

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/514/2021

1. K.G.D. Walter Abeyesundara
No. 20/2, Lily Mawatha,
Ganahena,
Battaramulla.
2. D.C.M. Abeyesundara
No. 20/2, Lily Mawatha,
Ganahena,
Battaramulla.
3. K.G.D.M.Y. Abeyesundara
No. 20/2, Lily Mawatha,
Ganahena,
Battaramulla.

All three of them in Partnership under
the name and style of “Amil Janitor
Services”

Presently at No. 22, Welikada Plaza,
Rajagiriya.

Petitioners

Vs.

1. Dr. S. H. Munasinghe
Secretary,
Ministry of Health,
Suwasiripaya,
No.385, Rev.Baddegama
Wimalawansa Thero Mawatha,
Colombo 10.

2. Y.L.M Navavi
Additional Secretary,
(Procurement)

Ministry of Health,
Suwasiripaya,
No.385, Rev.Baddegama
Wimalawansa Thero Mawatha,
Colombo 10.
3. Ms. D.L.U. Peiris
Chairperson,
Ministerial Procurement Committee
“C2” for Janitorial Services for the
National Hospital – 2021/2022 in
respect of the Tender Bearing No.
MH/PB/CL/02/2021,
C/O The Secretary,
Ministry of Health,
Suwasiripaya,
No.385, Rev.Baddegama
Wimalawansa Thero Mawatha,
Colombo 10.
4. Mr. K. P. Yogachandra,
Member,
Ministerial Procurement Committee
“C2” for the National Hospital –
Janitorial Services for the 2021/2022
in respect of the Tender Bearing No.
MH/PB/CL/02/2021,
C/O The Secretary,
Ministry of Health,
Suwasiripaya,
No.385, Rev.Baddegama
Wimalawansa Thero Mawatha,
Colombo 10.
5. Ms. P. Walli,
Member,
Ministerial Procurement Committee
“C2” for the National Hospital –
Janitorial Services for the 2021/2022
in respect of the Tender Bearing No.

MH/PB/CL/02/2021,
C/O The Secretary,
Ministry of Health,
Suwasiripaya,
No.385, Rev.Baddegama
Wimalawansa Thero Mawatha,
Colombo 10.

6. Dr. H.D.B. Hearth
Member,
Ministerial Procurement Committee
“C2” for the National Hospital –
Janitorial Services for the 2021/2022
in respect of the Tender Bearing No.
MH/PB/CL/02/2021,
C/O The Secretary,
Ministry of Health,
Suwasiripaya,
No.385, Rev.Baddegama
Wimalawansa Thero Mawatha,
Colombo 10.
7. Mr. R.A.S.K. Ranasinghe
Member,
Ministerial Procurement Committee
“C2” for the National Hospital –
Janitorial Services for the 2021/2022
in respect of the Tender Bearing No.
MH/PB/CL/02/2021,
C/O The Secretary,
Ministry of Health,
Suwasiripaya,
No.385, Rev.Baddegama
Wimalawansa Thero Mawatha,
Colombo 10.
8. Ms. H.W.S.P. Karunaratne
The Chairman,
Technical Evaluation Committee for
Janitorial Services for the National
Hospital - 2021/2022 in respect of
the Tender Bearing No.
MH/PB/CL/02/2021,
C/O The Secretary,
Ministry of Health,

Suwasiripaya,
No.385, Rev.Baddegama
Wimalawansa Thero Mawatha,
Colombo 10.

9. Ms. G.D.I Madumali
Member,
Technical Evaluation Committee for
Janitorial Services for the National
Hospital - 2021/2022 in respect of
the Tender Bearing No.
MH/PB/CL/02/2021,
Health Ministry,
Medihouse Buidling,
No. 26, 2nd Floor,
Sri Sangaraja Mawatha,
Colombo 10.
10. Mr. R. B. Neranjan
Member,
Technical Evaluation Committee for
Janitorial Services for the National
Hospital - 2021/2022 in respect of
the Tender Bearing No.
MH/PB/CL/02/2021,
Health Ministry,
Medihouse Buidling,
No. 26, 2nd Floor,
Sri Sangaraja Mawatha,
11. Mr. H.D.W. Gunawardena
Member,
Technical Evaluation Committee for
Janitorial Services for the National
Hospital - 2021/2022 in respect of
the Tender Bearing No.
MH/PB/CL/02/2021,
Health Ministry,
Medihouse Buidling,
No. 26, 2nd Floor,
Sri Sangaraja Mawatha,
12. Ms. H. A. Chandrika Perera
Member,
Technical Evaluation Committee for

Janitorial Services for the National
Hospital - 2021/2022 in respect of
the Tender Bearing No.
MH/PB/CL/02/2021,
Health Ministry,
Medihouse Buidling,
No. 26, 2nd Floor,
Sri Sangaraja Mawatha,

13. Mr. P. A. D Perera
No. 31, St. Savior Road,
Ja Ela.

14. Mr. L. G. Maduraperuma
M/S Super Shine Services
No. 31, St. Savior Road,
Ja Ela.

Both (13th and 14th) of them in
Partnership under the name and style
of “M/S Super Shine Services”

Presently at No. 22,
No. 31, St. Savior Road,
Ja Ela.

