

**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/517/2021

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/09/2021,
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/09/2021,
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/09/2021,

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

6. Dr. H.D.B. Herath
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/09/2021,
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/09/2021,
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/09/2021,
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/09/2021,
Health Ministry,
Medihouse Building,
No. 26, 2nd Floor,
Sri Sangaraja Mawatha,
Colombo 10.
10. Mr. R.B. Naranjan
Member,
Technical Evaluation Committee for
Janitorial Services for the National
Hospital - 2021/2022 in respect of
the Tender Bearing No.
MH/PB/CL/09/2021,
Health Ministry,
Medihouse Building,
No. 26, 2nd Floor,
Sri Sangaraja Mawatha,
Colombo 10.
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/09/2021,
Health Ministry,
Medihouse Building,
No. 26, 2nd Floor,
Sri Sangaraja Mawatha,
Colombo 10.

12. Mr. H.A. Chandika Perera
Member,
Technical Evaluation Committee for
Janitorial Services for the National
Hospital - 2021/2022 in respect of
the Tender Bearing No.
MH/PB/CL/09/2021,
Health Ministry,
Medihouse Buidling,
No. 26, 2nd Floor,
Sri Sangaraja Mawatha,
Colombo 10.
13. M/S Nisala Janitorial & Maintenance
Services
123/5C, Peralanda,
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.
Niranjan Arulpragasam for the 13th Respondent.

Argued on :11.03.2022, 21.03.2022, 01.04.2022

Written submissions: Petitioners -21.04.2022
1st to 12th Respondents -22.04.2022

Decided on : 01.06.2022

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 Newspaper on 04.05.2021, marked ‘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 a bid in respect of the area including the Epilepsy building and surroundings of the National Hospital of Sri Lanka (Tender No. MH/PB/CL/09/2021) and it is among other bids that they submitted in respect of the other hospitals and institutes under the same bid notice.

The Petitioners challenging the award of the tender to the 13th Respondent, seek from this Court *inter alia*, a writ of Prohibition restraining the 1st to 12th Respondents from issuing the Letter of Award and also entering into a contract in respect of the subject tender for year 2021/2022 with the 13th Respondent. The Petitioners are seeking for a writ of Certiorari even to quash the decisions of the Procurement Committee ('PC') and the Technical Evaluation Committee ('TEC').

The Petitioners state that as per the information taken down at the opening of the bids, the following bidders (including the Petitioners) have quoted the prices mentioned below for the said tender No. MH/PB/CL/09/2021 in relation to the provision of Janitorial Services for the year 2021/2022 for the area including the Epilepsy building and surroundings of the National Hospital of Sri Lanka. (Vide-paragraph 19 of the Petition)

<u>Tenderers</u>	<u>Bid Value (Rs.)</u>
M/S Rakna Arashaka Lanka Ltd	27,082,999.45
13 th Respondent - M/S Super Shine Services	27,224,245.00
14 th Respondent - Lakro Janitorial and Manpower Services	29,192,400.00
Petitioners - Amal Janitorial Services	29,208,850.00
Ultrakleen (Pvt) Ltd	32,236,259.44

It is noted that that the table named 1.0 reflected in the written submissions of the Petitioners is completely different to the above information.

The Bids submitted by M/S Rakna Arakshaka Lanka Limited, which was the lowest, has been rejected at the Appeal stage for non-compliance of Tender Conditions. Consequently the 13th Respondent who submitted the 2nd lowest bid, was awarded the subject tender. It is important to note here that the Petitioners are not the 3rd lowest bidder but they are the

4th lowest and that the Petitioners state that the instant application is also in the **public interest.**

The Petitioners' main contention in this application is two-fold and accordingly, they raise questions on worth certificate & the bank's letter submitted by the 13th Respondent. Although, the Petitioners alleged in their pleadings that the 13th Respondent has failed to comply with 8 Tender Conditions, the Petitioners supported at the hearing only the issues relating to the failure of the 13th Respondent to comply with the Clause 1.VIII (Worth Certificate) and the Clause 1.IX (Bank's letter) of the Tender Conditions.

