

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

**CA (Writ) Application No:
525/2019**

1. GRAPHIC SYSTEMS (PVT) LIMITED,
No. 835,
Kotte Road, Etul Kotte.
2. KEERTHI GUNAWARDANE,
Managing Director,
Graphic Systems (Pvt) Limited,
No. 835,
Kotte Road, Etul Kotte.

PETITIONERS

Vs.

1. PEOPLE'S BANK,
No. 75,
Sir Chittampalam A.Gardiner Mawatha,
Colombo 02.
2. R. GUNAWARDANE,
CEO/General Manager,
People's Bank,
No.30/101,
Kew Road,
Colombo 12.

3. S. GUNARATNE,
Chief Manager, Supplies Division,
People's Bank,
No. 30/101,
Kew Road,
Colombo 12.
4. M.T. S. N. SAMARASEKARA,
Senior Manager, Supplies Division,
People's Bank,
No30101,
Kew Road,
Colombo 12.
5. NISSANKA NANAYAKKARA,
Chairman, People's Bank,
No 30/101,
Kew Road,
Colombo 12.

1st – 5th RESPONDENTS

SUJEEWA RAJAPAKSE,
Chairman,
People's Bank,
No.30/101,
Kew Road,
Colombo 12.

SUBSTITUTED 5th RESPONDENT

Before: M. T. Mohammed Laffar, J.

S. U. B. Karalliyadde, J.

Counsel:

Sanjeewa Jayawardene, PC with Rukshan Senadeera, instructed by Paul Rathnayake Associates for the Petitioners.

Kawshalya Nawaratne with Ms. Nadeeshani Gunawardena, instructed by Ms. Chandima Induwara for the 1st - 5th Respondents.

Written submissions tendered on:

01.07.2022 and 12.12.2022 by the Petitioner.

27.01.2022 by the Respondent.

Argued on: 18.10.2022 and 02.11.2022.

Decided on: 27.03.2024.

S.U.B. Karalliyadde, J.

The 1st Petitioner to this Writ Application is a duly incorporated Company registered under the Companies Act, No. 17 of 1982 and the 2nd Petitioner is the Managing Director of the 1st Petitioner Company. A tender was called by the People's Bank (the 1st Respondent Bank) on 09.03.2019 (marked as P12), inviting suppliers who are capable of printing and supplying appropriate quality materials for 250,000 units of Cash Deposit Slips, within the stipulated time period mentioned in the tender notice. The Petitioner Company submitted its bid for the said tender by letter dated 26.03.2019

for a sum of Rs. 18,487,500.00/-. The 2nd and the 3rd Respondents of the 1st Respondent Bank informed the Petitioner Company that its tender bid had been rejected. On 19.07.2019 by the letter marked as P15, the Petitioner Company submitted a written request inquiring the grounds upon which its tender was rejected. The 1st Respondent Bank by P16 replied emphasizing Clause 17 of the Tender Notice marked as P12 which states as follows;

“The Bank reserves to itself the right **without question to reject** any or all tenders and the right to accept any portion of a tender **without assigning reasons** and the Bank will not entertain correspondence from suppliers for acceptance or non-acceptance of offers and the Bank is not bound to accept the lowest bid.”

The Petitioner argues that the 1st Respondent Bank having the right to reject any bid “without question”, and to do so, “without assigning reasons” thereto as per Clause 17 is completely obnoxious to any sense of reasonableness and justice, especially in the context of public procurement and, no public body should be permitted to rely on such a patently illegal and unreasonable clause.

By the letter dated 21.08.2019 (marked as P18), the 4th Respondent of the 1st Respondent Bank informed the Attorney at Law of the Petitioner that the acceptance or rejection of the tender depends solely on the discretion of the Bank. The Petitioner alleges that the 1st Respondent Bank is seeking refuge under Clause 17 of the tender

document which contradicts the principles of vires, equity, fairness, rationality, and natural justice under the Public Procurement Guidelines of 2006. The learned President's Counsel appearing for the Petitioners argue that every bidder whose bid is rejected, ought to be made aware of the reason for rejection for the following reasons;

- a. Natural justice demands that a decision-maker should give reasons for his decisions.
- b. Natural justice demands that the bidder be given an opportunity to clarify any issue with the bid.
- c. Natural justice demands that the bidder be given an opportunity to clarify any issue, particularly pertaining to any past performances of its tenders and/or contracts.
- d. Natural justice demands that the bidder be made known of the reasons for the rejection of its bid, as the bidder would be able to rectify such issues in future tenders.

