

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

CA /WRIT/449/2020

1. Kirillage Nishantha Upul Yasawardana
Medagama, Theppanawa,
Kuruwita

Petitioner

Vs.

1. Ceylon Electricity Board
No.50, Sir Chittampalam A. Gardiner
Mawatha, Colombo 02.
2. R.R. Jayarathne (Eng.)
Office of the Deputy General Manager
(Sabaragamuwa)
Ceylon Electricity Board
New Town, Rathnapura
3. Chairman
Provincial Procurement Committee-
Sabaragamuwa
Ceylon Electricity Board
New Town, Rathnapura
4. D.N.R. Siriwardena
Registrar of Public Contracts
Department of the Registrar of
Companies
'Samagam Medura', No. 400,
D.R.Wijewardena Mawatha, Colombo 10

5. Kasthuri Enterprises
No. 215/82A, Liberty Park,
Bandaragama Road,
Kesbewa.

Respondents

Before : Sobhitha Rajakaruna, J.

Dhammika Ganepola, J.

Counsel : Ruwantha Cooray and Namik Naffath for the Petitioner

Madubashini Sri Meththa, SC for all the Respondents except 5th Respondent

Argued on: 12.08.2021

Decided on: 29.09.2021

Sobhitha Rajakaruna, J.

The 1st Respondent, Ceylon Electricity Board ("CEB") invited for bids to obtain the services of contractors for execution of electricity disconnection and reconnection orders in Eheliyagoda area. The clause 7.0 of the Instructions to Bidders specifically requires furnishing of a Certificate of Registration (hereinafter referred to as "Certificate") under Public Contracts Act, No. 3 of 1987 (the "Act"), before the closing of bids for the contracts of which the cost exceeds Rs. 5 million. The said clause specifies that the failure to furnish the documents under said clause 7.0 including the said Certificate before the closing of bids will result in the bid being rejected.

The closing date for depositing bids was 10.06.2020. The Petitioner and the 5th Respondent submitted their bids before the closing date and however the Petitioner did not submit a Certificate as per the above requirement along with his bid. The Petitioner has requested for such Certificate from the 4th Respondent, the Registrar of Public Contracts (hereinafter referred to as "Registrar") on or around 08.06.2020 by way of his application marked as X3. The said application has been returned to the Petitioner on the same day with a remark to

'resubmit'. Subsequently, the Registrar has issued the relevant Certificate on 24.08.2020 upon the amended application resubmitted by the Petitioner on 24.08.2020. Finally, the Petitioner submitted the said Certificate only on 25.08.2020, a date well after the above closing date and however before the opening of bids.

The value of the bid submitted by the Petitioner exceeds Rs. 5 million. Therefore, the Technical Evaluation Committee ("TEC") rejected the offer of the Petitioner at the first stage of evaluation upon the failure to submit the said Certificate on time and the documents of proof of ability referred to in clause 27. The TEC has considered the failure to furnish the Certificate under the said Act as a major deviation and the failure to furnish proof of ability as a minor deviation. The TEC has recommended only the bid submitted by the 5th Respondent as a responsive bidder to the Provincial Procurement Committee ("PPC"). Accordingly, the PPC has approved the tender to be awarded to the 5th Respondent.

The Petitioner *inter-alia* seeks for a mandate in the nature of a writ of Certiorari to quash the decisions of the 2nd & 3rd Respondents and the TEC to reject the bid of the Petitioner. Apart from the complain that the Petitioner was not notified of the outcome of the bids, the Petitioner's argument in this matter is mainly twofold. Firstly, the Petitioner argues that under section 8 of the said Act any person who acts as an agent or sub-agent, representative or nominee for or on behalf of any tenderer should get themselves registered and however, there is no requirement under the said section for a 'tenderer' to get himself registered (Vide: averment 5 of the counter affidavit of the Petitioner). The subject bid has been submitted by the Petitioner himself as a 'tenderer' and not through any agent or representative etc.

The second main argument is that the Registrar by his letter dated 04.09.2020 marked as X10 (i), has informed the Petitioner *inter-alia* that a tenderer could submit a Certificate prior to the **award of the tender** and further, the requirement of submitting a Certificate prior to the **closing of the bid** is only applicable for any person who acts as an agent or sub-agent, representative or nominee for or on behalf of any tenderer. The Petitioner alleges that similar provisions are there in the letter dated 06.05.2020 (X11) originated by CEB and however the 1st to 3rd Respondents contends that the said letter X11 had been sent in respect

of a different tender. Along those lines the Petitioner contends that him being a 'tenderer' who directly lodged the bid, could submit the Certificate any time before the award of the Tender. Therefore, the Petitioner asserts that the 1st to 3rd Respondents has intentionally rejected his bid on the purported basis that he had failed to submit the Certificate prior to the closure of bids.

