

SMITHKLINE BEECHAM BIOLOGICALS S.A. AND ANOTHER
v.
STATE PHARMACEUTICAL CORPORATION OF
SRI LANKA AND OTHERS

SUPREME COURT.

DR. AMERASINGHE, J.,
WADUGODAPITIYA, J. AND
DR. GUNAWARDENA, J.
S.C. (F.R.) NO. 89/97.
MARCH 27, 1997.
APRIL 16, 18, 1997.

Fundamental rights – Award of contract on tenders – Right to equality – Duty of the Tender Board to act fairly in awarding contract – Article 12(1) of the Constitution.

Offers were invited worldwide by the State Pharmaceutical Corporation on behalf of the Director of Health Services for the supply of Rubella Viral Vaccine. There were five offers. Of them, SmithKline Beecham Biologicals S.A. Belgium (fourth lowest tenderer) was the only person who had made a responsive bid conforming with the tender document at the relevant date. In particular, its product had been registered with the Cosmetic Devises and Drugs Authority of Sri Lanka, which was a requirement of the tender conditions. It was also a past supplier; and there was no past complaint with regard to the previous tender. None of the other tenderers who were scheduled and considered were registered; nor were they past suppliers. Accordingly, the Cabinet Appointed Tender Board decided to award the tender to SmithKline Beecham Biologicals S.A. Thereafter, without communicating that decision to the tenderers and requesting them to make any representations to the Tender Appeal Board, as required by the Guidelines on Government Tender Procedure, the Tender Board allowed time to tenderers to obtain registration. Pending such registration, the tender board altered its original decision and made a limited award to SmithKline Beecham Biologicals S.A. for 2.5 million doses of vaccine. Thereafter the Tender Board proceeded to award 2 million doses of vaccine to Biocinie S.P.A. Italy (which had since registered its product) on the basis that the price quoted by it was "The lowest offer".

Held:

1. The submission of the counsel for the respondents that the application should be dismissed *in limine* as the acts in question relate to purely contractual rights of parties cannot be accepted.

(Per Dr. Amerasinghe, J.)

"The complaint of the petitioners is not that there has been a breach of contract; their complaint is that they were not awarded a contract because certain officials had acted unfairly."

2. In view of the fact that the product of Biocine S.p.A. had not been registered when the tender closed, its offer was the lowest offer, but not the lowest responsive offer; and therefore, Biocine S.p.A. was not qualified to tender. The decision to award it 2 million doses of vaccine was in breach of the Guidelines on Government Tender Procedure which provided equal opportunity for persons to participate and compete on identical terms and conditions. Consequently, the impugned decision of the Tender Board relating to the procurement of 4.5 million doses of Rubella Viral Vaccine was violative of Article 12(1) of the Constitution.

Cases referred to:

1. *Roberts v. Ratnayake* (1986) 2 Sri LR 36, 45.
2. *Wijenaike v. Air Lanka Ltd.* (1990) 1 Sri LR 293.
3. *Radhakrishna Agrawal v. State of Bihar* AIR (1977) S.C. 1496.
4. *Palihawadana v. Attorney-General* FRD Vol. 1 – 1, (1978-79-80) 1 SLR 65.
5. *Jayanetti v. Land Reform Commission* (1984) 2 Sri LR 172, 184.
6. *Srilekha Vidyarthi v. State of U.P.* AIR (1991) S.C. 537, 550.
7. *F.C.I. v. Kamdhenu Cattlefield Industries* (1993) 1 S.C.C. 71.
8. *Mahabir Auto Stores v. Indian Oil Corporation* AIR (1990) S.C. 1031.
- 9(a). *Vitarelli v. Seaton* (1959) 359 US 535, 79 S.Ct 968 3 L. Ed. 2d 1012 (1959).
- 9(b). *Kiriwanthe and Another v. Navaratne and Another* 1990 3 SLR 11 at 15.
10. *Roman Dayaran Shetty v. The International Authority of India and Others* AIR (1979) S.C. 1628.
11. *Barbier v. Connolly* 113 U.S. 27 (1885).

APPLICATION for relief for infringement of fundamental rights.

Shibly Aziz, P.C. with *Nigel Hatch* for the petitioner.

Saleem Marsoof, D.S.G. with *Shavindra Fernando, acting.* S.S.C. for the respondent.

Cur. adv. vult.

May 20, 1997.

DR. AMERASINGHE, J.

Offers were invited worldwide by the State Pharmaceutical Corporation, on behalf of the Director of Health Services, on the 14th

of May 1996, *inter alia*, for the supply of Rubella Viral Vaccine. The Tender (DHS/27/6/97) closed on 3rd July 1996. The bids were opened on the 3rd of July 1996. Offers were received from (1) Hubut Pharmaceuticals Ltd. of China; (2) Institute of Immunology Croatia; (3) Serum Institute of India; (4) SmithKline Beecham Biologicals S.A. Belgium; (5) Biocine S.p.A. Italy. The offers of (1) Institute of Immunology Croatia; (2) Biocine S.p.A. Italy; (3) Serum Institute of India; and (4) SmithKline Beecham Biologicals S.A., were scheduled and evaluated on the 12th of August 1996 by the Technical Evaluation Committee appointed by the Secretary to the Treasury. The Technical Evaluation Committee reported and recommended that each of the following, namely, The Institute of Immunology Croatia, Biocine S.p.A. Italy and the Serum Institute of India was "not registered, not a past supplier, not acceptable." The Committee stated that SmithKline and Beecham Belgium, was "Acceptable subject to supplying with cold chain monitors and renewal of registration in 1997." It was noted by the Committee that SmithKline Beecham Biologicals S.A. Belgium was (1) a registered (2) previous supplier, and (3) that there were no past complaints with regard to that tenderer.

