

**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, Prohibition
and Mandamus under and in terms of Article
140 of the Constitution of the Democratic
Socialist Republic of Sri Lanka.*

CA /WRIT/371/2020

1. K.G.D Walter Abeysundera
No.20/2, Lilly Mawatha,
Ganahena,
Battaramulla
2. D.C.M. Abeysundera
No. 20/2, Lilly Mawatha,
Ganahena,
Battaramulla

Both in Partnership under the name and
style of "Amil Janitor Services",
Presently at No. 766, Janajayacity,
Rajagiriya.

Petitioners

Vs.

1. Mr. S. Hettiarachchi,
Secretary,
Ministry of Tourism,
6th Floor, Rakshana Mandiraya,
No.21, Vauxhall Street, Colombo 02
2. Mr. Madhawa Devasurendra,
State Secretary,
Ministry of Aviation and Development of
Export Zones, 6th Floor,
Rakshana Mandiraya,
No.21, Vauxhall Street, Colombo 02

3. Airport and Aviation Services (Sri Lanka) Limited,
Bandaranaike International Airport,
Katunayake.
4. Major General (Rtd.)
G.A. Chandrasiri, Chairman,
Airport and Aviation Services (Sri Lanka) Limited, And Chairman – Tender Board
01- Airport and Aviation Services (Sri Lanka) Limited,
Bandaranaike International Airport,
Katunayake.
5. Mr. L. Dahanayake,
Member,
Tender Board No. 01-
Airport and Aviation Services (Sri Lanka) Limited,
Bandaranaike International Airport,
Katunayake.
6. Mr. Sunil Gunawardhana,
Member,
Tender Board No. 01-
Airport and Aviation Services (Sri Lanka) Limited,
Bandaranaike International Airport,
Katunayake.
7. Mr. W.K.W.K. Dharmadasa,
Chairman, Technical Evaluation
Committee,
Aviation Services (Sri Lanka) Limited,
Airport and Aviation Services (Sri Lanka) Limited,
Bandaranaike International Airport,
Katunayake.

8. Mr. W.K.W.K. Dharmadasa,
Airport Manager, (Terminal Operations)
Airport and Aviation Services (Sri
Lanka) Limited,
Bandaranaike International Airport,
Katunayake.
9. Mrs. R.D. Priyadarshani,
Senior Manager, Supply Chain
Management,
Airport and Aviation Services, (Sri
Lanka) Limited,
Bandaranaike International Airport,
Katunayake.
10. Abans Environmental Services (Pvt.) Ltd.
No. 141, Kirula Road,
Colombo 05.

Respondents

Before : Sobhitha Rajakaruna, J.
Dhammika Ganepola, J.

Counsel : Rajeev Amarasuriya for the Petitioner
Harsha Amarasekera, PC with Kanchana Peiris and A. Thevaraja for the 10th
Respondent
Dr. C. Ekanayake, SC for the Respondents

Decided on: 22.09.2021

Sobhitha Rajakaruna, J.

The 3rd Respondent, Airport and Aviation Services Sri Lanka Limited (AASL) by way of a paper advertisement invited for bids to provide janitorial and cleaning services at the terminal building & ancillary area at Mattala Rajapaksha International Airport (MRIA), Mattala for a period of one year. The bids were supposed to be made only on bid documents issued by AASL, and the closing date for bids was on 2nd October 2019.

The Petitioner as well as the 10th Respondent among several other bidders submitted their bids on time. The Technical Evaluation Committee (TEC) having evaluated the bids, initially recommended to award the tender to the 10th Respondent (Abans Environmental Service Pvt. Ltd.,) at a total cost of Rs. 34,680,000.00+ VAT for a period of one year from 01.12.2019. TEC made the said recommendation on 31.10.2019 on the basis that the 10th Respondent was the lowest responsive bidder.

Meantime, the Inland Revenue Department has issued a notification regarding the abolition of Nation Building Tax (NBT) with effect from 01.12.2019, pending an amendment to the NBT Act No. 09 of 2019. The said notification has been issued well after the closing date of the bids. Subsequently NBT Amendment Act No. 03 of 2020 was enacted and accordingly NBT was to be charged only prior to 01.12.2019.

