CASE TRANSLATION: GREECE

CASE CITATION:
Case No 803/2004

NAME AND LEVEL OF COURT:
Council of State for Suspensions

DATE OF DECISION: **15 September 2004**

MEMBERS OF THE COURT:
G Panayiotopoulos, Counsel of the State Council, President, substitute for the President of this Section and the senior counsel that had an objection Aik Christoforidou, Counsel V. Kintziou Counsel, Secretary I. Papacharalambous

LAWYER FOR THE PLAINTIFF: **Z. Spyropoulou**

LAWYERS FOR THE DEFENDANT: **G. Panousis and Pan. Anastasopoulos**

The committee of Suspensions of the Council of State (article 3 of the Law No 2522/1997 and article 52 of the Presidential Decree No 18/1989)

Sitting in Council on the 29th of March of 2004, with the following members: G. Panayiotopoulos, Counsel of the State Council, President, Aik Christoforidou, Counsel V. Kintziou Counsel, Secretary I. Papacharalambous

In order to decide on the petition of provisional measures of the 26th of November of 2003:

Of the company (...)
Against the University General Hospital of Thessaloniki
And against the intervening company (...)

Though this application, the court is asked to order provisional measures regarding the public, open notice of invitation to tender for the commission of medical equipment, in which eight automated respirators are included, for the satisfaction of the needs of the aforementioned Hospital.

The president of the Fourth Sector gathered the Committee in order to decide on the above application, according to the Law (article 52 of the Presidential Decree 18/1989 combined to the article 2 paragraph 2 of the Law No 2522/1997), appointed a rapporteur to the case and date the petition would be judged. During the meeting, the Committee heard the rapporteur, V.Kintziou. Afterwards, the lawyer for the applicant was heard, and asked the petition to be accepted; and afterwards the lawyers of the Hospital and of the second company were heard, who asked for the petition to be rejected.

After having studied the relevant documents

Considered according to the law

1. As for the lodging of the petition, the legitimate statutory fee has been submitted (no ...).
2. The Governor of the University General Hospital of Thessaloniki issued a public, open notice of invitation to tender, no 2/2-4-2003, using the criterion of the most profitable offer, for the commission of the items set out in Annex A of the notice of invitation of medical equipment, in which eight automatic respirators are included (1st type) for the satisfaction of the needs of the aforementioned hospital, the budget of which was 792,370 euros. In the invitation to tender, conducted on the 30.05.2003, the applicant company (...) and the company named (...) participated, amongst others. According to the decision of the Board of Directors of the aforementioned hospital, no20/ dated 21.10.2003 (12th issue), the minutes of the relevant Committee of Assessment dated 13.10.2003, judged the technical offers of the aforementioned companies, referred to the 1st kind of commission, were accepted and were graded with 102 and 118,2 grades respectively. On 3.11.2003, the applicant raised an objection against the legitimacy of the assessment and the grades of the technical offer in respect of one of the companies (...), based on the provisions of article 15 paragraph 2 c of Presidential Decree 394/1996, which was rejected as not having been exercised in time, according the minutes of the relevant Committee of Objections dated 7.11.2003, a decision of the Board of Directors of the Hospital against which the application was filed, no 21/dated 11.11.2003 (subject 250). Following this, the applicant company complained that the rejection of its objection as not accepted, and applied for it to be accepted and for the technical assessment of the offer to be effective from the beginning, and for the improvement of the grading scale, exercised on the 13.11.2003. The appeal was based on the provisions of article 3 paragraph 2 of Law no 2522/1997 against the decision of the Board of Directors of the Hospital and the of the relevant Committee minutes dated 13.10.2002 and

7.11.2003, which was silently rejected by the passing of 10 days without any action from the day that it was submitted. The applicant, by the application under question dated 27.11.2003, demands that proper provisional and protective measures be taken for the protection of its legal interest in accordance with the provisions of article 3 of Law no 2522/1997.

