

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

**Court of Appeal Case No.**  
**CA/WRT/0114/2025**

**EXPRESS ENVIRONMENTAL SERVICES**  
**(PRIVATE) LIMITED,**  
No. 402,  
George R De Silva Mawatha,  
Colombo 13.

**Petitioner**

**Vs.**

1. **K. T. A. R. C. K. KASTURIRATNE,**  
CHAIRMAN,  
Departmental Procurement Committee 01  
Airport And Aviation Services (Sri Lanka)  
(Private) Limited,  
Bandaranaike International Airport,  
Katunayake.

2. **T. A. B. BADDAWALA,**  
MEMBER,

3. **R. M. S. R. RATHNAYAKE,**  
MEMBER,

4. **BANDULA,**  
MEMBER,  
2<sup>nd</sup> to 4<sup>th</sup> Respondents being Members  
of the Departmental Procurement  
Committee 01  
Airport And Aviation Services (Sri  
Lanka) (Private) Limited

All of:

Departmental Procurement Committee  
01  
Airport And Aviation Services (Sri  
Lanka) (Private) Limited,  
Bandaranaike International Airport,  
Katunayake.

5. **AIRPORT & AVIATION SERVICES  
(SRI LANKA) (PRIVATE) LIMITED,**  
Bandaranaike International Airport,  
Katunayake.

6. **AIR CHIEF MARSHAL (RTD) HARSHA ABEYWICKREMA,**  
CHAIRMAN,  
Airport And Aviation Services (Sri Lanka) (Private) Limited,  
Bandaranaike International Airport,  
Katunayake.
7. **SAFE CARE FACILITIES MANAGEMENT (PVT) LTD,**  
No. 23/B, Lady Evelyn De Soysa Road,  
Idama,  
Moratuwa.
8. **CLEAN TECH (PVT) LTD,**  
No. 141.  
Kirula Road,  
Colombo 05.
9. **AMIL JANITOR SERVICES (PRIVATE) LIMITED,**  
Lily Avenue,  
Battaramulla.
10. **CARE CLEAN (PVT) LTD,**  
No. 125,  
Jawatte Road,  
Colombo 05.

**Respondents**

Before: **D. THOTAWATTA, J.**  
**K. M. S. DISSANAYAKE, J.**

Counsel: M.U.M. Ali Sabry, P.C. with Naamiq Nafath AAL, instructed by  
Ramzi Bacha Associates for the Petitioner.

Manohara Jaysinghe, DSG for the 1<sup>st</sup> to 6<sup>th</sup> Respondents.  
Lasitha Kanuwanaarachchi AAL with Vipuni Peiris AAL,  
Tharushi Amarasinghe AAL and Charith Widanapathirana AAL  
for the 7<sup>th</sup> Respondent instructed by Sanath Wijewardena AAL.

J. Sajuni Senavirathne AAL for the 10<sup>th</sup> Respondent.

8<sup>th</sup> and 9<sup>th</sup> Respondents are absent and unrepresented.

Argued on : 13.06.2025 and 23.06.2025

Written Submissions of  
the Petitioner  
tendered on : 01.07.2025

Written Submissions  
of the 1<sup>st</sup> to 6<sup>th</sup> Respondents : 30.06.2025  
tendered on

Written Submissions : 01.07.2025  
of the 7<sup>th</sup> Respondent  
tendered on

Decided on : 09.07.2025

**K. M. S. DISSANAYAKE, J.**

The Petitioner seeks in the instant application to challenge the legality of the decision of the 1<sup>st</sup> to 6<sup>th</sup> Respondents to reject the bid submitted by the Petitioner who admittedly, being the substantially responsive lowest bidder for the provision of Janitorial and Cleaning Services for Ancillary buildings and their precincts at the Bandaranaike International Airport, Katunayaka bearing bid No. 094/T/2023 for a period of two years and award it to the 7<sup>th</sup> Respondent who admittedly, being the substantially responsive second lowest bidder which decision was admittedly, based on the findings arrived at by the Technical Evaluation Committee (hereinafter called and referred to as the “TEC”) appointed for the said purpose by the 5<sup>th</sup> Respondent who being the Procuring Entity (hereinafter called and referred to as the “PE”) pursuant to its “on site” visit of the offices of all five substantially responsive bidders and contained in its report (**R3**).

As can clearly, be deducible from the pleadings and the submissions both oral and written of the Petitioner, the pivotal basis for the challenge being that TEC had acted in excess of the powers vested in it by the National Procuring Guidelines (**X11**) and or by the corresponding Procuring Manual (**X12**) and or by the Bidding document (**X6**) when it had conducted an “on site” visit of the offices of all five substantially responsive bidders as such in evaluating the said bids and determining the substantially responsive lowest evaluated bidder from among all five substantially responsive bidders when the National Procuring Guidelines (**X11**) and or corresponding Procuring Manual (**X12**) and or Bidding document (**X6**) does not in any manner, prescribe and or permit such a course as adopted by the TEC in this instance, to be adopted by the TEC, namely; to conduct an “on site” visit of the offices of all five substantially responsive bidders as such, in evaluating the said bids and determining the substantially responsive lowest evaluated bid by reason of the fact that the National Procuring Guidelines (**X11**) and or corresponding Procuring Manual (**X12**) and or Bidding Document (**X6**) expressly, and explicitly, prescribes and or stipulates the manner in which

the bids should be evaluated with a view to determining the substantially responsive lowest evaluated bidder in that bids should be first, evaluated strictly, according to the criteria and methodology specified in the bidding document; and that the evaluation of bids shall be consistent with the method, terms, and conditions disclosed in the bidding documents as stipulated in the National Procurement Guidelines (**X11**), and therefore, the decision of the 1<sup>st</sup> to 6<sup>th</sup> Respondents to reject the bid submitted by the Petitioner who admittedly, being the substantially responsive lowest bidder for the provision of Janitorial and cleaning services for Ancillary buildings and their precincts at the Bandaranaike International Airport, Katunayaka bearing bid No. 094/T/2023 for a period of two years and award it to the 7<sup>th</sup> Respondent who admittedly, being the substantially responsive second lowest bidder, which was based on the findings arrived at by TEC in pursuant to its “on-site” visit as enumerated above, and contained in its report (**R3**), was totally illegal, *ultra vires*, unlawful, wrongful, arbitrary, unreasonable, unfair, discriminatory, irrational, misconceived, erroneous, in breach of the principles of natural justice and or based on ulterior motives and or totally irrelevant and or extraneous, collateral considerations and actuated by palpable *mala fides* and in frustration of the legitimate expectations entertained by the Petitioner and in violation of the principles of proportionality and as such, it should be quashed by a mandate in the nature of a writ of *certiorari*.

The 1<sup>st</sup> to 6<sup>th</sup> Respondents had while, totally, denying and refuting the contention and or the assertion so adverted to by the Petitioner as such and raising a number of preliminary objections as to the maintainability of the instant application based on the want of necessary parties, the doctrine of futility and on the misrepresentation of material facts etc., sought to counter and resist it by contending that, in view of clause 2.13 of the Bidding document (**X6**), for a bidder to be qualified, he must be capable of providing janitorial and cleaning services morefully specified and it is in this context, that the report of the TEC (**R3**) and observations contained therein based upon an “on site” visit by the TEC, of the offices of all five

substantially responsive bidders should be considered; and that there is absolutely, no prohibition in doing an “on site” visits of offices of all five substantially responsive bidders as such, so long as it would be necessary to verify critical and crucial information; and that, if this is done in a uniform and non-discriminatory manner; and that in this instance, it is absolutely not a case where the Petitioner was subject to extra scrutiny in furtherance of a malice designed to deprive it of the award.

It appears that, the 7<sup>th</sup> Respondent too, had associated with the 1<sup>st</sup> to 6<sup>th</sup> Respondents to some degree and extent in countering the case for the Petitioner.

The 10<sup>th</sup> Respondent on the other hand, moves that it be discharged from these proceedings for; it was not a necessary party thereto.