15. Mr. K.Q.C. Anthony

Carrying on business as a Sole Trader
under the name and style of “lakro
Janitorial and Manpower Services”
No. 96/2, Thotupola Road,
Wellisara, Ragama.

Respondents

Before : Sobhitha Rajakaruna J.

Dhammika Ganepola J.

Counsel : Rajeev Amarasuriya with Malith Pitipanaarachchi for the Petitioners.
Amasara Gajadeera, SC for the 1st to 12th Respondents.
Sandamal Rajapakshe with Sampath Wijewardena for the 13th & 14th
Respondents.

Argued on: 08.12.2021 and 13.12.2021

Written submissions - tendered on behalf of Petitioners: 24.12.2021

tendered on behalf of the 1st to 12th Respondents: 22.12.2021

tendered on behalf of the 13th & 14th Respondents: 24.12.2021

Decided on: 28.01.2022

Sobhitha Rajakaruna J.

The Ministry of Health published a bid notice under the caption of “supply of cleaning services for hospitals and health institutions under National Competitive Bid Invitation – 2021/2022” appeared in the Daily News paper on 4th May 2021 (‘P5’). By virtue of the said bid notice, the Ministry of Health invited bids from registered institutions for the supply of cleaning services in respect of the hospitals and institutions mentioned in the said notice for the year 2021/2022. The Petitioners submitted their bids inter alia in respect of the National Hospital of Sri Lanka for the area including ‘ENT clinic, 18, 45 clinic, X-ray section & X-ray waste, 15, 16, 62, 63, 64, 66, the garden surrounding the white house, skin diseases, the garden surrounding the Buddhist center, PHI office, private office, AB overseer’s office, ABC Nawaloka surgery, surroundings of Blood Bank, all land portions surrounding the physical radiation, ward 65’. This area of the National Hospital of Sri Lanka comes under the Tender No. MH/PB/CL/02/2021 as per ‘P5’.

The Petitioners and four other bidders including the 13th & 14th Respondents (M/S Super Shine Services) submitted their bids in relation to the above tender. At the opening of bids, the Petitioner’s bid was placed as the 3rd lowest whereas the bids submitted by the 13th & 14th Respondents were placed as the 2nd lowest. The lowest bid has been rejected at the appeal stage for the reason of non-compliance of tender conditions. The Petitioners state that the bids submitted by the 13th & 14th Respondents are materially non responsive to several vital and mandatory tender conditions and therefore must necessarily be rejected.

As per the submissions of the learned Counsel for the Petitioners, the application of the Petitioners is mainly focused on the alleged failure of the 13th & 14th Respondents, as mentioned below, to satisfy and be compliant with principle eligibility criteria included in the bid notice;

- a) failure of the 13th & 14th Respondents to submit a worth certificate in Form Gen. 170 for the stipulated values for the hospitals and health institutions.
- b) failure to submit the letter issued by the Bank which with the contractor is engaged in transaction to the effect that bank overdraft (OD) facilities could be provided for the amount mentioned in the table for each of the hospitals and institutes.
- c) 13th & 14th Respondents have quoted unrealistic prices which renders their bid unlawful, illegal and in-eligible and non-responsive.
- d) the contravention of the Clause 15.2 of the tender conditions.
- e) the failure and neglect by the State Respondents to follow the procedure mandated by Clause 7.9.11 of the Procurement Guidelines in respect of unrealistic prices.

Worth Certificate

The Petitioners aver in the Petition that to the best of their knowledge, the 13th & 14th Respondents have not duly submitted the mandatory worth certificate which is a requirement in terms of Clause 1.VIII of the tender which should be considered as a major deviation. The Petitioners have originated this argument based on the copy of the worth certificate bearing serial No. A 108577 submitted by the 13th & 14th Respondents marked as 'R12'. The said worth certificate 'R12' has been issued for the value of Rs. 1 million. The Petitioners' contention is that 13th & 14th Respondents should have submitted a worth certificate to the value of Rs. 10 million as those Respondents have submitted bids for several hospitals and institutes. The value of the worth certificate that has to be submitted in respect of several hospitals is mentioned in the bid notice marked 'P5'.

The 13th & 14th Respondents and 1st to 12th Respondents in their respective Statement of Objections denying the relevant averments in the Petition aver that the 13th & 14th Respondents have duly complied with the tender conditions by tendering all the mandatory documents and thereby ensuring compliance with the provisions of the Government Procurement Guidelines. The 13th & 14th Respondents submit that the Petitioners by way of Motion dated 02.11.2021 tendered the bid document of the 13th & 14th Respondents marked as 'I'. According to 13th & 14th Respondents, such bid document is a confidential document in the possession of the Procurement Committee of the Ministry of Health and the Petitioners have not properly divulged how they have obtained such confidential documents. Further, the 13th & 14th Respondents submit that filing of the said document is absolutely shocking and indicates that the Petitioners have attempted to 'win at all costs' without having any regard to professional and ethical conduct. This Court

makes the observation that the party who furnishes such purported confidential documents in a judicial review application should mandatorily divulge the source of procuring any such documents in order to avoid unfair and unethical competition.