3. The invitation to tender under question, given the provisions of articles 8 and 9 of Law 2955/2001, falls within the provisions of Law No 2522/1997 (A' 178) because of its object and irrelevantly of the amount of the budget.
4. The aforementioned company (...) legitimately demands the rejection of the application in question by its intervention in the presence of the Committee of Suspensions of Council of State dated 22.12.2003. The allegation raised, and submitted in the statement of case dated 1.4.2004 after the deadline defined by the President of the Committee, that the above intervention was not exercised in an acceptable manner due to the lack of notification of the application to it (meaning the company), is rejected as not being legitimate. This is because this type of notification is not foreseen either in article 3 paragraph 3 of Law no 2522/1997, nor in article 52 of presidential decree 18/1989 as this is valid, supplementary applied in this specific case, according to the provisions of article 2 paragraph 2 of the same Law no 2522/1997, for procedural issues which are not regulated by it. (E.A. 500/2002, 74/2000).
5. According to the minutes of the company dated 13.10.2003, it was submitted that the opinion of the Assessment Committee of the technical offers of the competition was made by a legitimate quorum, because there where four out of five members of the collective body present, in accordance with the provisions of article 14 paragraph 1 of the Code of Administrative Procedure, ratified by the first article of Law no 2690/1999. Moreover, the minutes carry the signature of the President of the Committee, which is sufficient for the legitimate existence of the act in accordance with the provisions of article 15 paragraph 8 of the same Code, and is also signed by the other members present. Consequently, the applicant does not have any grounds to raise the allegation by making the application under question. The applicant has raised the argument in its appeal in the presence of the Administration, that the minutes are illegal as far as they are not signed by the (absent) fifth member of the Committee, which did not have legitimate basis due to a lack of quorum, with the corresponding result that the approval of these minutes by decision no 20 dated 21.10.2003 (subject 12) of the Board of Directors of the Hospital, is faulty.
6. According to the provision of articles 2 and 3 of Law No 2522/1997, the enactment of the appeal of article 3 paragraph 2 of this law, a procedural condition of exercising the application of the provisional and protective measures, provides for the possibility, on one hand to the party with an interest in the matter to raise, in time, specific actual and legal causes against the damage (to him) of any act or omission, and on the other hand, to the Administration to accept the appeal and redress the possible fault or to reject it in writing or in silence. In case of a silent rejection of a prejudicial appeal, if an administrative appeal of the interested party has been put before the proper body, referring as in this case, to issues of a technical nature, the proper body should have examined the objections submitted, so that the case could be determined at the point of judging the application of provisional and protective measures (comp. E.A. 554/1999, also E.A. 138 /2002).
7. The provisions of the last part of paragraph 2 of article 3 of Law no 2522/1997 provides that 'the provisions of this paragraph are without prejudice to the provisions of the legislation in force that lays down the exercise of administrative appeals against the conduct of public invitation to tender'. As a result, it is inferred that exercising an administrative appeal is not a prerequisite for the application of the provisional and protective measures to be accepted, nevertheless exercising it on time interrupts the deadline for the appeal set out in article 3 paragraph 2 of Law no 2522/1997 (E.A. 114, 617/2003, 72, 331/2002, 513, 719/2001). Nevertheless, in article 14, which bears the title 'Transfer of documents by electronic means (fax- e-mail)' of Law no 2672/1998 bearing the title 'Financial resources of prefecture government and other provisions' it is laid down that '1... 2. For the application of the present article it is defined ... c) As electronic mail, the system of sending and receiving messages through the internet, from and towards the electronic address of the users. d) As a message of electronic mail, the information, the text or the data file or other document, that is transferred through a system of

electronic mail'. At the last part of the paragraph 17 of article 14 of Law no 2672/1998, it is laid down that 'Sending a message by computer does not result in initiating or starting the deadlines for exercising an administrative appeal, legal assistance and legal means.'

8. The present case arises from the content of the folder, according to the document of the Hospital dated 22.10.2003, against which the application was exercised, addressed to the participants invited to tender for the first item under commission, which was notified on the same day to the applicant company by facsimile transmission, it was made known that with the no 20 dated 21.10.2003 (subject 120) decision of the Board of Directors of the Hospital, the minutes of the technical assessment of the relevant Committee dated 13.10.2003 were approved, that the participating companies had the opportunity to be informed of the result of the assessment of the technical offers by visiting the Office of Commission of the Hospital on specific dates (27.10.2003, 29.10.2003 and 30.10.2003), but also by sending, following the specific application, the copy of the above minutes to the electronic address that was for this reason noted by the Hospital.

