H.C.J 316/63

GAZIT & SHEHEM BLDG. LTD.

v.

PORTS AUTHORITY and others

In the Supreme Court sitting as the High Court of Justice
[January 23, 1964]
Before Sussman J.,. Landau J. and Manny J.

Public tenders - fair competition and equal terms - undisclosed matters - desire to save public funds.

Whilst the second respondent was building a wharf in Kishon harbour, the first respondent issued a tender for the erection of a warehouse in the same place. The second respondent competed in the tender but its bid was not the lowest. Because, however, of the desire to have the job finished for the coming citrus marketing season and because of the difficulties apprehended if two different contractors worked on the site at the same time, the work was awarded to the second respondent after negotiations for a reduction of the price. Only the second respondent of all those competing knew of the urgency for carrying out the work. The petitioner whose bid was the lowest challenged the award.

Held (1) The purpose of a public tender is on the one hand to obtain as many bids as possible from among which the most appropriate one can be chosen and on the other hand to give an opportunity for fair competition on equal terms to all participants.

(2) A contract is not to be awarded on grounds not obvious from the nature of things and undisclosed in the tender. Matters which are withheld create from the outset a situation of inequality.

(3) It is not proper to issue a tender with the intention of afterwards negotiating a reduction in price with one or other bidder. A bid is to be accepted or rejected as it stands. The desire to save public funds may well be *bona fide* but that is not the only element in conducting public tenders.

Israel cases referred to:

(1) H.C. 292/61 - *Bet-Ariza Rehovot* Ltd. *and others* v. *Minister of Agriculture and others* (1962) 16 *P.D.* 20.

(2) H.C. 273/60 - *B. Givstein* and *another* v. *Mayor, Council and Inhabitants of Rishon-le-Zion and another* (1961) 15 P.D. 916.

(3) H.C. 25/63 - *Uniko Roitman Ltd*. v. *Local Council of Kirya*t *Ono and another* (1963) 17 P.D. 1208.

(4) H.C. 117/63 - *A. Zalo*f v. *Mayor, Council and Inhabitants of Kfar Saba and another* (1963) 17 P.D. 1278.

(5) *H.C.* 210/52 - *Rehitei LaKol and another* v. *Minister of Commerce and Industry and another* (1952) 6 P.D. 795.

I. Nahshatan for the petitioner

Z. Terlo, Deputy State Attorney, for the first respondent.

R. Nabat for the second respondent.

SUSSMAN J. A wharf is in the course of being built in the Kishon area which is under the control of the first respondent. The work was given by the first respondent to the Ports and Foreign Work Co., which is a part of Solel Boneh Ltd. This company is closely linked with the second respondent. Although separate legal entities, the activities of the two companies in Israel are in practice combined and the work in question is being mainly carried out by the personnel and with the equipment of the second respondent.

By notice in the newspaper "Ha-Aretz" of 18 August 1963 the first respondent informed contractors of its intention to publish "a tender for the building of a warehouse of 5,000 square metres adjoining a new wharf (on the north side) which is now being built in the Kishon area of Haifa port" and invited contractors interested in being included in the list of participants in the tender to apply and receive approval of their inclusion. The petitioning company, a building contracting company, which was at its request included in the list, received from the first respondent the information it required to prepare its bid, including technical specifications, and duly put in its bid. The second respondent also submitted a bid and in addition three other bids were received by the first respondent.

2. Under clause 7(e) of the Practice regarding Tenders, laid down by the first respondent, it may "enter into a contract without tender if the contract is connected with any one of the

following activities: ... (e) in every case ... where the Director of the Authority decides that the circumstances require that execution of the work should be negotiated and not put out on tender." Hence to give out the work on tender is not compulsory. The Director, however, decided not to allot the work to any given contractor by negotiation and accordingly a tender was issued. In accordance with clauses 9 and 20(c) of the said Practice, the tender was to be in the form of "open competition", that is, by publication in two daily newspapers and by personal notice to at least three contractors.

3. On 25 October 1963, the offers received were opened by the Central Tenders Committee of the first respondent. It emerged that the lowest bid came to IL 720,790.20 and the highest to IL 1,287,983.40. The identity of the bidders was not then disclosed to the Committee. The Committee decided to pass the offers over to the engineering division and resolved that at its next meeting it would decide who had won the contract and when the work was to begin. In view of this, a technical committee met, which made the following recommendation to the Tenders Committee:

> "The cheapest bid is that of Competitor No. 3, then comes the bid of Competitor No. 5 and thirdly in the amount of the bid Competitor No. 1.
>
> The difference between the three offers is within 4% approximately. On the other hand it is very important to commence putting up the warehouse at the same time as the wharf is built. It appears to us that a decision should be made only after the names of the competitors are ascertained and in the event that the work is given to Competitor No. 3 it should be required to sign an express undertaking not to make any demands over excavation, locksmith and electrical work."

