1988 December 21

[BOYADJIS, J.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

CARAMONDANI BROS. LTD.,

Applicants,

v.

THE CYPRUS ATHLETIC ORGANISATION,

Respondents.

(Case No. 566/86).

Tenders—Principles governing the exercise of the discretion—Review of authorities.

Tenders—Belated award of tender—In the circumstances a non material irregularity.

The applicant impugns the validity of the decision of the respondents to award to the interested party the tender for the floodlighting services of a stadium at Larnaca.

Clause 6 of the prescribed tender form provided as follows:

"We agree to abide by this tender for the period of three (3) calendar months from the date fixed for receiving the same and it shall remain binding upon us and may be accepted at any time before the expiration of that period".

The respondents awarded the tender to the interested party, who had submitted the lowest tender, well after the expiration of the period provided in the aforesaid Clause 6. Applicant's complaint was the timeliness of the award.

After referring to the principles governing the exercise of the power to award a tender, the court,

Held, dismissing the recourse:

(1) The respondent's action did not result and could not have resulted to any unfair advantage to the interested party over the applicants nor to any inequality of treatment of the tenderers who had submitted the several initial tenders:

(2) The effect of clause 6 of the prescribed Tender Form (supra) was that the interested party whose initial tender was accepted by the sub-judice decision had the right to refuse to abide by the terms thereof, if it so chose, due to its belated acceptance by the respondents.

(3) The irregularity in the procedure followed by the respondents, which is restricted to the timeliness of the acceptance, was neither a material irregularity nor an irregularity that violates the principle of good administration.

Recourse dismissed:
No order as to costs.

Cases referred to:

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

J. N. Christofides Trading Ltd. v. The Republic (1985) 3 C.L.R. 546;

Matsouka (No. 2) v. The Republic (1985) 3 C.L.R. 686;

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

K. and M. Transport Co. Ltd. v. Eteria Fortigon Aftokiniton and Others (1987) 3 C.L.R. 1939.

Recourse.

Recourse against the decision of the respondents to award the tender for the flood-lighting services of the Athletic Centre G.S.Z. at Larnaca to the interested party instead of the applicants.

G. Michaelides, for the applicants.

M. Christofides, for the respondents.

Cur. adv. vult.

BOYADJIS J. read the following judgment. By the present recourse the applicants seek a declaration of the Court that: "The decision of the Respondents which was communicated to the Applicants by letter dated 8 July 1986 (Exh. A) whereby the tender of the Applicants for the flood-lighting services of the Athletic Centre G.S.Z. at Larnaca was rejected and instead the tender of another tenderer was accepted, is null and void and of no effect whatsoever".

The history of events that led to the institution of the present proceedings is briefly this:

In August 1985 the respondents invited tenders for the floodlighting services of the Athletic Centre GSZ at Larnaca which should be submitted by 28 September 1985. The tenders provided for floodlighting services suitable for immediate installation of black and white television system with possibility of future installation of colour television system. By their letters dated 11 September 1985 and 8 October 1985, the respondents extended the time for the submission of the tenders until 12 October 1985, and 31 October 1985, respectively.

Term No. 2 of the Instructions to the Tenders provided that tenders should be made on the tender form appended thereto. Clause 6 of the prescribed tender form provided the following:

> "We agree to abide by this tender for the period of three (3) calendar months from the date fixed for receiving the same and it shall remain binding upon us and may be accepted at any time before the expiration of that period."

Pursuant to the above, the applicants and the interested party duly submitted their respective tenders on the aforesaid tender form, together with other tenderers. That of the interested party

was for a sum of £182,890 and was the lowest of all. That of the applicants was the sixth lower tender.

By their letter dated 3 February 1986 the respondents asked the applicants to submit by March 3, 1986, later extended to March 26, 1986, an additional tender for floodlighting services suitable only for black and white television system in accordance with the specifications therein set out. The applicants duly submitted their additional tender which was the lowest of all other additional tenders.

By their letter dated 8 July 1986 the respondents informed the applicants that, having considered the whole matter in the light of the original and the additional tenders submitted to them, they (the respondents) ultimately decided to make installations which permit further extension of the floodlighting services required for coloured T.V. and that, in view of the above, having evaluated applicant's tender, they decided ro reject same, and accept the tender submitted by another tenderer (the interested party) which was more advantageous.

It is common ground that the sub-judice decision was reached on 3 June 1986, i.e. more than four months after 31 January 1986 when the aforesaid period of three calendar months, stated in the initial tenders, had expired.

Feeling aggrieved with the aforementioned decision the applicants seek to have it annulled through the present recourse filed on 10 September 1986 on the following grounds of law:

"1. The decision was taken in contravention of the conditions subject to which the tenders had been invited.