   Following its relevant request dated 22.10.2003, the minutes of the Committee of Assessment dated 13.10.2003 were sent to the electronic address of the applicant company on 27.10.2003 by electronic mail, which consisted of a legitimate method of notification of these minutes (see article 14 paragraph 4 last paragraph, 5, 6 c, 19, 20, Law no. 2672/1998 combined to article 1 paragraph 2 of Presidential Decree 150/2001, A' 125, and articles 1 and 2 paragraph 2 of Presidential Decree 342/2002, A' 284).

   Following this, the applicant raised their objection on the 3.11.2003, according to article 15 paragraph 2 c of Presidential Decree 394/1996, complaining about the legitimacy of the assessment and of the rating of its technical offer with 102 grades against 118,2 grades of the company intervening, and asked for a new technical assessment of its offer and the for the improvement of its rating scale. The minutes of the Committee of Objections dated 7.11.2003, indicate the 21/11.11.2003 (issue 25) decision of the Board of Directors of the Hospital in which the objection of the applicant was raised, and was rejected as inadmissible because of its late exercise, on the 3.11.2003 after the expiry date of the 31.10.2003, of provisions of article 5.2.3 of the tender notice (which repeats article 15 paragraph 2 c of PD 394/1996) with a deadline of three working days for the objections to be raised against the no 20 dated 21.10.2003 act of the Board of Directors of the Hospital, approving the Minutes of the Committee of Assessment dated 13.10.2003, which was notified to the applicant by electronic mail on the 27.10.2003.

9. The assessment of the Administration regarding the rejection of the applicant's objection, was exercised late on the 3.11.2003, after three (3) working days (from 29.10.2003 until 31.10.2003, because the 28.10.2003 was by law exempted) dated from the date of the notification to it by electronic mail dated 13.10.2003 in accordance with the minutes of the Committee of Assessment, does not seem to be legitimate. This is because, according to the provisions of article 14 paragraph 17, last paragraph of Law no 2672/1998, the purpose of the minutes (where the damage to the applicant was mentioned as a result of the assessment and the rating of its technical offer) sent to the electronic address of the applicant company by electronic mail, does not initiate the deadline for the exercise of the above administrative appeals against the no 20 dated 21.10.2003 act of the Board of Directors of the Hospital. As a result, the deadline of three (3) working days to raise any objection did not start with the sending of the minutes of the Committee of Assessment (for which the applicant company claims by their application that was acknowledged on the 29.10.2003), which means the Administration is obliged to judge the application as in time, and to examine the essence of the application.

10. On the other hand, because of raising the objection in time, according to the above, the five days deadline for the exercise of the appeal of the provisions of article 3 paragraph 2 of Law no 2522/1997 was interrupted, in addition the last appeals were exercised in time on 13.11.2003 against, rejecting the objection, the no 21 dated 11.11.2003 decision of the Board of Directors of the Hospital (which was issued before the expiry of the deadline of the ten working days, according to article15 paragraph 2 c of PD 394/1996 in which the appropriate body should have replied to the objection within the time as laid down by the

same article and the content of which was notified by facsimile transmission to the applicant the day after it was issued). Following that, the application under question was exercised in time, on the 27.11.2003, according to article 3 paragraph 3 of Law 2522/1997 within the deadline of ten days according to paragraph 2 of the article 3 of Law 2522/1997, silently presumed the rejection of the appeal with the expiry of ten says from its submission.