On the matter of specifications, the Committee made the following entry in respect of three of the suppliers, including SmithKline Beecham Biologicals S.A.: "Specs conform except details of cold chain monitors."

The State Pharmaceutical Corporation on the 27th of August 1996 sought confirmation that the product would be supplied with cold chain monitors. Confirmation was made on the 29th of August 1996 by SmithKline Beecham Biologicals S.A. that cold chain monitors would accompany each shipping box.

Since it was required of suppliers that the product should be registered under the Cosmetic Devices and Drugs Act, and the registration of the product of SmithKline Beecham Biologicals S.A. was valid only up to the 22nd of March 1996, whereas the product was required to be supplied in January **and in May 1977**, SmithKline Beecham Biologicals S.A. were required to renew the registration of

their product. Accordingly, the registration was extended for five years from the 23rd of March 1997.

The Cabinet Appointed Tender Board (CATB) on the 2nd of September 1996 recorded the following:

"The Tender Board after considering the T.E.C. recommendation decided to award the tender to SmithKline Beecham – Belgium the fourth lowest tendered for U.S. \$ 990,000. The three parties that were lower viz – Messieurs Institute of Immunology Croatia, Biocine Italy and Serum Institute of India are not registered parties. The T.B. noted that SmithKline Beecham is registered up to March 1997."

On November 1st 1996, the Managing Director of the State Pharmaceuticals Corporation wrote to Dr. Dudley Dissanayake, Secretary Ministry of Health, Highways & Social Services, the third respondent, with a copy to the Chairman of the State Pharmaceuticals Corporation and Advisor to the Cabinet Appointed Tender Board, the fifth respondent, as follows:

"I would like to make the following suggestions with regard to two items due to be taken up at the Cabinet Appointed Tender Board meeting, today.

PARACETAMOL TABLETS

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II. RUBELLA VACCINE –

This refers to my letter dated 18.9.96 on Rubella Vaccine. The earlier decision was to award to a particular Company to the value of approximately Rs. 54 Million. However, according to the schedule there were three other companies who had quoted much less, but unfortunately they are not registered. If one of them are (sic.) registered there will be a substantial amount of saving.

Therefore we have written to the CDDA asking for the registration status of these three companies. We have been informed that two companies have submitted their samples for testing and reports are awaited. Therefore Tender Board may consider to take this matter up at the next meeting within (sic.) next 2/3 weeks.

I spoke to Dr. Samaranayaka – Director – Medical Supplies Division on the above two suggestions. These suggestions are acceptable to him.”

The Cabinet Appointed Tender Board recorded its decision as follows:

“The T.B. recommends the tender of M/S SmithKline Beecham Belgium for 2.5 million doses to be delivered in January 1997 at U.S. \$ (illegible) by the lowest acceptable tenderer and registered party. The T.B. considered the letter of M.D. S.P.C. dated 1/11/96. In the course of discussion it became apparent that a delay in placing orders could lead to stocks running out. Therefore M/S Smith Kline Beecham's offer is recommended. The T.B. also noted that there are 2 million more doses to be ordered in 1997. By that time it is hoped that more parties would be registered.”

The offers for the supply of the Rubella vaccine, lapsed on 3rd November 1996 upon the expiry of the 120-day period of validity stipulated in Tender Condition (6). In response to a request from the State Pharmaceutical Corporation dated the 12th of November 1996, SmithKline Beecham Biologicals S.A., the Serum Institute of India, and Biocine S.p.A. (the 7th respondent) confirmed the extensions of their offers and bid-bonds on November 14th, November 13th and November 21st 1996, respectively.

The State Pharmaceutical Corporation published the “World wide tender results of High Value items from 1.1.96 to 30.9.96” in the **Daily News** of the 25th of November 1996. Among the 23 items listed, there is the following:

Tender No.	Item	Quantity	Supplier	Value
DHS/26/9/96	Rubella Vaccine Live	1.2 million vials	SmithKline Beecham Biologicals SA Belgium	USD 256,250 SLR 13.43 million

On the 3rd of December 1996, the Managing Director of the State Pharmaceutical Corporation sent the following "note" to the Cabinet Appointed Tender Board, with a copy to the Chairman of the Corporation:

"Further to my letter to the Secretary dated December 2, 1996 and our submission to the Cabinet Appointed Tender Board dated December 5, 1996. Now the following two companies have registered:-

- 1) Biocine S.p.A., Italy
- 2) Serum Institute, India

These two company's tenders are much lower than the 3rd lowest. However, none of the items of Biocine, Italy have been purchased in the past by us while Serum Institute, India is a past supplier for many vaccine types. Therefore I suggest to award:

- 1) 25% (i.e. 1,125 million doses) as a sample order to Biocine, Italy
- 2) 75% (i.e. 3,375 million doses) to be awarded to Serum Institute of India."

The Cabinet Appointed Tender Board met on the 10th of December 1996. In recording its decision, it referred to its decision on the 2nd of September, the fact that it had met again on the 1st of November to consider the letters of the Managing Director of the State Pharmaceuticals Corporation to the Secretary /Health Dated 18.9.96 and 1.11.96 and its decision on that date. The Cabinet Appointed Tender Board then stated as follows:

"At today's meeting (10.12.96) of the CATB it was revealed that the CATB recommendations of 2.9.96 and 1.11.96 have not gone up to Cabinet. As a result they were confronted with the matters mentioned in the note by MD/SPC to the CATB dated 9.12.1996. Under the present circumstances and given the fact that two other parties are now registered, CATB recommends that an award of 2.0 million doses be made to Biocine, Italy, the price being the lowest responsive offer.

