

1987 December 17

{A LOIZOU MALACHTOS LORIS PIKIS AND KOURRIS JJ }

K & M TRANSPORT CO LTD ,

Appellants-Interested Parties,

v

ETERIA FORTIGON AFTOKINITON (EFA) AND OTHERS,

Respondents-Applicants,

and

THE REPUBLIC OF CYPRUS, THROUGH
THE CYPRUS GRAIN COMMISSION,

Respondents
(Revisional Junsdiction Appeal 690)

THE REPUBLIC OF CYPRUS, THROUGH
THE CYPRUS GRAIN COMMISSION,

Appellants-Respondents,

v

ETERIA FORTIGON AFTOKINITON (EFA) AND OTHERS,

Respondents-Applicants
(Revisional Junsdiction Appeal No 691)

5 *Tender — Conditions set out in the invitation — Strct adherence directly depends on the materiality of a term — Timeliness — Ordinarily a maternal term — Ascertainment of compliance — A matter for the administration — This Court does not interfere, if the decision was reasonably open to the administration — In the absence of an indication of foul play and in the circumstances of this case it would have been legitimate to accept the tender, even if it was submitted a minute or two after the appointed hour*

10 The Cyprus Grain Commission invited tenders for the transportation of their products for 1985-1986 The invitation provided that tenders should be submitted on 5th December 1985, not later than 10 a m , by depositing them in the tender box posted outside the central offices of the corporation at Nicosia

When the clock at the offices of the Commission showed the hour to be 10 o'clock, and its accuracy was checked and confirmed by consulting the clock in the public square outside the building Mr Mouskos stepped out of his office and closed the tender box in order to deposit it inside the building. On his way to the premises no sooner than he had walked a distance of about ten paces a representative or agent of the appellants caught up with him and submitted their tender

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The Director-General of the Grain Commission decided to accept the tender. Eventually, the Board of the Commission awarded the tender to the appellants for the obvious reason that it was lower than that of the respondents by £300,000

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The decision was annulled by a Judge of this Court. Hence these appeals

Held allowing the appeals (1) The principle emerging from the caselaw is that strict adherence to the terms of a condition of the tender is directly dependent on the materiality of the term, a term is essential, if consequential for the decision or its observance is necessary for the sustenance of the efficacy of the administrative process. The timeliness of the tender is ordinarily a factor consequential for the decision for it ensures equality of treatment among tenderers on the one hand, and rules out the possibility of abuse arising from any forewarning to a late tenderer about the content of timely tenders on the other

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(2) The determination of the timeliness of the tender is a matter for the Administration and as in every other case the Court will not interfere with its assessment of the factual situation so long as the decision is one reasonably open to them

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(3) The fact that the tender was not received through tender box did not automatically seal the fate of the tender

(4) In this case it was reasonably open to the Grain Commission to accept the tender. In the first place, there was a possibility of errors of seconds or a minute in discerning time and, in the second place, the facts exclude the possibility of unfair advantage being derived from late tendering

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(5) The award was, also, challenged on the ground of lack of possession of the necessary equipment by the appellant. However, such possession was not a condition precedent to the acceptance of the tender

(6) A stipulation that went unnoticed was that the Grain Commission «was not bound to accept the lowest or anyone tender», a provision explicitly intended to safeguard to the Commission freedom to reject any tender on good cause

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(7) The difference between the price of the respondents' tender and that of the appellants amounted to £300,000. Moreover, in the absence of any indication of foul play on the part of the appellants, it would have been

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perfectly legitimate for the Commission to accept the tender, even if it was submitted a minute or two after the appointed hour

Appeals allowed.

No order as to costs.

5 *Cases referred to.*

Medcon Construction and others v. The Republic (1968) 3 C.L.R. 548;

Papadopoulos v. The Republic (1985) 3 C.L.R. 154;

Christofides Trading v. The Republic (1985) 3 C.L.R. 547.

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

10 *Georgiades v. The Republic* (1982) 3 C.L.R. 659.

Tyllis and Co. Ltd. v. The Republic (1986) 3 C.L.R. 401.

Appeals.

15 Appeals against the judgment of a Judge of the Supreme Court of Cyprus (Savvides, J.) given on the 21st November, 1986 (Revisional Jurisdiction Case No. 40/86)* whereby the decision of the Cyprus Grain Commission to accept the tender of the interested party (K. and M. Transport Co. Ltd.) was annulled.

M. Christofides, for the appellants in R.A. 690.

C. Velaris, for appellants in R.A. 691.

20 *K. Talarides*, for respondents in both appeals.

Cur. adv. vult.

A. LOIZOU J.: The judgment of the Court will be delivered by Pikis, J.

25 PIKIS J.: The Grain Commission is a statutory corporation** entrusted with the control and distribution of grain, a vital commodity for the well being of the public. In November 1985 they invited tenders for the transportation of their products for the years 1985-1986. The notice articulated the tendered terms and specified the date, hour and method of tendering. Tenders should
30 be submitted on 5th December, 1985, not later than 10 a.m., by depositing them in the tender box posted outside the central offices of the corporation at Nicosia. The respondents, Eteria

* Reported in (1986) 3 C.L.R. 2014.

