

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

FRIGI Engineering Services (Pvt) Ltd.
M/S Dunham Bush Industries Sdn Bhd
Joint Venture
C/O: FRIGI Engineering Services (Pvt)
Ltd.
145, Siri Dhamma Mawatha
Colombo 10

Petitioner

S.C.[FR] No.337/2015

Vs.

Secretary
Ministry of Food Security
CWE Secretariat Building
No.27, Vauxhall Street
Colombo 02

And 45 others

Respondents

BEFORE : **S.E.WANASUNDERA, PC, J.**
B.P.ALUWIHARE, PC, J.
K.T.CHITRASIRI, J.

COUNSEL : Dr.Mahinda Ralapanawa with Ms. Nisansala
for the Petitioners
Malik Hanan instructed by D.Abeygunawardena
for the 3rd Respondent
S.Rajaratnam, PC, Senior ASG
for the 1st, 2nd & 4th to 46th Respondents

ARGUED ON : 24.01.2018
WRITTEN : 09 and 14.02.2018 by the Petitioner
SUBMISSIONS ON : 08.02.2018 by the 3rd Respondents
05.02.2018 by the 1st, 2nd, 4th and 45th Respondents
DECIDED ON : 02.03.2018

CHITRASIRI, J.

Petitioner in this case has filed the present application in terms of Article 126 of the Constitution, seeking the following final reliefs:

- a. To declare the fundamental rights of the Petitioner guaranteed under Article 12(1) and/or 12(2) of the Constitution of the Democratic Socialist Republic of Sri Lanka has been violated at the instance of the Respondents;*
- b. To make order to quash and/or invalidate decision of the Respondents to award the tender in favour of the 3rd Respondent as contained in letter dated 27th July 2015 of the 1st Respondent;*

However, on 21.01.2016 this court granted leave to proceed only on alleged violations under Articles 12(1) of the Constitution. This Article 12(1) stipulates thus:

12(1) All persons are equal before the law and are entitled to the equal protection of the law.

In the averments found in the amended petition dated 16.11.2015 filed in this Court, it is stated that the Petitioner is a Joint Venture entity which was formed representing FRIGI Engineering Services (Pvt) Ltd and M/s Dunham Bush Industries Sdn Bhd. In that petition it is also mentioned that FRIGI Engineering Services (Pvt) Ltd, which is a company incorporated in Sri Lanka has entered into a Memorandum of Understanding with M/s Dunham Bush industries Sdn Bhd, which is a company, incorporated in Malaysia for the purpose of engaging in the business of Air-conditioning in countries world over. This Memorandum of Understanding is marked as X3 and is filed with the petition of the Petitioner.

On 10th February 2014, 2nd Respondent had called for tenders from eligible and qualified tenderers under the National Competitive Bidding Method, for the Design, Supply and Installation Testing and Commissioning and Ventilation System for the National Measurement Laboratory Building of the Department of Measurement Units, Standards and Services. This document by which the tenders were called is marked as X4 and it specifies the eligibility of tenderers who intend placing bids for the same. Following are a few of those eligibility criteria:

4. Contracting firms eligible to Bid should be:

4.1 Registered with the Institute for Construction Training and Development (ICTAD) under the National Scheme of Registration of Contractors for Grade EMI under Medical Ventilation and Air Conditioning in old scheme.

4.2 Joint Ventures subject to the condition that the lead partner of the Joint Venture is a local contractor satisfying the qualification requirements stated in 4.1 above.

5. Qualification Requirements to qualify for Contract award include

I Current ICTAD registration Grade EMT under the category Mechanical Ventilation and Air Conditioning (MVAC) in new scheme or Grade EMI under Air conditioning in old scheme.

II Annual average turnover of Design, Supply and installation work related to Air Conditioning performed in the last five years shall not be less than Rupees Five Hundred Million (Rs.500,000,000,000).

III Bidders should have successfully completed at least 2 Design Supply and Installation projects related to Air Conditioning, each over Rupees Five Hundred Million (Rs.500,000,000,000) of this specialized nature, during last 5 years.