The said section 8 of the Act reads;

- (1) *Any person who acts as an agent or sub-agent, representative or nominee for or on behalf of any tenderer, shall register himself and such public contract in accordance with section 10 and shall furnish to the Registrar the particulars required to be furnished under section 6.*
- (2) *Where any person is an agent, sub-agent, representative or nominee for or on behalf of a tenderer he shall first produce a certificate of his appointment as agent, sub-agent, representative or nominee to the Registrar before he registers himself and the public contract under this section*

The language in the provisions of the said section does not expressly identify a 'tenderer' also to be included in the category of persons required to register with the Registrar. Therefore, it is the duty of the Court to ascertain the intention of the legislature in interpreting the said section. In *Seaford Court Estates Ltd. v. Asher (1949) 2 ALL ER 155 CA p.164* Denning, L. J., said, "*when a defect appears a judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament..... and then he must supplement the written word so as to give "force and life" to the intention of the legislature..... A judge must not alter the material of which the Act is woven, but he can and should iron out the creases.*"

When finding the intention of the legislature, the provisions of Section 6 of the Act and the preamble of the Act is very much important. Section 6 stipulates the duties of the Registrar under the Act whereas the Registrar has a duty to register:

- (i) every tenderer, or
- (ii) every person who acts as an agent, sub-agent, representative or nominee, for and on behalf of such tenderer
- (iii) every public contract

In terms of above Section 6, the Registrar has a bounden duty to register every ‘tenderer’. Therefore, it is clear that there is a requirement for the tenderer also to get himself registered under the provisions of the Act.

The doctrine of '*contemporanea expositio*' is also very much apt here. Justice Dickson in *Perka v. The Queen (1984) 2 SCR 232 date 11.10.1984* observing the fact that this doctrine is well established in the law, has adopted these words- “*The words of a statute must be construed as they would have been the day after the statute was passed. Since a statute must be considered in the light of all circumstances existing at the time of its enactment it follows logically that words must be given the meanings they had at the time of enactment, and the courts have so held*”. See *Sharpe v. Wakefield (1888), 22 Q.B.D. 239, at p. 242 (per Lord Esher, M.R.)*. See also: *Driedger, Construction of Statutes (2nd ed. 1983) at p. 163*

If one were to construe the provisions of the Public Contracts Act, as they would have been the day after the statute was passed, it is pertinent here, in my view, to examine its preamble. The preamble of the said Act is as follows;

“An Act to provide for the registration of public contracts and persons who tender or enter into public contracts with any public body; for the appointment of a panel of inquiry and the nomination of members to constitute a tribunal to investigate into matters connected with public contracts; and to provide for matters connected therewith or incidental thereto”

The apex of the above preamble is to emphasize that it is an Act to provide for the registration of;

- (i) public contracts and
- (ii) **persons who tender or enter into public contracts** with any public body.

Therefore, it is obvious that the scheme of the Act has not ruled out the requirement of a ‘Tenderer’ to get Registered under the Act. The interpretation of ‘tenderer’ is given in section 45 of the Act and accordingly any individual ordinarily resident in Sri Lanka or if not so resident is or has been a citizen of Sri Lanka, also can be considered as a tenderer and the Petitioner is well within the said definition.

The Government Procurement Guidelines of 2006 on Goods and Works, stipulates in its Objective clause that -"maximizing economy, timeliness and quality in Procurement resulting in least cost together with the high quality; adhering to prescribed standards, specifications, rules, regulations and good governance". In ***Noble Resources International Pte Limited v Minister of Power and Renewable Energy***, SC FR No. 394/2015, SC minutes 24.06.2016 at p.21, Sripavan, CJ., has held that "*When specific provisions are laid down in the Government Procurement Guidelines – 2006 and in the Bid Documents, the rule of law will imply that the requirements of those provisions are not violated. The power of the State is conferred on the Members of the SCAPC and the PAB to be held in trust for the benefit of the public*". This clearly envisage that no person who tender or enter in to public contracts could deviate from the registration process set out in the Act.

Moreover, I observe that although the Petitioner asserts that he is not required to be registered, he has applied for the Certificate submitting the Form PCA 1 (4R1) to the Registrar and subsequently obtained the Certificate in Form PCA 3 (4R3). Therefore, I am of the view that the Petitioner has acquiesced to abide by conditions of the bidding document/ General Conditions of the Bid. Accordingly, I take the view that the Petitioner is not entitled to take up a different position after a long period from the inception and especially after when he got to know that the tender had been awarded to the 5th Respondent. I have dealt with the issue of acquiescence and the conduct of the tenderer in a tender process in my Judgment in ***Walter Abeyundara and another V. Secretary Ministry of Tourism and others, CA/Writ/371/2020 decided on 22.09.2021***.

Therefore, I cannot accept the proposition of the Petitioner that he is not required to get registered under section 8 of the Act.

Now I turn to the second main argument of the Petitioner. In spite of the above provisions of the said Act, the clause 7.0 of the General Conditions of Bid specifically provides the requirement of submitting a Certificate (in the event the contact cost exceeds Rs. 5 Million) before the closing of bids, irrespective of the fact whether the bid is being submitted by the 'tenderer' himself or through an 'agent' as mentioned in the said Section 8.