Only 2.0 million doses is being recommended in this instance as Biocine, Italy is a new supplier. This is recommended on the basis that each consignment would be suitably tested before despatch to hospitals.

If supplies of this vaccine are timely and in order and complied with quality assurance tests, CATB recommends that the balance quantity (2.5 million doses) should also be awarded to Biocine, Italy."

It is stated in the Preface to the Guidelines on Government Tender Procedure that they were designed, *inter alia*, "To keep the process fully transparent and honest." Paragraph 2 (h) of Part I of the Guidelines states that the Tender process should ensure transparency. Transparency requires at least that tenderers should be informed of decisions so that they might see what had been decided and have the opportunity of demonstrating why the decision was incorrect. And so, paragraph 136 of Part I of the Guidelines requires the Secretary to the Ministry concerned, within one week of the determination of a Cabinet Appointed Tender Board to inform in writing, all Tenderers who responded to the Tender Call, the intention to award the Tender to the successful Tenderer and request that if there are representations to be made against the determination, such appeals should be submitted in writing to the Tender Appeal Board with a copy to the Ministry concerned.

The Secretary to the Ministry concerned did not comply with the requirements of paragraph 136 of Part I of the Guidelines. When SmithKline Beecham Biologicals S.A wrote a letter dated the 13th of December 1996 to the Chairman of the Tender Board C/o the State

Pharmaceutical Corporation stating that the firm was awaiting a communication of the decision of the Tender Board, there was no response to that letter.

SmithKline Beecham Biologicals S.A. became aware of the latest decision of the Cabinet Appointed Tender Board, as they say in their letter dated the 22nd of January 1997 and in paragraph 14 of the affidavit of the Managing Director of SmithKline Beecham Mackwoods Ltd, through "highly placed officials"/ "senior officials of the 1st respondent corporation." They then wrote to the Chairman of the Cabinet Appointed Tender Board C/o The State Pharmaceuticals Corporation on the 22nd of January 1997 alleging that Biocine S.p.A. had failed to comply with the "fundamental and mandatory requirements of the tender conditions", and warned that, unless there was confirmation that SmithKline Beecham Biologicals S.A. would be awarded the contract, it would be compelled to take legal action. There was no reply to that letter.

The duty of the Secretary was, in terms of paragraph 136 of the Guidelines, to inform tenderers that if there were representations to be made against the decision of the Tender Board, they should be submitted to the Tender Appeal Board. The Secretary did not do so. In the circumstances, the letter, which contained representations made against the determination of the Tender Board, ought to have been forwarded by him to the Tender Appeal Board, so that in terms of paragraph 138 the Cabinet could have been informed of the decision of the Appeal Board. These matters were not mentioned in the Cabinet Memorandum dated the 28th of January 1997 which has been produced in evidence by Mr. M. D. D. Pieris, the Chairman of the Cabinet Appointed Tender Board and the 2nd respondent in the matter before us. (See paragraph 14 (n) of his affidavit dated 5th March 1997).

In the Memorandum to Cabinet, the Hon. Minister of Health, Highways and Social Services stated that he concurred with the recommendation of the Cabinet Appointed Tender Board and recommended that Cabinet Approval be granted to award 2.0 million doses of Rubella Viral Vaccine to M/S Biocine Italy at a total cost of U.S.\$ 360,000; SL Rs. 19,923,300/00. "Also to award balance of 2.45 million Rubella Viral Vaccine to same supplier if supplies of 2.0 million

doses Vaccines are timely and in order and complied with quality assurance tests at a total cost of US \$ 450,000 SL Rs. 24,904,125/00.

On the 29th of January 1997 SmithKline Beecham Biologicals S.A. and SmithKline Beecham Mackwoods Ltd. filed a petition in this Court alleging the infringement of their fundamental rights guaranteed by Article 12 and/or Article 12(2) of the Constitution. On the 30th of January 1997 the Court granted the petitioners leave to proceed for the alleged violation of Article 12 (1) of the Constitution. The Court issued interim orders restraining the import of the Rubella Vaccine from Biocine S.p.A. and restraining the respondents from taking any steps to prevent SmithKline Beecham Biologicals S.A. being awarded the contract for the supply of the Vaccine in terms of prayers 'g' , and 'h' of the petition, which orders were extended pending the final hearing and determination of this matter.

Learned Counsel for the respondents submitted that the application should be dismissed *in limine*, since the acts in question did not constitute 'administrative' or 'executive' action "as they relate to purely contractual rights of parties". He submitted that only an infringement of a **fundamental right** can be redressed through an application made under Article 126 of the Constitution. In support of his submission learned counsel cited *Roberts v. Ratnayake*⁽¹⁾: at p 45.

" ... where the rights and obligations of parties to such agreement have to be determined according to the ordinary law of contract, then even the State has to be treated in the same way as any other ordinary party ... where the rights and obligations of the parties to such a contract fall to be determined by the ordinary law of contract, then the provisions of Article 12 (1) of the Constitution have no application, and cannot be invoked."