The learned State Counsel who was permitted to correct the markings on the documents annexed to the Statement of Objections of the 1st to 12th Respondents, has submitted a worth certificate marked 'R12' bearing the serial No. A 108570 which is a document in addition to the worth certificate marked 'X2'. In the said worth certificate marked 'R12', the relevant Divisional Secretary has indicated that a value of Rs. 1 million out of 10 million has been released. However, no evidence has been placed by parties as to whether separate worth certificates have been annexed to their respective bids.

In response to the argument raised by the Petitioners on the worth certificate, the learned State Counsel asserts that the wordings of the tender condition 1.VIII requires the submission of separate worth certificates only if the bidder is submitting bids for more than one hospital. The learned State Counsel further submits that the requirement to submit multiple worth certificates for different premises of the same hospital (albeit on different tenders) does not arise when interpreting the said tender condition in the literal sense.

The said condition 1.VIII is as follows;

"රෝහල් සහ සෞඛ්‍ය ආයතන සඳහා පහත සඳහන් වටිනාකම් වලට මාස 06ක් ඇතුළත ප්‍රාදේශීය ලේකම්ගෙන් ලබාගත් පොදු 170 ආකෘතියේ වටිනාකම් සහතිකය (මුල් පිටපත) (කොන්ත්‍රාත්කරු විසින් රෝහල් /ආයතන කිහිපයකට මිල ගණන් ඉදිරිපත් කරනු ලබන්නේ නම් එම රෝහල් /ආයතනවල වටිනාකමට ලබාගත් සහතිකයක් විය යුතුය. නවද එම මුල් පිටපත අමුණනු ලබන්නේ කුමන ආයතනයේ ලිපි ලේඛන සමඟ ද යන්න අනෙකුත් සෞඛ්‍ය ආයතන වෙත ඉදිරිපත් කරන වටිනාකම් සහතිකයේ සහතික කළ ඡායා පිටපතක් සඳහන් කළ යුතුය.)"

The English translation of the said complete Clause is as follows;

"The worth certificate in Form Gen. 170 for the following values for hospitals and health institutions obtained from the Divisional Secretary within 06 months (The original). (If the contractor is submitting bids for several hospitals/ institutions, the certificate should be for the total value or more of such hospitals/ institutes).

Further, the annual value should be as mentioned below according to the hospital/ institute you apply for.

| | <u>Annual Value</u> |
|---|---------------------|
| a) Health Ministry/ Teaching Hospitals and General Hospitals | Rs. 1,000,000.00 |
| b) Base Hospitals, District Hospitals and Divisional (“ <i>pradeeshiya</i> ”) Hospitals | Rs. 500,000.00 |
| c) Health Institutions | Rs. 300,000.00” |

A careful examination of the wordings in the above clause indicates that the requirement of submitting a worth certificate for the total value of all hospitals and institutions arises only if the bidder submits bids in respect of hospitals other than the National hospital of Sri Lanka. In other words, if a bidder submits several bids in respect of one hospital, there is no specific requirement laid down in the above clause for such bidder to tender a worth certificate considering the value of several sites of the same hospital. I have arrived at that conclusion specifically because of the wording in that clause particularly to say – “if the contractor is submitting bids for several hospitals/institutions.....”.

Now, it is important to ascertain as to whether 13th & 14th Respondents have become successful in view of several bids in respect of hospitals other than the National Hospital of Sri Lanka.

The Petitioners have filed in this Court, two other applications bearing Nos. CA Writ 515/21 & CA Writ 516/21 of which the parties have agreed to be bound by the final determination of the instant case. As mentioned above, the instant application is in respect of the below mentioned areas/sites at the National Hospital of Sri Lanka;

“ENT clinic, 18, 45 clinic, X-ray section & X-ray waste, 15, 16, 62, 63, 64, 66, the garden surrounding the white house, skin diseases, the garden surrounding the Buddhist center, PHI office, private office, AB overseer’s office, ABC Nawaloka surgery, surroundings of Blood Bank, all land portions surrounding the physical radiation, ward 65.” (Tender No. MH/PB/CL/01/2021)

The connected case no. CA Writ 515/21 is in respect of the below mentioned areas/sites at the National Hospital of Sri Lanka as mentioned below;

“Area including ward Nos 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28 & 65 AB, Operation Theaters, OPD, ECG rooms, Vascular Lab, Zone Surrounding Bodhiya, Ground surrounding.” (Tender No. MH/PB/CL/03/2021)

The other connected case no. CA Writ 516/21 is in respect of the below mentioned areas/sites at the National Hospital of Sri Lanka;

“Area including wards 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, Laboratory, Mortuary, Overseer’s office, Insulator area.” (Tender No. MH/PB/CL/05/2021)

In my view, there are no separate institutions cited in the above areas/sites and all the places mentioned therein are wards, clinics or different sections in the same hospital, i.e., The National Hospital of Sri Lanka. Accordingly, it is obvious that the 13th & 14th Respondents in regard to the above three tenders have submitted bids for several sites/areas of the same hospital and not in respect of other hospitals or institutions.