Hence, the pivotal basis of the challenge to the decision of the 1<sup>st</sup> to 6<sup>th</sup> Respondents to reject the bid submitted by the Petitioner who admittedly, being the substantially responsive lowest bidder for the provision of Janitorial and cleaning services for Ancillary buildings and their precincts at the Bandaranaike International Airport, Katunayaka bearing bid No. 094/T/2023 for a period of two years and award it to the 7<sup>th</sup> Respondent who admittedly, being the substantially responsive second lowest bidder, is founded upon the premise that it was based on the findings of the TEC arrived at upon an “on site” visit as such and contained in its report (**R3**) which is *ultra vires* of the powers or the authority conferred upon TEC in evaluating and determining the substantive responsive lowest evaluated bidder from and among the substantially responsive five bidders upon an “on site” visit of all offices of all substantially responsive five bidders for; such a procedure or methodology has not in any manner, been envisaged by the provisions of the Bidding document (**X6**), and therefore, the said decision based upon the findings arrived at by TEC upon “on site” visit of all offices of all substantially responsive five bidders which is *ultra vires* of the authority or the power of TEC, was a nullity and hence, it is null and void *ab initio* and as such it should be liable to be quashed by an order in the nature

of a writ of *certiorari*, for; it was tainted with illegality and was also *ultra vires*, unlawful, wrongful, arbitrary, unreasonable, unfair, discriminatory, irrational, misconceived, erroneous, in breach of the principles of natural justice and or based on ulterior motives and or totally irrelevant and or extraneous, collateral considerations and actuated by palpable *mala fides* and in frustration of the legitimate expectations entertained by the Petitioner and in violation of the principles of proportionality.

Simply, the pivotal position of the Petitioner is that, the TEC cannot go beyond the criteria that is already stipulated in the Bidding Document (**X6**) in evaluating the substantially responsive five bids and in determining the substantially responsive lowest evaluated bid from among them for; the criteria stipulated in the Bidding Document (**X6**) is the only criteria that ought to be adopted in evaluating the bids and determining the substantially responsive lowest evaluated bid which does not permit an “on-site” visit as adopted by the TEC in this instance and therefore, TEC had gone beyond its authority and hence, the findings arrived at by it, as contained in its report (**R3**) were *ultra vires* and the said decision based thereon is thus, a nullity and would therefore, derive no legal consequence therefrom and hence, liable to be quashed by way of a writ of *certiorari*.

In the light of the above, the pivotal question that would now, arise for our consideration and determination in the instant application is whether or not, the methodology adopted by the TEC by way of an “on-site” visit of the office premises of the substantially responsive all 5 bidders as enumerated in its report by it (**R3**) by means of evaluating the Substantially Responsive bids and determining the Substantially Responsive Lowest Evaluated Bidder, was *ultra vires* of the evaluation criteria stipulated in the bidding document (**X6**); and if so whether or not the rejection of the bid submitted by the Petitioner being the Substantially Responsive Lowest Bidder and award it to the 7<sup>th</sup> Respondent being the substantially responsive second lowest bidder based on the said recommendation of the TEC made by it based on an “on-site” visit of the office premises of the substantially



responsive all 5 bidders as enumerated in its report by it (**R3**) is of no force or avail and therefore, a nullity?

It is in this context, I would think it most appropriate at this juncture to examine the evaluation criteria to be adopted in evaluating the substantially responsive bids and determining the substantially responsive lowest evaluated bid from and among them. Before, I venture to examine it, let me first, briefly, set out the facts relevant to the instant application as recited in its petition by the Petitioner.

The Petitioner in paragraph 3 of the petition describes the Respondents to the instant application in the following manner;

- a) The 1<sup>st</sup> Respondent being the Chairman of the Departmental Procurement Committee 01 of the 5<sup>th</sup> Respondent;
- b) The 2<sup>nd</sup> to 4<sup>th</sup> Respondents being the members of the Departmental Procurement Committee 01 of the 5<sup>th</sup> Respondent;
- c) The 5<sup>th</sup> Respondent being the Airport And Aviation Services (Sri Lanka) (Private) Limited;
- d) The 6<sup>th</sup> Respondent being the Chairman of the 5<sup>th</sup> Respondent;
- e) 7<sup>th</sup> Respondent being the party to whom the impugned bid is purported to have been awarded; and
- f) 8<sup>th</sup> to 10<sup>th</sup> Respondents being the bidders who participated in the said bid;

In terms of paragraph 4 of the petition, the subject matter of the instant being an invitation to bid for the provision of janitorial and cleaning services for Ancillary buildings and their precincts at the Bandaranaike International Airport, Katunayaka bearing bid No. 094/T/2023 for a period of two years.

In the rest of the averments in the petition, the Petitioner states that, the 2<sup>nd</sup> Respondent had by a newspaper publication (**X4**) called on or around 21.10.2024 for bids for the provision of Janitorial and Cleaning Services for Ancillary buildings and their precincts at the Bandaranaike International Airport, Katunayaka bearing bid No. 094/T/2023 for a period of two years;

that, the said advertisement **(X4)** had *inter-alia*, stipulated the following bidding conditions, namely; a) the prospective bidder shall have satisfactorily carried out a similar service to the value of Rs. Six Million or above per month for the immediate past two years up to the date of closing of bids; and b) that the prospective bidder should have a minimum number of 150 experienced staff employed continuously in janitorial work throughout the past two years up to the date of closing bids; that, pre-bid meeting was held on 01.11.2024 true copy of the minutes of which was annexed to the petition marked as **X5**; that, the petitioner in terms of the aforesaid advertisement/ invitation for bid paid a sum of Rs. 55,000/- being the non-refundable bidding document fee and purchased the bidding document **(X6)**; that the Petitioner had submitted a duly completed bid along with the supporting documents **(X8(i))** to **(X8(xxxi))** and furnished a bid security of Rs. Six Million satisfying the requirements stipulated in the invitation to bid **(X4)** and the bidding document **(X6)**; that subsequently, the bid was opened on 13.11.2024 at 2.00pm and the results were as follows;

	Bidder's Name	Amount per 02 years (Rs.)	
1	Express Environmental Services (Private) Limited	256,044,660.00	Petitioner
2	Safe Care Facilities Management (Pvt) Ltd	270,731,632.16	7 <sup>th</sup> Respondent
3	Clean Tech (Pvt) Ltd	273,672,861.54	8 <sup>th</sup> Respondent
4	Amil Janitor Services (Private) Limited.	343,727,393.89	9 <sup>th</sup> Respondent
5	Care Clean (Pvt) Ltd	355,458,226.48	10 <sup>th</sup> Respondent

The Petitioner further states in the averments in the petition that, in view of the above, the Petitioner's bid was the lowest responsive bid; that when matters remained as such, there had been no response whatsoever from the 1<sup>st</sup> to 6<sup>th</sup> Respondents and/ or any one or more of the Respondents in

respect of the said tender or the awarding of the tender; that, the Petitioner was made to be aware that the said bid had by the letter dated 30.01.2025, been awarded to the 7<sup>th</sup> Respondent for a total contract value of Rs. 270,731,632.05/- whereas, the contract value of the bid submitted by the Petitioner was for Rs. 256,044,660.00/- which was lower than the bid of the 7<sup>th</sup> Respondent by Rs. 14,686,972.05/- ;that the Petitioner had not been informed of the outcome of the said bid; that, the 6<sup>th</sup> Respondent had by the Letter of Award dated, 30.01.2025 (**X10**), awarded the said bid to the 7<sup>th</sup> Respondent which was not the lowest responsive bid thus, contrary to the purpose of the bidding process, namely; the least cost principle; that the failure of the 1<sup>st</sup> to 6<sup>th</sup> Respondents to award the bid to the Petitioner being the lowest responsive bidder, is contrary to the provisions of the Procurement Guidelines; that, the 1<sup>st</sup> to 6<sup>th</sup> Respondents had by failing to inform the outcome of the said bid to the bidders, acted in contravention of the Procurement Guidelines thereby violating the procedure set out therein; that, the Petitioner had then by the letter dated 09.02.2025 (**X14** and **X14(i)**), informed the Minister of Transport, Highways and Ports and Civil Aviation and the 6<sup>th</sup> Respondent about the abuse of the bidding process and the unlawful, arbitrary, unreasonable acts and or conduct of any one or more of the Respondents; that, the Petitioner through its Attorney-At-law had demanded (**X15** and **X15(i)**) the 1<sup>st</sup> and or 2<sup>nd</sup> and or 3<sup>rd</sup> and or 4<sup>th</sup> and or 5<sup>th</sup> and or 6<sup>th</sup> Respondents to reverse the decision to award the bid to the 7<sup>th</sup> Respondent and to award the bid to the Petitioner being the lowest responsive bidder; that in the circumstances, the decision and or determination and or conduct of the 1<sup>st</sup> to 6<sup>th</sup> Respondents and or any one or more of the Respondents in rejecting petitioner's bid being the lowest responsive bid and awarding the same to the 7<sup>th</sup> Respondent was unlawful, illegal, arbitrary, unreasonable and contrary to the Procurement Guidelines 2006 (Goods and Works) and therefore, **a)** the purported decision of the 1<sup>st</sup> to 6<sup>th</sup> Respondents and/or any one or more of the Respondents to award the tender to the 7<sup>th</sup> Respondent; **b)** the purported decision of the 1<sup>st</sup> to 6<sup>th</sup> Respondents and/ or any one or more of the Respondents to reject the bid of

the Petitioner which is the lowest responsive bid; **c)** Letter of Award dated 30<sup>th</sup> January 2025 issued in favour of the 7<sup>th</sup> Respondent and/or the underlying decision contained therein; **d)** All consequential decisions and/or determinations and/or steps taken pursuant to the Letter of Award dated 30<sup>th</sup> January 2025; and **e)** Failure of the 1<sup>st</sup> to 6<sup>th</sup> Respondents and/or any one or more of the Respondents to adhere to the Procurement Guidelines 2006(Goods and Works) and the corresponding Procurement Manual, were totally illegal, *ultra vires*, unlawful, wrongful, arbitrary, unreasonable, unfair, discriminatory, irrational, misconceived, erroneous, in breach of the principles of natural justice and or based on ulterior motives and or totally irrelevant and or extraneous, collateral considerations and actuated by palpable *mala fides* and in frustration of the legitimate expectations entertained by the Petitioner and in violation of the principles of proportionality.