2. The tender was awarded to another tenderer on the basis of tenders whose validity had expired and not on the basis of tenders which were valid at the time of the award.

3. The decision was taken in excess and/or in abuse of

power and/or in an irregular manner.

4. The decision was taken as a result of misconception regarding the facts and/or the law."

In the Opposition of the respondent Organisation it is alleged that the sub-judice decision is lawful in every respect and that it is the offspring of a correct and fair exercise of discretionary power. The interested party, though duly served with notice of these proceedings, has not appeared and has not taken any part therein.

In his written address learned counsel for the applicants submitted that the sub-judice decision was taken in excess and/or in abuse of power and/or in an irregular manner for the following reasons:

(1) The respondents did not award the tender on the basis of the valid tenders which they had invited on 3 February 1986 (after the expiry of the first tenders) the lowest of which was the one submitted by the applicants.

(ii) The respondents awarded the tender to another tenderer on the basis of the initial tenders which had expired on 31 January 1986, without asking the tenderers who had submitted them to either renew them or to submit afresh their tenders on the basis of the original specifications. Therefore, counsel added, the award of the tender was done on the basis of invalid tenders.

(iii) Furthermore, in awarding the tender, the respondents acted whilst labouring under a misconception in relation to the facts and/or the Law in that they treated the initial tenders as valid tenders as at the time of the award and/or in that they treated themselves entitled to award the tender on the basis of the initial tenders.

(iv) Whereas in their meeting of 20 May 1986, the respondents had provisionally decided to adopt the alternative

solution of black and white T.V. system, in respect of which the applicants had submitted the lowest tender, there is no due or any reasoning why the respondents had reverted to the solution in respect of which the initial tenders had been submitted.

In support of his submission learned counsel for the applicants cited a number of authorities to which I shall refer in due course.

In answer to the above submissions, learned counsel for the respondents alleged that they had treated at all times all the initial as well as the additional tenders submitted to them as valid and that they acted bona fide in the best interest of the Organisation and of the Public in general. He did not cite any authority.

One of the authorities relied upon by the applicants is the decision in *George D. Kounnas and Sons Ltd. and Another v. The Republic through the Cyprus Potato Marketing Board* (1972) 3 C.L.R. 542, where, in awarding the tender to the interested party, the respondent Marketing Board failed to consider at all the tenders of the applicants duly submitted to it, because by inadvertence they were not taken out of the tender box. The award of the tender in those circumstances was annulled. The decision is an authority for the proposition that: an administrative decision concerning tenders is the subject of judicial review under Article 146 of the Constitution, like all other administrative decisions, and such decision is treated separately from any contract entered into by the administrative organ as a result thereof; and that the decision is liable to be annulled if the tenders submitted are considered by the administration in a manner contrary to the principles of free competition or in an irregular manner affecting the outcome of such consideration.

The other authority relied upon the applicants is the decision in *J.N. Christofides Trading Ltd. v. The Republic through The Minister of Finance and others* (1985) 3 C.L.R. 546, where the applicants succeeded in obtaining a declaration annulling the respondent's decision whereby applicants' tender had been rejected and the tender of the interested party had been accepted for the

supply and installation of floodlighting services for the aircraft parking apron of Paphos International Airport, on the ground that the tender of the interested party did not comply with the specifications required by the invitation, in that it did not provide for proof of the expected values of illuminance without which the tender could not be evaluated at all. Annulling the administrative decision taken in the above circumstances, the Court held that the breach of the condition of the tender was material since it made the evaluation of the tender impossible; and that consideration of the tender in breach of specific conditions thereof in relation to a substantial matter involved abuse of power and violation of the principle of equality before the administration, embodied in Article 28.1 of the Constitution.

The next authority cited by learned counsel for the applicants is the decision in *Petros Matsouka (No. 2) v. The Republic through The Ministry of Interior and Others* (1985) 3 C.L.R. 686, where, in breach of the condition in the invitation which provided that tenders should be submitted in a sealed envelope the latest by May 21, 1982, the interested parties had submitted their tender on May 22, 1982, after the other tenders had been opened, the Court annulled the award of the tender to the interested parties on the ground that such tender was invalid. The Court also held that, in accepting an invalid tender from the interested parties, the respondents had acted in abuse of powers and in flagrant violation of the principles of good administration.