The Petitioners laying aside the submissions on behalf of the 1st to 12th Respondents who emphasize that the tenders in respect of the said National Hospital must be treated as ‘one’ for the purpose of the worth certificate, submit that;

- i. “If a bidder tenders for all nine sites, the value of the worth certificate must be more than Rs. 9 million;
- ii. If the Respondents’ contention is upheld then if a bidder submits 9 bids for the first 9 tenders which are all at the said National Hospital, the bidder would need to;
 - a) Submit worth certificate only to the value of Rs. 1 million
 - b) Loan facility, as required, only for one tender
 - c) Bid security as only value for one tender and also
 - d) Pay only for one bid document
- iii. The total bid value for the first 9 sites, i.e., the separate sites of the National Hospital of Sri Lanka, exceeds Rs. 250 million for the year and therefore, it is trite that a sum such as that cannot be backed or secured by a worth certificate of Rs. 1 million.”

In my view, one cannot compare the requirement of having a worth certificate with the concept of submitting a bid security. The bid security is intended to deter bidders from withdrawing their bids and if the bidder withdraws his bid prior to end of the bid validity period or refuses to sign the contract if selected, the procuring entity will automatically

forfeit the bid security amount. In terms of clause 5.3.11 (b) of the Procurement Guidelines, a bid security is obtained to ensure the following;

- i. that the bidder will not withdraw or modify the Bid during the period of validity;*
- ii. that the bidder will agree to an adjusted bid price after the correction of arithmetical errors, pursuant to the criteria described in the bidding documents;*
- iii. that the bidder will sign the contract if the contract is awarded within the validity period of the bid; and*
- iv. that the bidder will submit a performance security prior to the deadline specified in the bidding documents.*

Meantime, it is observed that the worth certificate is an instrument issued by the Divisional Secretary (DS) by virtue of the powers vested in him to that effect. The DS issues such certificate in General Form 170 based on the information he receives from the relevant 'Grama Sewa Niladari'. As per the said General Form 170, the relevant DS certifies that a particular land belongs to the person who requests for such certificate. He arrives at that conclusion on the contents available on the face of a deed tendered to him by such person. Further, the DS assigns a value to such land and certifies according to his knowledge and belief that the land/lands he refers to in the said form are free from any debt including mortgages and also it is not subjected to any partition case or any other litigation. Therefore, the purpose of obtaining a 'bid security' is completely different as regards to the requirement of submitting a worth certificate. In view of the contents of the format for bid security referred to in the tender conditions, no interpretation could be formulated requiring only one bid security, with the value for one site to be submitted for several bids even in relation to different sites/areas within the same hospital.

The Petitioners in paragraph 26 of their written submissions averse that Petitioners now have the supporting documentation to establish that the 13th & 14th Respondents had bid for at least 7 hospitals and institutions under 'P5'. The Petitioners further averse that due to the pleadings being closed, they are now unable to tender the same to Court which allegedly establishes that the 13th & 14th Respondents have submitted at least 7 tenders and on that basis, the worth certificate should be Rs 7 to 8 million at the very least. It is an admitted fact among the parties that the 13th & 14th Respondents have been awarded tenders for aforementioned three sites of the National Hospital of Sri Lanka.

Therefore, the alleged failure of the 13th & 14th Respondents to consider the value of above three main areas as mentioned in the bid notice 'P5' cannot be considered as a failure of

non-compliance of the tender conditions. The 13th & 14th Respondents are getting this benefit by interpreting the relevant clause in the literal sense due to the intentional or unintentional limitations imposed in drafting the said notice 'P5' or tender conditions. Had the Procurement Committee intended to invite the bidders to submit a worth certificate to the total value of the **several sites** of the **same hospital** that could have been expressly stated in those conditions. In my view, this is the best interpretation that I could give upon the said clause 1.VIII in order to afford equal opportunity to every bidder. It is the duty of the Procurement Committee to express all bidding conditions without creating any ambiguity within such several conditions. In the circumstances, I am unable to accept the proposition of the Petitioners on the worth certificate submitted by the 13th & 14th Respondents.

Requirement of submitting a letter issued by the Bank

The Petitioners further argue that the 13th & 14th Respondents have failed to submit a letter issued by the Bank in terms of Clause 1.IX of the conditions of the tender. The said Clause provides that the bidder should furnish a letter issued by the Bank which with the contractor is engaged in, to the effect that bank overdraft (OD) facilities could be provided for the amount mentioned in the table for each of the hospitals and institutes. Further, it stipulates that if the contractor is submitting bids for several **hospitals/institutes**, the certificate should be for the total value or more of such **hospitals/institutes**.

