

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

In the matter of an Application for mandates in the nature of Writs of Certiorari and Mandamus in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka

CA (Writ) Application No: 233/2018

Vincy Engineering Pvt. Ltd.,
No. 23, 5th Lane,
Ratmalana.

PETITIONER

Vs.

1. Kapila Waidyaratne
Former Secretary, Ministry of Defence.
- 1a. Hemasiri Fernando,
Secretary, Ministry of Defence,

Both of 15/5, Baladaksha Mawatha,
Colombo 3.
2. Vice Admiral S.S. Ranasinghe,
Former Commander of Sri Lanka Navy.
- 2a. Vice Admiral Piyal de Silva,
The Commander of Sri Lanka Navy.

3. Rear Admiral W.M.N.D. Bandara,
Director Naval (Logistics).
4. Chairman,
Procurement Committee.
5. Commander (S) J.M.D.J.N.
Jayamanne,
Staff Officer (Local Procurement).
6. Commander (E) W.K.E. Waduge,
Deputy Director,
Marine Engineering.
7. Commander (S) G.D.S.A.P. Perera,
Staff Officer (Local Procurement).
8. Lieutenant Commander (S)
S.K.B. Lindagedara,
Staff Officer (Local Procurement).
9. P.M.N.D. Fernando,
Rear Admiral,
Director General, Logistics.

All of Sri Lanka Navy,
Naval Headquarters,
P.O.Box 593, Colombo 1.

10. Hon. Attorney General,
Attorney General's Department,
Colombo 12.

RESPONDENTS

Before: Yasantha Kodagoda, P.C., J/ President of the Court of Appeal
Arjuna Obeyesekere, J

Counsel: Shiral Lakthilaka for the Petitioner

Ms. Anusha Fernando, Deputy Solicitor General for
the Respondents

Supported on: 1st July 2019

Written Submissions: Tendered on behalf of the Petitioner on 26th
November 2018

Tendered on behalf of the Respondents on 6th
December 2018

Decided on: 2nd December 2019

Arjuna Obeyesekere, J.

By a letter dated 13th September 2016, annexed to the petition marked 'P4', the Sri Lanka Navy had invited the Petitioner to submit a bid for the supply of three 81kVA marine generators. Detailed specifications of the generators that were to be supplied had been annexed to 'P4'. The Petitioner states that it responded to 'P4' by its bid dated 27th September 2016, annexed to the petition marked 'P5a'. After a series of correspondence between the Petitioner and the Sri Lanka Navy, the Petitioner was informed by letter dated 23rd June 2017, annexed to the petition marked 'P14' as follows:

"We are pleased to inform you that your quotation for supply of 81kVA Marine Generators has been accepted by the Sri Lanka Navy Department

Procurement Committee... Hence, arrange to submit a Performance Security ... on or before 5th July 2017 in order to finalise the purchase... ”

In addition to 'P14', Sri Lanka Navy had issued the Petitioner a purchase order, annexed to the petition marked 'P15' in respect of the said generators, on the same date as 'P14'.

The Petitioner states that although it complied with the requirement in 'P14' by the submission of the Performance Security, Sri Lanka Navy did not proceed to enter into an agreement with the Petitioner. Instead, the Petitioner states that by letter dated 19th March 2018 annexed to the petition marked 'P3', it was informed by the 3rd Respondent that the Purchase Order 'P15' had been cancelled as *“your after sales service capacities are not sufficient to continue the procurement process”*.

Dissatisfied by the said decision, the Petitioner has invoked the jurisdiction of this Court seeking *inter alia* the following relief:

- (a) A Writ of Certiorari to quash the decision of the 3rd Respondent contained in 'P3' to cancel the purchase order issued to the Petitioner for the supply of three 81kVA generators;
- (b) A Writ of Mandamus directing the Respondents to continue with the tender process relating to the procurement of the said generators.

This Court would now proceed to consider the primary complaint of the Petitioner that the decision to cancel the Purchase Order is unreasonable and

arbitrary, in the light of the material that has been placed before this Court by the parties.