IV *Liquid Assets and/or Credit facilities required shall not be less than Rupees One Hundred and Twenty Five Million (Rs.125 000 000 00).'*

Petitioner has submitted the following experience to support the requirement referred to in clause 5(III) above which are mentioned in the documents marked X13 and X13A.

Lead Partner- Frigi Engineering Services (Pvt) Ltd				
Design Experience in last five years				
Year	Employer	Description of Works	Amount	Responsibility to Joint Venture
2010	Bandaranyake International Airport - Katunayake	Design, Supply, installation MVAC System to Departure Lounge, New Arrival Lounge and Extension check in area	Rs.345 million	100%
2012	Sri Lanka Customs Headquarters building	Design, Supply, installation of HVAC system	Rs.526 million	100%

Lead Partner- Frigi Engineering Services (Pvt) Ltd				
Construction Experience in last five years				
Year	Employer	Description of Works	Amount	Responsibility to Joint Venture
2012	Sri Lanka Customs	MVAC System	Rs.560million	100%

Dunham-Bush Industries Sdn Bhd				
Construction Experience in last five years				
Year	Employer	Description of Works	Amount	Responsibility to Joint Venture
2013	Zuhai United Laboratories - China	Design, Supply and Installation AC System	RMB25.84 million (Rs.555.6million)	100%
2013	United Laboratories (Inner Mongolin) Co-Ltd	Design, Supply and Installation AC System	RMB105.6 million (Rs.2,257.5 million)	100%

Having considered the respective bids received, Cabinet Appointed Government Procurement Committee [CAPC] has decided to recommend awarding the tender to the Petitioner. Thereafter, the Minister of Co-operatives and Internal Trade had submitted the said recommendation to the Cabinet of Ministers for approval. It is evident by the document marked X15.

However, consequent to an appeal lodged to the Government Procurement Appeal Board (PAB) by the 3rd Respondent against the decision of the CAPC, it had summoned the 3rd Respondent and the Petitioner for an inquiry, by the letter dated 08.07.2014 which was marked as X9. The PAB having held the said inquiry on 10.07.2014 has submitted its 08 page Report that was marked and produced as 2R1.

In the aforesaid report marked 2R1, it is observed that the recommended bidder namely the Petitioner had not obtained the required minimum marks for the overall compliance of the Bidding document. In arriving at the aforesaid decision, the PAB has given the following reasons.

1. Bid Security being in the name of FRIGI Engineering Services (Private) Limited which is only a partner in the said Joint Venture;
2. The person who signed the Bid Form of the Petitioner did not have the required Power of Attorney to sign it. Furthermore, for the purpose of Clause 26.1 of Instructions to Bidders, this too is considered as non-compliance.
3. For the purpose of Clause 4.2 of Bidding Data in the Bidding Document, the documentary evidence submitted by the Malaysian company of the Joint Venture was not certified by the Sri Lankan Diplomatic Mission of Malaysia.
4. Similarly for the purpose of the abovementioned Clause 4.2, the requirement that the documentary evidence to confirm the foreign company as an active company should be certified by the Sri Lankan Diplomatic Mission of the respective country, was not complied with.

In accordance with the said document 2R1, PAB is of the view that the recommended bidder had not complied with a number of major, general and technical requirements as stipulated in the tender documents. Furthermore, it is observed that the Bid form submitted was not on behalf of the Joint Venture, but it was only on behalf of one of the partners of the Joint Venture, namely M/s FRIGI Engineering (Pvt.) Ltd. Also, the Bid Form did not carry any indication to show that it is from the Joint Ventures of M/s. FRIGI Engineering and Dunham Bush Joint Venture Industries. Therefore, it is seen that there are ample reasons for not awarding the tender to the Petitioner joint venture. Moreover, the Petitioner has failed to demonstrate that PAB, in making the recommendation, had acted illegally, arbitrarily, capriciously, mala fide and/or unreasonably, towards the Petitioner to establish any violation of its fundamental rights guaranteed under Article 12(1) of the Constitution.