Hence, the Petitioner now, seeks in the instant application before us to impugn; **a)** the purported decision of the 1<sup>st</sup> to 6<sup>th</sup> Respondents and/or any one or more of the Respondents to award the tender to the 7<sup>th</sup> Respondent; **b)** the purported decision of the 1<sup>st</sup> to 6<sup>th</sup> Respondents and/ or any one or more of the Respondents to reject the bid of the Petitioner which is the lowest responsive bid; **c)** the purported issuance of the Letter of Award dated 30<sup>th</sup> January 2025 issued in favour of the 7<sup>th</sup> Respondent and/or the underlying decision contained therein; **d)** All consequential decisions and/or determinations and/or steps taken pursuant to the Letter of Award dated 30<sup>th</sup> January 2025; and **e)** Failure of the 1<sup>st</sup> to 6<sup>th</sup> Respondents and/or any one or more of the Respondents to adhere to the Procurement Guidelines 2006 (Goods and Works) and the corresponding Procurement Manual.

It was on that basis, the Petitioner seeks in the instant application the following relief;

B) a mandate in the nature of a Writ of *Certiorari*, calling for and quashing the purported decision of the 1<sup>st</sup> to 6<sup>th</sup> Respondents and/or

any one or more of the Respondents to reject bid of the Petitioner which is the lowest responsive bid and to award the tender/bid to the 7<sup>th</sup> Respondent;

C) a mandate in the nature of a Writ of *Certiorari* quashing the Letter of Award dated 30<sup>th</sup> January 2025 issued to the 7<sup>th</sup> Respondent marked as “X10” and the underlying decisions contained therein;

D) a mandate in the nature of a Writ of *Certiorari*, calling for and quashing all consequential decisions and/or determinations and/or steps taken by the 1<sup>st</sup> to 6<sup>th</sup> Respondents and/or any one or more of the Respondents pursuant to the Letter of Award dated 30<sup>th</sup> January 2025 marked as “X10”;

E) a mandate in the nature of Writ of Mandamus directing the 1<sup>st</sup> to 6<sup>th</sup> Respondents and/or any one or more of the Respondents and/or their servants and/or agents to award the tender to the lowest responsive bidder namely the Petitioner;

F) a mandate in the nature of a Writ of Prohibition preventing the 1<sup>st</sup> to 6<sup>th</sup> Respondents and/or any one or more of the Respondents and/or their servants and/or agents thereof, from awarding the bid to anyone other than the lowest responsive bidder namely the Petitioner and /or taking any further steps consequent to the Letter of Award dated 30<sup>th</sup> January 2025 marked as “X10”;

G) an Interim Order, staying the Letter of Award dated 30<sup>th</sup> January 2025 marked as “X10” and the underlying decision(s) contained therein;

H) an Interim Order, staying the purported decision to award the Bid No. 094/T/2023 to the 7<sup>th</sup> Respondent and/or the purported decision to reject the bid of the Petitioner and/or any consequential decisions and/or determinations and/or steps taken by the 1<sup>st</sup> to 6<sup>th</sup> Respondents and/or any one or more of the Respondents pursuant to the Letter of Award dated 30<sup>th</sup> January 2025 marked as “X10”;

I) an Interim Order, preventing the 1<sup>st</sup> to 6<sup>th</sup> Respondents and/or any one or more of the Respondents from acting in terms of the Letter of Award dated 30<sup>th</sup> January 2025 marked as “X10” and/or taking any further steps in respect of Bid No 094/T/2023 other than awarding the same to the lowest responsive bidder namely the Petitioner;

It is in this backdrop of the instant application, let me now, deal with and examine the evaluation criteria set out in the Government Procurement Guidelines (Works and Goods) (X11), its corresponding manual (X12) and the Bidding Document (X6).

It is Government Procurement Guidelines 2006-Goods and Works (X11) (hereinafter called and referred to as the “Government Procurement Guidelines) that governs the procedure that should be adhered to by the Procuring Entity (PE) in carrying out any Procurement Action financed in whole or in part by Government of Sri Lanka or a Foreign Funding Agency as spelt out in clause 1.1.1 of chapter 1 thereof.

In the preface to that Government Procurement Guidelines (X11), the following observations are made by President of Sri Lanka;

“THE Government of Sri Lanka has placed the highest priority to ensure that development efforts across all sectors are evenly balanced and distributed to all cross sectors of the society, **in order to meet the overall national development and enhance the quality of life of its citizens.**

**To achieve the desired results it is imperative to ensure speed, transparency and integrity in all the development spheres and in regard to which the procurement function of goods, works and services plays a critical role.**

The development programmes which are instituted and other in the pipe line include those which are financed by public funds as well as by external funding. Within this context the availability of a set of guidelines on procurement which harmonizes the processes to be

followed under the different funding agency procedures has been identified and acknowledged by all providers of development funding as a vital factor.

It is in this context that the National Procurement Agency has been established under Presidential directive. The institution which functions directly under my purview is mandated to study, revise and adopt the procedures and processes in order to govern this vital aspect. The efforts taken by the National Procurement Agency, within a period of one year from its inception, to study the several procedural documents which prevail in the sphere of public procurement and to formulate a single harmonized procurement guideline applicable over the different funding agency procedure is a significant and commendable achievement.

I trust that this publication on procurement guidelines in the areas of goods and works would be made use of by all stakeholders of national development in order that **the overall national development goals as well as the individual organization development objectives are realized on a timely and cost effective manner.**” [Emphasis is mine]

The word “Procurement” is defined in the Government Procurement Guidelines (**X11**) to mean “the obtaining by Procuring Entities of Goods, Services or Works **by most appropriate means** with public funds or funds from any other source whether local or foreign received by way of loans, grants, gifts, donations, contributions and similar receipts...” [Emphasis is mine]

The objectives thereof as spelt out in 1.2.1 (a) to (g) of chapter 1 being that the Procurement process should ensure; a) maximizing economy, timeliness and quality in Procurement resulting in least cost together with the high quality; b) adhering to prescribed standards, specifications, rules, regulations and good governance; c) providing fair, equal and maximum

opportunity for eligible interested parties to participate in Procurement; d) expeditious execution of Works and delivery of Goods and Services; e) compliance with local laws and regulations and international obligations; f) ensuring transparency and consistency in the evaluation and selection procedure; and g) retaining confidentiality of information provided by bidders.

In terms of clause 2.7 of the Procurement Guideline, Procuring Committee (PC) is mainly, three-fold, namely;

- a) Cabinet Appointed Procuring Committee (CAPC) which shall be appointed by the National Procurement Agency (NPA) under delegated authority by the Cabinet of Ministers (Vide 2.7.1 thereof);
- b) Ministry Procuring Committee (MPC) which shall be appointed by the Secretary to the Line Ministry(Vide 2.7.4 thereof);
- c) Department Procuring Committee (DPC) which shall be appointed by the Secretary to the Line Ministry(Vide 2.7.5 thereof);

In terms of clause 2.8.1 (a) of the Government Procurement Guidelines (**X11**), there shall be TECs for all Procurements falling under the purview of CAPC, MPC and DPC and the TEC for Department Procurement Committee (DPC) is *inter-alia*, appointed by Head of the Department/Project Director (Vide 2.8.4. thereof).