The 3rd Respondent contends that 6 out of the 8 substantially responsive bidders (including the Petitioners) have specifically indicated NBT component in their bids. The 10th Respondent and one other bidder however, had not specifically shown the component of NBT in their respective bids. Accordingly, the TEC changing their previous decision took steps to deduct the NBT component from the total value indicated, only in respect of those six bids. No such component of tax was deducted from the price of the 10th Respondent as no NBT component was shown separately in the bid. As a result, the Petitioner became the lowest bidder. Hence, the TEC issuing their second report dated 26.12.2019 recommended to award the tender to the Petitioner at a total cost of Rs. 34,679,689.19 + VAT for a period of one year from 01.12.2019.

However, having examined the said TEC report dated 26.12.2019 the internal auditor has made his observations. Accordingly, the auditor has noted, that there had been a possibility for some bidders to include NBT in the price (total contract cost) instead of showing the component of NBT separately. He has further observed that no specific space is provided in the bidding document to indicate the NBT component. Therefore, the internal auditor has opined that it is unfair to deduct the NBT component only from the bids in which such NBT component has been shown separately. Accordingly, his opinion was that the bidders who have not shown the NBT component separately in the bids would be prejudiced unless the correct information is ascertained. Consequently, the TEC sought approval from the tender

board to get clarifications from each bidder upon inclusion of the NBT component in their respective total cost that is quoted, and also to resubmit a new bid evaluation. The 3rd Respondent thereafter has written to all substantially responsive bidders inquiring, inter alia, as to whether they have included the NBT amount in their price proposal. As a result, the two bidders including the 10th Respondent responded stating that their total cost quoted includes the relevant component of NBT.

The TEC thereon excluded the NBT component from all relevant responsive bids and submitted afresh cost schedule in their 3rd report dated 27.08.2020. According to the said cost schedule, the 10th Respondent became the 1st lowest bidder. Accordingly, TEC finally recommended awarding the bid to the 10th Respondent at a total cost of Rs. 34,000,000.00 + VAT for a period of one year from 01.10.2020. Subsequently, the tender board awarded the tender to the 10th Respondent and the AASL also entered into an agreement dated 28.09.2020 with the 10th Respondent.

The Petitioner in paragraph 44 in the amended Petition submits the matters impugned in his application. The Petitioner complains, inter alia, that **(a)** the award of the tender to the 10th Respondent has been done without a valid and operative tender being in existence, and without fulfilling the mandatory requirements in terms of the Government Procurement Guidelines of 2006; **(b)** the 1st to 9th Respondents have failed and neglected to request the Petitioners to extend the period of validity and the bid security beyond the request made by P6(a) (ii); **(c)** the request made to the 10th Respondent to extend the bid and the bid security are inter alia illegal and ultra vires and also offends the principals of legitimate expectation.

Furthermore, the Petitioners in their counter affidavit raising the issue of NBT component states that the 10th Respondent had not indicated the NBT even in the cage provided under the sub heading 'any other taxes (if applicable)' as seen at page 31 of the Bid Application Form. The Petitioner points out that the 10th Respondent had crossed off the said cage and inserted hand written words 'sub total' therein. The Petitioner argues that the very reason the taxes are requested to be indicated separately on forms as those values are subject to change and not within the control of the bidders but of the government.

It is important first to ascertain whether there is a mandatory requirement to highlight the NBT component separately in the subject bid form. On a perusal of the said page 31 of the bidding document, it is apparent that the relevant cage referred to by the Petitioner has the words 'if applicable'. Further, the cage immediately after that is for inclusion of the Value Added Tax (VAT) component. Therefore, it appears that the said form has given prominence to include the VAT component specifically among other taxes.

It is observed that the NBT was payable by every individual, company, body of persons and partnerships that carries out business activities of importing, manufacturing, wholesale and retail sale, service providers in Sri Lanka. On the other hand, VAT is introduced by the Act, No. 14 of 2002. VAT replaced the goods and services tax (GST). When outlining the VAT, it appears that the input tax paid on the imports and supplies of goods (including capital goods) and services in a month, and used in the business of making taxable supplies in that month, can be deducted from the tax payable (output tax) on such supplies subject to certain limitations. Refunds of excess VAT paid are available to zero – rated supplies and to new businesses registered under the VAT Act. Therefore, in considering the scheme of the VAT Act, the requirement of highlighting the VAT component in a bid document is important. Apart from the VAT and NBT there can be several other taxes and duties such as customs duties, excise duties, payroll taxes (EPF and ETF), telecommunications levy, local taxes that is applicable to any bidder time to time.

