

**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/591/2021

1. Finco Technologies (Pvt) Ltd
No.16, 5th Lane,
Galle Road, Colombo 03.
2. Jayasundara Mudiyansele Ruwan
Rohana Bandara
Chief Executive Officer
Finco Technologies (Pvt) Ltd,
No.16, 5th Lane,
Galle Road, Colombo 03.

PETITIONERS

Vs.

1. Dr. G.L.K.Ekanayake
Director General
Institute of Sports and Medicine
No.33,
Maitland Place,
Colombo 07.
2. Ravindra Samarawickrama
The Secretary
State Ministry of Rural and School
Sports Infrastructure Improvement.
3. The Chairman
Ministry Procurement Committee
4. Dr.E.A.L.C.K.Edirisinghe
The Chairman
Technical Evaluation Committee
5. Dr. Daminda Attanayake
Member
Technical Evaluation Committee
The 2nd – 5th Respondents at:

State Ministry of Rural and School
Sports Infrastructure
Improvement,
12th Floor, West Tower,
World Trade Centre,
Colombo 01.

6. Anuradha Wijekoon
The Secretary
Ministry of Youth and Sports
No.09,
Philip Gunawardena Mawatha,
Colombo 07.
7. Techomedics International (Pvt)
Ltd
No.04, Dhammodaya Mawatha,
Pannipitiya Road,
Battaramulla.
8. P&T Trading (Pvt)Ltd
No.57/23,
Gallage Mawatha, Mirihana,
Nugegoda.
9. Hon. Attorney General
Attorney General's Department,
Colombo 12.

RESPONDENTS

Before: Sobhitha Rajakaruna J.
Dhammika Ganepola J.

Counsel: Harsha Fernando with Chamith Senanayake and Yohan Coorey for the Petitioners
Sumathi Dharmawardana PC ASG with Amasara Gajadeera SC for 1st to 6th and
9th Respondents
Dr.Asanga Gunawansa with Nikita Gomez and Navindra Fonseka for the 7th
Respondent
Suren Gnanaraj with Rashini Dias Gunawardana for the 8th Respondent

Argued on: 06.04.2022, 27.04.2022, 10.10.2023

Written submissions: Petitioners - 25.04.2022
1st to 6th and 9th Respondents - 29.11.2023
7th Respondent - 05.04.2022, 24.11.2023

Decided on: 12.01.2024

Sobhitha Rajakaruna J.

The Institute of Sports Medicine ('Procurement Entity') by way of the advertisement marked 'P3' called for tenders for "supplying, installation, commissioning, training and maintaining of the equipment for the Human Performance Laboratory of the Institute of Sports Medicine". The Petitioners on 09.07.2021 allegedly relying on the assurances given at the pre-bid meeting submitted their bid quoting a bid price of LKR 179,873,082.50 (excluding VAT). The Petitioners filed the instant Application challenging the decision of the 1st to 6th Respondents to award the above tender to the 7th Respondent and to reject the 1st Petitioner's bid on the grounds that it was non-responsive.

At the pre-bid meeting, the Petitioners raised concerns regarding how the specifications in the bid document had been formulated alleging that such selection of specifications violates the Procurement Guidelines. The Petitioners assert that the technical specifications in the bid document were copied from a product catalog of a specific product known as 'Vicon', which was offered by the 7th Respondent. The contention of the Petitioners is that by adopting such technical specifications the bid has been tailor-made to benefit the 7th Respondent and it amounts to 'Vendor Bias'. It is averred that the Petitioners were assured by the 1st Respondent regarding such complaints that the Technical Evaluation Committee ('TEC') would be specifically instructed not to permit bias in favor of the product mentioned above leaving no room for the procurement decision to be skewed unfairly and also that the technical specifications would be evaluated while keeping in mind the concerns raised on behalf of the Petitioners. Following the concerns raised on behalf of the Petitioners and some other bidders, on 08.07.2021 an Addendum (bid addendum - 1) was issued under the signature of the 3rd Respondent - Chairman of the Ministry Procurement Committee.