Clause 2.4 of the Government Procurement Guidelines (**X11**) spells out the joint responsibilities of Procurement Committees (PCs) and Technical Evaluation Committees (TECs) and clause 2.4.1 (a) thereof, stipulates that “The relevant PC and the TEC as described in these Guidelines **shall carry out the entire Procurement Process.**” And clause 2.8.1 (e) of the Government Procurement Guidelines (**X11**) spells out that “A TEC is however, **solely responsible for the technical evaluation.** [Emphasis is mine]

Clause 3.12.1 (a) of the Government Procurement Guidelines (**X11**) spells out that, “Pre-qualification is generally required in circumstances where the



high cost of preparing detailed bids by potential bidders could discourage competition, such as Procurements involving, large or complex works contracts, *i.e.* turnkey, design and build or management contracts; or custom designed equipment, industrial plants Specialized Services”, whereas, 3.12.1(b) thereof stipulate that, “This method ensures that, invitations to bid are extended **only to those who have adequate capabilities and resources**”[Emphasis is mine].

Clause 5.2.1 (a) of the Government Procurement Guidelines (**X11**) stipulates that, “The bidding documents shall contain **all relevant information necessary for a prospective bidder to prepare a bid for the Goods or Services or Works to be offered in response to the invitation to bid (or quote). The contents of the bidding documents should be unambiguous**”[Emphasis is mine].

Clause 5.3.2 of the Government Procurement Guidelines (**X11**) stipulates that, “The invitation to bid shall contain appropriate and relevant basic information required by prospective bidders to prepare the Bid or Quotation, **including main eligibility criteria and the qualification requirements of the successful bidder.**” [Emphasis is mine].

Clause 5.3.19(a) of the Government Procurement Guidelines (**X11**) stipulates the evaluation criteria applicable to an evaluation of a bid wherein, it spells out that, “The bidding documents shall also specify **the relevant factors in addition to price, to be considered in bid evaluation and the manner in which they will be applied for the purpose of determining the lowest evaluated bid**” [Emphasis is mine].

Clause 5.3.20(b) of the Government Procurement Guidelines (**X11**) spells out that, “**The disclosed criteria shall not be modified or additional criteria shall not be introduced during evaluation.**” [Emphasis is mine].

Chapter 7 of the Government Procurement Guidelines (**X11**) makes provisions for bid evaluation. Clause 7.2 thereof stipulates that, “After bid

opening, information relating to substance, clarification, examination and evaluation of Bids and recommendations concerning awards **shall not be communicated to bidders nor to any other person** (unless they are formally involved in the process) **until after the date on which the award of contract is formally notified to the successful Bidder**” [Emphasis is mine].

With regard to the purpose and stages of Bid evaluation, Clause 7.7.1 (a) and (b) (i),(ii),(iii) of the Government Procurement Guidelines (**X11**) stipulates as follows;

“a) The purpose of bid evaluation is **to determine the lowest evaluated substantially responsive bid out of the Bids received**;

b) Therefore, bid evaluation process could be divided into three broad stages:

i) Bid examination: To determine the eligibility of bidders, legal validity of bid and substantial responsiveness of Bids received.

ii) Detailed Bid evaluation: To determine the lowest evaluated Bid, from among the substantially responsive Bids received.

iii) Post qualification: to determine the qualification and experience of the lowest evaluated bidder.” [Emphasis is mine]

Clause 7.8 of the Government Procurement Guidelines (**X11**) sets out the general principles applicable to bid examination wherein, it states that, bid examination may be carried out in two stages:

“a) Stage 1;

To ascertain whether the;

- bidder is eligible,
- if the bid is signed,

- Bid is legally valid, and
- Bid accompanied by the required bid security.

If the answer is negative to any of the above, the Bid is rejected and excluded from further consideration.

b) Stage 2;

To ascertain the deviations from the provisions of bidding documents and categorize such deviations into major or minor deviations. Also, to identify deviations (debatable deviations) which may be categorized as either minor or major deviations depending upon the requirements of the specific provisions of the bidding document, the criticality of the deviation, the value of the contract in comparison to the value of the deviation and the judgment of the TEC. **The purpose is to identify substantially responsive Bids with a view to subjecting such Bids for detailed bid evaluation**” [Emphasis is mine]

Clause 7.8.6 of the Government Procurement Guidelines (**X11**) makes provisions for the determination of substantially responsive bids.

“7.8.6. A substantially responsive bid should be one which conforms to all the terms, conditions and specifications of the bidding documents, without material deviation or reservation....”

Clause 7.8.7 of the Government Procurement Guidelines (**X11**) stipulates that, “All Bids that are considered as substantial responsive shall be subjected to detailed evaluation.”.

Clause 7.9 of the Government Procurement Guidelines (**X11**) stipulates the procedure to be adopted in Detailed Bid Evaluation and it reads thus;

### **General Principles**

7.9.1 (a) The manner in which the bids are to be evaluated, including the

criteria for selection of the lowest evaluated bid **must be stipulated in the bidding document.**

(b) The evaluation of bids **shall be consistent with the method, terms, and conditions disclosed in the bidding documents.**

(c) A systematic and logical sequence should be followed and such a procedure is enumerated below.

**7.9.2 Step-by-step procedure to be followed:**

- correction of arithmetical errors;
- discounts, if any;
- evaluation of acceptable omissions (line items or parts of work);
- conversion to a common currency;
- delivery periods or completion times;
- adjustments for various minor deviations;
- operational costs or life cycle costing (if applicable);
- the availability of after sales service and spare parts;
- the acceptable departures of warranties;
- discounts, if any;
- domestic preference;
- assessment of monetary implications on deviations and other matters;
- adjustments for various minor deviations.

The corresponding manual to the Government Procurement Guidelines (**X12**) lays down the general principles of detailed bid evaluation and comparison of Bids as follows;

Procurement Guideline Reference: 7.9.1

General Principles of detailed bid evaluation and comparison of Bids;

The main objective of detailed bid evaluation **is to determine the cost that PE will incur if the contract is awarded to each of the bid which was determined as a substantial responsive bid. Therefore only the bids that have been determined to be substantially responsive to the bidding documents, i.e. do not contain material deviation, should be considered for detailed evaluation.** Out of the three stages of bid evaluation described in this manual **only during this stage the bids are compared with each other. The purpose of comparison is to determine the lowest evaluated cost that will be incurred by the PE from the substantially responsive bids received. The lowest evaluated bid may or may not necessarily be the lowest quoted bid. In order to determine the lowest evaluated bid the PE should only use the evaluation criteria disclosed in the bidding document. No additional evaluation criteria other than that were disclosed should be used during the evaluation.** A systematic and logical sequence as described in this manual should be followed during the detailed evaluation and comparison of bids. [Emphasis is mine]

Clause 7.9.10 of the Government Procurement Guidelines (**X11**) provides for the general principles applicable to evaluation of the Lowest Evaluated Substantial Responsive Bid and it reads thus;

“Bids shall be first evaluated strictly according to the criteria and methodology **specified in the bidding documents and such evaluated Bids shall be compared to determine the lowest evaluated substantially responsive Bid.**” [Emphasis is mine]

The Bidding Document (**X6**) in its clause 10.7 stipulates the evaluation criteria applicable to determining 'the Lowest Evaluated Substantial Responsive Bid' as follows;

#### 10.7 **Evaluation Criteria**

1. Eligibility Requirements (Refer Section 2 Clause 11 of Bid)
2. Accuracy of Details given in the Supporting Documents
3. Realistic Data
4. Realistic Bid Value
5. Adequacy of Resources to be used to execute the Contract
  - a. Manpower
  - b. Equipment
  - c. Materials
  - d. Financial Capability
  - e. History
  - f. Bid Value

In the light of the Preface contained in the Government Procurement Guidelines (**X11**) and provisions contained therein as enumerated above and also the provisions contained in the corresponding manual to it (**X12**), the purpose of those guidelines is to set forth the procedures that should be adhered to by the Procuring Entity (PE) in carrying out any Procurement Action financed in whole or in part by Government of Sri Lanka or a Foreign Funding Agency and its objectives being *inter-alia*, to ensure maximizing economy, timeliness and quality in Procurement resulting in least cost together with the high quality while, ensuring transparency and consistency in the evaluation and selection procedure.