The Registrar has addressed a letter to the Petitioner on 04.09.2020 [X10 (i)] annexing thereto a paper advertisement published on 16.10.2018 [X10 (ii)]. The said advertisement in its clause 3 indicates the following;

“In terms of section 6, 8 of the Public Contracts Act and the second schedule thereto:

- (a) should register as a sub-agent, agent (wkq ksfhdaö;hl=" Wm ksfhdaö;hl=" ksfhdaö;hl=) prior to the bid/ tender being submitted;*
- (b) tenderer should register prior to the award of the tender”*

The Petitioner based on the above contents of the said letter argues that there is no requirement for him to submit the Certificate before the closing date of bids since he has directly submitted the bids as a tenderer.

The Registrar who has the exclusive authority upon registration under the Act has affirmed an affidavit dated 19.02.2021, which is filed of record. By the said affidavit he has responded to the relevant averments in the Petition which deals with the letters marked as X10 (i) and X10 (ii) and has stated as follows:

"Answering the averments contained in the paragraphs 10 and 12 of the Petition I admit the letters marked as X10(i) and X10(ii) and consequently deny the averments which are inconsistent to above. Answering further I state that the letter marked as X10(i) has been issued by the Assistant Registrar of Public Contracts in response to a query made by the Petitioner by an undated letter - I annexed hereto marked as 4R(6), a true copy of the undated letter of the Petitioner and pleads as part and parcel hereof"

In my view, the averments of the said affidavit of the Registrar, including the above paragraph, has not categorically divulged whether the contents of the said Clause 3 of the paper advertisement [X10 (ii)] published in the year 2018 are valid even to date and also whether those provisions are based on a valid regulation made under the said Act.

However, I observe that nowhere in the Act specify a time line as to when a ‘tenderer’ should be registered. As mentioned above the requirement of submitting the Certificate before the closing of bids has been adopted in clause 7.0 of the General Conditions of Bid in

the bidding document. I do not see there is any legal impediment to include any additional requirement in a bidding document which does not supersede or override any provisions of the Act.

It is important now to examine as to whether the Petitioner is entitled to overlook or violate General Conditions imposed by the Procurement Entity. The golden rule in a tender process is that any person who tenders or enter into public contract with any public body is bound to follow such conditions of the bidding document/ General Conditions.

Also, I observe that the Petitioner has never taken steps to raise his concerns or objections against the said requirement of submitting the Certificate before the closing of bids. Instead of raising such concerns or seeking for any clarification he submitted the Certificate on 25.08.2020 and he has not given any explanation as to why he is not complying the conditions of the set out in Clause 7.0 of the General Conditions of the bid. In the circumstances, when analyzing the reliefs prayed for by the Petitioner, I am of the view that the Petitioner's conduct, particularly the acquiescence during the tender process should be taken into consideration (see my judgment in Walter Abeysundara and another V. Secretary Ministry of Tourism and others, cited above).

In the case of *SmithKline Beecham Biologicals S.A. and Another v. State Pharmaceutical Corporation of Sri Lanka and others*(1997) 3 Sri LR 20 the Supreme Court held as follows;

“Therefore, the Guidelines too make it clear that a Tender Board may only consider bids which are responsive and qualified by substantially conforming with the tender documents. The State and its agencies are bound by and must rigorously and scrupulously observe the procedures laid down by them on pain of invalidation of an act in violation of them. Justice Frankfurter in Vitarelli v. Seatom said: ‘An executive agency must be rigorously held to the standards by which it professes its action to be judged ; Accordingly, if... [an action] is based on a defined procedure, even though generous beyond the requirements that bind the agency, the procedure must be scrupulously observed ... This judicially evolved rule of administrative law is now firmly established and, if I may add, rightly so. He that takes the procedural sword shall perish with the sword’.”

Amerasinghe J. expressing his view in *Pamkayu (M) SndBhd (appearing by its attorney, Hemachandra) and another v. P. Liyanaarachchi, Secretary, Ministry of Transport and Highways and others [2001] 1 Sri LR 118 at pages 123-125* stated that;

"The award of a tender must be based on compliance with the terms and conditions of the tender, documents on the date and at the time specified for the closing of the tender. An offer that does not comply with the terms, conditions and specifications at that date and time must be rejected in the same way as a late offer. SmithKline Beecham Biologicals S.A. and Another v. State Pharmaceutical Corporation of Sri Lanka and others¹, Ramana Dayaram Shetty v. The International Airport Authority of India and others². The terms and conditions of a tender cannot be arbitrarily dispensed with or varied by an evaluation committee or tender board to accommodate a particular tenderer."

In the light of the above I take the view that the decision of the TEC and the PPC to reject the Petitioner's bid is in conformity with the terms and conditions of the bidding document/ General Conditions of Bid, although the Petitioner had submitted the lowest bid.

In the circumstances I am of the view that the Petitioner is not entitled to any relief as prayed for in the prayer of the Petition of the Petitioner. I proceed to refuse this application. I order no costs.

Judge of the Court of Appeal

Dhammika Ganepola, J.

I agree.

Judge of the Court of Appeal

¹(1997) 3 Sri LR 20 at 50

²AIR 1979 SC 1628