** (See, Grain Control Law - Cap. 68 (amended).

Fortigon Aftokiniton (EFA) and two others, submitted their tender before the expiration of the hour appointed by the notice. But doubts arose with regard to the timeliness of the submission of the tenders of the appellants, K. & M. Transport Co. Ltd. The facts relevant to the submission of the tender of the appellants were elicited in the evidence of Mr. Christakis Mouskos, the Chief Clerk of the Grain Commission charged with responsibility to close the tender box at the set hour and remove it to the offices of the Corporation. 5

When the clock at the offices of the Commission showed the hour to be 10 o' clock, and its accuracy was checked and confirmed by consulting the clock in the public square outside the building, Mr. Mouskos stepped out of his office and closed the tender box in order to asport it inside the building. On his way to the premises, no sooner than he had walked a distance of about ten paces, a representative or agent of the appellants caught up with him and submitted their tender. Mr. Mouskos refused to re-open the box and thereby facilitate the insertion of the tender therein, informing appellants' agent that for that they had to await the instructions of Mr. Charalambous, the Director-General of the Grain Commission. On being apprised of the facts surrounding the submission of the tender of the appellants, Mr. Charalambous decided to accept it as having been made within the time limited by the notice. In explanation of his action he stated in evidence that it was the fair course to follow as they were not guided in the determination of the time by the Greenwich chronometer. A detail of the evidence of Mr. Mouskos of which it is worth reminding is that it was not possible by looking at the clock in the square to tell with precision whether the hour was 10 o' clock or half a minute to ten. 10
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The Board of the Commission awarded the tender to the appellants for the obvious reason that it was lower than that of the respondents by £300,000.- The learned trial Judge annulled the decision on the ground that tender of the appellants had been submitted out of time and consequently in breach of a material term of the invitation to tender. Moreover, the decision of the respondents was taken without comprehensive prior knowledge of the circumstances attending the submission of the tender of the appellants. 35

Learned counsel addressed us at length on the importance and implications of the terms of the tender and the duty of the Administration to observe those conditions as a matter of proper administration and equality of treatment of the tenderers. The implications stemming from breach of the conditions stipulated in the tender were examined on at least three occasions by three different members of this Court, namely, by Triantafyllides J., as he then was, in *Medcon Construction and Others v. The Republic**, by L. Loizou, J., in *Papadopoulos v. The Republic*** and myself in *Christofides Trading v. The Republic****. The principle emerging from the caselaw**** is that strict adherence to the terms of a condition of the tender is directly dependent on the materiality of the term; a term is essential if consequential for the decision or its observance is necessary for the sustenance of the efficacy of the administrative process. The timeliness of the tender is ordinarily a factor consequential for the decision for it ensures equality of treatment among tenderers on the one hand, and rules out the possibility of abuse arising from any forewarning to a late tenderer about the content of timely tenders, on the other. Therefore, we agree with the learned trial Judge that compliance with the time provisions of the invitation to tender was a condition for the acceptance of the tender.

The determination of the timeliness of the tender is like any other matter pertaining to fulfilment of the terms of the tender, a matter for the Administration and as in every other case***** the Court will not interfere with its assessment of the factual situation so long as the decision is one reasonably open to them. The pertinent question in this case is whether it was, in the circumstances under consideration, reasonably open to the Grain Commission to accept it as timeously made. The fact that the tender was not received through the tender box did not automatically seal the fate of the tender. For example, an official of the Grain Commission might mistakenly close the tender box five or ten minutes before the effluxion of the stipulated time interval.

* (1968) 3 C.L.R. 548.

** (1985) 3 C.L.R. 154.

*** (1985) 3 C.L.R. 547

**** See also *Kounnas & Sons v. Republic* (1972) 3 C.L.R. 542

***** (See, *inter alia*, *Georghiades v. Republic* (1982) 3 C.L.R. 659, 668-669; *Tyllis & Co. Ltd v. Republic* (1986) 3 C.L.R. 401, 411).

The submission of the tender through the tender box was not in itself a material term of the tender but a procedural one designed to ensure maximum efficiency in the submission of tenders. Could an administrative body, acting in the bona fide discharge of its duties, accept in good reason and sense the tender of the appellants as having been made in time? Our answer is in the affirmative. Not only there was an inherent likelihood of a margin of error of seconds or a minute or two occurring in the discerning of time but the possibility of unfair advantage being derived from late tendering could be confidently ruled out. 5 10

The decision affecting the timeliness of the tender was entrusted to Mr. Charalambous, the chief executive of the respondents, which was in due course relied upon and espoused by the Grain Commission Board. In our judgment it was reasonably open to the respondents to treat the tender of the appellants as valid and evaluate it, along with the other tenders, on its merits. 15

The acceptance of the tender of the appellants was also challenged on the ground that they lacked the means to perform the contract, namely, that they did not have at their disposal, at the time the tender was made, as sufficient number of licensed vehicles to carry out the obligations envisaged in the tender. Possession of the necessary equipment at the time of making the tender was not a condition precedent to the acceptance of a tender. Amenity to perform the contract was contemplated as a condition to be included in a contract that might ensue from acceptance of the tender. Any breach of such condition would entitle the Commission to rescind the agreement in view of the provisions of Clauses 7, 7.1 and 7.2 of the invitation to tender. 20 25

A stipulation of the invitation to tender that went virtually unnoticed, was Clause 10.3 providing that the Grain Commission «was not bound to accept the lowest or anyone tender»; a provision explicitly intended to safeguard to the Commission freedom to reject any tender on good cause. And they had every cause to reject the tender of the respondents on account of the difference between the price of their tender and that of the appellants amounting to £300,000.- Moreover, in the absence of any indication of foul play on the part of the appellants it would have been perfectly legitimate for the Commission to accept their tender even if it was submitted a minute or two after the appointed hour. In fact, it would have been an abuse of power on their part 30 35 40

if they had accepted the tender of the respondents in preference to that of the appellants and charged the corporation with an additional liability of £300,000.

- 5 For the reasons above indicated, the appeals are allowed. The judgment and order as to costs are set aside. The decision of the Grain Commission to award the tender to the appellants is confirmed pursuant to the provisions of Art. 146.4(a) of the Constitution. Let there be no order as to costs.

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Appeals allowed.

No order as to costs.