

IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST
REPUBLIC OF SRI LANKA

In the matter of an application under and in terms of Article 17 and 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

1. Target Environmental Services Company (private) Limited.
No. 38, Jethawana Road, Colombo 14
2. R.M. Anura Jayantha Ratnayake
Chairman,
Target Environmental Services Company (private) Limited.
No. 38, Jethawana Road, Colombo 14

Petitioners

SC (F/R) Application No. 91/2008

Vs.

1. Dr. Ashoka Kahandaliyanage
Secretary
Ministry of Healthcare and Nutrition
"Suwasiripaya"
No 385, Rev. Baddegama Wimalawansa Thero mawatha Colombo 10.
2. Dr. Ajith Mendis
Director-General of Health Services
Ministry of Healthcare and Nutrition
"Suwasiripaya"
No 385, Rev. Baddegama Wimalawansa Thero mawatha Colombo 10.
3. Shantha Wijeratne
Senior Assistant Secretary (Procurement)
Ministry of Healthcare and Nutrition
"Suwasiripaya"
No 385, Rev. Baddegama Wimalawansa Thero mawatha Colombo 10.
4. H.A. Ariyadasa
Deputy Director General (Building and Supply)
Ministry of Healthcare and Nutrition
"Suwasiripaya"
No 385, Rev. Baddegama Wimalawansa Thero mawatha Colombo 10.

5. **B.N.K.B. Bamunendra**
Senior Assistant Secretary
(Administration)
Ministry of Healthcare and Nutrition
"Suwasiripaya"
No 385, Rev. Baddegama Wimalawansa
Thero mawatha Colombo 10.
6. **P.A.P.P. Pathiratne**
Deputy Director General (Finance)
Ministry of Healthcare and Nutrition
"Suwasiripaya"
No 385, Rev. Baddegama Wimalawansa
Thero mawatha Colombo 10.
7. **Y.S.L.P.K. Perera**
Director (Finance)
Ministry of Healthcare and Nutrition
"Suwasiripaya"
No 385, Rev. Baddegama Wimalawansa
Thero mawatha Colombo 10.
8. **R.M.S.G. Amarasinghe**
Assistant Secretary
Ministry of Public Administration and
Home Affairs,
Independence square,
Colombo7.
9. **Dr. Nihal Jayatillake**
Additional Secretary (Medical Services)
Ministry of Healthcare and Nutrition
"Suwasiripaya"
No 385, Rev. Baddegama Wimalawansa
Thero mawatha Colombo 10.
10. **D.A. Indrasena**
Deputy Director General (Finance-I)
Ministry of Healthcare and Nutrition
"Suwasiripaya"
No 385, Rev. Baddegama Wimalawansa
Thero mawatha Colombo 10.
11. **C.S. Kumarasinghe**
Additional Director-General
Department of National Budget,
The Secretariat,
Colombo1.
12. **K.A. Indran**
Director
Department of State Enterprises
The Secretariat,
Colombo1.
13. **Will Shine Janitor Services,**

No. 88/3, Aponso Mawatha
St. Jude Place, Taladuwa,
Negambo.

14. Amila Janitor Services,
No. 22
Welikanda Plaza,
Rajagiriya.

15. Ultrakleen (private) Limited.
No. 291/37
Havelock Garden,
Colombo 5.

16. Hon. Attorney General
Attorney General's Department
Colombo12.

Respondents

Before : J.A.N. de Silva J.
Jagath Balapatabendi J.
Chandra Ekanayake J.

Counsel: S.A. Collure for the Petitioner.
Rajive Goonatillake SC for the Attorney General

Gamini Perera with Vijitha Salpitikorale and U.R.C. Udaweediya for the 13th Respondent.
C. Nilanduwa for the 14th Respondent.

S. Rajaratnam D.S.G. for 4th and 5th Respondents.

Argued on : 02/06/2009

Decided on:

J.A.N. De Silva CJ

This is an application made by the Petitioners under and in terms of Articles 17 and 126 of the constitution. The Petitioner is a company which offers janitorial services to various institutions. Facts reveal that the Chairman of the Procurement Committee of the Ministry of Healthcare and Nutrition had published an advertisement for sealed bids for the supply of cleaning services for eighteen healthcare institutes. The Petitioner and the 13th, 14th and 15th Respondents

among others deposited sealed bids in response to the said adverts. The Petitioners allege numerous irregularities in the tender process and claim that their rights under Article 12(1) as being infringed.

The Petitioner claims that a technical evaluation committee (TEC) constituted for the evaluation of bids had not selected the 13th or the 14th Respondents. Upon close inspection of documents marked R1 to R18 it is clear that the Petitioner had been recommended in respect of thirteen of the said institutes. However it is equally clear that the Petitioner had not offered the lowest bid in respect of the majority of the institutes. It is also pertinent to note that the Petitioner's recommendation occurred in those instances in default as his opponents were found to be disqualified. The reason given was noncompliance with paragraph 7.8.4 of the Procurement Guidelines-2006 *read with paragraph 2 of the document marked R23 titled Guidelines on conditions pertaining to cleaning services Ministry of Healthcare and Nutrition.*

Paragraph 7.8 refers to bid examination and deals with some general principles applicable for such examination. Rule 7.8.2 reads

“Deviations from bidding conditions must be clearly identified. Deviations which are deemed acceptable would be categorized as minor deviations, whilst deviations which are unacceptable would be categorized as major deviations”

Paragraph 7.8.4 contains a list of major deviations. It appears that the technical evaluation committee had considered the failure to tender

1. Proof of payment of tax for the period 2005.04.01 to 2006.03.31
2. Annual financial statements for the period 2005.04.01 to 2006.03.31 ,

as major deviations.

