

**IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF
SRI LANKA**

*In the matter of an application for writs of
Certiorari, Mandamus and Prohibition under
and in terms of Article 140 of the Constitution
of the Democratic Socialist Republic of Sri
Lanka.*

CA/WRT/198/2021

1. Panasian Power PLC,
Level 4, BTL Shipping House,
45/2 Braybrooke St, Colombo 02.
2. Manelwala Hydropower (Private) Limited
Level 4, BTL Shipping House,
45/2 Braybrooke St, Colombo 02.
3. Eco Green Solar Solutions (Pvt) Ltd.,
Level 4, BTL Shipping House,
45/2 Braybrooke St, Colombo 02.
4. Solar Power Generation Matara (Private)
Limited,
Level 4, BTL Shipping House,
45/2 Braybrooke St, Colombo 02.

Petitioners

Vs.

1. Ceylon Electricity Board,
No. 50,
Sir Chittampalam A Gardiner Mawatha
Colombo 02.
2. Chairman
No. 50,
Sir Chittampalam A Gardiner Mawatha
Colombo 02.
3. General Manager
No. 50,

Sir Chittampalam A Gardiner Mawatha
Colombo 02.

4. Additional General Manager
No. 50,
Sir Chittampalam A Gardiner Mawatha
Colombo 02.
5. Deputy General Manager, Renewable
Energy Development & Performance
Monitoring,
Ceylon Electricity Board
No. 6-1/2, 1st Floor,
Kalinga Place, Off Suleiman Avenue,
Colombo 05.
6. Secretary,
Ministry of Power,
72, Ananda Coomaraswamy Mawatha,
Colombo 07
7. Senior Assistant Secretary (Procurement)
Ministry of Power,
72, Ananda Coomaraswamy Mawatha,
Colombo 07
8. Public Utilities Commission of Sri Lanka
6th Floor, BOC Merchant Tower,
St. Michael's Road, Colombo 03.
9. Director General
Public Utilities Commission of Sri Lanka
6th Floor, BOC Merchant Tower,
St. Michael's Road, Colombo 03.
10. The President Secretary
Presidential Secretariat
Galle Face, Colombo 01.
11. Additional Secretary to the President,
Secretary to the Procurement Appeal
Board,

Presidential Secretariat, Galle Face,
Colombo 01

12. Senior Assistant Secretary to the President
For Secretary to the Procurement Appeal
Board,
Presidential Secretariat, Galle Face,
Colombo 01

13. Procurement Appeal Board
Presidential Secretariat
Galle Face, Colombo 01

14. Chairman,
Procurement Appeal Board,
Presidential Secretariat
Galle Face, Colombo 01

15. Mahawa Solar (Private) Limited
150, St. Joseph's Street,
Colombo 14.

16. Ceylex Renewables (Pvt) Ltd,
06th Floor, Astoria Tower 3,
No. 422 6/2
R A De Mel Mawatha, Colombo 3

17. Fourth Partner Energy (Pvt) Ltd.
Plot No. N46, House No. 4-9-10,
HMT Nagar,
Hydrabad-76, Telangana, India

18. Attorney General,
P.O. Box 502,
Hulftsdorp, Colombo 12

19. Hon. Mahinda Rajapaksa,
Minister of Finance,
Minister of Buddha Sasana, Religious &
Cultural Affairs &
Minister of Urban Development &
Housing, The Secretariat,

Colombo 01.

20. Hon. Nimal Siripala De Silva,
Minister of Labour
6th Floor, 'Mehewara Piyesa',
Narahenpita,
Colombo 05.
21. Prof. G.L.Peiris,
Minister of Education,
'Isurupaya'
Battaramulla
22. Hon. Pavithra Devi Wanniarachchi,
Minister of Health,
'Suwasiripaya', No. 385,
Rev. Baddegama Wimalawansa Thero
Mawatha, Colombo 10.
23. Hon. Dinesh Gunawardena,
Foreign Minister,
Republic Building, Sir Baron Jayathilake
Mawatha, Colombo 01.
24. Hon. Douglas Devananda,
Minister of Fisheries,
New Secretariat, Maligawatta,
Colombo 10.
25. Hon. Gamini Lokuge
Minister of Transport,
7th Floor, Stage II
'Sethsiripaya', Battaramulla
26. Hon. Bandula Gunawardena,
Minister of Trade,
No. 27, CWE Secretariat Building,
Vauxhall Street, Colombo 02.
27. Hon C.B. Rathnayake,
Minister of Wildlife & Forest
Conservation,