The technical committee also did not know who were the participants in the tender.

On 14 November 1963, the Tenders Committee met again, with the recommendation of the technical committee before it. The Committee ascertained at this meeting that the cheapest bid had been submitted by the petitioner, whereas the price proposed by the second respondent was IL 739,339.05. Another bid was for IL 753,909.75. The Committee

resolved "to accept the offer of Solel Boneh (that is, the second respondent) provided the company agreed to a reduction of 2.5%". The resolution went on to give the following reason.

> "Reason: Solel Boneh Ltd. is at present engaged in building wharfs in Kishon harbour. The entry of a second contractor into an area where another is already active necessitates coordination and adjustment of work. In this case that would cause a four months' delay in commencement and since the building work will take 10 months, the warehouse will not be ready by April 1964/65."

4. Subsequently, Mr. Laskov (the Director of the Ports Authority) got into touch with the second respondent which agreed to a reduction of 2%. As a consequence, the Central Tenders Committee resolved on 24 November 1963 to give the work to the second respondent. The next day, 25 November 1963, an order was sent to the second respondent to commence work and work in fact commenced on 3 December 1963.
Later, on 10 December 1963, a contract was signed between the two respondents.

5. On 12 December 1963 the petitioner applied to this Court for an order *nisi* and the following day an order issued from the Court, calling upon the respondents to show cause why the said contract should not be set aside and the work not be awarded to the petitioner which had made the lowest bid. Along with the order the Court directed that in the meantime the work should cease until after trial.

6. In his affidavit on behalf of the second respondent in answer to the order *nisi*, Mr. Yaakov Porat, one of its directors, states in clause 7(3):

> "After learning that the intention was that the work should begin at once in coordination with the main work (the wharf of Kishon harbour) and we could thus save money, we agreed to reduce our bid but only by 2%, and we informed Mr. Laskov accordingly so that he could pass on our amended offer to the Committee."

The affidavit also states in clause 6(b)(2)

> "The said work - erection of the warehouse - must be done in the same area as the main work is being done. A contractor doing the two at the same time can do both and each with greater efficiency, speed and coordination than two contractors, however capable they might be."

As we know the Committee approved the bid at its meeting of 24 November 1963.

By virtue of rule 16(a) of the Rules of Procedure in the High Court of Justice we found fit to allow cross-examination on the affidavits in order to do justice in the matter, but Mr. Porat was injured in a traffic accident and could not appear in court. In his place another director of the second respondent, Mr. Tzutzka, was examined by counsel for the petitioner and he confirmed that when the second respondent sent in its bid, it knew that if successful it could commence the work of building the warehouse immediately. It should be added here that the contract fixed a period of "10 calendar months from the day it was decided to commence work". Thus, the date of commencing and of completing the work was left to the bidder; it was, however, clear to the second respondent that if it obtained the work the first respondent would order it to be commenced at once. Petitioner's counsel showed that Mr. Porat's assertion in clause 7(3) of his affidavit cited above contradicted the evidence of Mr. Tzutzka, the former saying that the second respondent only learned of the intention to commence work at once during the conversation with Mr. Laskov after the tender was opened. The question whether or not this is a contradiction no longer needs to be resolved. It is reasonable to assume that the advantage mentioned in clause 6(b)(2) of Mr. Porat's affidavit, that as a contractor already working at the site the second respondent could carry out the two jobs, "both and each of them with greater efficiency, speed and coordination than two contractors", was known in advance by the second respondent. The commencement of the work, however, was not made conditional only upon the readiness of the contractor but mainly on the instructions given by the tenderer, and in this respect Mr. Natan Kaplan testified in his affidavit on behalf of the first respondent that there was no possibility of allowing two contractors to work simultaneously on the site. Therefore, he said, "no company could commence before the wharf was built", meaning obviously no company other than the second respondent which was already engaged in building the wharf, "and this we knew when the tender was published". The wharf was to be finished by 15 March 1964, which meant that no other contractor could commence before 15 March

1964, and, as I have said, Mr. Tzutzka, a director of the second respondent, also knew that his company would receive instructions to commence work at once and would not need to wait until the wharf was finished, provided only it won the contract.

It is reasonable to assume that in negotiating with the second respondent Mr. Laskov emphasised this fact and used it as a reason for reducing the price, and that Mt. Porat's statement in his affidavit is so to be understood.