In the circumstances, it is clear that with such infirmities, the Petitioner cannot legitimately expect that it would get the tender referred to in the advertisement marked X4, awarded in his favour. Therefore, there is no doubt that even if the

award made in favour of the 3rd Respondent is annulled, the petitioner is not entitled to have the tender awarded in its favour. Indeed, the Petitioner has not sought any relief to have the tender awarded to it, instead has sought only to quash the decision referred to in the letter dated 27.07.2015 marked X10. By that letter X10, Secretary to the Ministry of Food Security has informed the Petitioner of the decision to award the tender to the 3rd Respondent, namely M/S AIPPL Access International Joint Venture.

At this stage, it is necessary to note that Sujeewa Nishantha Akuranthilaka, in his capacity as the Director of the Measurement Units, Standards and Services Department, [2nd Respondent] in his affidavit dated 22nd November 2017, has stated that this particular tender cannot be awarded to any of the tenderers due to the reasons set out below.

1. *I state, according to the design of the laboratory building, fresh air supply and air conditioning was to be done by a single system. At present, the laboratory building is functioning with the support of a split type air conditioning machines without the high precision air conditioning and ventilation system.*
2. *I state that the failure to install the requisite air condition system has caused severe repercussions. The split type AC is unable to maintain the environmental condition of the laboratory, the air quality tests carried out by the National Building Research Organization (NBRO) and Industrial Technology Institute (IIT) reveal that formaldehyde levels of the internal air exceeds the standard permissible level. Moreover, there is high risk of the laboratory equipment becoming unsuitable as a result of the atmospheric conditions inside the laboratory.*
3. *I further state, the current specifications and design of air conditioning system was to be installed parallel to the construction work, however, the high precision air condition could not be installed due to unavoidable circumstances. The said tender was a Design and Build Tender but according to the current situation, it has to be redesigned since the construction of the laboratory has been completed.*

4. *I state that the prepared specification and design of the AC system is not effective for the present situation, the new design is capable of reducing the formaldehyde content level to levels approved by the Health and Labour Authorities whilst maintaining laboratory environmental conditions in conformity with international standards.*
[Para. 5,6,7 & 8 of the affidavit dated 22.11.2017 of the Director]

Moreover, in the report of the Procurement Appeal Board [PAB] also, it is mentioned that the Technical Evaluation Committee (TEC) had found that none of the tenderers had fulfilled the following three requirements:

1. Specific experience of the Bidder;
2. Preliminary Design Approach; and
3. any other improvements to the Employer's Requirements suggested by the Bidder

[Page 3 of the PAB report]

Learned Senior ASG on behalf of the 1st, 2nd, 4th and 45th Respondents submitted that the Minister of Finance and the Cabinet of Ministers have so far not sanctioned the request made in the Cabinet Memorandum marked 2R2 by which approval of the cabinet of Ministers was sought to award the tender to the 3rd Respondent. This is evident by the Cabinet Decision marked 2R3. Instead, the Cabinet has suggested calling for fresh tenders. The Ministry of Finance in its observations for the Cabinet Memorandum marked 2R2 has suggested calling for fresh tenders as none of the bidders have fulfilled the threshold requirement to award the tender.

Averments in the 2nd Respondent's Affidavit dated 22nd November 2017 indicate that it is necessary to change even the specifications and design that is required for the Laboratory. In such a situation, calling for fresh tenders would give an

opportunity for all bidders including the Petitioner, to submit the bids afresh in accordance with the revised specifications. Accordingly, the decision to call for fresh tenders to suit the present requirements of the laboratory Building of the Department of Measurement Units, Standards and Services is amply justified.

In the circumstances, the question of cancellation of the tender awarded to the 3rd Respondent will not arise. It is merely because, with the implementation of the decision of the Cabinet to call for fresh tenders to suit the present requirements of the laboratory building of the Department of Measurement Units, Standards and Services, then the decision to award the tender to the 3rd Respondent would automatically get annulled.

For the reasons set out hereinbefore, I am of the view that the Petitioner has failed to establish that its fundamental rights enshrined under Article 12(1) of the Constitution have been infringed.

The application is dismissed without costs.

JUDGE OF THE SUPREME COURT

S.E.WANASUNDERA, PC, J.

I agree

JUDGE OF THE SUPREME COURT

B.P.ALUWIHARE, PC, J.

I agree

JUDGE OF THE SUPREME COURT