The 13th & 14th Respondents have annexed to their Statement of Objections, a letter issued by the Bank of Ceylon addressed to the Chairman of Health Ministry Procurement Committee dated 07.05.2021 (marked 'X3'). Accordingly, the 13th & 14th Respondents complain that the Petitioners have strived to misdirect this Court by averting false facts. The 1st Petitioner in his Counter Affidavit dated 08.12.2021 in response to the said letter marked 'X3' states that the 13th & 14th Respondents have failed to tender letters issued by the bank in respect of the amounts mentioned in the table for each of the hospitals and institutes and instead those Respondents have submitted only a confirmation of account balances.

The Petitioners in paragraph 67 of their Petition (submitted along with an affidavit) state as follows;

“The Petitioners further state that according to the aforesaid Clause the 13th Respondent is required to submit a letter thereof with a total value more than Rs. 6,758,500.00. However,

to the best of the knowledge of the Petitioners the 13th and 14th Respondents have not provided a letter thereof with a total value more than Rs. 6,758,500.00 wherein makes the bid submitted by the 13th and 14th Respondents non-responsive and necessarily be rejected.”

However, it appears that the Bank of Ceylon in the said letter marked ‘X3’ has confirmed account balances therein as at 05.05.2021. Moreover, the said Bank has mentioned in the same letter that a Permanent Overdraft limit of Rs. 11,538,500.00 exists against ten fixed deposit accounts of which the account numbers and the respective values are stipulated therein. There is no specific counter argument raised by the Petitioner in this regard in their Counter Objections.

Therefore, I am not inclined to accept the argument raised by the Petitioners against the 13th & 14th Respondents with regard to the alleged failure of submitting a letter issued by the Bank.

Unrealistic prices

The learned Counsel for the Petitioners in his written submissions states that one of the pillars of this case is rooted on the submissions that the 13th & 14th Respondents have submitted wholly and ex facie unrealistic prices in the tender.

The Petitioners have invited the attention of this Court to the price comparison between the Petitioners and 13th & 14th Respondents in respect of the;

- a) Monthly chemical list -Table 1.1 (mentioned in the Written submissions of the Petitioners)
- b) Monthly equipment list -Table 1.2 (mentioned in the Written submissions of the Petitioners)
- c) Annual equipment list -Table 1.3 (mentioned in the Written submissions of the Petitioners)

The Petitioners referring to above price comparison assert that the prices submitted by the 13th & 14th Respondents contain wholly unrealistic prices. For example, the Petitioners pointed out that a large garbage bag (thickness over 200 microns) cannot be purchased for Rs. 6.00 (wholesale price) and also that those Respondents have quoted the same Rs. 6.00 price for a small garbage bag (thickness over 200 microns). The Petitioners further referring to the annexure marked as ‘13R2a’ submit that a small garbage bag with a thickness of 25.1 microns which is far below the requirement of 200 microns is priced at Rs. 11.00 per

bag and further, it is evident that a large garbage bag with thickness over 200 microns cannot be purchased at Rs. 6.00 in Sri Lanka.

Referring to the invoice marked as '13R1b' (an invoice obtained from D & J Hitinawaththa Products), the Petitioners highlight the prices therein and submit that;

- a) 1 liter of air freshener cannot be purchased at Rs. 50.00
- b) 1 kg of dishwash powder cannot be purchased at Rs. 35.00
- c) Glass cleaner of 1 liter cannot be purchased at Rs. 40.00
- d) 1 liter of pine disinfectant cannot be purchased at Rs. 40.00
- e) 1 liter of toilet cleaner cannot be purchased at Rs. 40.00
- f) 1 liter tile cleaner bottle cannot be purchased at Rs. 55.00

In view of Clause 15.2 of the tender conditions, the prices offered for annual chemicals and equipment cost mentioned in Annexure V (annexure to the tender conditions) should be reasonable at market prices. Accordingly, the Petitioners argue that prices should be on par with the market prices and whereas the 13th & 14th Respondents have submitted wholly unrealistic prices in respect to chemical, annual equipment and monthly equipment. On those grounds the contention of the Petitioners' is that such unrealistic prices amount to a major deviation as it vitiates Clause 7.9.11 of the Government Procurement Guideline.

In response to the Petitioners' argument on unrealistic prices, the 1st to 12th Respondents submit as follows;

- i. *At the appeal stage, the Petitioners contended that the monthly allocation by the successful bidder for the chemicals, equipment would not be sufficient. The insufficiency of the monthly financial allocation was made in comparison to that of the Petitioners.*
- ii. *However, at the argument stage before your Lordships' Court, the Petitioners alleged that the chemical cost and the cost of certain equipment quoted by the successful bidder are unrealistic. To buttress the argument, the Counsel for the Petitioner relied on a garbage bag that was bought at the retail price from a leading supermarket and relied on the price difference quoted by the successful bidder and the Petitioners in relation to a mop. (vide page 11 of the Written Submission of the 1st to 12th Respondents)*

In addition to the above argument, 1st to 12th Respondents submit that the bidding document has set out only the chemical composition which inter alia requires that the chemical products have to be certified by SLS or ITI; the bidding document does not

impose a brand name and therefore, permitting the prospective bidders to quote prices of any brand so long as the chemical products meet the standardization requirements set out therein. Those Respondents further submit that the prospective bidder is required to state the (a) brand name, (b) monthly requirement and (c) monthly cost and it is of significance that the Petitioners in their bidding document have failed to specify the monthly requirement and therefore, the information submitted by the Petitioners is incomplete. Accordingly, the Respondents contend that the information submitted by the successful bidder in respect of the said Annexure V is full and complete and the bidding document furnished by the Petitioners is flawed owing to incomplete information submitted therein.