The decision in *Roberts (supra)* was followed in *Wijenaike v. Air Lanka Ltd. and Other*⁽²⁾ at p. 293. *Wijenaike* also followed the view expressed in certain Indian decisions which had held that, although acts of the State at the threshold stage or at the stage of granting a contract would attract the constitutional guarantees of equality and equal protection of the law, yet, where there was a contract in force, Article 12 would apply only if the rights and liabilities were statutory: e.g. see *Radhakrishna Agrawal v. State of Bihar*⁽³⁾.

Article 12(1) of the Constitution states that "All persons are equal before the law and are entitled to the equal protection of the law". With great respect, I am unable to accept the view that "law" in Article 12 (1) is confined to enactments of Parliament: In my view "law" includes regulations, rules, directions, instructions, guidelines and schemes that are designed to guide public authorities. If they contain provisions that are impermissible in terms of the provisions of Article 12(1), or if in their application the guarantees of Article 12(1) are violated, they must be declared to be unconstitutional: This Court has consistently proceeded on that basis from the time of *Palhihawadana v. Attorney-General*⁽⁵⁾ See also *Jayanetti v. Land Reform Commission*⁽⁵⁾ at p. 184. I am also unable to agree with the view that a distinction should be drawn between cases in which there is a contract and those in which the matter is at a threshold stage or some stage before the making of the contract: In my view, where there is a breach of contract and a breach of Article 12 (1) brought about by the same set of facts and circumstances, it cannot be correctly said one of the remedies only can be availed of, the other being thereby extinguished; nor can it be correctly said that the aggrieved party must be confined to his remedy under the law of contract, unless there is a violation of statutory obligations: In *Srilekha Vidarthi v. State of U.P. A.I.R.*⁽⁶⁾ at p. 550, the Supreme Court of India considered contracts vis-a-vis Article 14 of the Indian Constitution, which corresponds with Article 12 of our Constitution. Verma, J (as he then was) speaking for the Court said:

"The state cannot be attributed the split personality of Dr. Jekyll and Mr. Hyde in the contractual field so as to impress on it all the characteristics of the State at the threshold while making a contract requiring it to fulfill the obligation of Article 14 of the Constitution and thereafter permitting it to cast off its garb of State to adorn the new robe of a private body during the subsistence of the contract enabling it to act arbitrarily subject only to the contractual obligations and remedies flowing from it. It is really the nature of its personality as State which is significant and must characterize all its actions, in whatever field, and not the nature of function, contractual or otherwise, which is decisive of the nature

of scrutiny permitted for examining the validity of its act. The requirement of Article 14 being the duty to act fairly, justly and reasonably, there is nothing which militates against the concept of requiring the State always to so act even in contractual matters. There is a basic difference between the acts of the State which must invariably be in public interest and those of a private individual, engaged in similar activities, being primarily for personal gain, which may or may not promote public interest. Viewed in this manner, in which we find no conceptual difficulty or anachronism, we find no reason why the requirement of Article 14 should not extend even in the sphere of commercial matters for regulating the conduct of State activity."

A similar view was taken by the Indian Supreme Court in *F.C.I. v. Kamdhenu Cattlefield Industries*⁷¹.

The petitioners are before this Court complaining that they have been denied equal treatment and that they have been denied the equal protection of the law guaranteed by Article 12 (1) of the Constitution. The complaint of the petitioners is not that there has been a breach of contract: their complaint is that they were not awarded a contract because certain officials had acted unfairly. Public functionaries must ensure that the guarantees of Article 12 of the Constitution are observed in the discharge of their duties and in the exercise of their powers, regardless of whether there is a statute or contract on which the rights of a petitioner may be based: See *Mahabir Auto Stores v. Indian Oil Corporation A.I.R.*⁷². For the reasons I have explained, the submission of learned counsel for the respondents that the petition must be rejected *in limine* cannot be accepted.

Chapter XIII of the Financial Regulations and various circulars issued from time to time by the Ministry of Finance prescribe the procedures to be followed in obtaining goods and services by Government bodies. On the 30th of September, 1996, The General Treasury issued a most important document: **Guidelines on Government Tender Procedure**. In the Preface to that document,

the following observations are made by President of Sri Lanka and Minister of Finance and Planning:

"Though the Tender procedure adopted at present is comprehensive, it has not prevented the occurrence of irregularities. Due to its complexity, the finalization of tenders has taken unusually long periods. It is observed that our procedure takes the longest in this region.

Therefore, the Government decided to prepare Guidelines on Tender Procedure, introducing amendments to the present procedure where necessary, in order to achieve the following objectives:-

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

At present it takes 24-36 months to bring a tender process to conclusion. This adversely affects development work and often leads to cost escalations.

Constant allegations of corruption and lack of transparency have a debilitating effect on the Government administration and Government officers. The objective of formulating these guidelines is to eliminate the weaknesses by collating all the instructions, strengthening the procedures and assisting users by introducing features like check lists, standard documents etc.

Therefore, this document attempts to reduce the time taken for the process to six (6) months, while keeping the whole process transparent and ensuring a level playing field to all tenderers ...

I hope these guidelines will help tenderers to offer their services with the minimum of problems and delays. These guidelines will make the officer's task easier in completing the process expeditiously and accurately ...

I sincerely hope that this document will serve to streamline the purchasing and selling procedures of Government, in order to achieve speed, efficiency and transparency and to provide a level playing-field for all citizens who participate in the economic process of the country."