In spite, however, of the advantage of carrying the two sets of work at the same time, which enabled the second respondent to save on expenses, its offer was not the lowest.

7. In clause 11 of the petition, the petitioner sets out its criticisms of the tender. It submits *inter alia* that the first respondent preferred on the face of it the second respondent "without any justification and not in accordance with the standards of law and equity but out of extraneous considerations, invalid and arbitrary, and out of unfair preference and discrimination" and that "it had made up its mind to hand over the building of the warehouse to the second respondent even before it had published the tender and only published that in order to do its ostensible duty."

We agree with the submission of the Deputy State Attorney that these matters were not proved. These is not an iota of evidence that the tender was a sham. We also agree with the submission of counsel for the second respondent that this conduct was not exceptional. We believe what the declarant on its behalf, Mr. Porat, said, that it knew nothing about the existence of the petitioner and that its existence first came to its knowledge when it read in a newspaper that an order *nisi* had issued from this Court. Notwithstanding all this, we are of the opinion that the tender does not comply with principles laid down by this Court regarding public authority tenders and must be treated as invalid.

8. As I have said, the second respondent had the initial advantage that if it won the contract it could carry out the job, or more correctly the two jobs, "with greater efficiency, speed and coordination than two contractors" and with a saving of costs. Thus far all seems to be fine. since the difference in performance capacity between two competing contractors is not a flaw.

But the first respondent had the intention, not disclosed in the tender, of instructing the second respondent to commence work immediately, which it would not do with any other contractor until March 1964 and make it impossible to finish the work until 15 January 1965, that is ten months after the wharf was finished. Here we come to the matter which was undisclosed to the participants in the tender: the first respondent vitally needed the wharf to be finished, even if incompletely without gates and doors, by October 1964, since otherwise it would be unable to use the structure to market the season's citrus fruit. A building delay would involve the first respondent in losses, estimated by Mr. Kaplan at IL 1,833 a day. Hence the first respondent decided that even if the job done by the second respondent cost more, the loss arising out of delay in erecting the warehouse would be avoided, and as long as the cost outbalanced the loss, the second respondent was preferable to any other contractor.

9. The consideration that there was already a contractor on the site with equipment and workers, who could finish the job at an earlier date than any other contractor is certainly a material consideration and there is nothing wrong with it. All the more so when the presence of two contractors working at the same time, each with their own equipment and workers, was likely to create disputes and problems, as Mr. Kaplan explained in evidence before us. For this reason we should not criticize the first respondent had it seen fit therefore to forgo a tender and contract with the second respondent without tender on the basis of clause 7(e) of the Practice. But had it done so, it would presumably have been unable to fix a competitive price and would perhaps have had to pay more to the second respondent. In parenthesis, it is to be observed that before publishing the tender the first respondent estimated the building costs at IL 823,316.50 and as a result of competitive pressure it also obtained a reduction of 2% on the bid made by the second respondent, which was already more than IL 80,000 less than the estimate. The first respondent thus saved public funds, and there is no foundation for the argument that it did not act in good faith. Its intentions were desirable and fair. We also believe the first respondent, that had the difference between the bid of the second respondent and the lowest bid been greater than it was, it would not have been given the job but the lowest bid would have been accepted in view of the fact that the loss entailed by delay in erecting the warehouse till after the commencement of the season of October 1964, would be balanced by the saving in the costs of the building.

10. We are prepared to agree with the submission of the Deputy State Attorney that the petitioner as well knew, or should have known, that the second respondent had the said initial advantage, that by already being on the site it was in a better position to carry out the work. The participants in the tender visited the place and the representatives of the petitioner also saw that the wharf was in the course of building. As experts they could not but understand and know what others knew, that a contractor doing other work near to the site would be at an advantage. The petitioner indeed competed in these circumstances with open eyes. But the ability of a competitor to do the work is one thing, and the considerations of the tenderer in choosing a contractor is another. As regards the first, it is natural that one's capacity should differ from another's and nothing rests on that. But all who join in a tender are entitled that the choice between those competing should not fall to be decided by matters not in the nature of things and undisclosed in the terms of the tender. Secret conditions create at once lack of equality between competitors, whilst a contractor submitting his offer and joining in a tender expends money in preparation and expects that he is *par inter pares.*

The petitioner was not *par inter pares.* Although the contractor building the wharf would save on expenses by also erecting the warehouse, the petitioner still made a lower bid. The first respondent was interested in having the warehouse ready by 15 October 1974 and for it that was determinative. But nothing was said about that in the tender nor was the petitioner aware of it. The petitioner was prepared to carry out the work during such time as another contractor continued building the wharf. The first respondent was afraid of disturbances in the latter and since these fears were not imaginary its wishes are to be honoured, since if the contract were not awarded to the second respondent work could not commence until that was finished. For this reason the second respondent was instructed to begin at once and the decision went in its favour, but no other bidder was entitled to that, although he was not restrained from carrying out the work because of the presence of another contractor on the site. It follows that every other bidder was disqualified from the start unless his bid was so much smaller as to compensate for the prospective loss resulting from putting off the warehouse from October 1964 until January 1965.