Having examined the documents submitted by the parties, this Court observes that in its bid of 27th September 2016 marked 'P5a', the Petitioner had made the following representations with regard to after sales service:

"We confirm that we have a well equipped workshop with a team of skilled Engineering Staff specially trained for generator installations, repairs and maintenance.

We provide prompt after sales service 24 hours a day and 365 days a year for our customers.

If the generator is needed to be brought to our workshop for any repair/service during the warranty period, we will provide a stand-by generator until the repair/service is completed."

By a second letter of the same date annexed to the petition marked 'P5', the Petitioner had informed the Chairman of the Procurement Committee as follows:

"We are the authorized distributor for 'Mega Power', 'Denyo', 'Lister Petter', 'Danyo' and 'Haomax' generators in Sri Lanka and equipped with fully company trained engineers and technicians for repairs and maintenance work.

We take this opportunity to inform you that we are one of leading players in the field of supplying and installation of generators in Sri Lanka and gained wide experience in supplying, installing, commissioning and maintenance of generators to government and private organisations island wide.

We also have a well equipped workshop manned by fully qualified technical team attending to after sales service within 24 hours in the Colombo city limits and 48 hours in outstations.”

By a third letter dated 27th September 2016,¹ which has not been produced with the petition, the Petitioner has informed the Chairman, Procurement Committee as follows:

“Certification of the Workshop facilities and having of tools and accessories for after sales service

We hereby certify that we have fully equipped workshop facilities dedicated tools to carry out the after sales services, maintenance and repairs for the Generators and other machineries marketed by us and also having a team of skilled Engineering Staff specially trained for carry out the after sales services, maintenance and repairs.

Our workshop addresses are as follows:

Workshop No. 1 – No. 7, 37th Lane, Colombo 6.

¹ This document has been annexed to the set of documents marked '2' filed by the Respondents.

Workshop No. 2 – No. 11, Pennyquick Road, Colombo 6.”

It is the view of this Court that by the above letters, the Petitioner had represented in no uncertain terms that it has fully equipped workshops and qualified, skilled and experienced staff to carry out the maintenance and repairs of the generators that were to be supplied.

This Court, having observed that the petition does not contain any material with regard to what transpired between the Petitioner and the Respondents after the Purchase Order 'P15' was issued and prior to the cancellation thereof by 'P3', afforded the Respondents an opportunity of filing documents to explain what prompted the Sri Lanka Navy to come to the conclusion that the Petitioner does not possess the capability to provide after sales services, which is the basis for 'P3'.

By a letter dated 25th August 2017,² the Respondents had informed the Petitioner that it has received information that the Petitioner has supplied false information with regard *inter alia* to its after sales service capabilities, and called upon the Petitioner to confirm whether it has workshop facilities and other resources to carry out repairs and maintenance, to which the Petitioner had responded positively.³ Sri Lanka Navy had thereafter appointed a Board of Study to '*ascertain the capacities/facilities*' possessed by the Petitioner.⁴ Pursuant to a joint physical inspection carried out with the

² This letter has been produced by the Respondents marked '10'.

³ This letter has been produced by the Respondents marked '11'.

⁴ The report of the Board of Study has been produced by the Respondents marked '13'.

Petitioner of its workshop facilities, the Board of Study had made the following observations:

"The Committee Members visited the workshop No. 1 at Colombo 06. However, it was observed that the said location is only a storing yard of generators which is named under M/S Mangala Electronic and Supermarket. Neither was there any generator repair facility nor spares available in this location.

The Committee Members inquired about the workshop No. 2 at Colombo 06 and representatives of M/S Vincy Engineering Private Limited informed the said workshop was closed and same had been shifted to Piliyandala recently.

The Committee Members visited the workshop which is located at Piliyandala and observed it is not a proper workshop. The said workshop is located in a part of a house and there is neither sufficient work space nor sufficient repair facility even for medium range generators. Further, it was observed that there was no standard tools and test equipment available in the workshop. The Board inspected the shown store which is kept with limited number of consumable type spares related to machinery and generators.