In this instance, offers were invited by the Chairman, Departmental Procurement Committee 01, Airport and Aviation Services (Sri Lanka) (Private) Limited from reputed organizations by way of national competitive bidding for provision of Janitorial and Cleaning Services for Ancillary buildings and their precincts at the Bandaranaike International Airport, Katunayaka bearing bid No. 094/T/2023 for a period of two years by the newspaper advertisement (**X4**) and based on the documents submitted along with the bid, all the five bidders enumerated above were initially evaluated, to be substantially responsive bidders and the TEC had thereupon, proceeded to the detailed bid evaluation as enumerated above, by adopting a kind of methodology by means of an “on-site” visit of the office premises of all five Substantially Responsive Bidders with a view to determining the substantially responsive lowest evaluated bidder from among the all five substantially responsive bidders, and in pursuant to the detailed bid evaluation as such, conducted by it, the TEC had determined the 7<sup>th</sup> Respondent to be the Substantially Responsive Lowest Evaluated Bidder, and recommended it to be awarded the tender in question. It is the legality of the decision of the 1<sup>st</sup> and or 2<sup>nd</sup> and or 3<sup>rd</sup> and or 4<sup>th</sup> and or 5<sup>th</sup> and or 6<sup>th</sup> Respondents to reject the bid of the Petitioner and award the tender to the 7<sup>th</sup> Respondent based on the recommendations made by the TEC upon the findings arrived at by it in pursuant to an “on-site” visit of the office premises of all five Substantially Responsive Bidders adopted by it as being a methodology to determine the substantially responsive lowest evaluated bidder from among the all five substantially responsive bidders that the Petitioner now, seeks to challenge before us by way of a writ of *certiorari* in the instant application.

It is in this context, let me examine the provisions relating to evaluation criteria as embodied in the Government Procurement Guidelines (**X11**) and its corresponding manual (**X12**) and the bidding documents itself (**X6**) as reproduced above.

Clause 5.3.19(a) of the Government Procurement Guidelines (**X11**) stipulates the evaluation criteria applicable to an evaluation of a bid wherein, it spells out that, “The bidding documents shall also specify **the relevant factors in addition to price, to be considered in bid evaluation and the manner in which they will be applied for the purpose of determining the lowest evaluated bid**” [Emphasis is mine].

Clause 5.3.20(b) of the Government Procurement Guidelines (**X11**) spells out that, “**The disclosed criteria shall not be modified or additional criteria shall not be introduced during evaluation.**” [Emphasis is mine].

Procurement manual at its page 93 stipulates the bid evaluation criteria with reference to clause 5.3.19 of the Government Procurement Guidelines (**X11**) and it may be re-produced as follows;

#### **“Bid Evaluation Criteria**

Other than the substantial responsive and price of the bid there may be other factors, depending on the case, that are relevant for the evaluation. **'The PE shall identify such factors and include in the bidding documents. The evaluation should be done only using such criteria and methodology disclosed.** No advantage should be given to any bid proposing the requirements than specified. Some of the criteria generally used for procurement of goods/works are:

- Arithmetical errors;
- Omissions;
- Delivery schedule or time for completion;
- Efficiency of the equipment;
- Capacity;
- Spare parts;
- After sale services;
- Payment schedule;
- Operating costs;



- Life cycle costing;
- Currency conversion;
- Domestic Preferences;
- Discounts offered for combination of lots in multiple contract awards (cross discounts);
- Experience and qualifications of the lowest evaluated and substantially responsive bidder;
- Alternate Bid.” [Emphasis is mine]

In the light of the evaluation criteria as embodied in the Government Procurement Guidelines (X11) and its corresponding manual (X12), the manner in which the bids are to be evaluated, including the criteria for selection of the lowest evaluated bid **must be stipulated in the bidding document and the evaluation of bids shall be consistent with the method, terms and conditions disclosed in the bidding documents;** and that the bidding document shall also specify **the relevant factors in addition to price, to be considered in bid evaluation and the manner in which they will be applied for the purpose of determining the lowest evaluated bid;** and that, **the disclosed criteria shall not be modified or additional criteria shall not be introduced during evaluation.** [Emphasis is mine].

The Court in the decisions in Smithkline Beecham Biologicals S.A. and Another V. State Pharmaceutical Corporation of Sri Lanka and Others [1997] 3 SLR 20, Noble Resources International Private Limited Vs. Hon. Ranjith Siyamabalapitiya and Others SCFR NO. 394/2015-Decided on 24.01.2016 and Pamkaya (M) SND BHD Vs. Liyanaarachchi [2001] 1 SLR 118, too, laid emphasis on the strict compliance of the procedure set out in the Government Procurement Guidelines and the bidding documents.

The manner in which the bids are to be evaluated, is stipulated in clause 10.7 of the Bidding documents (X6) and it may be reproduced as follows;

#### **“Evaluation Criteria**

1. Eligibility Requirements (Refer Section 2 Clause 11 of Bid)
2. Accuracy of Details given in the Supporting Documents
3. Realistic Data
4. Realistic Bid Value
5. Adequacy of Resources to be used to execute the Contract
  - a. Manpower
  - b. Equipment
  - c. Materials;
  - d. financial Capability;
  - e. History;
  - f. Bid Value.

It is in this backdrop, let me now, examine the report of the TEC (**R3**) and its findings and recommendations contained therein, the part of which is most relevant to the issue at hand before us may be re-produced *verbatim* the same as follows;

**Table I – Details of the Bidders**

S/N	Name of the Bidder	Amount for two years without VAT	Amount for two years with VAT
1	M/s Express Environmental Services	216,987,000.00	256,044,660.00
2	M/s Safe Care Facilities Management (Private) Limited	229,433,586.58	270,731,632.16
3	Clean Tec (Pvt) Ltd	231,926,153.85	273,672,861.54

4	M/s Amil Janitor Services	291,294,401.60	343,727,393.89
5	M/s Carekleen (Pvt) Ltd.	301,235,785.15	355,458,226.48

### **Observations**

TEC observed that the offers listed in the Table-II are eligible for the evaluation and hence, the below mentioned five bids were evaluated based on the criteria outlined in the Tender Document, The compliance sheet of the bidders is attached herewith as the Annex-II. Technical Evaluation Committee observed that all the five bidders have submitted all required documents that has been requested in the tender document. It was noted that all offers quoted by the bidders are lower than the cost estimation (Annex-II) by the TEC. However, every bidder was able to prove their financial capabilities and experiences in the- field and-no major deviation were observed. Accordingly based on the documents submitted along with the bid, it was observed that all above five bidders are substantially responsive.

**Table II – Bidders Taken for Evaluation**

S/N	Name of the Bidder	Amount for two years with VAT	Rank
1	M/s Express Environmental Services	256,044,660.00	Lowest
2	M/s Safe Care Facilities Management (Private) Limited	270,731,632.16	2nd Lowest
3	Clean Tec (Pvt) Ltd	273,672,861.54	3rd Lowest
4	M/s Amil Janitor Services	343,727,393.89	4th Lowest
5	M/s Carekleen (Pvt) Ltd.	355,458,226.48	5th Lowest

However, the Technical Evaluation Committee made arrangements to visit the office premises of all the bidders on 7th January 2025 in an uninformed

way to further clarify certain areas and Table III depicts a summary of the visit.

**Table III – Summary of the Inspection**

S/N	Name of the Bidder	Inspected documents / areas	Special Remarks
1	M/s Express Environmental services	<p>Original certificate of the Business registration.</p> <p>Annual audited accounts.</p> <p>Original copies EPF &amp; ETF Payment proofs</p> <p>Bank statements to see the transactions</p> <p>Original award letters of the contracts, earned more than 6 Mn per month</p> <p>Details of the permanent employees of the company</p> <p>Office Premises</p>	<p><input type="checkbox"/> Failure to Provide Required Documents M/s Express Environmental Services failed to produce the majority of the original documents requested by the TEC during the site visit. Instead, they requested additional time to provide these documents, stating they would produce them on January 10, 2025, which reflects a lack of readiness and professionalism.</p> <p><input type="checkbox"/> Incomplete Office Setup It was observed that both M/s Target Environmental Services (Pvt) Ltd and M/s Express Environmental Services were operating from a location still under construction. Due to this, the</p>

		<p>companies failed to demonstrate a fully functional office setup. TEC was informed by the remaining staff that many employees were working from home, which raised concerns about the company's operational stability.</p> <p>□ General Manager's Employment Status and Knowledge Gaps</p> <ul style="list-style-type: none"> <li>• The General Manager was unable to provide proof of permanent employment with the company. When asked to provide his EPF number, he admitted that no EPF number was available for him, which is unacceptable for such a key position.</li> <li>• The General Manager demonstrated inadequate knowledge of the company's business operations. He stated that different sections were handled by</li> </ul>
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		<p>separate teams and admitted he was unaware of certain critical details; Notably, he was unable to provide the approximate annual turnover of the company, which raised serious doubts about his competency and the company's leadership.</p> <p>□ Interlinked Operations with Target Environmental Services (Pvt) Ltd</p> <p>• Both M/s Express Environmental Services and M/s Target Environmental Services (Pvt) Ltd are owned by siblings from the same family. Although the companies claimed to operate independently, TEC discovered instances where correspondence was conducted by one company on behalf of the other, and vice versa.</p> <p>This overlap indicated that the two companies are</p>
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			<p>effectively managed by the same team, which violates the tender document's requirement for independent operations.</p> <p><input type="checkbox"/> Office Premises and Staff Limitations</p> <p>During the visit, the officers from Express Environmental Services failed to demonstrate the operational capacity expected for the scope of the tender. The incomplete office premises and the lack of on-site staff further amplified concerns about their ability to manage the required janitorial and cleaning services effectively.</p>
2	M/s Safe Care Facilities Management (Private) Limited		<p>M/s Safe Care Facilities Management (Private) Limited successfully presented themselves during the evaluation process and provided all the documents and information requested by the</p>