Further, the TEC will eventually be duty bound to inquire from all the bidders about the inclusion of the NBT component in the respective bid offer since the abolition of NBT was taken place well after the closing of the bids.

Hence, I am of the view that the decision of the Internal Auditor/ Head of Supply Chain Management to inform the TEC to re-evaluate the bids considering the abrogation of NBT is equitable. Moreover, I am not inclined to accept the proposition made by the Petitioners asserting that the 10th Respondent has not dully completed its bid application and the internal process followed by the AASL is flawed.

The next question that has to be examined is whether the Petitioners could maintain their argument pertaining to the validity of the tender and the non-extension of the bid security

regularly by the 10th Respondent. The Petitioners argue that the bid offer and the Bid Guarantee of the 10th Respondent lapsed on 30.01.2020 and 28.02.2020 respectively and the law does not permit the resuscitation of an expired bid offer & expired bid guarantee.

In terms of 'instructions to bidders', an offer should be valid for a period of 120 days from the date of closing the bids. The said closing date being 02.10.2019, such offers were valid approximately until 30.01.2020. The bid guaranties should be valid for 150 days and accordingly, the bid guarantees submitted by bidders were valid until 28.02.2020. The 3rd Respondent requested the bidders to extend the validity of their offer and the validity of bid security only on 02.03.2020. The Petitioners on those lines argue that the tender has lapsed on 30.01.2020 and therefore, the tender ceased to be valid & operative from 30.01.2020. The Petitioners make this claim on the grounds that there had been no request for extension of the offers up until 02.03.2020.

When examining the aforesaid question it is pertinent, firstly, to ascertain the Petitioner's own conduct in relation to the above impugned issue. It is an admitted fact that the Petitioners, even on 30.01.2020, were providing janitorial and cleaning services upon extension of their previous agreement. The TEC issuing their second report on 26.12.2019 recommended the tender to be awarded to the Petitioners. Meantime the 1st Petitioner has addressed a letter on 06th February 2020 (P6) to the Chairman of AASL and has expressed their understanding that them being placed as the 3rd lowest bidder. The 1st Petitioner indicates in that letter that only the Petitioners and the 10th Respondent are remaining for evaluation as the 3rd tenderer had allegedly been disqualified. The Petitioner in the same letter has categorically indicated their knowledge about awarding the tender to the 10th Respondent. Furthermore, the Petitioner indicating their past record therein, has requested the Chairman of AASL to consider awarding the tender to them alleging that they were the lowest tenderer.

In those circumstances, if the Petitioners to be successful in their argument that the tender has expired on 30.01.2020, then the Petitioners could not possess a legitimate right to make a request on 06th February 2020 seeking for the award of the tender in their favor. The Petitioners have expressly renounced raising objections on the alleged lapse of the tender or on the request for its extension merely by originating the said communication dated 06th

February 2020. The Petitioners instead of challenging the alleged lapse of the tender at the first instance have taken all the steps to proceed with their bid by extending their offer as well as the bid security. In other words, the Petitioners have held back coming to this Court until they formally lost the tender or until the tender was awarded to the 10th Respondent. Any decision related to the move taken by the 3rd Respondent by way of its letter dated 02.03.2020 has not been challenged at the first instance. The Petitioners have sought the intervention of this Court only on 28.09.2020 by their original application. Therefore, it appears that the Petitioners were marking time expecting a decision favorable to them.

Now it is important to examine as to whether such conduct of the Petitioner and the delayed application for judicial review is reasonable. Lewis in *Judicial Remedies & Public Law* (4th ed.) says, at para. 9-17, that:

"The claimant should challenge the decision which brings about the legal situation of which complaint is made. There are occasions when a claimant does not challenge that decision but waits until some consequential or ancillary decision is taken and then challenges that later decision on the ground that the earlier decision is unlawful. If the substance of the dispute relates to the lawfulness of that earlier decision and if it is that earlier decision which is, in reality, determinative of the legal position and the later decision does not, in fact, produce any change in the legal position, then the courts may rule that the time-limit runs from that earlier decision."