No. 1090, Sri Jayawardenapura Mawatha
Rajagiriya

28. Hon. Janaka Bandara Tennakoon,
Minister of Public Services,
Provincial councils & Local Government,
Independence Square,
Colombo 07
29. Hon. Keheliya Rambukwella,
Minister of Mass Media,
No. 163, 'Asidisi Medura'
Kirulapone Avenue, Polhengoda,
Colombo 05.
30. Hon. Chamal Rajapaksa,
Minister of Irrigation,
No. 500, 10th Floor,
T B Jaya Mawatha,
Colombo 10.
31. Hon. Dullas Alahapperuma,
Minister of Power, No. 72, Ananda
Coomaraswamy Mawatha, Colombo 07
32. Hon. Johnston Fernando,
Minister of Highways,
9th Floor, 'Maganeguma Mahamedura'
Denzil Kobbekaduwa Mawatha
Koswatta, Battaramulla
33. Hon. Wimal Weerawansa,
Minister of Industries,
P.O. Box 570, No. 73/1,
Galle Road, Colombo 03
34. Hon. Mahinda Amaraweera,
Minister of Environment,
416/C/1, 'Sobadam Piyasa'
Robert Gunawardena Mawatha,
Battaramulla.

35. Hon. S.M. Chandrasena,
Minister of Lands,
1200/6, Land Secretariat,
Rajamalwatte Avenue,
Battaramulla.
36. Hon. Mahindananda Aluthgamage,
Minister of Agriculture,
80/5 'Govijana Mandiraya'
Rajamalwatte Road,
Battaramulla.
37. Hon. Wasudeva Nanayakkara,
Minister of Water Supply,
No. 35, 'Lakdiya Medura'
New Parliament Road, Pelawatta,
Battaramulla.
38. Hon. Udaya Prabhath Gammanpila,
Minister of Energy,
No. 80, Sir Ernest De Silva Mawatha,
Colombo 07.
39. Hon. Ramesh Pathirana,
Minister of Plantation,
11th Floor, Stage II, 'Sethsiripaya'
Battaramulla.
40. Hon. Prasanna Ranatunga,
Minister of Tourism,
6th Floor, No. 21, Rakshana Mandiraya,
Vauxhall Street, Colombo 02.
41. Hon. Rohitha Abeygunawardena,
Minister of Ports & Shipping,
No. 19, Chaithya Road, Colombo 1
42. Hon. Namal Rajapaksha,
Minister of Youth & Sports,
No. 09, Philip Gunawardana Mawatha,
Colombo 07.

43. Hon. Ali Sabry,
Minister of Justice,
Supreme Court Complex,
Colombo 12.

44. Hon. Sarath Weerasekara,
Minister of Public Security
14th Floor, 'Suhurupaya'
Battaramulla.

45. Cabinet Appointed Negotiation
Committee,
Presidential Secretariat, Galle Face,
Colombo 01.

Respondents

Before : Sobhitha Rajakaruna, J.
Dhammika Ganepola, J.

Counsel : Vidura Gunarathna with Warna Dahanayake for the 1st – 4th Petitioners
Milinda Gunetilleke, ASG for the Respondents

Supported on: 14.07.2021

Decided on: 26.07.2021

Sobhitha Rajakaruna, J.

The 1st Respondent Ceylon Electricity Board ("**CEB**") published an advertisement inviting proposals from prospective developers (project proponents) through international competitive bidding ("**ICB**") for development of Solar PV Power Plants of total capacity of 150MW, AC on Build, Own and Operate (BOO) basis to be connected at the grid substations mentioned in the said advertisement, which is marked as P5. In terms of the said advertisement a project proponent should purchase a separate Request For Proposals ("**RFP**") for each proposal tendered, on submission of written request and payment of non refundable fee of Rs. 100,000/-. The proposals prepared according to instructions in Section

2.10 Volume 1 of the RFP document and addressed to the Chairman of the Cabinet Appointed Negotiation Committee ("CANC"), should be submitted to the office of the Deputy General Manager during the time period mentioned in the said advertisement. The Petitioners of the instant case also submitted proposals separately with regard to respective grid substations.