The 1st to 12th Respondents further assert that the Petitioners in their bidding document have failed to submit information in respect of Annexure IV and also that the cost for the items contained therein is not set out anywhere in the bid document. According to those Respondents the overhead cost which is the cost for the day-today operations of the Petitioners' business is excessively higher than that of the successful bidder's. Based on those grounds, the Respondents argue that the competitive advantage the successful bidder has over chemical cost due to his capacity to manufacture chemicals and purchase ingredients at wholesale price cannot be held against the successful bidder.

The main contention of the 13th & 14th Respondents is that, it is not them but the Petitioners who have submitted a bid with unrealistically high prices for the items with a large profit margin which would eventually cause a great loss to the State. The Respondents aver as follows;

1. *that most of the prices offered by the Petitioners are similar to the retail price of the local market which cannot be expected by an experienced janitorial service provider as;*
 - a) *naturally any service agency should have mechanism to minimize their expenditure while securing the quality of service and goods, in order to gain profit from the business,*
 - b) *therefore, there may have tendency of any agency to purchase goods in lots for wholesale price and/or sometimes they may purchase raw materials and may have mechanism of manufacturing certain items.*

2. *that in the event of using machines as polishers, Grass cutting machines, water suction machines, etc. if there are previously purchased machines which are in good serviceable quality, they might use those machines for new projects and only claim some depreciation value from the government.*
3. *that is one of the reasons for which the Respondents' prices are lower than the Petitioners' prices. (vide – paragraphs 12 and 13 of the statement of Objections of the 13th & 14th Respondents)*

The 13th & 14th Respondents continuously posed the question during the argument as to why the Petitioners do not have items (such as polisher, grass cutting machine, water suction machine, pressure washer etc.) that have already been purchased and are in good and serviceable conditions as the Petitioners have been providing janitorial services for a period over 20 years. Accordingly, the Respondents argue that there is no necessity to buy brand new equipment and quote brand new prices and strive to have a large profit margin ultimately causing heavy loss to the State.

Now, I advert to the relevant provisions of the Procurement Guidelines 2006, (Goods & Works) relating to unrealistic rates;

Clause 7.9.11, upon selection of the lowest substantially responsive Bid:

- a) *If such bidder has quoted unrealistically low rates on **critical or very important items**, the bidder shall be requested to prove to the satisfaction of the TEC, how the bidder intends to procure such items/perform the Works/provide the Services as per the quoted rates, for such purposes the bidder may be asked to provide a rate analysis.*
- b) *If the TEC is of the view that the justification/explanation provided by the bidder is unacceptable, and hence the bidder would fail in the performance of his obligations within the quoted rates, such Bid may be rejected.*
- c) *If the justification/explanation of the bidder is acceptable, the TEC should proceed with the evaluation.*
- d) *If the TEC continues to entertain some doubt about the contractor's/supplier's ability to procure such items/perform the Works/provide the Services as per the quoted rates despite explanation/justification provided, a higher performance security may be requested to mitigate such risks.*
- e) *If the bidder refuses to provide such additional performance security, his Bid shall be rejected. (Emphasis added)*

On careful examination of the said Clause, it is apparent that the provisions of the said Clause are limited to unrealistically low rates on **critical or very important items**. It is obvious that the subject tender is to get the services of janitorial cleaning services. A Janitorial Services company will take care of day today cleaning duties and keep the premises clean and well maintained. Those duties may include cleaning of rooms, kitchens, toilets and also sweeping, mopping, vacuuming, dusting and emptying trash. In terms of Clause 24 of the tender conditions, the details of the areas & the premises that are to be cleaned and the type of the cleaning job to be carried out can be obtained by the Head of the Institution and additionally Clause 40 also describes certain duties of the tenderer.

Therefore, it is observed that the subject tender is not to purchase any medical equipment, mops, garbage bags etc., but only to get janitorial cleaning services. In a tender to procure medical equipment, such medical equipment has to be considered as critical or very important items. However, when the tender is to provide janitorial services, a question arises as to whether;

- i. monthly chemicals such as liquid detergent, bleaching powder, turpentine, air freshener, red polish, glass cleaner, tile cleaner etc.
- ii. monthly equipment such as commode brushers, mops, brooms, cobweb dusters, glass pairs, dusters, dust pans
- iii. annual equipment such as mamoties, garden rakes, hand axes, knives, water suction machines, pressure washers, garden forks, digging bars, garden hoses, plant water buckets, boots, ladders, wheelbarrows, vacuum cleaners

comes within the interpretation of critical or very important items. In the instant case successful bidders' main duty is to provide cleaning services utilizing such chemicals and equipment.