While visiting the workshop at Piliyandala, only one technician was there. Due to some ambiguities, the Board inquired about the ownership of the said workshop and he confirmed that the said workshop is registered under the name of M/S J.S. Lanka Services and Suppliers Private Limited

which undertakes machinery repairs including generator repairs as a machinery repair firm of Sri Lanka.

It is observed that the workshop which was located at Piliyandala did not consist of sufficient technical staff and there was no engineer available."

The above findings have been communicated to the Petitioner by letter dated 13th October 2017⁵. It was the submission of the learned Deputy Solicitor General that the decision to cancel the award was taken pursuant to the Sri Lanka Navy having satisfied itself that:

- (a) The Petitioner does not have the necessary facilities to carry out after sales and maintenance services;
- (b) The Petitioner has misrepresented facts in its bid with regard to its ability to provide after sales and maintenance services.

Two issues arise from the above submission of the learned Deputy Solicitor General.

The first is whether the decision to cancel the purchase order issued in favour of the Petitioner can be considered 'unreasonable', in the light of the material that has now been placed before this Court by the Respondents. This Court observes that public funds are being used by the Sri Lanka Navy for the purchase of the said generators. It is therefore the responsibility of the Sri Lanka Navy to ensure that what the Government eventually purchases meets

⁵ This letter has been produced by the Respondents marked '17'.

its technical specifications and requirements, is the most economical in terms of price, and is capable of being used for a long period of time. In other words, the procurement of the goods by the Respondents should be on the '*financially the most advantageous and qualitatively the best services and supplies for the country*'.⁶ This Court must emphasise that adhering to this norm is of paramount importance because procurement is carried out by a State agency, using public funds. Thus, the procurement decision must serve the best interests of Sri Lanka.

What is meant by the said phrase was explained succinctly by A.R.B. Amerasinghe J, in Smithkline Beecham Biologicals S.A and another Vs. State Pharmaceutical Corporation of Sri Lanka and others⁷, in the following manner:

"Instead of stating that the objective of the (Procurement) Guidelines was to procure the cheapest services, the President and Minister of Finance, in the Preface to the Guidelines said that the prescribed procedure was "To obtain financially the most advantageous and qualitatively the best services and supplies for the country." What the "Tender procedure should ensure" is, inter alia, stated in the Guidelines to be "optimum Economic Advantage to the nation": I understand this to mean that the procedure relating to Government procurements should ensure the most favourable conditions for the advancement of the People by obtaining "financially the most advantageous and qualitatively the best supplies for the country". What is "financially the most advantageous and qualitatively the best

⁶ Per Amerasinghe, J in Smithkline Beecham Biologicals S.A and another Vs. State Pharmaceutical Corporation of Sri Lanka and others (1997) 3 Sri LR 20 at 38).

⁷ Ibid.

supplies for the country” is pre-eminently a matter of policy that the Government, which is accountable to the People, must decide....”

In its bid document, the Petitioner has clearly represented to the Sri Lanka Navy that it has its own workshops and that it has the capacity to carry out the maintenance of the said generators as well as the repair of the said generators. The decision to award the tender to the Petitioner appears to have been influenced by the aforementioned representations made by the Petitioner by 'P5', 'P5(a)' and the third letter of even date.⁸ However, the joint inspection that was carried out with the participation of the Petitioner after the procurement decision was taken, had revealed that the Petitioner does not possess such capabilities. The Petitioner has not filed any material before this Court to demonstrate that it submitted a response to the said observations nor has the Petitioner filed any material to contradict the said findings. In such circumstances, it is the view of this Court that where material facts have been misrepresented in the offer, the Respondents were left with no option but to cancel the Purchase Order 'P15'. Thus, this Court must arrive at the finding that the Petitioner is guilty of dishonest misrepresentation of material facts to both the Sri Lanka Navy, and subsequently to this Court. To have proceeded with the procurement in spite of knowing that the Petitioner has misrepresented facts and would not be able to carry out repairs and provide maintenance services effectively, may have resulted in a loss to the State and wastage of public funds. In this background, this Court is of the view that the decision of the Respondents to cancel the Purchase Order is 'reasonable', and has been taken in the best interests of the Sri Lanka Navy.