The Petitioners, among other documents, have submitted their proposal letters using a format as per the document marked P36. However, the Secretary to the Ministry of Power by his letters marked as P23, P24, P25, P29, P30, P31, P32, P33, P34 and P35 has informed the respective Petitioners that their bid had not been selected for the purpose of awarding the tender. The reason given for non responsiveness of their bids is that certain changes have been made by the Petitioners to the contents of the 3rd paragraph of the proposal letter which is ought to be submitted in terms of the RFP.

In other words, the reason to consider the Petitioner's bids as non-responsive by the Respondents, was that the 3rd paragraph of the Proposal Letter submitted by the Petitioners was different to the sample letter provided by the CEB in its RFP No. TR/RED&PM/ICB/2019/001/C (RFP).

The 3rd paragraph of the proposal letter submitted by the Petitioners reads as follows;

"On acceptance of the Letter of Invitation the undersigned shall extend the proposal Security and agrees to execute the Power Purchase Agreement for the provision of the facility to be financed, designed, constructed, commissioned, operated and maintained by a Project Company of the undersigned."

However, the 3rd paragraph of the specimen proposal letter provided in Volume II, Section A of the RFP states as follows;

"On acceptance of the Letter of Award the undersigned shall submit a Performance Security (Bond) in the form of a Bank guarantee to an amount of LKR Ten Million (LKR 10,000,000/-) per MW, AC and agrees to execute the Power Purchase Agreement for the Provision of the Facility to be financed, designed, constructed, commissioned, operated and maintained by a Project Company of the undersigned."

The Petitioners particularly in paragraph 97 of their affidavit filed along with the Petition affirm that the above difference was a typing mistake and was a genuine oversight and lapse

caused by Petitioners having inadvertently utilized the draft proposal letter template that had previously been published by the CEB (1st Respondent) in their RFP for Tender '*Establishment of Sixty (60) Solar Power Plants of 01MW*', marked as P36.

Moreover, the Petitioners submit that they had taken steps to lodge appeals to the Chairman of the Procurement Appeals Board (14th Respondent), Secretary Ministry of Power (6th Respondent) and General Manager of CEB (3rd Respondent). It is observed that by virtue of Clause 8.4 of the Supplement 24 to the Procurement Manual issued on 21.03.2012 [to be used along with Procurement Guidelines (Goods & Works)], after investigating into representations made in the Appeal, the Procurement Appeal Board (PAB), shall submit its independent report to the Cabinet of Ministers for its decision.

The attention of this Court was drawn by the Respondents to Clause 6.2 of the RFP (marked as 'P61g') by which CEB reserves the right to reject the proposal of any project proponent who has qualified on the basis of fraudulent, suppressed, or incomplete information. Project proponents who submit proposals do so without recourse against Government of Sri Lanka (GOSL) or CEB or their representatives for their rejection by CEB or failure to execute a PPA for any reason whatsoever.

Now the question that has to be examined is whether the Petitioners have caused only a minor deviation in the letter P36 in contrast to the specimen letter marked as 'P36a'. The Petitioners argue that the mistaken words in paragraph 3 of P36 was a minor deviation, whereas the Respondent's contention is that it is a major deviation which comes under clause 4.3 (i) of the RFP.

The document marked 'P36a' is the format of the proposal letter for the subject tender given in page 44 of Volume II of the RFP. In terms of the 3rd paragraph of the said letter it is mandatory for the project proponent, on acceptance of the letter of award to submit a Performance Security (bond) in the form of a bank guarantee to an amount of Rs. 10 million, whereas, in the document marked P36 the project proponent is not undertaking to submit such a performance security.

The Petitioners in paragraph 115 of their affidavit further affirm that the corrected proposal letter as per in the format of the RFP was annexed to their appeal submitted to the 14th, 6th

and 3rd Respondents. Therefore, it is obvious that the document marked 'P36a' has never been submitted by the Petitioners along with their proposal letters during the tender process.