			TEC in a timely and organized manner.
3	Cleantec (Pvt) Ltd		<p>Cleantec (Pvt) Ltd was a subsidiary company of Abanse group and their scope as per the business registration was, collection and processing of recyclable waste and not the janitorial services.</p> <p>However, Cleantec (Pvt) Ltd they were able to produce everything requested by the TEC.</p>
4.	M/s Amil Janitor services		M/s Amil Janitor services successfully presented themselves during the evaluation process and provided all the documents and information requested by the TEC in a timely and organized manner."
5.	M/s Carekleen (Pvt) Ltd.		M/s Carekleen (Pvt) Ltd. successfully presented themselves during the evaluation process and provided all the documents and information requested by the



			TEC in a timely and organized manner."
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### **Recommendations**

Considering the above facts the Tender Evaluation Committee recommends to award Tender for ‘Janitorial & Cleaning Services for Ancillary buildings & their Precincts Bandaranaike International Airport (BIA), Katunayake for the period of 2024/2026’ to substantially responsive, 2nd lowest bidder, M/s Safe Care Facilities Management (Private) Limited for the total cost of, Two Hundred Twenty-Nine Million Four Hundred Thirty-Three Thousand Five Hundred Eighty-Six Sri Lankan Rupees and Fifty-Eight Cents (229,433,586.58) + VAT. Moreover, the total cost inclusive of 18% VAT would be, Two Hundred Seventy Million Seven Hundred Thirty-One Thousand Six Hundred Thirty-Two Sri Lankan Rupees and Sixteen Cents. (Rs. 270,731,632.16) for the period of 2 years under terms and conditions stipulated in the tender document.

In the light of the observations made in the report by the TEC(**R3**), all five bidders are substantially responsive; and that the Petitioner being the substantially responsive lowest bidder while, the 7<sup>th</sup> Respondent being the substantially responsive second lowest bidder.

At this juncture, it is pertinent to examine the clause 10 of the Bidding document (**X6**) which is dedicated to the Qualification Questionnaire wherein, it stipulates that, “it is important that, the prospective bidder should complete the qualification questionnaire providing all information in full as this will be considered in evaluation of bid”. Hence, it becomes clear, that whatever the information that is provided in the qualification questionnaire will be considered in evaluation of bid.

Clause 10.7 of the Bidding document (**X6**) refers to the evaluation criteria and Clauses 10.7.1, 10.7.2, 10.7.3, 10.7.4 and 10.7.5 (a),(b),(c), (d), (e) and (f) of the Bidding document (**X6**) expressly, and explicitly, list out in detail, an array of grounds as amenable for evaluation criteria to be adopted by the

TEC in evaluation of a bid and they may be re-produced *verbatim* the same as follows;

**“10.7 Evaluation Criteria**

1. Eligibility Requirements (Refer Section 2 Clause 11 of Bid)
2. Accuracy of Details given in the Supporting Documents
3. Realistic Data
4. Realistic Bid Value
5. Adequacy of Resources to be used to execute the Contract
  - a. Manpower
  - b. Equipment
  - c. Materials
  - d. Financial Capability
  - e. History
  - f. Bid Value;” [Emphasis is mine]

Hence, the grounds morefully, enumerated in the Clauses 10.7.1, 10.7.2, 10.7.3, 10.7.4 and 10.7.5 (a),(b),(c), (d), (e) and (f) of the Bidding document (**X6**), as being the grounds amenable for evaluation criteria, are the grounds that should be adopted by the TEC in evaluation of a bid with a view to determining the Substantially Responsive Lowest Evaluated Bidder.

In the circumstances, it is beyond any doubt, that the TEC has all the powers and the authority to carry out the evaluation process as authorized by the aforesaid Clauses of the Bidding document (**X6**) on the grounds morefully, enumerated in the Clauses 10.7.1, 10.7.2, 10.7.3, 10.7.4 and 10.7.5 (a),(b),(c), (d), (e) and (f) thereof and therefore, it is incumbent upon the TEC in the first place, to satisfy itself as to the accuracy and or the genuiness and or the truthfulness of the information so furnished by a bidder in the qualification questionnaire in the Bidding document (**X6**) so as

to enable it to make a determination as to the Substantially Responsive Lowest Evaluated Bidder.

Now, the pertinent question is whether the TEC had in this instance, acted *ultra vires* of the powers or authority conferred upon it by the aforesaid Clauses for evaluation of a bid and for determination of the Substantially Responsive Lowest Evaluated Bidder from and among all five substantially responsive bidders when it had gone on an “on-site” visit of the office premises of all five substantially responsive bidders, as contended by the Petitioner.

It may now, be examined.

The report of the TEC (**R3**) *inter-alia*, reveals that the TEC had made arrangements to visit the office premises of all five substantially responsive bidders on 07.01.2025 in an uninformed way to further clarify certain areas and table III depicts a summary of that visit.

Table III thereof sets out the summary of inspection which outlines the inspected documents at the “on site” office visit by the TEC with special remarks made by it in relation thereto and the inspected documents being **“Original certificate of the Business Registration”, “Annual audited accounts”, “Original copies of EPF and ETF payments proofs”, “Bank Statements to see the transactions”, “Original award letters of the Contracts earned more than 6Mn per month” and “details of the permanent employees of the company.”** [Emphasis is mine].

It was remarked by the TEC that the Petitioner had failed to produce the majority of the original documents requested by the TEC during the site visit. Instead they requested additional time to provide those documents stating they would produce them on January 10<sup>th</sup>, 2025, which according to the TEC, reflects a lack of readiness and professionalism.

Upon a careful scrutiny of the evaluation criteria set out in the clause 10.7.2 of the Bidding document (**X6**), it becomes abundantly, clear that one of the most significant and crucial grounds upon which its task for evaluation of a

bid is to be implemented and executed by the TEC, is **“the accuracy of details given in the supporting documents”**. Hence, the fundamental duty cast upon the TEC in evaluating a bid is to evaluate a bid based on the accuracy of details given in the supporting documents by a bidder.

In the light of the evaluation criteria set out in the clause 10.7.2 of the Bidding document (**X6**), it is within exclusive power and or authority of the TEC to evaluate a bid on the accuracy of details given in the supporting documents by a bidder as being one of the significant and crucial aspects of bid evaluation as set out therein. And to accomplish this task so entrusted with the TEC, it has all the powers or authority vested in it under the clause 10.7.2 of the Bidding document (**X6**) to ask for and or call for documents necessary for the verification and or clarification of the accuracy of details given in the supporting documents by a bidder to its satisfaction so as to enable it to determine the Substantially Responsive Lowest Evaluated Bidder from and among all five substantially responsive bidders.

Even in this instance too, the TEC has all the powers and or the authority to ask for and or call for a kind of documents that had been asked for by it not only from the Petitioner but also from all the other Substantially Responsive bidders namely; **“Original certificate of the Business Registration”, “Annual audited accounts”, “Original copies of EPF and ETF payments proofs”, “Bank Statements to see the transactions”, “Original award letters of the Contracts earned more than 6Mn per month” and “details of the permanent employees of the company”**, by way of further clarification or verification of the accuracy of the supporting documents stated in the bidding document by all of them being substantially responsive bidders, in order to ascertain the genuiness and or accuracy and or truthfulness of the supporting documents so as to enable TEC to come to a right determination as to the Substantially Responsive Lowest Evaluated Bidder from and among all five substantially responsive bidders. [Emphasis is mine]

And in the circumstances, it is immaterial and it does not make any difference whatsoever, as to the mode that the TEC sought to adopt in this instance for clarification or verification of the accuracy of those supporting documents, namely; by way of an “on-site” visit of office premises of all substantially responsive bidders or otherwise for; it is exclusively, within its power and authority conferred upon it by Clause 10.7.2 of the bidding document and hence, the alleged act of the TEC is *intra-vires* and not *ultra vires* as contended by the Petitioner.