Bids were opened on 12.07.2021 and there were only three bids. Those were submitted by the 1st Petitioner, 7th Respondent and the 8th Respondent. The Petitioners state that, notwithstanding their bid being the lowest substantially responsive bid, the Petitioners were informed by letter dated 12.10.2021 ('P13') that the 7th Respondent "had been evaluated as the substantially evaluated lowest responsive bidder for the contract". According to 'P13', the 1st Petitioner's bid has not been evaluated as substantially qualified during the technical evaluation on the grounds of *"failing to comply in two of the five major items considered major*

deviations according to the specific evaluation criteria adopted for the process with the remaining three items being only partially complied technically in accordance with Section III. Evaluation and Qualification Criteria, ITB 35.3 and ITB 35.4 of the Bidding document”. Further, the 7th Respondent has been selected as the substantially evaluated lowest responsive bidder for the contract value of LKR 248,588,726.30 (without VAT). The Petitioners contend that the decision to award the bid to the 7th Respondent is among other things ultra vires, biased, unjustifiable, made in breach of Rules of Natural Justice and is prejudicial to the interest of the Procurement Entity and the State.

Halfway through the hearing in this Court, the parties agreed that this matter be dealt with and determined solely on the basis of written submissions.

Firstly, I must consider the Preliminary objection raised by the 7th Respondent on futility. The 7th Respondent argues that granting the reliefs as prayed for in the Prayer of the Petition would be futile and devoid of any practical effect on parties before the Court. The 7th Respondent contends that it has completed in supplying, insulation, commissioning and training of the Human Performance Laboratory of the Procurement Entity. As such, it is stated that the contract entered into between the Procurement Entity and the 7th Respondent has now been fully performed and the payment of up to 90% of the total contracted value has been settled. Relying upon several judgments¹ of the Superior Courts the 7th Respondent submits that it is trite law that no court will issue a Writ of Certiorari or Mandamus, where doing so would be vexatious and futile.

After reviewing all such authorities of higher courts, I take the view that the Writ Court is not mandatorily bound to refuse an Application if it observes that

(a). granting a Writ would not be needful to remedy the grievances of the

Applicant,

(b). no purpose is served by issuing a writ.

¹ See : JSC VTB Bank v Pavel Valerjevich Skurikhin (2022) EWCA CIV 1337; Mosley v Newsgroup Newspapers Ltd (2008) ALLER (D) 322; P.S. Bus Company Limited v Members and Secretary of Ceylon Transport Board (1958) 61 NLR 499; Samastha Lanka Nidahas Grama Niladhari Sangamaya and Others v D. Dissanayake Secretary and Others (SC Appeal 158/2010); Credit Information Bureau of Sri Lanka v M/s Jafferjee & Jafferjee (2005) 1 SLR 89; Siddeek v Jacolyn Seneviratne and Others (1984) Sri LR 83.

None of those previous judgements have expressly curtailed the discretion of the Review Court but have only implied that the Court, under usual circumstances, should not issue a Writ if the result would be a futility. How the court should exercise its discretion upon an objection on futility should be decided based on the facts and circumstances of each case, for the best interest of justice, without restricting its jurisdiction to a rigid rule as such. Hence, I decide, taking into consideration the circumstances of this case, to exercise the inherent powers of this Court to examine the questions relating to the Petitioners' alleged grievance, especially considering the significant difference in value between the bid amounts offered by the 1st Petitioner and the 7th Respondent.

Now I must consider the primary allegation raised by the Petitioners against the Respondents on 'Vendor Bias'. The Petitioners argue that the original technical specifications in the bid document specifically targeted the product offered by the 7th Respondent and to the exclusion of the other bidders. As mentioned above, the Petitioners contend that the technical specifications in the bid document were identical to that of the product catalog of a specific product known as 'Vicon' which was the product offered by the 7th Respondent. The complaint of the Petitioners is that the TEC and the Ministerial Procurement Committee ('MPC') have not considered the inbuilt bias specifically in the specifications and have evaluated the bids regardless of the assurance given at the pre-bid meeting.

The contention of the 1st to 6th and 9th Respondents is that the TEC having considered the suggestions made by the Petitioners decided to amend the technical specifications and also obtained the advice of a technical expert in that regard. The amended technical specifications in the bidding document are marked as 'P9'. Thus, the said Respondents assert that the Petitioners cannot approbate and reprobate on the issue of 'Vendor Bias' as the Petitioners have gone ahead without any protest submitting the bid after the TEC accommodated the request of the Petitioners to amend the specifications to a certain extent.