The Petitioners assert that to the best of their knowledge, the original Worth Certificate in Form Gen.170 has not been provided by the 13th Respondent and the said 13th Respondent is required to submit a Worth Certificate for the value of Rs.8.4 million. The 1st to 12th Respondents have annexed a Worth Certificate No. A132440 (marked 'R13') to the statement of objections and thereafter an additional Worth Certificate No. A132003 marked 'X1' has been submitted along with the motion dated 22.03.2022.

The Petitioners' argument that no Worth Certificate has been tendered by the 13th Respondent is not tenable as the 1st to 12th Respondents have submitted to Court the aforesaid Worth Certificates of the 13th Respondent. However, the Petitioners still maintain their argument on the 'value' of the Worth Certificate. I have dealt with a similar question on Worth Certificates in ***K.G.D. Walter Abeysundara and others vs. Dr. S.H. Munasinghe, Secretary Ministry of Health and others, CA/Writ/514/2021 (decided on 28.01.2022)*** where I have focused my mind to the aspect whether the successful bidder in respect of the relevant impugned tender of that case, has become successful even in his/her bids in respect of the hospitals other than the National Hospital of Sri Lanka, under the same bid notice marked 'P5'. It is not a disputed fact that if the bidder is submitting bids for several hospitals/institutes that the Worth Certificate should be for the total value or more of such hospitals/institutes. In the said case I have observed, by examining the wordings in the Clause 1.VIII of Tender Conditions 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. The contention of the learned State Counsel for the 1st to 12th Respondents in this regard is that the 13th Respondent has appended separate Worth Certificates to separate bids (of the 13th Respondent) in respect of those respective hospitals (including the National Hospital of Sri Lanka) with which the 13th Respondent had been successful.

The above Worth Certificate marked 'X1' (dated 29.07.2021) is for the value Rs.300,000.00 and the Certificate marked 'X2' ('R13') (dated 11.10.2021) is for the value of Rs.1,000,000.00. The required value as per the Bid notice for the impugned tender is Rs.1,000,000.00. Therefore, the 13th Respondent has prima facie fulfilled the basic requirement on the Worth Certificate in respect of the impugned tender.

The closing date for receiving bids in view of the Bid notice marked 'P5' was 21.05.2021. The Petitioners' Worth Certificate No. A140711 also has been annexed to the Petition among other documents. Accordingly, it is noted that the Petitioners as well as the 13th Respondent have obtained Worth Certificates from the respective Divisional Secretaries on dates after the above closing date and the reason for that has not been divulged to Court. In terms of the Tender Conditions, prima facie Worth Certificate is a document that should be annexed to the respective Bid.

This is although more why I have decided in *K.G.D. Walter Abeyundara and others vs. Dr. S. H. Munasinghe, Secretary-Ministry of Health and others, CA/Writ/518/2021 (decided on 31.05.2022)* that introducing a requirement of submitting a Worth Certificate as per Form Gen.170 which has not been duly and lawfully interpreted can create ambiguity and also it is an antiquated procedure. I have further observed in the above case that the procurement entity has a major role in formulating criteria in the Tender Conditions by providing fair, equal and maximum opportunity for eligible interested parties to participate in Procurement. Therefore, the instant application also, I am not inclined to bestow the Petitioners with the benefit of doubt in respect of the criteria of a Worth Certificate, based on all the circumstances of this case.