It is observed that the tender conditions impose several safeguards in the event the successful bidder fails to comply with such conditions. In terms of Clause 17 of the tender conditions, the Secretary to the Ministry of Health has the power to (a) stop the services, (b) call for fresh tenders or (c) take any other action in an event the successful bidder fails to provide a satisfactory service. The Clause 26 provides strict requirements to be obliged by a successful bidder in complying with the composition requirement and the requirements set out in its Annexures III, IV and V. The Clause 35.5 is also an attractive safeguard stipulated in the tender conditions and the said Clause 35.5 is as follows;

“මාසිකව අවශ්‍ය වන උපකරණ හා රසායන ද්‍රව්‍ය ප්‍රමාණයන් සෑම මසකම රෝහල මගින් දැනුම්දෙන දිනයේ ආසාදන පාලන ඒකකයේ හෙද නිලධාරී/ ආසාදන පාලන ඒකකයේ භාර නිලධාරියෙකුට/ මහජන සෞඛ්‍ය පරීක්ෂකට හෝ ආයතන ප්‍රධානියා විසින් නම් කරන ලද නිලධාරියෙකුට ඉදිරිපත් කර එය නිවැරදි බවට ලොග් සටහන් පවත්වා ගත යුතුය. එසේ නොකිරීම වෙනුවෙන් ඒ සඳහා රු. 2500/- ක අනිරේක පිරිවැයක් සහ රෝහල්/ ආයතනයට ඒ වෙනුවෙන් අමතර වියදමක් දැරීමට සිදුවුවහොත් එම මුදල සහ 25% අනිරේක පිරිවැයක්ද අය කිරීමට ආයතන ප්‍රධානියා කටයුතු කරනු ලැබේ.”

In view of those provisions, supply of the chemicals and equipment are regularly monitored by the hospital authorities and in an event of a failure of the successful bidder, such authorities are empowered to discontinue the services and take necessary actions. Therefore, I am of the view that, by reason of the special circumstances of this case, the chemicals and the items referred to by the Petitioners to establish alleged unrealistic prices cannot be directly considered as critical items under Clause 7.9.11 of the Procurement Guidelines, although, those chemicals and other items are very important and essential for the successful bidder to carry out the cleaning duties.

I have come to the above conclusion on a careful consideration of the whole matter and also based on the reasons of the special circumstances exclusive to this case. My above findings no way should be interpreted for a bidder who provides services such as ‘cleaning’ to quote inordinate prices. In other words, such bidders should not be able to quote for example, Rs. 1.00 for each tool or for items such as garbage bags. This issue has to be examined on an overall conspectus as the main items such as wages of the employees at any time during the tender process cannot be compromised at any cost and such items always should be in accordance with the existing laws of the country. If a bidder could provide tools or machines without incurring any capital expenditure, that aspect has to be considered in view of striking a balance between the purported unrealistic prices and the maximum advantage to the procuring entity.

The 1st to 12th Respondents referring to judgements in; i) Sierra Construction Limited vs. Municipal Commissioner and others¹; ii) Rajapaksha Pathiranage Namal Kumara vs.

¹ CA (Writ) Application 50/2018 (decided on 19.06.2018)

Susantha Attanayake²; iii) Thajudeen vs. Sri Lanka Tea Board and another³; iv) Dr. Puvanendran and another vs. Premasiri and two others⁴, assert that the issue on unrealistic prices are disputed facts and this Court does not have the expertise to consider matters relating to the evaluation of the financial responsiveness of the bidders. The Respondents submit that there was no necessity for the TEC to request a rate analysis or to impose an additional performance security as the TEC did not entertain any doubt as to the ability of the successful bidder to procure items and/or services. It is important to note that, although the Petitioners have invited this Court to take Judicial Notice of the prices indicated in the tables mentioned in the pleadings of the Petitioners, no substantive proof has been submitted for the perusal of this Court establishing the accurate retail and wholesale rates separately.

The Procurement Appeal Board (PAB), upon the appeal dated 30.08.2021 lodged by the Petitioners has considered the objections on unrealistic prices raised by the Petitioners at the appeal stage. The PAB after investigating at the appeal stage, the objections raised by the Petitioners and the other unsuccessful bidders, has made its determination on 24.09.2021. The Technical Evaluation Committee (TEC) recommended that the tender be awarded to 13th & 14th Respondents ensuring maximum benefit to the State and the PAB has endorsed such recommendation of the TEC. The members of the TEC and the PAB were of the opinion that the prices quoted by the 13th & 14th Respondents are not unrealistic. Therefore, I am convinced that the question of unrealistic prices has been examined to a considerable extent by the TEC and the PAB. Moreover, PAB has ordered to include the conditions and orders imposed by their order dated 24.09.2021 in the Agreement that would be entered in to with the successful bidder. Therefore, I am inclined to accept to a greater extent the proposition of the Respondents that this Court is unable to conduct an investigation on such disputed facts.