⁸ Supra.

The second issue that arises from the submission of the learned Deputy Solicitor General is the fact that the Petitioner has suppressed from this Court what transpired between the issuance of 'P15' and 'P3'. As observed earlier, the joint inspection was carried out with the participation of the Petitioner and its findings were made available to it. This Court is of the view that the Petitioner ought to have, and could have disclosed details thereof in its petition as it has a direct bearing on the cancellation of the Purchase Order and was therefore a material fact. The Petitioner, for reasons that are inferentially obvious, has chosen to suppress such facts from this Court. In these circumstances, this Court is of the view that the Petitioner is guilty of suppression of material facts, and that, in the said circumstances, this application is liable to be dismissed, *in limine*, with consequences flowing to the Petitioner

Our Courts have consistently held that a party invoking the Writ jurisdiction of this Court must come with clean hands and in utmost good faith. The rationale for this principle has been laid down by the Supreme Court in Liyanage & another v Ratnasiri, Divisional Secretary, Gampaha & Others⁹ citing the case of Jayasinghe v The National Institute of Fisheries and Nautical Engineering (NIFNE) and Others¹⁰ which had held as follows:

"The conduct of the petitioner in withholding these material facts from Court shows a lack of uberrimae fides on the part of the petitioner. When a litigant makes an application to this Court seeking relief, he enters into a contractual obligation with the Court. This contractual relationship

⁹ 2013 (1) Sri LR 6 at page 15.

¹⁰ 2002 (1) Sri LR 277.

requires the petitioner to disclose all material facts correctly and frankly. This is a duty cast on any litigant seeking relief from Court."

In M.P.A.U.S Fernando, the Conservator General of Forests and two others vs. Timberlake International Pvt. Ltd. and another¹¹, the Supreme Court, having held that the conduct of an applicant seeking Writs of Certiorari and Mandamus is of great relevance because such Writs, being prerogative remedies, are not issued as of right, and are dependent on the discretion of Court, stated as follows:

"It is trite law that any person invoking the discretionary jurisdiction of the Court of Appeal for obtaining prerogative relief, has a duty to show uberrimae fides or ultimate (utmost) good faith, and disclose all material facts to this Court to enable it to arrive at a correct adjudication on the issues arising upon this application."

This Court has also repeatedly expressed the view that parties seeking relief from this Court should present all relevant facts to this Court without suppressing material facts.

The final matter that this Court needs to decide is whether costs should be ordered, taking into consideration all of the circumstances of this case and the conduct of the Petitioner. In this regard, this Court would be guided by the following observation of the Supreme Court in Leon Peiris Kumarasinghe vs. Samantha Weliveriya:¹²

¹¹ S.C. Appeal No. 06/2008; SC Minutes of 2nd March 2010.

¹² S.C. Spl. L.A. No. 37/2012 - SC Minutes of 12th November 2013.

“This Court cannot over emphasize the need to appropriately deal with litigants who attempt to abuse the process of Court and thereby cause unnecessary delay and costs to other parties, in order to ensure that in the future, litigants will not be tempted to indulge in such ill- conceived practices.”

In the above circumstances, this Court does not see any legal basis to issue formal Notice of this application on the Respondents. This application is accordingly dismissed. This Court orders that the Petitioner pay a sum of Rs. 25,000 as costs to the Commander of the Sri Lanka Navy.

This Court directs the Registrar of this Court to forward a copy of this Order to the Secretary, Ministry of Defence and the Commander of the Sri Lanka Navy to enable Sri Lanka Navy to review its decision to have the Petitioner on its ‘Register of Local Suppliers’.

Judge of the Court of Appeal

Yasantha Kodagoda, P.C., J/ President of the Court of Appeal

I agree.

President of the Court of Appeal