of their counsel, are described as merchants dealing in meat, poultry and fish, in response to an invitation for tenders made by the Ministry of Defence for the supply, amongst other food stuffs, of pork
10 meat for the needs of the National Guard, submitted an offer by which they undertook to provide, during the period 1st January, 1979 to 30th June, 1979, the required quantity at the price of £0.670 mils per oke in the District of Nicosia and £0.750 mils in the District of Limassol.

15 In accordance with the notice, by which the tenders were asked for and which was published in the Official Gazette of the Republic under No. 1482 dated the 10th November, 1978, the tenders had to reach the Tender Board of the Republic, respondent No. 3, not later than 9.00 a.m. of
20 the 25th November, 1978.

Ten tenderers, one of them the applicants, duly submitted their tenders which were later opened and handed to an official of the Ministry of Defence for study and submission by him of recommendations.

25 However, before the Tender Board reached their decision as to who would have been the successful tenderer, the Ministry of Commerce and Industry asked the Tender Board to refrain from taking a decision as they intended to make recommendations for the better protection and
30 promotion of pig breeding. In view of this, the Tender Board, at its meeting of the 9th December, 1978, decided to refer the matter for decision to the Council of Ministers pursuant to regulation 41D of the Store Regulations which provides that "the Minister of Finance may suspend consideration of
35 any tender and refer same for decision to the Council of Ministers".

On the 14th December, 1978, the Chairman of the

Tender Board addressed a letter to the Minister of Finance by which he informed him that the Pig Breeders Association (to be referred to hereinafter as the "interested party") did not submit a tender because a number of its members were absent abroad; that after the close of the tenders a request was made by the interested party for the award to them of the contract and that the price offered by them was, after pressure exerted on them, reduced from £0.700 mils to £0.680 mils per oke. In his said letter the Chairman of the Tender Board also expressed the opinion that acceptance of the offer of the interested party by the Council of Ministers would protect prices of pork meat, protect pig breeding and provide the supply of better quality of pork meat to the National Guard.

As it appears from the relevant extract of the minutes of the Council of Ministers dated 21st December, 1978, the Minister of Finance referred the matter to it and by his submission suggested that for the protection of pig breeding and the supply of better quality of pork meat to the National Guard the offer of the interested party ought to be accepted.

After an exchange of views, the Council of Ministers, by its decision No. 17.556, awarded the tender to the interested party.

Counsel for the applicants submitted, amongst others, that the sub judice decision is contrary to Article 28 of the Constitution as the respondents have failed to examine the tender of the applicants and have awarded to the interested party, contrary to the rules of proper administration, the supply of pork meat to the National Guard.

In considering this issue reference may be made, by way of useful guidance, to the cases of *Medcon Construction v. The Republic*, (1968) 3 C.L.R. 535, and *George D. Kounnas and Sons Ltd. v. The Republic*, (1972) 3 C.L.R. 542.

In the *Medcon Construction* case, supra, Triantafyllides, J., as he then was, stated the following (at pp. 544, 545):-

"It was not possible, or permissible, to treat the interested party as a tenderer at all, because, though

the initial non-compliance by the interested party with term 11 of the invitation for tenders could have been waived—as it was done—it was expressly provided by term 13 that any tender which would not be accompanied by a certificate of fitness, of the material offered, given by the District Engineer of the Public Works Department, would not be taken into account; and it is common ground that the tender of the interested party was not accompanied by a certificate of fitness. Thus, the interested party was treated as having submitted a valid tender, when by express provision in the invitation for tenders this could not be done; and it was not possible to put things right, ex post facto, by deciding that the contract would be awarded to the interested party provided that the quarry and crushing plant of the interested party would be inspected and found to be fit for the purpose (see exhibit 7(a))—see, also, Decisions of the Greek Council of State 531(49) vol. B, p. 13, and 1403(60) in Zacharopoulos Digest 1953-1960 vol. 1 a-k, p. 489. Moreover, tenderers were entitled to equality of treatment, and to exempt the interested party from compliance with the express requirement of term 13 of the invitation for tenders, and from the sanction for such non-compliance, was, not only contrary to good and proper administration and in abuse and excess of powers, but also contrary to the requirement for equality of treatment laid down by Article 28.1 of the Constitution”.

30 In the *George D. Kounnas and Sons Ltd.* case, supra, Triantafyllides P. said (at p. 546):

“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 circum-

stances of this case, that the sub judge 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 judge decision has to be annulled; and it is so declared".

Article 28.1 of the Constitution provides that all persons are equal before the law, the administration and justice and are entitled to equal protection thereof and treatment thereby.

Having taken into account the circumstances under which the contract concerned was awarded to the interested party, I have reached the conclusion that the respondents have acted in a discriminatory way against all the tenderers vis a vis the interested party, who had not submitted a tender and to whom the supply of meat was finally awarded. Persons or firms interested in the supply of meat in accordance with the invitation for tenders were entitled to equality of treatment, and, in this respect, strict compliance with the terms of such invitation was essential. Otherwise the principles of free competition and the rules of proper administration are violated in a manner leading to the annulment of the sub judge decision.

If the respondents had found that the tenders submitted could not be accepted by them and that reasons of public interest called for the assignment of the contract concerned to other persons, then they had to resort to a fresh invitation of tenders.

Therefore, the sub judge decision is null and void as it

was reached in an invalid manner, contrary to Article 28.1 of the Constitution and in violation of the rules of free competition and proper administration.

5 In view of my above conclusion there is no need to embark into the examination of any other issue raised in this case.

In the result the present recourse succeeds with no order as to its costs.

Sub judice decision annulled.

No order as to costs.

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