

**IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST
REPUBLIC OF SRI LANKA.**

In the matter of an application for grant of writ of certiorari and mandamus in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka

Court of Appeal case no. CA 303/2017

1. Reliance Life Sciences Private Limited,
Dhirubhdal Ambanie Life Sciences Centre,
R-282, TTC Industrial Area,
Thane Belapur Road, Rabale,
Navi Mumbai – 400701, India.
2. ABC Pharma Services (Private) Limited,
No. 42, Jayantha Mallimarachchi Mawatha,
Colombo 14.

Petitioners

Vs.

1. P.H.J.B.Sugathadasa,
Secretary, Ministry of Health, Nutrition, and
Indigenous Medicine,
Chairman of Standing Cabinet Appointed
Procurement Committee,
“Suwasipaya”,
No. 385, Ven. Beddegama Wimalawansa
Thero Mawatha,
Colombo 10
2. State Pharmaceuticals Corporation of Sri
Lanka,

No. 75, Sir Baron Jayathilaka Mawatha,
Colombo 01.

3. M/s A.J. Medichem international (Pvt) Ltd.
No. 50, Albion Lane, Colombo 09.

And 59 others

Respondents.

Before : L.T.B. Dehideniya J. (P/CA)

: Shiran Gooneratne J.

Counsel : Nihal Jayawardane PC with Malik Hanas for the Petitioners.

: Faizna Jameel PC ASG with Mithree Amarasinghe SC for the
Respondents.

Argued on : 20.10.2017

Decided on : 01.11.2012

L.T.B. Dehideniya J. (P/CA)

The Chairman of the Cabinet Appointed Procurement Committee on behalf of the Ministry of Health called global tenders for the supply of 80000 bottles of Human Albumin Solution BP/Ph Eur, 20% in 50 ml bottle. The 1st Petitioner through the 2nd Petitioner tendered a bid for the supply of the medicine. The Petitioners state that they were the second lowest bidder. After evaluating the bids, the petitioners state that the Committee decided to award the tender to the Petitioners. Thereafter the unsuccessful bidders made an appeal to the Procurement Appeal board and the Petitioners were invited by the board to participate at the inquiry. Thereafter the board directed the Technical Committee to re-evaluate the bids. On re-evaluation, the tender was awarded to the 3rd Respondent who was not the lowest bidder. The Petitioners' contention is that the tender should have been awarded to them.

The learned President's Counsel for the Petitioners submitted that the Technical Committee did not inform the Petitioners of their decision to award the tender to the 3rd Respondent. Further he submitted that the Petitioners were the suppliers of this medicine for the last four years to the Sri Lanka government without any complaint. As per the tender notice, the drug should certify to the BP/Ph Eur standard but the Petitioners' drug is IP standard certified drug. The learned President's Counsel admits that those are two different standards but the Counsel's argument is that the IP standard is equal or higher than the BP standard.

The learned President's Counsel, ASG, for the Respondents raised a preliminary issue that the Petitioners have given notice only to the 2nd Respondent, the other respondents; especially the 1st Respondent should have been noticed before supporting this application for interim relief.

On the merits, the learned ASG submits that the Petitioners' bid is not within the specifications of the tender notice. The tender notice was to supply the drug in BP/Ph Eur standard but the petitioners do not have that standard, their standard is the IP standard.

The learned ASG further submitted that the Procurement Appeal Board, after considering the appeal, directed the Technical Committee to evaluate the bids that are in conformity of the tender notice only and accordingly the tender was awarded to the 3rd Respondent. She further brought to our notice that the Letters of Credit to import the drugs have been opened before institution of this action.

The learned ASG submits that the Petitioners have given notice only to the 2nd Respondent and no notice of this application is given to the other Respondents. Her argument is that under the Rule 2 (1) of the Court of Appeal (Appellate Procedure) Rules 1990, the Petitioners should have given notice to the other Respondents too. The learned ASG relies on the

judgment of the of H/L Surasena J. in the case of C.A. (Writ) Application No. 98/2016 CA Minutes dated 22.06.2016 where the requirement of issuing notice prior to supporting for interim relief has been emphasized.

I will first consider the merits of this application.

The tender notice calling for global tenders is marked as P3. According to this notice it is very clear that the standard of the drug that is intended to import has to bear the BP/Ph Eur certification. The Petitioners' argument is that the IP certification is equal or higher than the BP standard. It may or may not be, but what is necessary is the BP standard. Unless the bidder has the BP standard, he is not qualified to bid. His bid should have been rejected at the first instant.

The Procurement Appeal Board is for a displeased bidder to challenge the decision of the Committee. In the present case the unsuccessful bidder exercising his right to appeal, has appealed to the Procurement Appeal Board. The board has invited the Petitioners also to make their representations to the Board. According to the learned ASG, the Board has directed the Technical Committee to evaluate the bids that were offered by the bidders who has the relevant standards according to the tender notice. Since the Petitioners do not have the relevant standards at the time of presenting the tender, his bid was not necessitated to be considered by the Technical Committee.

The learned President's Counsel for the Petitioner's argument is that the Petitioners were the suppliers for the last four years without the BP standard will not carry any weight. If the State wanted the BP standard drugs for the last four and the tender was awarded to the Petitioners who don't have BP standard during the last four years, is a wrong practice adopted by the authorities concerned and the Petitioners do not get any right to ask for the tender even for this year without BP standard. If the

Petitioners are of the opinion that the IP standard is equal or higher than the BP standard, they should have represented facts to the authorities prior to calling for tenders because the Petitioners knew that the standard required by the Sri Lankan government is the BP standard which they did not have. Once the tender notice is published, an offer which is not in conformity with the requirements cannot be accepted.

The learned President's Counsel submits that the Petitioners have obtained the BP certification after closing the tenders. What has to be considered is the qualification of the bidders as at the time of closing tenders. If he is not qualified to present the offer at the closing of the tender, any subsequent qualification obtained by the petitioner will not bring him in to the category of qualified bidders. His disqualification, as at the time of closing the tender, remains.

Under these circumstances, it is not necessary for the Court to consider the applicability of the rules at this stage. The Petitioners have failed to establish that they were qualified bidders for the subject tender.

Accordingly, I see no reason to issue notice or to issue any interim relief.

Application dismissed. No costs.

President of the Court of Appeal

Shiran Gooneratne J.

I agree.

Judge of the Court of Appeal