Now, I advert to the second main contention of the Petitioners raised at the argument stage. The Petitioners assert that the 13th Respondent has failed to tender a letter issued by the Bank (which with the contractor is engaged in transaction) to the effect that bank overdraft facilities could be provided for the amount mentioned in the relevant table for each of the hospitals/institutes in terms of Clause 1.IX of Tender Conditions. The particular letter issued by the bank on behalf of the 13th Respondent has been annexed to the statement of objections marked as 'R15'. In view of the Bid notice marked 'P5', the required amount of loan facilities which is required to be obtained by the Bank in respect of the impugned tender is Rs.515,446.13. Although the said document 'R15' does not reflect any figure as such, the learned State Counsel argues that the 'R15' has been exclusively issued in respect of the impugned tender. Referring to the heading of the said

letter, the learned State counsel submits that the absence of the particular figure required by the said Bid notice in no way renders the said letter 'R15' defective on the basis of non-compliance of the Tender Conditions. The learned State Counsel further argues that the said letter 'R15' does not impose any condition or restriction on the overdraft facilities that could be drawn by the 13th Respondent.

On a careful examination of the said letter marked 'R15', the relevant bank has only indicated that arrangements could be made to provide overdraft facilities as and when required in relation to the relevant current account maintained by the 13th Respondent. However, the relevant Bank has failed to express categorically whether a sum of Rs.515,446.13 could be released as an overdraft in respect of the relevant current account and that creates, in my view, a lacuna on the part of the relevant Bank. Therefore, I accept the Petitioners' arguments on principle that the 13th Respondent has failed to submit a bank letter reflecting the exact amount mentioned in the Bid notice. Moreover, even if it is assumed that the 13th Respondent has failed in submitting a Bank letter consisting the said exact figure, a question arises as to whether the Petitioners are reasonably capable of being successful in their claims in the instant application, based on the extraordinary circumstances of this case.

In this context, I wish to draw my attention to the objections raised by the 13th Respondent in the above case No. CA/Writ/518/2021. I am of the view that I am not transcending the scope of the jurisdiction of this Court by drawing my attention to the submissions made on behalf of a Respondent in another case due to the reasons that;

- a) the above Petitioners filed four other applications before this Court, namely, CA/Writ/514/2021 , CA/Writ/515/2021 , CA/Writ/516/2021 , CA/Writ/518/2021 along with the instant application bearing No. CA/Writ/517/2021;
- b) all above five applications have been filed based on the same Bid notice published by the Ministry of Health under the caption of "Supply of Cleaning Services for Hospitals and Health Institutions under National Competitive bid invitation-2021/2022" marked as **P5**;
- c) this Court after a full hearing has already dismissed the applications Nos. CA/Writ/514/2021 , CA/Writ/515/2021 , CA/Writ/516/2021 and CA/Writ/518/2021;

- d) although the successful bidders are different, the questions discussed in all above four cases are more or less similar;

The learned Counsel who appeared for the successful bidder in CA/Writ/518/2021 pointed out that the Bid document submitted by the above Petitioners contained several major deviations in terms of Clause 7.8.4 of the Procurement Guidelines making their bid unacceptable in law.

On a careful perusal of the said Bid document 'P8', it is observed that the;

- a) clause 45 of the Bid of the Petitioners (page 36 of the brief);
 - b) 3rd, 6th & 8th columns in the list of chemicals submitted by the Petitioners (page 47 of the brief);
 - c) 3rd column in the list of equipment (to be provided annually) submitted by the Petitioners (page 48 of the brief); and
 - d) 3rd & 6th columns of the list of equipment (to be provided monthly) submitted by the Petitioners (page 49 of the brief)
- have not been **filled** by the Petitioners.

I have observed that the identical lapses on the part of the Petitioners existed in the bid in relation to the case No. CA/Writ/518/2021 as well. The Petitioners' contention in this application is also that the Petitioners are only possessed with the document 'P8' which is supposed to be an office copy. The 1st to 12th Respondents, in their statement of objections filed in respect of this application also, have admitted 'P8' as the bid received by the Procurement Entity. Petitioners have not taken effective measures for this Court to make an order in view of paragraph ('o') of the prayer of the Petition.