Furthermore, in terms of the grounds morefully, enumerated in the Clause 10.7.3, 10.7.5 (a), (d) and (e) of the Bidding Document (**X6**) as amenable for evaluation criteria in evaluation of a bid, it is within the exclusive power of the TEC to ask for and or call for any such document that had been called for by the TEC on the “on site” visit of the office premises of all five substantially responsive bidders, namely; **“Original certificate of the Business Registration”, “Annual audited accounts”, “Original copies of EPF and ETF payments proofs”, “Bank Statements to see the transactions”, “Original award letters of the Contracts earned more than 6Mn per month” and “details of the permanent employees of the company”** for; they are absolutely, necessary for the TEC to evaluate the bid based on the realistic data as set out in Clause 10.7.3 of the bidding document in order to satisfy itself as to the real situation of the bidder so as to enable it to make a right determination as to the Substantially Responsive Lowest Evaluated Bidder. [Emphasis is mine]

Moreover, such documents namely; **“Original certificate of the Business Registration”, “Annual audited accounts”, “Original copies of EPF and ETF payments proofs”, “Bank Statements to see the transactions”, “Original award letters of the Contracts earned more than 6Mn per month” and “details of the permanent employees of the company”** that the TEC sought to inspect at its “on site” visit of the office premises of all five substantially responsive bidders, are absolutely, necessary for it to properly evaluate a bid on the ground set out in the evaluation criteria by its Clause

10.7.5, namely; Adequacy of resources to be used to execute the contract. [Emphasis is mine]

Even, under the Clause 10.7.5 (a) of the Bidding Document (**X6**), it was within the exclusive power of the TEC to ask for such documents namely; **“Original certificate of the Business Registration”, “Annual audited accounts”, “Original copies of EPF and ETF payments proofs”, “Bank Statements to see the transactions”, “Original award letters of the Contracts earned more than 6Mn per month”** and **“details of the permanent employees of the company”** that the TEC sought to inspect at its “on site” visit of the office premises of all five substantially responsive bidders, for; they are absolutely, necessary for it to properly evaluate a bid on the ground set out in the evaluation criteria by its Clause 10.7.5 and 10.7.5 (a) of the Bidding Document (**X6**), namely; Adequacy of resources to be used to execute the contract and under the sub ground set out thereunder by Clause 10.7.5 (a) of the Bidding Document (**X6**), namely; Manpower. [Emphasis is mine]

Furthermore, in order to evaluate the bid under the sub ground set out in Clause 10.7.5 (d) of the Bidding Document (**X6**), namely; Financial capacity, it was within the exclusive power of the TEC to ask for such documents namely; **“Original certificate of the Business Registration”, “Annual audited accounts”, “Original copies of EPF and ETF payments proofs”, “Bank Statements to see the transactions”, “Original award letters of the Contracts earned more than 6Mn per month”** and **“details of the permanent employees of the company”** that the TEC sought to inspect at its “on site” visit of the office premises of all five substantially responsive bidders, for; they are absolutely, necessary for it to properly evaluate a bid on the ground set out in the evaluation criteria by its Clause 10.7.5 and 10.7.5 (d) of the Bidding Document (**X6**), namely; Adequacy of resources to be used to execute the contract and under the sub ground set out thereunder by Clause 10.7.5 (d) of the Bidding Document (**X6**), namely; Financial capacity. [Emphasis is mine]

Moreover, in order to evaluate the bid under the sub ground set out in Clause 10.7.5 (e) of the Bidding Document (X6), namely; History of the bidder, it was within the exclusive power of the TEC to ask for such documents namely; **“Original certificate of the Business Registration”, “Annual audited accounts”, “Original copies of EPF and ETF payments proofs”, “Bank Statements to see the transactions”, “Original award letters of the Contracts earned more than 6Mn per month” and “details of the permanent employees of the company”** that the TEC sought to inspect at its “on site” visit of the office premises of all five substantially responsive bidders, for; they are absolutely, necessary for it to properly evaluate a bid on the ground set out in the evaluation criteria by its Clause 10.7.5 and 10.7.5 (e) of the Bidding Document (X6), namely; Adequacy of resources to be used to execute the contract and under the sub ground set out thereunder by Clause 10.7.5 (d) of the Bidding Document (X6), namely; History of the bidder. [Emphasis is mine]

In view of the foregoing, I am of the view that, it cannot in any manner, be said that, the TEC had acted *ultra vires* in holding an “on-site” visit of the office premises of all five substantially responsive bidders in an uninformed way with a view to getting further clarifications on certain areas of the information furnished by the substantially responsive five bidders in their respective bidding documents, more particularly in the qualification questionnaire in the bidding document for; it is within the exclusive power of the TEC to ask for such documents namely; **“Original certificate of the Business Registration”, “Annual audited accounts”, “Original copies of EPF and ETF payments proofs”, “Bank Statements to see the transactions”, “Original award letters of the Contracts earned more than 6Mn per month” and “details of the permanent employees of the company”** that the TEC sought to inspect at its “on site” visit of the office premises of all five substantially responsive bidders, for; they are absolutely, necessary for it to properly evaluate a bid on the grounds set out in the evaluation criteria by its Clauses 10.7.2, 10.7.3, 10.7.5 (a),(d) and (e) the Bidding Document (X6).

Besides, an “on-site” visit of office premises of all five substantially responsive bidders, would in my opinion, probably, be the best method in evaluating a bid for; it would certainly, demonstrate the real situation of the capabilities and abilities of a bidder to execute the contract if awarded for; like in this instance, the TEC had found upon its “on-site” visit of office premises of all five substantially responsive bidders, that the Petitioner, had failed to demonstrate a fully functional office set up necessary for the proper and timely, execution of the contract if awarded to it for; the Petitioner company was operating from a location still, under construction and that that, the TEC was informed by the remaining staff of the Petitioner that many employees were working from home, which findings of facts and or observations of the TEC would still remain, unchallenged and uncontroverted by the Petitioner for; neither in the Petition of the Petitioner nor in the counter affidavit nor in the comprehensive written submission of the Petitioner, had the Petitioner ever, sought to refute it and or controvert it and or challenge it by proof on the contrary which would no doubt, raise serious concerns about the Petitioner’s Operational Stability as rightly, observed by the TEC on its “on-site” visit. This alone, clearly, and unequivocally shows that, although it being the Substantially Responsive Lowest Bidder, the Petitioner is not in any manner, a responsible and trustworthy bidder to be awarded the tender in question as rightly, determined by the TEC and the Procuring Entity.

Hence, I would hold that, the bids of all five substantially responsive bidders had been evaluated by the TEC strictly, in accordance with the manner stipulated in the Clause 10.7 of the Bidding Document (**X6**) and therefore, the evaluation of the bids of all five substantially responsive bidders are entirely, consistent with the method, terms and conditions disclosed in the Clauses 10.7.2, 10.7.3, 10.7.5 (a),(d) and (e) the Bidding Document (**X6**) and as required by Clauses 7.9.1 (a) and (b) of the Government Procurement Guidelines (**X11**) and as such the fact that, the evaluation process was conducted by the TEC by way of an “on-site” visit of office premises of all five substantially responsive bidders, does not in any manner, make the



evaluation process a nullity for; the evaluation process was conducted by the TEC in accordance with the method, terms and conditions disclosed in the Clauses 10.7.2, 10.7.3, 10.7.5 (a),(d) and (e) the Bidding Document (**X6**) and as required by Clauses 7.9.1 (a) and (b) of the Government Procurement Guidelines (**X11**).

In view of all the circumstances, I would hold that, the decision sought to be quashed by the Petitioner by way of a writ of *certiorari* in the instant application is totally, legal, *intra-vires*, lawful, reasonable, fair, non-discriminatory, rational and based on the principles of natural justice and in accordance with the provisions of the Government Procurement Guidelines (**X11**) its corresponding Manual(**X12**) and the evaluation criteria set out in the bidding document (**X6**) as morefully, enumerated above.

Hence, I would hold that, the instant application is not entitled to succeed both in fact and law.

Let me now, deal with the preliminary objections raised by the 1<sup>st</sup> to 6<sup>th</sup> Respondents as to the maintainability of the instant application.

**For want of parties.**

It is admitted by the Petitioner that, the whole of the members of the Procuring Committee had not been made parties to the instant application. Hence, it is an admitted fact.

In the light of the preliminary objection so raised by the 1<sup>st</sup> to 6<sup>th</sup> Respondents as to the maintainability of the instant application, the pivotal question that would arise for our consideration would be, “**who should be a necessary party to applications for writs?**”[Emphasis is mine]

It may now, be examined.

It was held in **Hatton National Bank PLC Vs Commissioner General of Labour and Others. [CA (Writ) Application No. 457/2011; CA Minutes of 31<sup>st</sup> January 2020]**; that, “It is trite law that any person whose rights are affected by an order that a petitioner is inviting a Court of law to make in his

favour is entitled to be named as a party and is entitled to be heard, before Court makes any order adverse to such person. **The rule is that all those who would be affected by the outcome of an application should be made respondents to such application.**" [Emphasis is mine]

It was held in **Gnanasambanthan v Rear Admiral Perera and others** [1998] 3 SLR 167 at 172 that "it is both the law and practice in Sri Lanka to cite necessary parties to applications for Writs of Certiorari and Mandamus".

