

1988 April 16

[A. LOIZOU, P.]

IN THE MATTER OF ARTICLE 146 OF THE CONSTITUTION

TASMI TRADING CO. LTD. ,

Applicants,

v.

THE REPUBLIC OF CYPRUS, THROUGH

1. THE COUNCIL OF MINISTERS,
2. THE MINISTRY OF HEALTH,
3. THE TENDERS BOARD, THROUGH ITS CHAIRMAN,

Respondents.

(Cases No. 689/86).

General principles of administrative law—Good administration—Tenders—Two conflicting opinions placed before the Tender Board—Tender Board hearing exclusively and relying on those who supported the one of the two opinions—Such a course runs contrary to the notion and norms of good administration.

5

Reasoning of an administrative act—Tenders—Two conflicting opinions placed before the Tender Board—Failure to give reasons for rejecting the one of the two opinions—As the material in the file are conflicting, the vacuum in the reasoning cannot be supplemented.

The facts of this case appear in the Judgment of the Court.

10

*Sub judice decision annulled.
No order as to costs.*

Cases referred to:

Ioannou v. The Republic, (1976) 3 C.L.R. 431;

Kyprianou (No. 2) v. The Republic (1975) 3 C.L.R. 187;

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

Recourse.

Recourse against the decision of the respondent Tender Board to accept the tender of the interested party to that of the applicant in respect of an "Image Intensifier Complete with Camera and T.V. Monitor".

A.S. Angelides, for the applicant.

N. Charalambous, Senior Counsel of the Republic, for the respondents.

M. Georghiou, for the interested party.

Cur. adv. vult.

A. LOIZOU P. read the following judgment. On April 9, 1986, the Ministry of Health invited quotations for the supply of an "Image Intensifier Complete with Camera and T.V. Monitor". Among the firms that submitted quotations were the applicant Company and Papaetis Medical Co. Ltd.

Following the submission of the quotations to the Ministry of Health the matter was referred to (a) Dr. Costeas, Senior Medical Physicist and Dr. P. Peratitis, (Senior Radiologist); and (b) The Department of Electrical and Mechanical Services. Both the above officials of the Ministry of Health recommended the tender of Messrs Papaetis Medical Co., Ltd., (to be referred to hereinafter as "the interested party"). The Department of Electrical and Mechanical Services in its report dated 26th May, 1986, stated that the tender of the interested party could not be recommended "because all the offered image intensifier systems

are of a single field type and do not satisfy the required specifications which specifically stated that required image intensifier is needed to replace the existing Siemens Cigantos SIRESKOP 2, Duplex 25/15."

Regarding the tender of the applicants the said report stated that it was "within specification and could be recommended". 5

The Departmental Tender Board of the Ministry of Health having considered the reports of its two officials and the above report of the Director of the Electrical and Mechanical Services "as well as the written clarification received from Messrs. Papaetis Medical Co., Ltd., that the offered Image Intensifier is a 3 - field and also has an automatic dose control which will be interfaced with the siemens generator, decided to recommend to the Main Tender Board that the award be made to the interested party. 10

The Main Tender Board referred the matter for consideration by the Tenders Technical Committee which decided by majority that the tender be awarded to the applicant Company. The relevant report of the technical Committee dated 7th August 1986, reads: 15

"On the 2nd August, 1986 the Technical Committee examined the quotations submitted and decided by a majority of 3 to 2 to recommend award in favour of Messrs TASNI TRADING CO LTD., as proposed by the Department of EMS, because it is the cheapest quotation within specifications. It should be noted that the Technical Committee considered the system offered by Messrs Papaetis, to be outside specifications, because in their original quotation it was stated that it was of the single field type. At a later stage a letter dated 2nd July, 1986 was received from Messrs Papaetis in which it was stated that the system was of a 3 - field type. In view of the fact that this letter was received after the closing date of the quotation, the Technical Committee could not take it into consideration. 20 25 30

Furthermore, taking into consideration the attached letter of

Dr. Costeas in which it is stated that the automatic dose control facility is essential, it is recommended to increase the price quoted by Messrs TASMI by SF 7,210 to include the above facility. This price also includes an 'image inversion' facility worth SF 620.-.

Mr. A. Pittas and Mr. A. Lambrianou disagreed with the majority, and recommended award in favour of Messrs Papaetis. Their reasons for disagreeing with the majority are recorded below:

"The original tender submitted by Messrs Papaetis is within specifications, because it was not clear that we were asking for a two-field system. The clarification by the tenderer after the closing date, make their offer more attractive and identical with the recommended tender which is more expensive by three thousand pounds."

The matter was then placed before the Main Tender Board at its meeting of the 2nd August 1986. Present at the meeting of the Main Tender Board were a certain Mr. Pittas and the aforesaid Dr. Costeas. None of those two officials were members of the Tender Board. Mr. Pittas was a member of the above Technical Committee who was in the minority and he gave the reasons of his disagreement with the majority. Dr. Costeas, through not expressly, spoke in favour of the tender of the interested party. Regarding the tender of the applicants he said that there are differences therein because the model described in the tender is different from the model referred to in the accompanying leaflets.

Thereafter the minutes of the Tender Board read as follows:

"There are doubts regarding the tender of Papaetis (the interested party), since at the same time it refers to single-field machine and three-field as well as regarding the tender of Tasmi (the applicants) because it refers to two different models (9428 and 9428E)."

When the matter was put to the vote the five members of the Main Tender Board expressed the following opinion:

"G. Tsielepis: To the cheaper - Papaetis.