Further, the learned President's Counsel appearing for the Petitioners argues that Clause 17 of the Tender Notice violates the Procedure Manual for Procurement, Supplies, Stores and Inventory of People's Bank (R9) pertaining to the tenders which set out the "guiding principles" that ought to guide procurements.

In the performance of a previous tender in 2017 submitted by the Petitioner Company to the 1st Respondent Bank regarding a similar supply of stationaries, the 1st Respondent

Bank by the letter dated 07.07.2017 (marked as P25) informed the Petitioners that certain slips were incomplete as the carbonized duplicates were missing. In response thereto, by letter dated 11.07.2017 (marked as P26), the Petitioners clarified the impossibility of such misplacement and in any event, requested the 1st Respondent Bank to return the boxes of the slips which had the issue, so that the Petitioner could rectify the same. However, the 1st Respondent Bank has not responded to the said letter and therefore, the Petitioners assumed that the said issue had been resolved. The position of the learned President's Counsel is that the said issue has been conjured up by the Respondents in evaluating the Petitioner's bid relating to the tender Notice marked as P12 in 2019 which is the subject matter of this Application. The learned President's Counsel appearing for the Petitioner argues that if the alleged issue pertaining to the incomplete deposit slips in 2017 was so grave and was the reason that led the Respondent in rejecting the Petitioner's bid, the 1st Respondent should have already blacklisted the Petitioner as per Clause 9.16 of the Manual of the 1st Respondent Bank marked as R9, but the 1st Respondent had not done so. At the hearing of this Writ Application, the learned President's Counsel appearing for the Petitioners informed this Court that the Petitioners are confining their reliefs only to prayer (i) in the Petition which is as follows,

- (i) Issue a writ of Mandamus, directing the 1st Respondent and the 2nd Respondent and his successors in office, when calling for, evaluating and awarding any tenders in the future for the supply of deposit slip cash -213DP and any other

printed documents and/or printed material and/or printed forms to duly call for, evaluate and award such tenders, strictly in due accordance with government/public procurement process including *inter-alia*, the Government Procurement Guidelines of 2006 and all such other formal guidelines and/or other rules and principles of law governing public procurements, as well as any other rules stipulated by the National Procurement Commission, as well as in terms of the rule of law, and a transparent and objective manner and based on intelligible criteria;

The Respondents submitted that the Tender No. P/20021/2019 contested by the Petitioners in the instant writ Application, was called adopting the National Competitive Bidding method as the approximate value of the purchase order exceeded Rs. 20 Million and the Tender Notices were published on the website of the 1st Respondent Bank and national newspapers (marked as R4 and R5, and Article 2.4 of the Procurement Manual). As the purchase order exceeded Rs. 20 Million, the members of the Technical Evaluation Committee were appointed to evaluate bids and make recommendations to the Procurement Committee (*vide* marked as R6(c), Article 6 of the Procurement Manual). Bids were received for consideration from 10 suppliers which included the 1st Petitioner as well (marked as R6(d)).

In 2017, the Petitioner was awarded Tender No. P/1510/2017 for the purchase of 30,000 units of cash deposit slips as the lowest complying bid (marked as R1(a), R1(b), R1(c)

and R1(d)), which the Respondent later encountered missing carbonized duplicate copies and the Petitioners were directed to replace the defective pads with immediate effect by the letter marked P25. However, the Petitioners failed and neglected to take any action. In the evaluation of the bids received, it is the responsibility of the Technical Evaluation Committee to adhere to Article 5, Chapter 1 of the Procurement Manual (marked as R9) which states,

"To provide a continuous and uninterrupted flow of banking activities by obtaining and ensuring the delivery of acceptable quality goods and services, at the right price, at the right time, in the right quality in correct quantity from the right source."

Further, Article 5.2 and Article 5.5 in the same document respectively state that the Technical Evaluation Committee has the responsibility "to ensure the Bank gets the best Value for Money spent on all purchases" and "all complaints regarding goods purchased to be resolved in the best interest of the Bank". The learned Counsel appearing for the Respondents argues that the Technical Evaluation Committee is mandated to consider the past performance of a supplier and complaints received in relation to the delivery of inferior quality goods as material considerations which is relevant to the evaluation of bids received. Therefore, the learned Counsel appearing for the Respondents submitted that the Technical Evaluation Committee has no obligation to accept the lowest bid without considering such material factors as per

Article 9.13, Chapter 1 of the Procurement Manual (marked as R9) and the rejection of the bid by the Petitioner is completely justified. Further, the learned Counsel appearing for the Respondents submitted that the Technical Evaluation Committee acted in accordance with the mandate of the Procurement Manual in arriving at the recommendation to award the tender to the second lowest bid.