Because, as already mentioned, the appeal of article 3 paragraph 2 of Law no 2522/1997 of the applicant, which includes claims of a technical nature, the same as those of its previous objection, was silently rejected by the Administration, which, because of its faulty rejection of the objection as not accepted, did not examine the essence of the claim, as it was obliged to, the issues raised repeated in the appeal legal and with actual claims. Based on these data, with the view to the issues of a specific technical nature raised by the objection and by the Appeal, the Committee of the Suspensions judges that it cannot examine the defects of the assessment and rating of the technical offer of the applicant by the application under question, nor can it intervene, because the case is not clear from the point of view of the legal and actual part. This lack cannot be healed by the documents of the Administrator of the Hospital against which the application was exercised and the President of the Committee of the Technical Assessment respectively, where the opinions of the Administration to the application under question are mentioned (34298/16.12.2003 and from 16.12.2003). Following this, the Committee of Suspensions taking under consideration the interest noted, judges that the application under question should be accepted, because it is seriously probable that the objection of the applicant was illegitimately rejected as not accepted with the no 21 dated 11.11.2003 (issue 250) decision of the Board of Directors of the Hospital, to suspend the execution of that act as well as the further progress of the procedure and the award of the invitation to tender, in respect of commission 1 species (eight automatic respirators). Furthermore, the case should be resent to the Administration in order to examine in essence the applicants' objections and relevant claims, which are repeated by the silently rejected claim.

For these reasons
It accepts the application under question.
Suspends the execution of the no 21 dated 11.11.2003 (issue 250) decision of the Board of Directors of University General Hospital of Thessaloniki. Orders not to further proceed to the procedure of tender invitation to tender and not to award it, as to the 1st of the commission items (eight automatic respirators).
Resends the case to the Administration according to the justification.
Rejects the intervention.
Orders the payment of the fiscal stamp.
Imposes against the application of the University General Hospital of Thessaloniki and to the intervening company equally, the judicial expenses of the applicant company at 580 euros each.
Judged and decided in Athens on the 2nd of April 2004.
The president counsellor the secretary
And Published on the 15th of September 2004
The president of the C Part of Vacations the secretary of the D Part.
In the name of the Greek people.
Every bailiff is ordered to execute the above decision when he is asked, the Public Prosecutors to act according to their competence and the Administrators and other bodies of the Public Force to help when asked.
The order is certified by the drafting and the signature of the present document
Athens,
.....
The president of Part D The secretary of Part D

Anastasia Fylla thanks Michael G. Rachavelias, correspondent for Greece, for his invaluable comments.

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Commentary

Despite the complexity in the legal thinking of the case, what is quite interesting is the fact that it reaches the following legal conclusion: sending a document (in the specific case, the minutes) by computer from an

electronic address with an e-mail, does not result in initiating or starting the deadline to exercise an administrative appeal, legal assistance and legal means, which is based on Act 2672/1998.

Nevertheless, the reasoning of the court fails to cover a series of critical issues. It does not mention whether or how the e-mail was signed, and if the lack of a signature was the reason that the provisions of the Act were not applied, or if a method of verification of the sender's identity was necessary.

This is quite obvious in administrative proceedings according to Greek law, especially if someone takes into account that recent case law has accepted that the appeal of the provisions of article 3 paragraph 2 of Law no 2522/1997 (that is also mentioned in this case) can be filed electronically (by facsimile transmission or an e-mail), but in order for this appeal to be valid, an original and tangible document needs to be produced to the clerk of the same court in five days, with identical content, bearing a manuscript signature. So, although in theory it is possible to submit electronic documents with an electronic signature, it appears that Greek courts and the legal system in general are less than prepared to accept such a progressive prospect at present. Perhaps this specific provision is obsolete and needs to be replaced to enable an e-mail message that bears specific requirements of form that could act to initiate the deadlines.

The judgment does not mention how the specific deadline can be initiated (given the fact that the sending of an e-mail does not initiate the deadline). Considering the content of paragraph 8, it mentions '*...that the participating companies had the opportunity to be informed of the result of the assessment of the technical offers by visiting the Office of Commission of the Hospital on specific dates (27.10.2003, 29.10.2003 and 30.10.2003), but also by sending, following the specific application, the copy of the above minutes to the electronic address that was for this reason noted by the Hospital'*, so perhaps a visit to the office and a 'formal' acknowledgement of the outcome could initiate this deadline. Unfortunately, such bureaucracy is commonplace in Greece, which is why this provision is probably obsolete.

Michael G. Rachavelias is the correspondent for Greece