It appears that the nature of the bias complained of by the Petitioners deviates from the traditional maxim *Nemo judex in re sua*. Christopher Forsyth in Administrative Law (*by the late Sir William Wade and Christopher Forsyth, 11th Edition Oxford p.390*) under the subheading 'Fanciful Allegations of Bias' states;

“While the test of bias is unsatisfactory in application, clarity may be sought in the actual decisions. It may be noted that, generally, a challenge based on a personal interest or connection between the judge and the parties or witnesses is more likely to succeed than one based upon membership of particular organizations or institutes that may be thought to have an interest in the dispute. A line must be drawn between genuine and fanciful cases”

‘The question of bias is always the question of fact. The court has to be vigilant while applying the principles of bias as it primarily depends on the facts of each case. The court should only act on real bias and not merely on the likelihood of bias.’ [Vide - ***Cantonment Executive Officer v. Vijay V. Wani (2008) 12 SCC 230, 234 (para 7)***]

I take the view that when a party raises a ground of bias against the opposing party in a review case, they should provide sufficient material to support their allegation. During a tender process, the Procurement Entity should have the privilege to select the best item that they need to fulfill their requirements. I cannot see any viable restriction for the Procurement Entity of the instant Application to request specifications of a branded and reliable item if it is of the view that such an item would be more suitable to their exact requirements through their past experience. However, this proposition would be different if the 7th Respondent is the sole agent of this particular product sold under the 'Vicon' brand name. Vicon Motion Systems Limited (www.vicon.com) is a company based in the United Kingdom which manufactures motion capture systems. It is noteworthy that neither the 1st Petitioner nor the 7th Respondent manufacture motion capturing systems. The Annexure I of the bidding document ('P4') declares the technical specification for motion camera systems. The 1st to 6th and 9th Respondent's argument is that it does not refer to any brand name and the mentioned specifications are rather generic in nature. Moreover, it is noted that the amendments suggested to the bidding documents by the Petitioners were only in relation to the Motion camera systems whereas tenders were called for (i) Motion camera systems, (ii) Inertial systems, (iii) Force platform, (iv) EMG (Electromyography) and (v) Service provisions. It appears that the Petitioners' claim on 'Vendor Bias' is only in reference to one component (i.e. Motion camera systems) of the above three items.

I am of the view that it is hard to accept the specific contention of the Petitioners on 'Vendor Bias' solely on the ground that the specifications in respect of the Motion camera system

declared in the bidding document resemble those of the same product marketed under 'Vicon' name. It would be too broad a proposition to extend the theory of bias to exclude the specification of the bidding document only because such specifications are identical or substantially similar to a product already available in the market. I am reluctant to apply the concept of 'Bias' except where there is clear and unmistakable evidence of an individual interest that unequivocally signifies bias. The presence of such an individual interest stands out as a key factor in establishing bias. I cannot find any material establishing the fact that the members of the TEC or the MPC have prejudged the successful bidder within their decision-making process. Similarly, the Petitioners have failed to portray an adequate correlation beyond doubt between the allegation of bias and the personal interest/involvement of the members of the TEC and the MPC.

Be that as it may, I cannot possibly overlook the difference in the bid value between the 1st Petitioner and the 7th Respondent and it is noticeably a sum of Rs. 68,715,643.80. The fact that public monies were used to pay the 7th Respondent cannot be ignored by the TEC, MPC, or the Procurement Entity at any point. A tremendous responsibility will be cast upon the members of the TEC and the MPC when concerns are raised on matters such as 'Vendor Bias'. If the specifications described in the bidding documents specifically target the product offered by one particular bidder or such specifications are directly copied from a catalog of a desired product, it can be assumed as serious malpractice in the procurement trade. Such bad practice may be labeled as 'Vendor Bias' or by any other name, but the liability of the members of the TEC or the MPC to evaluate carefully the bids considering respective allegations will not be readily relinquished, especially in the presence of a significant disparity in the bid values.

The members of the MPC ought to focus their scrutiny and evaluation to assess whether the specifications in the bidding document are unusually not competitive to the majority of bidders other than to one single bidder. The MPC is indeed guided by the specifications stipulated in the bidding documents, but it needs to consider the material impact on the end result concerning the product offered by the bidder who quoted a significantly lower price. The MPC must evaluate the reasonability of paying an exorbitantly higher rate using public funds to a bidder who has offered a product with specifications that are precisely the same as

those that the authorities have seemingly taken straight from a catalog of a specific product. Such exercise is essential to promote Good Governance. The product offered by the lowest bidder needs to be evaluated even considering the fact whether accepting such goods will compromise the exact requirements of the Procurement Entity rather than limiting the evaluation to the specifications that are of a technical nature.