The pertinent questions arising at this stage in this application (which are similar to that of case No. CA/Writ/518/2021) are as follows;

- a) whether a party could claim relief in a judicial review application against another whilst the claiming party is also at fault or his/her conduct is wrongful within the same impugned process.
- b) whether this is a fit case to adopt the doctrine of clean hands which is a root cause of unreasonableness.

I have dealt extensively on the principle of clean hands in my above judgement CA/Writ/518/2021, where I have decided as follows;

“I take the view that a party claiming relief against an irregularity of another stakeholder, in a judicial review application, should come to Court with clean hands without having a record of committing a similar irregularity within the same impugned process. I have approached the said opinion as I strongly take the view that a person who applies for judicial review should come to Court with clean mind & clean heart expressing the true conscience on the objective which are, in my view, part and parcel of the doctrine of clean hands. My said findings cannot be considered as imaginary as the policy of ‘good governance’ is well embodied in the objectives of the said Procurement Guidelines. There cannot be effective ‘good governance’ without good conscience, transparency & accountability within the relevant government authorities and even within all the stakeholders. The theory of good governance cannot be confined only towards the decision maker but it is an essential element on the part of all the relevant stakeholders”

I need to reiterate my above findings in this judgement as well and I hold that this is a fit case to adopt ‘clean hands doctrine’. Furthermore, I take the view that my said findings on the applicability of the doctrine of clean hands outweigh the asymmetry of the document marked ‘R15’ which was discussed earlier. Additionally, I see that no material prejudice has been caused to the Petitioners in respect of the said incomplete document ‘R15’ as Petitioners rights have not been directly affected due to the reason that the Petitioners are not the next lowest bidders among who submitted bids. As I have observed above, the Petitioners have alleged in paragraph 83 of the Petition that the instant application **is also in the public interest.**

At this stage, I am reminded of the judgement in ***Public Interest Law Foundation vs. Central Environmental Authority and others, CA/Writ/527/2015 (decided on 24.02.2020)***, where His Lordship Justice Mahinda Samayawardhena J. held as follows;

“Public interest litigation is a hallowed concept. Nevertheless, public interest litigation shall not be converted to public vexatious litigation. Frivolous and vexatious applications cost the judiciary and Government agencies dearly. Such applications inter alia impede the efficacy of the Courts by detracting from the limited time and resources available to devote to cases which legitimately deserve attention. Public interest litigation shall be a boon not a bane.”

I further observed that the Petitioners have failed to challenge the evaluation & examination of TEC and of MPC at the Appeal stage and has not challenged the eligibility of the 13th Respondent at the said Appeal stage. It is essential for this Court to adhere to the norm which focuses in obtaining financially the most advantageous and qualitatively the best services and supplies for the benefit of the country as a whole in view of the Procurement Guidelines of 2006. Admittedly, the Ministry of Health already has awarded the subject tender and also entered in to an agreement with the 13th Respondent. Even if the Court is to consider the relief for a writ of Mandamus sought by the Petitioners, directing the 1st to 12th Respondents to award the impugned tender to the Petitioners, I see, there is no legal right existing for the Petitioners to call upon the judicial intervention of this Court in that regard. Even if the Court decides to issue a writ of Certiorari as prayed for in the prayer of the Petition, the next lowest bidder has a greater opportunity to be successful as the Petitioners are not the next lowest bidders. Therefore, I take the view that no substantive prejudice has been caused to the Petitioners by awarding the subject tender to the 13th Respondent. In that event the probable damages that would be caused to the Ministry of Health by changing the supplier of janitorial services at this crucial juncture in the country should be seriously taken in to consideration vis-à-vis the respective indistinct claim on public interest litigation by the Petitioners.

Bearing in mind such unnecessary prejudice that could be caused to the 1st and 2nd Respondents and also on a careful consideration of the whole matter, I have come to the conclusion that by reason of the special circumstances of this case, I should exercise my discretion to refuse the application.

Application is dismissed. I order no costs.

Judge of the Court of Appeal

Dhammika Ganepola J.

I agree.

Judge of the Court of Appeal