Another instance of annulment by the Court of the administrative decision of acceptance of a tender which did not comply with a term set out in the invitation for tenders is afforded by the case of *Medcon Construction and Others v. The Republic (Minister of Finance and Others)* (1968) 3 C.L.R. 535, where the non-compliance concerned the requirement that tenders should be accompanied by a certificate of fitness of the material offered and where the Court stressed that: (i) tenderers were entitled to equality of treatment: and (ii) to exempt one tenderer (the Interested Party) from compliance with an expressed term 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.

Reference should finally be made to the recent decision of the Full Bench in *K. & M. Transport Co. Ltd v. Eteria Fortigon Aftokiniton and Others* (1987) 3 C.L.R. 1939, where the implications stemming from breach of the conditions stipulated in the tender were examined and where reference is made to some of the decisions cited hereinabove. It was held that, from a consideration of the caselaw on the matter, the principle which emerges is that strict compliance with the terms of a condition of the tender depends on the materiality of the term; that a term is material if it is consequential for the decision or if its observance is necessary for the sustenance of the efficacy of the administrative process; that the timeliness of the tender is ordinarily a factor consequential for the decision because on the one hand it ensures equality of treatment among tenderers and, on the other hand, it rules out the possibility of abuse arising from any forewarning to a late tenderer about the contents of timely tenders; that compliance with the time provisions of the invitation to tender is, therefore, a condition for the acceptance of the tender; and that a term of the invitation to tender providing that tenders should be submitted through the tender box was not in itself a material term of the tender but only a procedural term designed to ensure maximum efficacy in the submission of tenders.

Close examination of the facts pertaining to the sub-judice decision, upon which the applicants rely, reveals that in the instant case the interested party is not being accused with non-compliance with any material or immaterial condition of the invitation to tender. On the contrary, the Interested Party as well as the Applicants complied fully with the requirement to submit their initial tenders on the prescribed form attached to the Instructions of Tenderers which formed part of the invitation to tender. The result was that, by doing so, they both stipulated to abide by their respective tenders for the period expiring on 31 January, 1986. There is no allegation (none could validly be made) that the inter-

ested party' s initial tender was invalid when it was submitted or that, in considering the initial tenders, the respondents should have ignored the interested party's tender for any reason whatsoever which did not apply to the applicants' tender as well or that the interested party had at any time caused or contributed to the suggested irregularity or wrongful act of the respondents, which consisted solely in the belated and out of time consideration by them of all the initial tenders four months approximately after 31 January 1986 when the aforesaid period of three calendar months during which all the tenderers had stipulated to abide by their respective tenders had expired. The respondent's action did not result and could not have resulted to any unfair advantage to the interested party over the applicants nor to any inequality of treatment of the tenderers who had submitted the several initial tenders. The instant case is in this repect clearly distinguishable from the decisions relied upon by the applicants where the administrative acts were annulled on the ground that the consideration of the tenders had been made in circumstances amounting to a violation of the principle of equality of treatment of the tenderers required by Article 28.1 of the Constitution.

The effect of clause 6 of the prescribed Tender Form (supra) was that the interested party whose initial tender was accepted by the sub-judice decision had the right to refuse to abide by the terms thereof, if it so chose, due to its belated acceptance by the respondents. Be that as it may, the interested party did not raise the question of the belated award and considered itself bound by its initial tender. Having considered all the circumstances pertaining to the time of the final consideration of the initial tenders and to the acceptance by the respondents of the tender of the interested party, which was admittedly the lowest tender, including the fact that neither the respondents nor anyone of the tenderers had at any time either expressly or by necessary implication withdrawn any of the initial tenders from consideration, I am of the opinion that the irregularity in the procedure followed by the respondents, which is restricted to the timeliness of the acceptance, was neither a material irregularity nor an irregularity that violates the principle of good administration. The very nature of the irregularity ruled

out the possibility of abuse in the form of deriving of any unfair advantage by one tenderer over another tenderer, or in any other form that I can think of, and did not contravene in any manner the requirement for equality of treatment by the administration of all the tenderers. The applicants' grievance relates in effect to their claim to be given a second chance to submit another tender, perhaps lower than their initial tender, after the tenders of their competitors had been opened and had been placed on the table for consideration. The sub-judice decision was not, in the circumstances, taken by the respondents in abuse or in excess of their powers.

Since the objection of the applicants against the acceptance of the initial tender of the interested party concerned solely the belated timing thereof, the recourse is without merit, for the reasons stated hereinabove, and is liable to be dismissed. Concerning the complaint of the applicants against the omission of the respondents to accept their additional tender, which was admittedly the lowest, the answer to it is that the respondents were under no obligation to accept anyone of the additional tenders.

In the result, the recourse is dismissed. Taking, however, all the relevant circumstances into consideration, I do not propose to make any order as to costs.

Recourse dismissed.
No order as to costs.