It is important to note that the judicial review is concerned, not with the decision but with the decision making process⁵. As mentioned in the following paragraph, in the case of

² CA (Writ) 240/2017 (decided on 04.04.2019)

³ 1981 2 Sri L.R. 471

⁴ 2009 2 Sri. L.R. 107

⁵ See Chief Constable of the North Wales Police vs. Evans [1982] 3 All ER 141, 154-155, HL (Lord Brightman; R vs. Panel on Take-overs and Mergers, ex p Datafin plc [1987] QB 815, 842 (Sir John Donaldson); Lonrho plc vs. Secretary of State for Trade and Industry [1989] 2 All ER 609, 617 (Lord Keith of Kinkel).

*Developments vs. Covent Garden [2012] EWHC 2546*⁶, the Court is reviewing a decision solely to see whether or not there was a manifest error and/or whether the process was in some way unfair;

“Under the 2006 Regulations as amended, the principal way in which an unsuccessful bidder, such as the claimants, can challenge the proposed award of a contract to another bidder is to show that the public body's evaluation of the rival bids either involved a manifest error or was in some way unfair or arose out of unequal treatment. Accordingly, in deciding such claims, the court's function is a limited one. It is reviewing the decision solely to see whether or not there was a manifest error and/or whether the process was in some way unfair. The court is not undertaking a comprehensive review of the tender evaluation process; neither is it substituting its own view as to the merits or otherwise of the rival bids for that already reached by the public body.”

Conclusion

In view of the foregoing, it is my considered view that there are no sufficient grounds to restrain or prevent the 1st to 12th Respondents from proceeding in respect of the agreement already entered in to between the Ministry of Health and the 13th & 14th Respondents. Furthermore, I am of the view that there are no sufficient grounds to quash the decisions of the 3rd to 7th Respondents taken during the tender process.

In terms of clause 7.7.1 (a) of the Government Procurement Guidelines of 2006 on (Goods and Works), the purpose of a bid evaluation is to determine the lowest evaluated substantially responsive bid out of the bids received. Therefore, taking all the circumstances in this application in to consideration and based on my above findings, I hold that this bid evaluation has been conducted by the 1st to 12th Respondents in an acceptable manner by awarding the tender to the least responsive bidder, the 13th & 14th Respondents whilst ensuring the best interest of the State. Amerasinghe J., in ***Smithkline Beecham Biologicals S.A. and another vs. State Pharmaceutical Corporation of Sri Lanka and others (1997 3 Sri. L. R. 20)*** has been held;

⁶Also see - Amey vs. Scottish Ministers [2012] CSOH 181 and Lion Apparel Systems vs. Firebuy [2007] EWHC 2179

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

The other factor of concern is whether the low prices presented by the 13th & 14th Respondents have created a market monopoly restricting the opportunities for other bidders. In addition to my above findings, I am of the view that the nature of the agreement and the circumstances surrounding each case play a prominent role when coming in to conclusion whether the lower prices have created a market monopoly restricting the entrance to trade. In the case of ***Union of India and Others vs. Hindustan Development Corporation and Others SC 1994 AIR 988***, it was stated as follows;

“.....however, the determination whether such agreement unreasonably restrains the trade depends on the nature of the agreement and on the surrounding circumstances that give rise to an inference that the parties intended to restrain the trade and monopolise the same.”

“.....A mere offer of a lower price by itself does not manifest the requisite intent to gain monopoly and in the absence of a specific agreement by way of a concerted action suggesting conspiracy, the formation of a cartel among the producers who offered such lower price cannot readily be inferred. In the instant case..... Therefore, no conclusion can be reached definitely that offer of the price of Rs 67,000 by itself was predatory and the manufacturers who offered such a price consequently formed a cartel”

Unrealistic or predatory pricing is a subset of unfair price and as the unfair price has not been defined anywhere, the unfairness has to be determined on the basis of the facts of each case. The unfairness has to be examined in relation to the customer or the competitor. Therefore, I am of the view that in a judicial review application, the Court should intervene if it appears that unrealistic rates have been adopted in order to create a trade monopoly or any other adverse and illegal agenda.

It is observed that, the Petitioners were providing services to the National Hospital of Sri Lanka at the time the procuring entity called for bids by ‘P5’. The 1st to 12th Respondents assert that the motive of the Petitioners in the instant application was to seek an extension of the said previous contract and to have a fresh contract awarded at a higher price when

the successful bidder has quoted a lower price. The Respondents' contention in this regard is that the conduct of the Petitioners is indicative that the Petitioners are seeking to manipulate the tender process for their financial advantage, with the objective of sustaining a monopoly over the janitorial service in public hospital.

Therefore, on a careful consideration of the whole matter including the events relating to the decisions made by the TEC and PAB, I have come to the conclusion that the Petitioners are not entitled to any relief as prayed for in the prayer of the Petition of the Petitioners. In the circumstances, I proceed to dismiss this application. I order no costs.

Judge of the Court of Appeal

Dhammika Ganepola J.

I agree.

Judge of the Court of Appeal