Paragraph 6 of Part I Chapter I of the Guidelines stipulates that "The Tender process should be concluded in the shortest possible time." As observed in the Preface to the Guidelines, delay "adversely affects development work and often leads to cost escalations." In the matter before us, yet another undesirable consequence has been highlighted, namely, the possibility that stocks of essential items may run out, a fact, as we have seen, that was noted by the Cabinet Appointed Tender Board. In paragraph 15 of the affidavit dated the 5th of March 1997, Mr. M. D. D. Pieris, who was Chairman of the Tender Board, states as follows: "... Rubella vaccine is administered on potential mothers to prevent the birth of deformed children ... the current annual requirement of the vaccine in Sri Lanka is 4,500,000 doses whereas what is available in stock at present is only 600,000 doses. I state that in these circumstances, irreparable loss and damage would be caused to the Republic of Sri Lanka if the interim order already granted is extended any further." The interim order was granted to ensure that pending a determination of whether the procedures adopted in dealing with tender DHS/27/6/97 were in violation of the Constitution, the procurement of the vaccine under that tender would be suspended. Any damage that might be caused by a shortage of stocks is referable to the failure of the Tender Board and certain officials to adhere to the procedures prescribed by the Government designed, *inter alia*, to eliminate delays.

In the matter before us, the process started when the Secretary of the Cabinet of Ministers on the 6th of March 1996 informed

the Secretary of the Ministry of Health, Highways and Social Services that Her Excellency the President had approved the appointment of the Tender Board to determine the procurement of pharmaceuticals for the State Pharmaceutical Corporation in 1996. However, it was not brought to a finality. The Cabinet Appointed Tender Board, accepting the recommendations of the Technical Evaluation Committee, made a decision on the 2nd of September 1996: However, the Secretary of the Ministry of Health neither took action to pursue residual action for the completion of the tender award, nor did he inform tenderers of the decision that had been made, nor was a Cabinet Memorandum submitted under the hand of the Minister, forwarding the reports of the Tender Board and the Technical Evaluation Committee with the recommendations of the Minister.

In my view, it was the failure of the Secretary of the Ministry of Health to take necessary action that not only caused the delay but also opened the door to the Cabinet Appointed Tender Board, eventually misdirecting itself, The Cabinet Appointed Tender Board, as we have seen, at its meeting on the 10th of December 1996 noted that at that meeting that "it was revealed that the CATB recommendations of 2.9.96 and 1.11.96 had not gone to Cabinet. **As a result they were confronted with the matters mentioned in the note by MD/SPC to the CATB dated 9.12.1996.**

The emphasis is mine.

In my view, the "confrontation" would have been avoided if the salutary directions given in paragraphs 135 and 136 of the Guidelines had been followed:

135. The determination of the Tender Award will be notified by the Chairman of the Tender Board to the Secretary of the Ministry concerned or the Head of the Department concerned, as the case may be, who will thereafter pursue within one week residual action for the completion of the tender award.

136. In the case of A CATB, the Secretary to the Ministry concerned will, within one week of the determination inform in writing, all Tenderers who responded to the Tender Call, the intention to award the Tender to the successful Tenderer and request that if there are any representations to be made against the determination, such appeals should be submitted in writing to the Tender Appeal Board with a copy to the Secretary of the Ministry concerned. Simultaneously, a Cabinet Memorandum should be submitted under the hand of the Minister, forwarding the Reports of the Tender Board and the TEC, with the recommendation of the Minister.

137. An appeal against an award should be lodged with the Appeal Board within one week of the intimation of the determination. The appeal should contain all materials required to support the averments and should be self-contained for the Board to arrive at a conclusion ...

138. The Appeal Board shall report to the Cabinet, through the Secretary to the Cabinet within two weeks of an appeal being lodged ..."

There was an appeal dated the 29th of November 1996 against the award of the contract to SmithKline & Beecham Biologicals S.A. by the Country Manager of Biocine S.p.A. but this was not dealt with in the manner prescribed in paragraphs 136, 137 and 138 of the Guidelines: Biocine S.p.A. did succeed eventually, in so far as it became the tenderer recommended by the Minister acting on the recommendations of the Cabinet Appointed Tender Board but, as we have seen, not because its appeal had been considered by a Tender Appeal Board whose decision had been reported to the Cabinet, as required by the Guidelines.

The Chairman of the Cabinet Appointed Tender Board does not in his affidavit of the 17th of February 1997 state that either he or the Cabinet Appointed Tender Board were influenced by the fact that the

Government of Sri Lanka owed the State Pharmaceutical Corporation over Rs. 300 million on account of the supply of medical products with the result that the State Pharmaceutical Corporation had to borrow from Commercial Banks at the market rate of interest to maintain supplies of products. Nor does this appear as a stated reason for any of the several decisions of the Cabinet Appointed Tender Board. However, in his second affidavit dated the 5th of March 1997 the Chairman of the Cabinet Appointed Tender Board seeks to justify the decision made by the Tender Board on that ground. The Managing Director of the State Pharmaceutical does not advert to this matter in any of the documents placed before us, although he does refer to the matter of **savings**. Cost, *per se*, is no doubt one of the matters the Tender Board may have legitimately taken into account in arriving at its decision. However, the indebtedness of the State Pharmaceutical Corporation was another matter.