The 13th and 14th Respondents appear to have learnt of the circumstances and had made representations to various parties upon which a second Technical Evaluation Committee is constituted. The Petitioner questions the validity of the second committee and claims that a recommendation made by such committee has no validity in law.

Paragraph 8.3 contains provisions regarding the appeals procedure available to unsuccessful bidders. The process commences when an unsuccessful bidder is informed in writing by the secretary of the relevant line ministry of his failure, whereupon he may appeal to a duly constituted Appeal Board. It is noted that until such time, the Procurement Committee can act in accordance with paragraph 8.1 which includes the power to request the TEC to resubmit a report. I find that the decision to reconstitute a TEC, as falling within the provisions of 8.1 especially since certain allegations had been levelled against members of the first TEC.

At this juncture my attention is drawn to the reports of two inquiries made in consequence to the numerous complaints made by the parties. The inquiry officers were able to obtain statements from both the Petitioner and the 13th and 14th Respondents. They observed that the bid requirements contained in document marked R23, were rather ambiguous as to the requirement of tax returns and financial statements. The tenders were called on 2007.6.16. If this date was to be considered the date to be applied in interpreting the said requirements the "*previous year*" should be the financial year 2006.04.01 to 2007.03.31. However documents pertaining to this period have not been tendered even by the Petitioners. As noted earlier the TEC considered the "*previous year*" to begin from 2005.4.01. Therefore it is clear that an ambiguity existed as to the relevant time frame. This ambiguity was cleared up by letter marked R28, a letter written by the senior assistant procurement secretary to the 13th Respondent stating that the relevant time period was the period from 2005.04.01 to 2006.03.31. Therefore all bidders were placed on a level playing field by the said letter, whereby the deciding factor becomes the price of the bid. I see nothing irregular of the procedure adopted. The guidelines a two step approach in evaluation and the first filter is on the bidder's viability as a supplier. The ambiguity adverted to previously, distorted this first step. Therefore it appears the bidders were given a renewed opportunity to establish their credentials.

The allegation remains that the 13th and 14th Respondents had not submitted some form of document despite the existence of the ambiguity. They strenuously deny nonsubmittal and allege that the said documents have been "made to disappear". I am inclined to make a finding in favour of the Respondents. The observations of the inquiring officer reveal that there was a

high probability that the sealed bids contained the relevant documents since the contents page of the bids advert to those documents.

On the question as to whether the TEC had authority to entertain the newly submitted documents I look no further than paragraph 7.9.7. It authorises a TEC to seek clarifications from a bidder so long as the bid price is not changed. I consider the instant circumstances to fall squarely within the said rule. However I wish to emphasise that a distinction must be drawn between non-submission of a document and the present circumstances. A TEC cannot requisition documents under the pretext of seeking a clarification where the documents have not in fact been submitted.

Having dealt with the concerns of the Petitioner I now wish to direct my attention to matters brought to this courts notice by the Respondents.

It appears that the Petitioners had by way of a separate document offered discounts in respect of their bids. These documents formed no part of their sealed bid but constituted a separate bid. Mr. K.M.D.L. Amaratunga`s report reveals that the discount offers were made prior to the bids being opened (even though their existence was only revealed after the first four bids were opened as claimed by the 14th Respondent). It appears that the Petitioner sought to gain an unfair advantage by making the discount offers by revealing them in the event of their legitimate bid price being higher than those of his competitors. This behaviour is objectionable on several grounds.

The tender process is a device used by the administration to ensure fair play between competitors. Each bidder is afforded an equal opportunity to make offers, where each bidder makes his offer blindly. The Petitioner`s action takes away this quality from the bidding process as he is able to alter his bids according to those of his competitors. This principle is reinforced by the inclusion of paragraph 3 to the bid requirements (marked R23) prohibiting the tender of multiple bids. The petitioner appears to have attempted to make an additional bid in the guise of an offer of a discount.

Furthermore it appears that the offer of a discount was made on the whole bid price. This is contrary to all bidding norms. According to the bid requirements each bidder is required to include in his price what is referred to as *statutory labour cost*. Calculating a discount on the whole bid price would involve discounting the above *statutory labour cost*. This falls within paragraph 7.8(a) of the Procurement Guidelines as applied by the original TEC in disqualifying several bidders.

For these reasons I see no merit in the Petitioner's application. Application is dismissed with costs fixed at Rs 25000.

Chief Justice

Jagath Balapatabendi J.

I agree.

Judge of the Supreme Court

C. Ekanayake J.

I agree.

Judge of the Supreme Court