In the decision in **Wijeratne (Commissioner of Motor traffic) Vs. Ven, Dr. Paragoda Wimalasena Thero and 4 others**, [2011] (2) SLR 258 at page 267, the following two rules were laid down by Court with regard to naming of necessary parties;

1. **The first rule regarding the necessary parties to an application for a writ of certiorari is that the person or authority whose decision or exercise of power is sought to be quashed should be made a respondent to the application.** If the act sought to be impugned had been done by one party on a direction given by another party who has power granted by law to give such direction, the party who had given the direction is also a necessary party and **the failure to make such party a respondent is fatal to the validity of the application.** [Emphasis is mine]

2. The second rule is that those who would be affected by the outcome of the writ application should be made respondents to the application.

It was held in **Dominic V. Minister of Lands and Others**, (2010) 2 SLR 398, that, "In the context of writ applications, a necessary party is one without whom no order can be effectively made. A proper party is one in whose absence an effective order can be made but whose presence is necessary to a complete and final decision on the question involved in the

proceedings.....Persons vitally affected by the writ petition are all necessary parties. If their number is very large, some of them could be made respondents in a representative capacity (vide Prabodh Derma v. State of Uttara Pradesh also see Encyclopedia of Writ Law By P.M. Bakshi )In view of the above authorities it is clear that the failure to name the necessary parties.....as parties in this application is fatal.

In the case of **Abeywardane and 162 others vs. Stanley, Wijesundara, Vice Chancellor, University of Colombo and Another [1983] 2 Sri LR 267 at 291 at** it was held that, "The whole petition is directed against the 115 students of the North Colombo Medical College. Both the final relief and the Interim order asked for by petitioners are intended to achieve one object, namely, the exclusion of the 115 students from the 2<sup>nd</sup> MBBS examination. According to the affidavit of Dr. Ratnavale, who is the Director of the North Colombo Medical College, the 115 students have followed the approved courses of study, have applied to the University of Colombo to sit the 2<sup>nd</sup> MBBS examination, have paid the requisite examination fees, and have received their admission cards from the University of Colombo for the said examination. There is no doubt then, that if this Court were to issue a Mandamus as prayed for by the petitioners, the 115 students would be adversely affected. If as contended by learned Counsel for the petitioners, the 115 students have no legal right to sit the 2<sup>nd</sup> MBBS examination, this is all the more reason we should have them before us and hear them, before we make an order against them. To use the words of Cayley, C. J. in effect we are asked by the petitioners to pronounce an opinion upon a disputed examination, without large section of the students, who propose to sit the examination, being parties to the proceedings or having had any notice on them. This we cannot do."We hold that the 115 students of the North Colombo Medical College are necessary parties and the failure to make them respondents is fatal to the petitioners' application".

It was held in **Rawaya Publishers and Others v. Wijedasa Rajapaksha and Others, [2001] (3) SLR 213, at page 216,** that, "In the context of writ

applications, a necessary party is one without whom no order can be effectively made. A proper party is one in whose absence an effective order can be made but whose presence is necessary to a complete and final decision on the question involved in the proceedings. In the case of *Udit Narayan Singh v. Board of Revenue* it has been held that where a writ application is filed in respect of an order of the Board of Revenue not only the Board itself is necessary party but also the parties in whose favour the Board has pronounced the impugned decision because without them no effective decision can be made. If they are not made parties then the petition can be dismissed *in limine*. It has also been held that persons vitally affected by the writ petition are all necessary parties. If their number is very large, some of them could be made respondents in a representative capacity (vide **Prabodh Derma v. State of Uttara Pradesh** also see Encyclopedia of Writ Law By P. M. Bakshi)" (Emphasis is mine).

See also; **Jayawardena and Another Vs. Pegasus Hotels Of Ceylon Ltd. And Others** [2004] 2 Sri. LR 39.

It is trite law that, in the context of writ applications, a necessary party is one without whom no order can be effectively made; and that, a proper party is one in whose absence an effective order can be made but whose presence is necessary to a complete and final decision on the question involved in the proceedings and hence, persons vitally affected by the writ petition are all necessary parties; and that, if their number is very large, some of them could be made respondents in a representative capacity.

It is trite law as can be deducible from the case laws (Supra) that, the rule regarding the necessary parties to an application for a writ of *certiorari* is that the person or authority whose decision or exercise of power is sought to be quashed should be made a respondent to the application and the failure to make such party a respondent is fatal to the validity of the application.

In the instant application, the Petitioner seeks to quash by way of a writ of *certiorari* the decision of the 1<sup>st</sup> and or 2<sup>nd</sup> and or 3<sup>rd</sup> and or 4<sup>th</sup> and or 5<sup>th</sup>

and or 6<sup>th</sup> Respondents to reject its bid and award it to the 7<sup>th</sup> Respondent notwithstanding the Petitioner being the Substantially Responsive Lowest Bidder.

The Petitioner has in its petition, described the 1<sup>st</sup> Respondent as the Chairman of the Departmental Procuring Committee of the 5<sup>th</sup> Respondent and admitted without any reservation that whole of the members of the Departmental Procuring Committee of the 5<sup>th</sup> Respondent had not been named as the Respondents to the instant application although, the Petitioner seeks by way of a writ of *certiorari*, to quash the decision of the Departmental Procuring Committee of the 5<sup>th</sup> Respondent in the instant application and also it becomes manifest when the Petitioner asks that, the decision of the 1<sup>st</sup> and or 2<sup>nd</sup> and or 3<sup>rd</sup> and or 4<sup>th</sup> and or 5<sup>th</sup> and or 6<sup>th</sup> Respondents to be quashed by way of a writ of *certiorari*.

However, it is an admitted fact that the whole of the members of the Departmental Procuring Committee of the 5<sup>th</sup> Respondent whose decision or exercise of power is sought to be quashed by the Petitioner in the instant writ application, had not been named as parties to the instant writ application, nor, had there been any application made to this Court by the Petitioner right up to now, to add all members of the Departmental Procuring Committee of the 5<sup>th</sup> Respondent even after, the preliminary objection was raised by the 1<sup>st</sup> to 6<sup>th</sup> Respondents at the very outset of the proceedings of the instant application.

The Petitioner seeks to rely on the decision in **Anurashantha Kumara Vs. T. A. C. N. Thalangama and 36 Others, CA Writ Application No. 238/2020- Decided on 21.05.2021** to contend that, the Petitioner has made all necessary parties to adjudicate the present application before this Court for; the Chairman of the Departmental Procuring Committee of the 5<sup>th</sup> Respondent had been named as the 1<sup>st</sup> Respondent to the instant application.

However, it is significant to observe that, the Petitioner himself conceded unequivocally, that some of the members of the Departmental Procuring Committee of the 5<sup>th</sup> Respondent whose decision or the exercise of power is sought to be quashed by the Petitioner in the instant application, had not been made parties to the instant application notwithstanding the preliminary objection raised by the 1<sup>st</sup> to 6<sup>th</sup> Respondents for want of parties nor had there been any application made to this Court by the Petitioner right up to now, seeking permission of this Court to add them as parties thereto nor had there been any material furnished to this Court by the Petitioner in order to satisfy this Court that there exists reasonable grounds for this Court to exercise its discretion to condone the failure on the part of the Petitioner to add the other members of the departmental procurement committee of the 5<sup>th</sup> Respondent as parties to the instant application.

In the circumstances, I would hold that, the preliminary objection raised by the 1<sup>st</sup> to 6<sup>th</sup> Respondents for want of parties, is entitled to succeed.

I would therefore, hold that, the failure on part of the Petitioner to name the other members of the Departmental Procuring Committee of the 5<sup>th</sup> Respondent as parties to the instant application whose decision or the exercise of power is sought to be quashed by the Petitioner in the instant application, is fatal to the maintainability of the instant application.

I would therefore, hold that the instant application ought to be dismissed on this ground too.

In view of the my aforesaid findings on the facts and law, I would think it not necessary to consider any further, the rest of the preliminary objections raised by the 1<sup>st</sup> to 6<sup>th</sup> Respondents on the doctrine of futility and on the misrepresentation of material facts.

In view of the foregoing, I would proceed to reject the instant application.

In the result, I would dismiss the instant application with costs.

***JUDGE OF THE COURT OF APPEAL***

**D. THOTAWATTA, J.**

I agree.

***JUDGE OF THE COURT OF APPEAL***