G. Kontolemis: - To the cheaper - Papaetis.

K. Lambrinos: - To the cheaper - Papaetis - since there are ambiguities in both tenders and since they offer the same machinery. 5

O. Georghiou: - To the cheaper - Papaetis - for the reasons invoked by Mr. Lambrinos and moreover because the machinery is urgently required. 10

A. Constantinou: By what I heard, I was persuaded that the tender of Papaetis is within specifications and I vote in favour of its award to this firm."

The Chairman of the Board said: "I reserve my decision in order to clarify certain matters with the technicians". 15

After the meeting and on 1st September, 1986, the Chairman stated the following:

"By studying the second lowest tender - that of applicants - I became certain that it has an ambiguity regarding the model since the one analyzed in the tender (TH9428), is different than the one referred to in the accompanying leaflets (TH9428E). I have no doubt that the two models are different. It is not absolutely clear which of the two models he offers and we are interested in the electronic (TH9428E). It is a fact that this tender has disadvantages. For this reason though there is a contradiction and ambiguity in the lowest tender too, I see no reason to purchase the more expensive since both tenders contain ambiguities. In view of this I accept the recommendation of the Ministry of Health and I vote like all the members of the Board for the award of the tender to Messrs Papaetis Medical Co., Ltd." 20
25
30

It is clear from the aforementioned extracts from the minutes of the Main Tender Board that what led the five members of the Board - excluding the President - decide in favour of the tender of the interested party - was the existence of ambiguities in both tenders. And it is also clear that in reaching this conclusion they relied on the views of those officials - Costéas and Pittas - who had already expressed themselves in favour of the award of the tender to the interested party. The Chairman of the Board, on the other hand, who reserved his decision in order to clarify certain matters with the technicians, - and we are not told who are the technicians he consulted - adopted the same line of approach as that of the other members of the Board which had been formulated - as already said - as a result of what Costéas and Pittas said. Therefore it can be inferred that the Chairman too relied on the views of officials who had already expressed themselves in favour of the award of the tender to the interested party. We are thus faced with a situation whereby the Main Tender Board had before it (a) two conflicting opinions: (b) In reaching its decision it relied exclusively and heard the views of the officials who formulated one of the two opinions and, (c) has given no reasons for rejecting one of the two opinions.

What is then the effect of this situation? In Conclusions from the Jurisprudence of the Greek Council of State under the heading "Reasoning Contrary to the Contents of the File" we read:

"Ελλείπουσα αιτιολογία δεν δύναται να συμπληρωθή εκ συγκρουομένων προς άλλα στοιχεία του φακέλλου: 377, 464 (45), 295 (54); διότι εν τη περιπτώσει ταύτη, η αναπλήρωσις της αιτιολογίας υπό του ακυρωτικού ενέχει ουσιαστικήν στάθμισιν μη επιτρεπτήν: 267 (45). Ούτω π.χ. αναιτιολόγητος τυγχάνει απόφασις εκδοθείσα εν όψει δύο αντιθέτων γνωμοδοτήσεων αρμοδίως συντάχθεισών, μη μνημονεύουσα τον λόγον της απορρίψεως της μιας εκ τούτων: 1391 (48). Εξ αντιθέτου όμως, εκρίθη πλήρως ητιολογημένη υπουργική απόφασις δεχομένη τας απόψεις της μειοψηφίας γνωμοδοτικής επιτροπής, επ' όσον εν προοίμω της αποφάσεως γίνεται μνεία της εν λόγω γνωμοδοτή-

σεως, ήτις αποτελεί στοιχείον προς σχηματισμόν της ουσιαστικής επί του θέματος κρίσεως του Υπουργού: 541 (54).

And in English it reads:

"Lacking reasoning cannot be supplemented from conflicting to each other elements in the file: 377, 464 (45), 295 (54), because in such a case the supplementing of the reasoning by the Annuling Court amounts to evaluation of the merits which is not permissible: 267 (45). So it is without reasoning a decision issued in the light of two conflicting opinions prepared competently which does not make reference to the ground of rejecting one of the two. 1391(48). On the contrary, however, a ministerial decision was found as fully reasoned, when accepting the views of the minority of a committee giving an opinion, as in the preamble to the decision there was reference of the said opinion, which constituted an element for the formation of the substantive judgment of the Minister: 541(54)." 5 10 15

The above approach - reasoning contrary to the administrative records - has been consistently adopted by the case law of this Court (see *Ioannou v. The Republic* (1976) 3 C.L.R. 431). 20

In view of the above statement of the law the sub judge decision is not reasoned because it was reached whilst two conflicting opinions were in existence and there was failure to record the reasons for rejecting one of such opinions (vide Conclusions from the Jurisprudence of the Greek Council of State supra). 25

The sub decision must be annulled for another reason. As already said the Main Tender Board heard only - and relied on - the views of those officials who had already expressed themselves in favour of the award of the tender to the interested party and has failed to hear and consider the views of the side - the E.M.S. and the majority of the Technical Committee - who were in favour of the award of the tender to the applicants and who stated that it was the only tender that was within specifications. Such an ap- 30

proach by the Board runs, in my opinion, contrary to all norms and notions of good administration under which a collective organ has to act (See *Kyprianou (No. 2) v. The Republic* (1975) 3 C.L.R. 187 and *Medcon Construction v. The Republic* (1968) 3 C.L.R. 535.).

For all the above reasons the sub judice decision is annulled, but in the circumstances there will be no order as to costs.

*Sub judice decision annulled.
No order as to costs.*