Learned counsel for the respondents, whilst conceding that the provisions of the Guidelines had not been followed in the matter of submitting the recommendations to the Cabinet, submitted that the "omission is understandable as the Guidelines were issued only on or about 30th September." This can hardly be pleaded as an excuse, for at least by the time of the second decision on the 1st of November the Secretary concerned, as the chief accounting officer of his Ministry, might reasonably have been expected to be acquainted with the contents of a document of prime importance to the proper discharge of his duties. Moreover, somewhat curiously, learned counsel for the respondents sought to justify the alteration of the views of the Cabinet Appointed Tender Board on the ground that since the first decision, the Guidelines had been issued, in terms of which "the foremost objective" of the tender process, when it relates to procurements, is the achievement of "maximum benefit to the Government" at the "least cost". Either the Secretary to the Ministry of Health was unaware of the Guidelines and, therefore, did not comply with them, or he was aware of them and, therefore, followed them. If the Tender Board was in fact guided by the so-called foremost objective of the tender process set out in the Guidelines, then the

Secretary of the Ministry of Health, as a Member of the Cabinet Appointed Tender Board, was aware of the Guidelines. In paragraph 17 of his affidavit dated the 17th of February 1997, the Chairman of the Cabinet Approved Tender Board admits "that the tender board having considered all relevant matters ... recommended to the Cabinet of Ministers in terms of the Financial Regulations (1992) and Guidelines on Government Tender Procedure (1996) that the tender with respect to the Rubella Vaccine should be awarded to the 7th respondent ..." In the circumstances, the failure on the part of the Secretary to the Ministry of Health, the third respondent, to comply with the Guidelines, is neither "understandable" nor excusable. Although he has been duly given notice, he has not filed an affidavit explaining his failure to comply with the prescribed procedures.

Part I of the Guidelines deals with "Government Procurement". Chapter I of that part deals with matters "General". Paragraph 2 of that Chapter sets out what the "Tender process should ensure". They are stated to be as follows:

- (a) The least cost and maximum benefit to the Government.
- (b) Adherence to prescribed standards, rules and regulations.
- (c) Optimum Economic Advantage to the nation.
- (d) Maximum income in the disposal of assets or in granting of rights, concessions or exclusive benefits.
- (e) Equal opportunity for interested parties and persons to participate and compete on identical terms and conditions and emergence of competence and efficiency.
- (f) Expeditious execution of works and delivery of goods and supplies.
- (g) Compliance with local laws and international obligations.
- (h) Transparency and uniformity of the evaluation procedure.
- (i) Confidentiality of information provided by tenderers."

The explanation of the respondents for the change of the decision of the Cabinet Appointed Tender Board is that it was compelled to do so by the Guidelines issued by the General Treasury in September 1996 since, as the learned Deputy Solicitor-General stated in his written submissions, "the foremost objective of the tender process when it relates to procurements is the achievement of 'maximum benefit to the Government' at the 'least cost'. He said that "the award in favour of the 7th respondent [biocine S.p.A.] would save the Government approximately Rupees 9,937,800." In support of his submission, the learned Deputy Solicitor-General cited paragraph 14 (j) of the Affidavit, dated, 5th March 1997, of the second respondent who was the Chairman of the Cabinet Appointed Tender Board, wherein it was stated as follows:

"... the tender board was conscious of the saving of approximately Rs. 9,937,800/- that could be made by accepting the tender of the 7th respondent, which was the lowest responsive offer as against the offer of the 1st petitioner."

Admittedly, "The least cost and maximum benefit to the Government" is, as we have seen, placed by paragraph 2, Chapter 1, Part 1, of the Guidelines at the head of the list of what the "tender procedure should ensure". There is no evidence to support the view that the arrangement was on a hierarchical basis. Moreover, "the least cost" is not referred to as the ultimate or sole criterion: the criterion of "least cost" is subject to the criterion of "maximum benefit to the Government". If "maximum benefit to the government" meant "maximum financial benefit" in the sense of saving rupees and cents, the reference to "maximum benefit to the Government" is tautologous. It is not: "Maximum benefit to the Government" refers to other, quite distinct, notions: obviously, the cheapest, as common experience shows, may not procure the best product. On the other hand, affordability is always an important consideration, and, in relation to some matters, perhaps, having regard to our limited resources, it may be appropriate to settle for something less desirable: but when any authority is dealing with a product concerned with the lives of the people, including the unborn citizens

of Sri Lanka – as in the case of Rubella Vaccine which, as we have seen, according to the Chairman of the Tender Board, is to be injected into pregnant women to immunize their babies – would the Government compromise, may it gamble? Can it afford to do with less than the best available in terms of efficacy? Specifically, in this case, the Government acted with care: It appointed a Technical Evaluation Committee of four persons including Dr. T. A. Kulathilaka, Epidemiologist, Dr. (Mrs) N. Vithana, Virologist, and Dr. J. M. J. Munasinghe, Pharmacologist. Financial considerations were also to be considered, and so, the fourth member of the Committee nominated by the Secretary to the Treasury was Mr. M. Piyasena, Director Public Finance, General Treasury.

Instead of stating that the objective of the Guidelines was to procure the cheapest services, the President and Minister of Finance, in the Preface to the Guidelines said that the prescribed procedure was "To obtain financially the most advantageous and qualitatively the best services and supplies for the country." What the "Tender procedure should ensure" is, *inter alia*, stated in the Guidelines to be "optimum Economic Advantage to the nation": I understand this to mean that the procedure relating to Government procurements should ensure the most favourable conditions for the advancement of the People by obtaining "financially the most advantageous and qualitatively the best supplies for the country." What is "financially the most advantageous and qualitatively the best supplies for the country" is pre-eminently a matter of policy that the Government, which is accountable to the People, must decide. In order to assist it in making an informed decision in the best interests of the People, the Government has, through the Financial Regulations, Circulars, and the Guidelines of 1996, laid down procedures to be followed in the matter of Government procurements. Unless they are followed, the Government is liable to be misled in making its decisions. Therefore, there must be scrupulous adherence to procedures laid down by the Government. Part I Chapter I paragraph 2 (b) states that the tender process should ensure "adherence to prescribed standards, rules and regulations."