11. The purpose of a tender, as this Court ruled in Bet-Ariza Rehovot Ltd. v. Minister of Agriculture (1), is twofold: from the standpoint of the person issuing the tender it is to obtain as many bids as possible from amongst which to choose the most convenient and

most appropriate; from the standpoint of the contractors it is that "the tender gives them the opportunity to get the proposed job in fair competition and under conditions of equality."

The first respondent's tender failed in respect of the second purpose. Its interest in having the work completed by October 1964 was of decisive importance and not only was that not disclosed in the tender but a period of ten months was laid down from a date it would decide upon and the fact that the second respondent would be instructed to commence at once whilst any other contractor would only do so after the warehouse was finished was not mentioned. By suppressing this important fact from those participating in the tender - apart from the second respondent which knew, as I have said, that it would be allowed to begin at once - the first respondent was in breach of the principles of equality on which every fair tender is founded. Had the other contractors known of the first respondent's hidden intention, they could have competed more effectively with the second respondent; they could have made bids which because of the difference of cost between them and the second respondent might have gained them the contract even though they did not begin building at once. And it is not impossible that because of this absence of equality, the other contractors might have chosen not to compete in the tender.

12. In *Givstein* v. *Rishon-le-Zion* (2) this Court nullified a tender drawn up by a public authority because, whilst under the tender it had to chose the most convenient bid within the terms of the tender, it had decided to have regard also to an offer which it had already received outside the tender. Such an act, the Court held, offended the rule of equality in tenders. Although in the present case the first respondent did not deal with any offer outside the tender, it drew up the tender in the knowledge that, when it came to examine the bids put in, it would decide according to a consideration which gave one bidder an advantage. That bidder knew about this but the rest did not. Even if this consideration was valid - and we have already expressed the opinion that the first respondent cannot be said to have acted maliciously and in bad faith - the result was invalid because in fact it led to discrimination and preference. Any one making a bid in response to the tender was entitled to expect that in general the lowest bid would be accepted. Here, on the other hand, the lowest bid would not have been successful unless the difference between it and that of the second respondent would render delay in the commencement of the work worthwhile. In the words of this Court in *Uniko Roitman Ltd. v. Kiryat Ono* (3) the effect was that "competition among the bidders was not conducted within bounds known to all of them,

which they had to keep in mind". And nothing turns on the fact that in that case, the tender suffered from many defects whereas here there is only one ground for disqualifying it.

13. We have asked ourselves whether the first respondent could have drafted the terms of the tender it published in such a manner that on the one side disclosed the decisive facts on which it intended to accept a bid and on the other would not deter contractors from participating in the tender and competing with the second respondent when they read that the first respondent wished the warehouse to be finished by October 1964 and that they would not be allowed to commence the work until the wharf was completed. One thing certainly could have been published, that completion of the building by October 1964 was vital for the purposes of the first respondent. As for the date of commencement - as against the necessity to finish by the date mentioned - the first respondent might possibly have maintained equality had it asked for alternative bids based, for instance, on a six or seven or ten month period for the job, provided the warehouse was finished by the date mentioned. We have said "possibly" because we cannot determine what minimum period was required for carrying out the work but, be that as it may, the lack of possibility to issue a fair tender cannot justify an unfair one; it can only justify for objective reasons giving the work to a contractor, capable of doing it, not by way of tender.

14. The petitioner voiced another objection to the tender proceedings. It complained that as a result of the decision of the Tenders Committee of 14 November 1963, the Director of the first respondent got into touch with the second respondent, as mentioned in paragraphs 3 and 4 above, and negotiated with it behind the backs of the others. To justify this the first respondent relies on rule 47 of the Practice which prescribes that

> "Where the Tenders Committee decides to give the work not to the lowest bidder, the chairman of the Committee shall conduct negotiations with the bidder to whom the work has been given for reducing the price bid and adjusting it to the lowest bid."

We are afraid that rule 47 creates a difficulty which the Deputy State Attorney did not succeed for all his ability to dispel. If the Committee decided "to give the work not to the lowest bidder", it is difficult to understand what use there is in conducting negotiations "with the bidder to whom the work has been given". Why should this bidder, to whom the

work has already been given, agree to lower his price? It is superfluous to say that it is unprecedented to issue a tender in order afterwards to bargain about it with one or another bidder.