The clause 6.3 (i) of the aforesaid RFP (marked as 'P61g'), categorically prescribes that non-submission of duly completed proposal letter signed by the authorized person and the original of the certificate of purchase of RFP will be considered as a major deviation and such proposal will not be considered for further evaluation. Further, the said clause 6.3 declares that if a proposal is found to be non-responsive it will be rejected and may not subsequently be made responsive by correction or withdrawal of the item which resulted in the disqualification and/or rejection.

By examining carefully, the contents of the 3rd paragraph of P36 and P36a, this court cannot accept the proposition made by the Petitioners in paragraph 97 of their affidavit for this Court to arrive at a conclusion that it was a typing mistake or its is a minor deviation as affirmed therein by those Petitioners.

Additionally, the Petitioner strenuously argued, based on the provision of clause 7.8 of the Government Procurement Guidelines (P-61b), that the bids submitted by the Petitioners were not rejected at the initial stage. The Petitioners contention is that they were successful at stage 1 that is mentioned in the said clause 7.8(a). However, this court observes that the said clause 7.8 deals with general principles of bid examination. The Respondents contend that the subject bids have been rejected at the threshold stage and the process has not reached the second stage evaluation that is mentioned in clause 6.4 of RFP at the time of issuing the letters marked P23, P24, P25, P 29, P30, P31, P32, P33, P34 and P35.

Furthermore, the attention of the Court was drawn by the Respondents to paragraph 5 of the Cabinet decisions dated 08.02.2021 (marked as P62) which declares the approval of the Cabinet of Ministers in relation to the subject tender process. The said paragraph 5 is as follows:

"Approval of the Cabinet of Ministers has been granted to implement the procurement process for initiating solar power plants with a capacity of 150 mega watt each in various places in the island. Accordingly, approval at the meeting of the Cabinet of Ministers was granted on 14th December 2020 for awarding contracts to the procurements to which appeal had not been arisen against the recommendations of the negotiating committee appointed by the Cabinet of Ministers by inviting

*international competitive bids under 05 packages. **The procurement appeals board has denied the appeals furnished in relation to rest of the procurements.** Accordingly, the Cabinet of Ministers approved the proposal submitted by the Minister of Electricity for awarding the relevant procurements to selected bidders for the Grid Sub-Stations of Anuradhapura, Habarana, Matara, Galle, Deniyaya, Kosgama, Mathugama, Pannala, Mahawa and Kurunegala for a period of 20 years" (emphasis added)*

It is important to note that the Petitioners *inter alia* seek for a mandate in the nature of a writ of Certiorari quashing the said Cabinet decision marked as P62. Therefore, it is necessary to ascertain as to whether the Petitioners have established any valid ground for judicial review upon the said cabinet decision or any other impugned decisions.

Lord Brightman in **Chief Constable of the North Wales Police v. Evans**(1982) 1 WLR 115, emphasized the fact that "*Judicial review, as the words imply, is not an appeal from a decision, but a review of the manner in which the decision was made*". If the decision making process is flawed for illegality, irrationality, and procedural impropriety such decision is amenable to writ jurisdiction (also see page 12 of the order of this court in *CA (Writ) Application No. 63/2020 CA minutes 07.07.2020*). Hence, we take the view that it is the duty of the Petitioners in the instant case to make out a *prima facie* case establishing the decision-making process of refusing to award the tender to the Petitioners, is flawed under such grounds mentioned above.

The interpretation given upon the words 'prima facie case' in **Ginadasa v. Weerasignhe**, 31 NLR 33 by Dolten, J. is apt here. Accordingly, "*the court must be satisfied that there is a serious case to be tried at the hearing and that on the facts before it there is a probability that plaintiff is entitled to relief.*" The test for prima facie case in applications for judicial review should be similar. The vitiating ground must be arguably material to the impugned decision. That decision must be arguably amenable to judicial review- See **R v. Chief Rabbie ex. p. wachmann** (1993) 2 All ER 249.

In the instant application the Petitioners have admitted that it was a typographical error or a mistake to submit the wrong proposal letter and thereupon it is observed that the Respondents had no option other than disregarding the proposals made by the Petitioners in terms of the provisions of the RFP. Therefore, this court takes the view that the Petitioners

have not made out an arguable case or a prima facie case for this court to issue notice. Therefore, I refuse notice and dismiss the application.

Judge of the Court of Appeal

Dhammika Ganepola, J.

I agree.

Judge of the Court of Appeal