The respondents' claim that cost was the decisive factor is inexplicable in the light of the fact that in respect of oral polio vaccine (Tender No. DHS/R/VAC/96), which was awarded under the same world-wide tender (P 1) that dealt with the Rubella virus vaccine (Tender No. DHS/26/9/96), the contract was awarded to SmithKline Beecham Biologicals SA **despite the fact that its quotation was not the lowest.** It was awarded the contract, as the Marketing Director of the 2nd Petitioner explains in paragraph 8 of his affidavit because "*inter alia* it was the sole registered supplier thereof".

Answering the averments of the Marketing Director, the Chairman of the Tender Board, in paragraph 9 of his affidavit dated the 5th of March 1997, said: "I state that the question of registration of the product was only one of the matters taken into consideration in awarding the 1st Petitioner the tender for the supply of vaccines in question, and I reiterate the averments of paragraph 13 and 16 of my affidavit dated 17th december 1996. I further state that in view of the financial difficulties now faced by the Government of Sri Lanka as well as the 1st Respondent Corporation, and the existing budgetary constraints, the price factor has become extremely important if not crucial in tender deliberations."

As we have seen, Mr. M. Piyasena, the Director of Public Finance of the General Treasury, was a member of the Technical Evaluation Committee that recommended the award of the contract for the supply of Rubella vaccine to SmithKline Beecham Biologicals SA. Was he unaware of or unmindful of the financial difficulties referred to by the Chairman of the Cabinet Appointed Tender Board? Was Mr. V. S. Amaradasa, Director of Public Finance and a Member of the Cabinet Appointed Tender Board, the fourth respondent, unmindful or unaware of the financial difficulties referred to by the Chairman when the board decided on the 1st of November 1996 to award the contract to SmithKline Beecham Biologicals S.A.? Were the financial difficulties of the Government less when the Board decided in September and November 1996 to award the contract to SmithKline Beecham Biologicals SA than in December when it decided to award the contract to Biocine S.p.A.? What

was the explanation for the award of the previous contract on Tender No. DHS/26/9/96 for the supply of Rubella vaccine to SmithKline Beecham Biologicals S.A. in 1996 when it was the third lowest tenderer? It was not cost, but the fact it was the only registered responsive bidder.

The Chairman of the Tender Board is unable to explain why the cost factor was decisive in the case of the Rubella vaccine but not in the case of the polio vaccine. The truth of the matter is that, being the only registered supplier, the only responsive bid for the polio vaccine was made by SmithKline Beecham Biologicals SA. However, although that supplier was also the only responsive bidder for the Rubella vaccine, the Tender Board, which had earlier correctly decided on the recommendations of the Technical Evaluation Committee to award the Tender to SmithKline Beecham Biologicals SA, later decided to award the contract to Biocine S.p.A. by misdirecting itself to believe that it was obliged or entitled to do so.

Learned counsel for the respondents submitted that the Tender Board had "a clear discretion".

Specifically, in the matter before us, he said, because:

"the tender conditions marked P1 provide that-

The Tender Board reserves to itself the right without question to reject any or all offers, the right to accept any part of a quotation, or order only such quantities and items as may be required."

This provision reiterates and expressly reserves the basis 'power' (this term is used in the 'Hohfeldian sense) of the offeree recognized by Financial Regulation 697 (2) and Part I Chapter X paragraph 131 of the Guidelines ... to deal in whatever way he pleases with an offer received by him under the law of contract."

If learned counsel for the respondents was right in asserting that a private individual may act as he pleases with an offer, he is, in my view, mistaken in treating the State (including its agencies) as being on the same footing as a private individual. The State is not in the same position. In contractual matters, State action, such as the procurement of drugs for its health services, having as it does a public element, must be transparent, timely, and financially the most advantageous and qualitatively the best for the country: See the Preface to the **Guidelines** of 1996. In order to achieve those ends, it has been provided in paragraph 2 of Chapter 1, Part, I of the **Guidelines** certain things that the "tender process should ensure". They include "equal opportunity for interested parties and persons to participate and compete on identical terms and conditions": Paragraph 2 (e) of the **Guidelines**; and "transparency and uniformity of the evaluation procedure": paragraph 2(h) of the **Guidelines**.

Recognizing its unique role and special responsibilities, the Government has prescribed procedures to be followed in the matter of procurement in its Financial Regulations and the **Guidelines** of 1996. It is stated in paragraph 2 (b) of the **Guidelines** that the tender process should ensure "adherence to prescribed standards, rules and regulations". Paragraph 2(g) of the **Guidelines** requires that the tender process should ensure "compliance with local laws": this would, of course, include compliance with Article 12 of the Constitution that guarantees equality before the law and equal protection of the laws. In determining whether there was conformity with the procedures laid down for the purpose, *inter alia*, of ensuring equal protection of the law by providing, what was twice described in the Preface to the **Guidelines** as, "a level playing field", what is relevant are the norms laid down by the State. The Financial Regulations provide in regulation 697 that

- (1) ...
- (2) The Board shall have power

- “(a) To accept any tender, or portion of a tender;
- (b) To accept portions of more than one tender;
- (c) To reject all or any tenders;
- (d) ...
- (e) ...

The Tender Board shall, in every case, record the reasons for its decision.

(3) ...