In fact the Committee at that meeting only came to a "conditional decision". The condition was actually not fulfilled since the second respondent agreed to a reduction of 2% and not 2.5% asked of it. We assume that had the Director of the first respondent not obtained this reduction in the negotiations he conducted, the Committee at its next meeting would have given the work to the petitioner because its bid was the lowest. There was no final decision not to give it the work. Although the hands of the first respondent were tied since it was interested in the second respondent's bid because it could begin at once, the first respondent had got itself into this difficulty by not disclosing the matter at once in the tender. For this reason the proceedings were invalid, as it was in *Zalo*f v. *Kfar Saba* (4). There, as here, "(the respondent) did not expressly say 'yea' or 'nay' " but "chose (the second respondent) as the only bidder with whom to negotiate, clearly by intending to obtain a reduction in price. Thus it offended against the principle of equality of opportunity and assurance of fair competition among the various bidders which are the foundation of public tenders" (at 1278). In *Rehitei Hakol* v. *Minister of Commerce and Industry (5)* this Court had already held (at 799) that negotiations with one bidder on a matter unbeknown to the others would disqualify a tender.

15. With regard also to the negotiations with the second respondent we have no doubt that the first respondent intended saving public funds and that attests to its good faith, but good faith alone, as we know, is not the sole basis on which to conduct a tender. Here the original sin was that because of the factor concealed by the tenderer, the true conditions of competition were unknown to all the competitors. When the bids were received and the second respondent did not make the lowest bid, the first respondent hesitated from paying it - because the work could be carried out more efficiently and perhaps more cheaply - more than that asked by any other bidder and felt itself bound to enter into negotiations. The first respondent's motive was proper and found justification in rule 47 of the Practice. But we are doubtful how rule 47 can be reconciled with the principle of tendering, that a bid is accepted or rejected as it is and no negotiations are conducted.

The cumulative effect of these two defects in the tendering process is that the first respondent used the bids as a means of reducing the demand of one bidder without revealing to the others that because of two considerations - the need to finish the building by October 1964 and the unwillingness to have two contractors on the site - the matter would not be dealt with on the basis of equality among the bids made.

16. Having found the tendering process imperfect, the question arises whether to direct the first respondent to give the work of building the warehouse to the petitioner in accordance with its bid.

Counsel for the second respondent stressed that the second respondent had already begun working and expended money in connection therewith. He also submits that no faulty behaviour attaches to his client. We agree to this submission but not for this reason alone can the contract made with it remain in effect. Prima facie invalidation of the tender compels the conclusion that the contract is to be cancelled and that it be given to one entitled to get the job in accordance with the tender, since otherwise there would be no point in this Court intervening in the matter.

Another reason moving this Court to refrain from passing on the contract may be that the contractor who was wrongfully successful has already carried out part of the work. Indeed in *Zalof* (4), unlike here, a very considerable part of the work had already been done. The value of what has already been done by the second respondent until stopped by the interlocutory order does not, according to Mr. Kaplan's estimate, amount to more than IL 4,000 - "not including organisation". As against the value of the whole tender which is over IL 700.000. this is a paltry sum and the second respondent can be compensated by the first respondent if it so claims. The very day when instructions were given to the second respondent to commence work, the petitioner turned to the first respondent asking why the contract had not been awarded to it. On the petitioner's part there was no delay.

The only doubt in our minds does not concern the rights of the second respondent but the public interest. Since we do not presume to compel the first respondent to allow the work to begin before 15 March 1964 when the second respondent leaves the port, is not the public prejudiced by the fact that the warehouse will not be ready for marketing citrus at

the beginning of the season? This Court, needless to say, is enjoined to safeguard vital public interests before which private rights must sometimes yield.

Having reached this conclusion, we invited counsel to find out whether the petitioner is ready to complete the building work by 15 October 1964. Petitioner's counsel informed us today, after consulting with his client, that the petitioner is prepared to do so provided that the first respondent instructs it to commence immediately on 15 March 1964 and that the site will be vacant and made available by that date. The idea is that the petitioner can already now, forthwith upon receiving the order for the job, make the necessary preparations for carrying it out but will not go onto site at the port until 15 March 1964, and will finish on 15 October 1964.

Accordingly we make the order *nisi* absolute and direct the first respondent to give the work to the petitioner in accordance with the conditions of the tender, subject to the dates for beginning and finishing the work is amended as above.

Order nisi made absolute.

Judgment given on *January 23, 1964.*