

Annulment of Ministry of Transport decision on concession contract provides clarity to tender parties



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Litigation, Cyprus

🔍 Facts

🔍 Decision

On 16 February 2021 the Administrative Court annulled a Ministry of Transport decision which had awarded *Concession Contract F for the Provision of Intercity Public Passenger Transport Services with the Use of Buses Connecting Cities in Cyprus* to Υπεραστικά Λεωφορεία Κύπρου (ΥΛΕΚΥ) ΛΤΔ (known by the trade name 'Intercity Buses'). The court's decision was issued in Recourse 892/2020, which was filed on behalf of the consortium comprising Malta Lines Limited and Kapnos Airport Shuttle Limited (together, MLKP).

Facts

MLKP was originally awarded Concession Contract F. However, on 27 April 2020 the court annulled the decision to award MLKP the contract following a recourse filed by Intercity Buses. The decision was annulled due to the Ministry of Transport's inability to investigate an issue concerning the fulfilment of an essential condition of the tender. It was concluded that certain terms of the tender documents regarding MLKP's technical and professional skills had been violated.

Previously, on 7 April 2020, another court annulled the Ministry of Transport's decision to award MLKP *Concession Contract E for the Provision of Public Transport Services by Bus in the Province of Famagusta*. This was for reasons relating to the transition and implementation plan submitted by MLKP in the context of the tender for said contract.

Both MLKP and the Ministry of Transport appealed the 7 and 27 April 2020 court decisions. The Ministry of Transport, in the appeal against the 7 April 2020 decision (regarding Concession Contract E), argued that the plan submitted by MLKP met the terms of the tender.

At the same time, the Ministry of Transport proceeded with a joint review of its decisions which had been annulled on 7 and 27 April 2020, despite the fact that they had not been annulled for the same reasons. During the review, the tender board decided that it was satisfied that MLKP had in fact met the conditions for the Concession Agreement F tender. However, the Ministry of Transport then proceeded, via a majority decision, to reject MLKP's bid for the concession due to non-compliance with the terms of the tender regarding the drafting of the transition and implementation plan. Following this decision, the Ministry of Transport awarded Concession Contract F to Intercity Buses.

In September 2020, MLKP filed Recourse 892/2020. MLKP also obtained a unilateral interim order suspending the validity and execution of the Ministry of Transport's decision, preventing the signing of the contract in question.

Decision

The Ministry of Transport's pending appeal against the 7 April 2020 court decision (for Concession Contract E) had a catalytic effect on the judgment of the Administrative Court, which concluded that the MLKP had raised a well-founded and justified issue of probable error in relation to the ministry's decision that it had not met the disputed condition (for the drafting of the transition and implementation plan), contrary to its previous position on the matter. The presumption of error, according to the court, was evident through the actions and position of the Ministry of Transport, which were manifestly contradictory. Specifically, while the Ministry of Transport pointed out the need for uniform treatment of both contracts (Concession Contracts E and F), it had adopted the conclusions of the court's 7 April 2020 decision (concerning Concession Contract E) and rejected MLKP's plan. However, at the same time, it filed a (currently pending) appeal in which it directly questions the correctness of the 7 April 2020 decision on the issue under consideration and its conclusions as to the legality of the plan submitted by MLKP. Consequently, the Ministry of Transport has put its assumption that MLKP did not fulfil this condition in serious dispute. By default, this is now sufficient evidence to presuppose the possibility of error on the matter.

The court further highlighted that the reviewed contradiction is not attributable to those who sometimes represent the Ministry of Transport in court (since the Cyprus law office assigned the representation of the Ministry of Transport to a private lawyer), but rather to the Ministry of Transport itself. On the one hand, the Ministry of Transport, in its capacity as appellant, supports the misinterpretation given by the court on 7 April 2020 regarding the contested condition. However, as the defendant in the present recourse, the Ministry of Transport upheld said interpretation as correct and, in the contested review discussed here, followed and applied it. The connection of the 7 April 2020 court decision concerning Concession Contract E with the present case (concerning Concession Contract F) was made by the Ministry of Transport itself, the attitude of which was neither uniform nor consistent. In fact, its diametrically contradictory and concomitant positions on the issue created, in the court's view, the impression of a possible (yet substantial) error concerning the interpretation of the term in question.

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