Nevertheless, by viewing the contents of the Bid Evaluation Report ('R10') I make an observation that no evidence can be found to signify that the Members of the MPC had taken any of the grounds mentioned above into consideration to substantially justify the significant difference in the bid values or to dismiss the said allegations on the specifications. In terms of the Procurement Manual 2006, fair, equal and maximum opportunity for interested parties to participate in Procurement is one of the hallmarks of a sound procurement system. Even the alleged complaints on the Issuing Register, "R7," where it appears that the 7th and 8th Respondents were represented at the pre-bid meeting by the same individual have gone unnoticed by the MPC. The Petitioners assert that the 1st to 6th Respondents have negligently or willingly chosen to ignore possible collusion between the 7th and the 8th Respondents.

The fact that the specifications were directly copied from a catalog of a desired product eradicates the opportunities for interested parties to participate in the procurement. In view of the minutes of the pre-bid meeting (Vide- 'R5'), the TC has accepted the need to modify some details within the technical specification of the tender bid following the concerns raised by the Petitioners. The MPC should not be a 'rubber stamp' of the Procurement Entity to overlook the above crucial factors when evaluating the bids. Hence, the MPC or TEC should have given adequate reasons considering the above aspects for clarity and transparency.

Notwithstanding the preceding, a reasonable question arises as to whether the strength of the 1st to 6th and 9th Respondents' legal arguments restrict this Court from proceeding with the Petitioners' arguments against the MPC when reaching the final determination of this case. I have already addressed the Petitioners' arguments on the so-called 'Vendor Bias' and manipulation of specifications stated in the bidding documents. Having considered those questions, now the Court's task is to assess the other arguments raised in the Petition solely

based on the uncontested amended version of the specifications which I am compelled to acknowledge whilst conferring it a 'purified status'.

According to the bid evaluation Report marked 'R10', the 1st Petitioner has not complied with the technical specifications in respect of 'Motion Camera Systems' and service provisions, whereas it has partially complied with the specifications in respect of Inertial measurement system, EMG and Force platform. The 7th Respondent has complied with three specifications while partially complying with the other two specifications. Concerning the technical specifications of the Motion camera systems, the 7th Respondent has only substantially complied with such specifications. The 1st to 6th and the 9th Respondents strenuously argue that such failure of the 1st Petitioner are major deviations in terms of the Procurement Guidelines. For instance, those Respondents submit that the 1st Petitioner has suggested 12MP for camera resolution as a minimum while the said Annexure I required 8MP and thus, any bidder who submits specifications with a resolution less than 8MP will not be considered. Referring to the Appeal submitted by the Petitioners to the 6th Respondents ('P15'), it is contended that the Petitioners have not challenged the expertise of the members of the TEC as a ground for Appeal.

Now I must advert to the other allegations raised by the Petitioners, particularly mentioned in paragraph 33 of the Petition of the Petitioners. The said paragraph reads:

"The Petitioners state that the letter dated 12th Oct. 2021 (P13) and the decision contained therein is, in addition to the afore-stated reasons, bad in law for several reasons including;

- a. That, in terms of the Procurement Guidelines, the decision to award the Tender must be conveyed by the Secretary to the Line Ministry; i.e. in this instance, the 6th Respondent. However, the Letter dated 12th Oct. 2021 (P13) was signed by the 1st Respondent; thus rendering such to be ultra vires and bad in law;*
- b. has failed to give reasons for the decisions as contained therein; namely failing to specify which of the "two of the five major items have been considered major deviation";*
- c. failing to identify as to which of the items have been considered as "...partially complied technically...";*

- d. due to (a) and (b) above, denying and/or precluding the Petitioners' ability to meaningfully exercise their right of appeal granted in terms of the Procurement Guidelines; and
- e. requiring the appeal to be lodged to the “Chairman, Ministry Procurement Committee, State Ministry of Rural and School Sport infrastructure improvement” (3rd Respondent) who is one of the decision makers, thereby breaching rules of natural justice specifically the principle of *nemo judex in causa sua* and the provisions of the Procurement Guidelines pertaining to appeals.”