It is apparent that the Petitioner has opted not to challenge the alleged lapse of tender or the request for extensions, which is certainly a preliminary or provisional stage in the tender procedure. Lord Justice Underhill in *Nash, R (on the application of) v Capita Plc & Ors [2013] EWHC 1067 (Admin)* referring to the above passage of Lewis has observed that – “decisions plainly constituted distinct substantive decisions, namely decisions to outsource the functions and services identified, and for that purpose to commence the formal procurement procedure under the 2006 Regulations by the placing of notices in the OJEU. They were not preliminary, provisional or contingent”. The Court in the said case has refused permission to apply for judicial review in respect of all the grounds argued in that case.

I am of the view that where the impugned action takes place in stages, the challenge should be launched against the earliest stage rather than the final and decisive stage. See *R v*

Secretary of State for Trade and Industry ex p. Greenpeace) [1998] COD 59 and *R (Burkett) v Hammersmith & Fulham LWC* [2002] 1 WLR 1593 (HL). It is apparent that the Petitioners were marking time until the final outcome of the tender turns to be favorable to them. Hence, the well-established principles of estoppel that applies in the context of basic principles of contract law, would deem the Petitioners as being barred from claiming relief in a manner that is inimical to their previous manner of conduct.

Having observed the Petitioner's conduct as narrated above I now proceed to consider the Petitioner's other complaint. The Petitioners assert that the 10th Respondent did not have a bid guarantee in operation for the period from 28.02.2020 until 01.07.2020. Accordingly, Petitioners argue that the 10th Respondent having failed to extend the bid security from 28.02.2020 until 01.07.2020 should have necessarily been excluded from further evaluation as unequivocally provided by the procurement guidelines read with the bid document. However, it is observed that the 10th Respondent has submitted a fresh bid guarantee dated 01.07.2020 (10R 6b) which has the validity period until 28.09.2020.

There is no dispute on the fact that the Petitioners and the 10th Respondent had duly submitted a bid guarantee along with their respective bids upon the requests made by AASL. Also, the Parties do not dispute the fact that the bid guarantee submitted by the Petitioners and the 10th Respondent were originally valid for 150 days (approximately until 28.02.2020).

The specimen bid guarantee that provides in Section 8 of the bidding document stipulates the period that the bid bond required to be remained in full force and effective. The said sub paragraph (a) (i) declares, inter alia, that "*it shall remain in full force and effective until the earliest of (i) Date, being 150 days from (submission date), the date stipulated by the authority for the submission of bids **or any prolongation** of such date above notified for the authority by the bidder and the surety in writing.* It is noted that the AASL requested the Petitioners for the first time on 02.03.2020 to extend the validity period of their offer and validity period of the bid security. The Petitioner's as well as the 10th Respondent's bid security was originally valid only till 28.02.2020. Responding to the aforesaid request the Petitioners submitted a letter of amendment to the bid security dated 05.03.2020. According to the said letter of amendment, the validity of their bid security has been extended up to 30.05.2020. Once again, on

26.06.2020 the AASL requested the Petitioners to extend the validity of the offer and the bid security. In response to the second request made by the AASL, Petitioners submitted a letter of amendment dated 11.06.2020 whereas the 10th Respondent submitted a fresh bid guarantee as mentioned above.

The Petitioner's argument is that the 10th Respondent has not taken steps to extend the guarantee from 01.03.2020 to 30.06.2020. The Petitioner's further contend that the 10th Respondent, instead of extending the original bid, has submitted a fresh bid guarantee.

When Petitioners were submitting their first letter of amendment dated 05.03.2020 there was a gap of approximately 05 days and when he was submitting the letter of amendment dated 11.06.2020 there had been a gap of about 10 days. Furthermore, Petitioners have not taken steps to extend their bid security beyond 30.08.2020. The contention of the Petitioners is that the AASL has failed to request the bidders to extend the bid guarantee regularly. While the Petitioner highlights a longer gap in non-extension of 10th Respondent's bid security the Petitioners themselves have not given any extra justification for gaps in submitting their own extended bid securities. Although the 10th Respondent has submitted a fresh bid security rather than extending the original bid security, it is observed that the 10th Respondent had a valid bid security at the time of submitting the bid & at the time of opening of bids and even at the time of awarding of the tender. It is noted that the second request for extension of the bid security was made by AASL on 26.06.2020.