The contention of the learned President's Counsel appearing for the Petitioners is that the discretion of the 1st Respondent Bank to reject any or all tenders without giving reasons as per Clause 17 of the Tender document (marked as P12) is in contradiction with the objectives of the Government Procurement Procedure 2006. The learned President's Counsel argued that the Respondents have an obligation to conduct the tender procedure as stipulated in the Government Procurement Guidelines of 2006.

The Petitioners agreed to confine the reliefs sought in the Petition only to prayer (i). By that prayer, the Petitioners seek a Writ of Mandamus directing the Respondents to strictly follow the government/public procurement process including *inter-alia*, the Government Procurement Guidelines of 2006 and all such other formal guidelines and/or other rules and principles of law governing public procurements, as well as any other rules stipulated by the National Procurement Commission, as well as in terms of the rule of law, and a transparent and objective manner and based on intelligible criteria in the future tender procedures.

The said Government Procurement Guidelines of 2006 are intended to guide the tender procedures in the State Institutions. In the case of *Daewoo Engineering and Construction Co. Ltd Vs Amarasekera*¹ where the Guidelines on Government Tender Procedure of 1997 was applicable, Sripavan, J. observed that,

“The preface to the "Guidelines on Government Tender Procedure" states that Government institutions are expected to follow the tender procedure to obtain goods and services in order to achieve the following objectives: -

- 1. To keep the process fully transparent and honest.*
- 2. To speed up the process.*
- 3. To obtain financially the most advantageous and qualitatively the best services and supplies for the country.”*

Sripavan, J. further held in the case of *Daewoo Engineering and Construction Co. Ltd* (supra) that the guidelines should be followed by all Government Institutions inclusive of Ministries, Departments, Public Corporations and Statutory Bodies, Fully Owned Government Companies, Provincial Councils and Local Authorities for the procurement of works, services and supplies and disposal of Government Assets.

In the case of *SmithKline Beecham Biologicals S.A. and another Vs. State Pharmaceutical Corporation of Sri Lanka and others*² Dr. Amerasinghe, J. held that,

¹ (2006) 2 Sri LR 232.

² (1997) 3 SLR 20.

“the Guidelines make it clear that a Tender Board may only consider bids which are responsive and qualified by substantially conforming with the tender documents. The State and its agencies are bound by and must rigorously and scrupulously observe the procedures laid down by them on pain of invalidation of an act in violation of them.”

In *Pamkayu (M) SND BHD (Appearing by Its Attorney, Hemachandra) Vs. P. Liyanaarachchi, Secretary, Ministry of Transport and Highways*³, Amerasinghe, J. held that,

“The President of the Republic and Minister of Finance & Planning states in the Preface to the Guidelines on Government Tender Procedure that they were designed, inter alia, 'To keep the process fully transparent and honest'.

The State and its agencies are bound by and must rigorously and scrupulously observe the procedures laid down by the Executive on pain of invalidation of an act or omission in violation of them. An executive agency must be rigorously held to the standards by which it professes its conduct is to be judged: Accordingly, if an action is based on a defined procedure, that procedure must be scrupulously observed.

³ (2001) 1 Sri L.R. 118.

K. Sripavan, C.J., in *Noble Resources International Pte Limited Vs. Hon. Ranjith Siyambalapitiya and others*⁴ held that,

“it is essential to the maintenance of the rule of law that every organ of the State must act within the limits of its power ...When specific provisions are laid down in the Government Procurement Guidelines- 2006 and in the Bid Documents, the rule of law will imply that the requirements of those provisions are not violated.”

When considering the above-stated decisions it is clear that the Court endorses the importance of following the Government Procurement Guidelines when awarding tenders in the State institutions to keep the process fully transparent and honest and to protect equity, fairness, rationality, and natural justice in tender processes. Under such circumstances, no prejudice would be caused to the Respondents if the Court grants the relief prayed by the Petitioners in prayer (i).

Therefore, considering the above-stated facts and circumstances, this Court issues a Writ of Mandamus directing the Respondents to strictly follow the government/public procurement process including *inter-alia*, the Government Procurement Guidelines of 2006 and all such other formal guidelines and/or other rules and principles of law governing public procurements, as well as any other rules stipulated by the National Procurement Commission, as well as in terms of the rule of law, and a transparent and

⁴ The Bar Association Law Journal 2016 Vol. XXII at page 161.

objective manner and based on intelligible criteria when calling, evaluating and awarding any tenders in the future. No costs ordered.

Application allowed.

JUDGE OF THE COURT OF APPEAL

M.T. MOHAMMED LAFFAR, J.

I agree.

JUDGE OF THE COURT OF APPEAL