The 1st to 6th and 9th Respondents, based on the contention of the TEC in the said Report marked ‘R10’ have summarized the reasons for rejections of the bids submitted by the 1st Petitioner and the 8th Respondent as follows:

- “a. The Petitioners had failed to attach the Letters of Authorization for several products*
- b. The Petitioners had failed to furnish details pertaining to Service provisions*
- c. There were significant number of unspecified or inappropriate specifications as well as variable specifications*
- d. The Petitioners had quoted only for a single seat license [Visual 3D (C-Motion)] when in fact Bid Specification required the bidder to quote for multiple users/seats*
- e. The Petitioners had only quoted for 3 years software support service for (Visual 3D(C-Motion), when the minimum requirement was 5 years*
- f. In each of the five components the Petitioners had submitted inappropriate specifications and/or variable specifications.”*

During the detailed evaluation, the MPC has identified the following major deviations in respect of the bid submitted by the 1st Petitioner:

“1. Specifications Annexure – I (Motion Camera Systems, Software and accessories) Non complied

No direct manufacturers LOA available for: i) Inertial system (Noraxon), ii) EMG system (Noraxon), iii) Force Plate system (AMTI), iv) Visual 3D (C-Motion). Qualisys identify AMTI

and Noraxon as partners in their LOA. The letter does not include any details regarding C-Motion.

2. Specification Annexure – V (Service Provision) Non complied

No specification or detail pertaining to the service provision, in relation to annex 9.2: Team of full-time and part-time experts for 2 years specializing in the field of biomechanics and biomechanical engineering, including a local Lead Researcher and Foreign Consultant expert network.”

It appears that the major deviations identified by the MPC show the lack of due diligence on the part of the Petitioners. The fact that an Addendum is being published following the Petitioners' concerns and the 1st Petitioner submitting a bid without any further protest is also a major drawback for the arguments raised on behalf of the Petitioners. Similarly, the allegations leveled against the MPC by the Petitioners on copying the specifications from another catalog are referred only to 'Motion Camera System'. The Bidding Data Sheet in Section II (ITB 35.5) of the Bidding document specifies that the bidder must consider all items as a single unit and submit a price.

The 1st to 6th and the 9th Respondents strenuously argue that what is most pertinent and what appears to be outrageous is that the Petitioners have waited until the contract with the 7th Respondent was executed on 16.11.2021 to come before this Court. The said Respondents relying on the dicta in the judgment of ***Walter Abeyesundara and Another v. Secretary, Ministry of Tourism and Others, CA/Writ/371/2020 decided on 22.09.2021*** contend that the Petitioners have failed to demonstrate due diligence and have slept over their rights. By closely observing the chronological sequence of events such as the date of the pre-bid meeting; the date the Petitioners made their suggestions; the date of the issuance of the Addendum, I am convinced that the Petitioners lacked promptitude.

Based on all the above circumstances I take the view that the major and minor deviations pointed out by the 1st to 6th and 9th Respondents in respect of the bid submitted by the 1st Petitioner outweigh the claims made by the Petitioners against the MPC, especially the one in paragraph 33 of the Petition of the Petitioners. In addition to that, the lack of promptitude in invoking writ jurisdiction disentitle the Petitioners in seeking reliefs as prayed for in the

prayer of the Petition. It is true that the Petitioners were able to raise the pivotal arguments on different perspectives such as 'Vendor Bias', 'Inbuilt Bias' in the specifications as well as the failure of the MPC to consider the significant difference in the bid values. Irrespective of the foregoing, I am afraid that the Petitioner is not entitled to be benefited by any of those arguments since the Petitioners have failed to adequately establish that they have followed the due process diligently and establish that the product they have offered is more responsive than the product which is offered by the 7th Respondent. For the reasons set forth above, I take the view that no substantial prejudice has been caused to the 1st Petitioner due to the conduct of the members of the MPC or the TEC in not giving clear and transparent reasons as observed by me earlier in this judgement.

Furthermore, when arriving at the above conclusions I was captivated by the Judgement in ***Tata Cellular v. Union of India (1994) 6 SCC 651***, upon which the 1st to 6th and the 9th Respondents have placed reliance. It is a case where a three-judge bench of the Supreme Court of India extensively considered the English decisions as well as the previous decisions of the Supreme Court of India in the matters of judicial review and scope relating to Government contracts and tenders and deduced the legal principles as under:

“(1) The modern trend points to judicial restraint in administrative action.

(2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.

(3) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise which itself may be fallible.

(4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract.

Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.

(5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness (including its other facts pointed out above) but must be free from arbitrariness not affected by bias or actuated by mala fides.

(6) Quashing decisions may impose a heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.”

Considering all the above circumstances, I hold that the Petitioners are not entitled to any of the reliefs as prayed for in the prayer of the Petition. In light of the reasons given above, I take the view that other than the objections on futility as discussed above, this Court is not required to analyze in detail the other preliminary objections raised on behalf of the 7th Respondent. Hence, I proceed to dismiss the instant Application.

Application is dismissed.

Judge of the Court of Appeal

Dhammika Ganepola J.

I agree.

Judge of the Court of Appeal