The 10th Respondent's main argument is that a valid bid security in favour of the said Respondent was available at all times which were material namely -

- (a) at the time the tender was closed (on 02.10.2019)
- (b) at the time that the tender was evaluated (on 31.10.2019 being the date of the 1st report of the TEC, on 26.12.2019 being the date of the 2nd report of the TEC and on 27.08.2020 being the date of the 3rd report of the TEC)
- (c) at the time the tender was awarded (on 22.09.2020)

The Petitioners strongly condemning the above defense strenuously argues that if such defense is accepted then the tender guidelines would have to be for the want of a better term,

'have to be turned upside down on its head' (Vide ~ page 6 of the Petitioner's written synopsis of submissions dated 22.07.2021).

I see no reason to analyze at this stage as to which tender guideline is more prominent in relation to the issues of this case as the Bidding Document (P3(b) / 10R7) has clearly set out all relevant requirements. In terms of clause 10 of the 'Instructions to Bidders' in the said Bidding Document, a bid may be rejected for any of the reasons mentioned therein. One of the main reasons to reject a bid is failing to provide a valid bid guarantee along with the bid. There is no specific ground mentioned therein to reject for submitting a fresh bid guarantee instead of extending the original one that was attached to the bid. In *Pamkayu (M) Snd Bhd (appearing by its attorney, Hemachandra) and another v. P. Liyanaarachchi, Secretary, Ministry of Transport and Highways and others [2001] 1 Sri LR 118 at page 125*, the Supreme Court observed as follows: *"In terms of section 113 of Guidelines on Government Tender Procedure a deviation might have been considered 'minor', inter alia, if it had not been specified in the bid documents as a ground for rejection of the bid. In the matter before us, the failure to submit an 'acceptable bid security' was specified as a ground for mandatory rejection of a bid".* **Amarasinghe J.** has held in the said judgment as follows: *"The award of a tender must be based on compliance with the terms and conditions of the tender, documents on the date and at the time specified for the closing of the tender. An offer that does not comply with the terms, conditions and specifications at that date and time must be rejected in the same way as a late offer."*

Judicial activism is a delicate exercise involving creativity in the process of judicial control through effective judicial review. Judicial creativity is needed to fill the void occasioned by any gap in the law or inaction of any public authority and thereby to implement the Rule of Law but not to usurp the role of such authority. Too much control may destroy the efficiency of those autonomous bodies that engaged in various activities focusing the economic growth of the Country.

Therefore, I deem that it is inappropriate in this case to interpret the gaps where the bid guarantee (of the bidders) was not in operation, in a stringent manner encroaching the parameters of the bidding document including the 'Instructions to Bidders'. I have arrived at this conclusion based on the acquiescence of the Petitioners who actively participated in the tender/bidding process by extending their offer and their bid bond from time to time

irrespective of the alleged lapses in extending the bid bonds of both parties. The other reason for me to take that view is due to the fact that both the Petitioners and the 10th Respondent complying with the instructions of the bid document had submitted the 'bid offer' and the 'bid guarantee' which were duly valid during the required period. In that context, I agree with the contents of the specific passage referred to by the Petitioners in the case of *Sunway International (Pvt) Ltd*¹ which classifies the requirements in a tender notice. Accordingly, I share the same view that the authority should be able to deviate from and not to insist upon the strict literal compliance of the bid conditions in appropriate cases, when such requirements are merely ancillary or subsidiary with the main object.

In view of the aforementioned reasons, I hold that there is no viable reason for the TEC to reject the bid of the 10th Respondent upon submission of a fresh bid guarantee or upon the alleged non-extension of the bid guarantee during a particular period. Therefore, in my view the Respondent's decision to proceed with the tender process by accepting the extension of the bid offer and bid guarantees is lawful.

I now proceed to analyze the applicability of the three main judgments cited by the Petitioners, who relies upon certain dicta of those judgments. The first case referred to is the *Sierra Construction Limited* case². In that, the validity period of the disputed bid bond is shorter than the required bid validity period as per the bid document. Whereas in the instant case both the Petitioners and the 10th Respondent had tendered a bid bond valid for 150 days, which is the requirement in the relevant bid document. Secondly, in the case of *Pamkayu (M) Snd Bhd*³ which has been referred to by the Petitioners, the issue is also identical to the *Sierra Construction Limited* case. The other case referred to is *SmithKline Beecham* case⁴ in which the main issue was that the selected bidder had not been registered under the Public Contracts Act. Therefore, I am of the view that the dicta of the above cases will not defeat my above findings.

¹ Sunway International (Pvt) Ltd. and Another vs. Airport & Aviation Services (Sri Lanka) Limited and Others. SC FR Application No. 147/2017; SC minutes 02.12.2019

² *Sierra Construction Limited v Municipal Commissioner and others CA Writ No. 50/2018 (CA Minutes 19th June 2020)*

³[2001] 1 Sri LR 118 at page 124

⁴SmithKline Beecham Biological S.A. and Another Vs. State Pharmaceutical Corporation of Sri Lanka and Others [1997] 3 Sri LR 20

I now turn to the matters raised by the Respondents on the pretext of preliminary objections based on '*locus standi*', '*futility*', etc. The learned counsel for the Petitioners at the argument stage in this case specifically submitted that the Petitioners are not seeking the tender to be awarded to them. He further submitted that this application had been filed in view of public interest, as the impugned tender is a public tender. In my view, the operation of balancing the public interest against a private interest should be based on a test that amplifies the true conduct of such litigant, within the impugned process. The following paragraph in *Administrative Law of H. W. R. Wade and C. F. Forsyth, 11th Edition, Oxford* at page 716 is apt here. *“In a case where a company sued the Bank of England for the recovery of a large holding securities, and the Attorney General intervened to resist disclosure of papers about government policy and confidential matters, a majority of the House of Lords decided that the inspection was necessary. Having inspected, the House upheld the claim of immunity, largely on the ground that evidential value of the papers was insufficient to outweigh the objections to disclosure. (Burmah Oil Company Ltd. v Bank of England [1980] AC 1090). The relevance and cogency of the evidence made by thus be weighed in the balance along with other matters. In confirming this last proposition, the House has since held that the Court should not inspect documents unless satisfied that they are likely to give substantial support to the applicant's case, and that he is not merely undertaking a 'fishing expedition' (Air Canada v Secretary of State for Trade [1983] 2 AC 394.”*

In the circumstances, when analyzing the reliefs prayed for by the Petitioners, I am of the view that the Petitioner's conduct, particularly the acquiescence in the bid evaluation process should be taken into consideration. The said conduct, in my view, amplifies the inexplicable delay to apply to this Court at the first instance and also the experimental manner adopted upon the tender process so as to learn its behavior and control it better in the future. Therefore, the Petitioner will not be entitled to the benefit of the discretionary jurisdiction vested in this court.

Finally the observations made by Saleem Marsoof, J. in *Timberlake International Pvt. Ltd., v. The Conservator General of Forests, S.C. APPEAL No.: 06/2008, decided on 02.03.2010* are also apt here;

“Questions (f) to (h) and (k) relate to the conduct of Timberlake IPLtd in relation to the matters that are relevant to the application for the writs of certiorari and mandamus filed by it in the Court of Appeal.

They are of great relevance because such writs, being prerogative remedies, are not issued as of right, and are dependent on the discretion of court. It is trite law that such discretionary relief may be withheld where a party has “disentitled himself to the discretionary relief by reason of his own conduct” (per Sharvananda, J. in Biso Menika v Cyril de Alwis [1982] 1 Sri LR 368 at page 377)."

Based on the above line of reasoning, I am of the view that there is no necessity to go deep in to the alleged preliminary objections on standing and futility taken up by the Respondents.

Therefore, I am of the view that the Petitioners are not entitled to any relief as prayed for in the prayer of the amended petition of the Petitioners. In the circumstances, I proceed to refuse this application. I order no costs.

Judge of the Court of Appeal

Dhammika Ganepola, J.

I agree.

Judge of the Court of Appeal