(4) Tender Board should compare tenders received with departmental cost estimates. Tenders which are considerably higher than the departmental estimate should normally be rejected. If the tenders are all excessively high, action should be taken under (2) (e) above [i.e. direct that fresh tenders be called for].

(5) By and large a Tender Board should accept the lowest evaluated tender ... which satisfies all conditions, specifications etc. of tender; and except with the ... approval of the Cabinet in the case of tenders in excess of Rs. 5,000,000 in value no tender other than the lowest ... should be accepted; and that too only if such lowest ... tender satisfies all requirements.

(6) All tenders which are not in conformity with the stipulated specifications and conditions of tender should be rejected; but a Tender Board is not precluded from accepting a tender, if

(a) the specifications are better than those prescribed;

(b) the specifications or conditions offered conform substantially to those in the tender documents and vary only in minor details.

(7) If negotiations in regard to the variation of any conditions or specifications, or in regard to any other matter pertinent to the final adjudication have to be conducted after the tenders have been opened, the Tender Board should conduct such negotiation

only after notice to all the tenderers. A full record of all such negotiations should be maintained. The final adjudication following on such negotiation should not be made by the Tender Board without the approval of the appropriate authority under F.R. 799.
(8) ..."

It is evident from the foregoing provisions of the Financial Regulations that, although a Tender Board does have very wide powers, it does not have uncontrolled, and unrestricted powers. It cannot, for instance, accept any tender that fails to conform substantially to the specifications and conditions of the Tender documents.

The **Guidelines** provide as follows in Part I Chapter X:

"131. The Tender Board shall have power to:—

- (a) accept any tender, or portion of a tender;
- (b) accept portions of more than one tender;
- (c) reject all or any tenders;
- (d) direct that fresh tenders be called for
- (e) ...

The authority for the determination of the Award is subject to the approval of the appropriate higher authority.

132. ...

133. If a Tender Board recommends a deviation of non-critical nature from the tender conditions, the reasons for such deviation should be recorded clearly on the minutes of the proceedings ...

134. Only the bids which are responsive and qualified substantially conforming in accordance with the tender documents are considered for detailed evaluation.

Therefore, after the detailed evaluation, the Tender Board should recommend the lowest, evaluated, responsive, qualified bid for acceptance. Where the Tender Board does not agree with the recommendations of the Technical Evaluation Committee, the reasons for such disagreement should be clearly stated."

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. Seaton*^{19(2a)} 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."

The State Pharmaceutical Corporation called for tenders for the supply of certain products required by the Department of Health Services on a world wide basis. It set out the terms and conditions of the tender and the specifications relating to each of the products in a document issued to those who wished to tender. (P1). Clause 9(a) states as follows:

"All drugs imported to Sri Lanka must be registered with the Cosmetics Devices and Drugs Authority of Sri Lanka and Tenderers should attach photocopies of the current Registration Certificates with their Tender Offers. Registration numbers should be indicated on Schedule II. Tenderers must advise their local agents to attend to product Registration."

The underlining appears in the document itself. Some other matters, not germane to the matter in dispute, are also similarly

underlined. The registration of certain products is required under the Cosmetic Drug Act No. 27 of 1980. Registration is to ensure that the product meets required standards. Clause 29 of the tender document (P1) states as follows:

"Awards are made to suppliers taking into consideration among other factors: price quoted, past performance, quality of samples, delivery offered, product registration etc., and the decision of the Tender Board is final. No. correspondence will be entertained from unsuccessful tenderers."

Clause 34 of the document (P1) states: "Prospective tenderers should acquaint themselves fully with these terms and conditions..."

In paragraph 8 of his affidavit dated the 5th of March 1997, the Chairman of the Cabinet Appointed Tender Board states, *inter alia*, that "the past practice in regard to the award of tenders for the supply of medical supplies shows that the registration of the drug at the time of closing of tenders was not treated as a mandatory requirement as what was required by the Cosmetic Devices and Drugs Act was that the drug should be registered at the time of importation."

Whatever his interpretation of the law may be, the fact is that registration was stated, and stated with emphasis, **in the tender document** (P1) to be a condition of the award.

Learned counsel for the respondents submitted that the requirement of registration was not mandatory and that the failure to register was not a fatal flaw. He cited *Kiriwanthe and Another v. Navaratne Another* ⁽⁹⁶⁾ at p. 15, in support of his submission. I do not think that the dicta he referred to assist him in this case.

Admittedly, where the specifications or conditions offered conform substantially to those in the tender documents and vary in only minor details, a Tender Board is not precluded from accepting a Tender: See F.R. 697 (6) (b). Considering the broad policy of the condition and the critical and substantial nature of the mischief to which it is directed, namely, assurance of the quality of the product, I am of the

view that the requirement of registration was mandatory and could not be treated as a mere formality or technicality, or minor detail that could have been waived or ignored either by the Technical Evaluation Committee or by the Tender Board. The necessary consequence of a failure to comply with the condition relating to registration is the rejection of the tender. (See F.R. 697 (6) and **Guidelines**, Part I, clause 134).

If a Tender Board recommends a deviation of a non-critical nature from the tender conditions, the reasons for such deviation should be recorded clearly on the minutes of the proceedings. (**Guidelines**, Part I, clause 133.) There is no record of the Tender Board having regarded registration as being a matter of a non-critical nature. The Tender Board does not recommend a deviation at all: On the other hand, it proceeds on the basis that registration is essential.

In paragraph 14 (i) of his affidavit, the Chairman of the Board states that the decision was made "... in accordance with the relevant tender conditions and regulations taking into consideration all relevant matters including the price quoted, the past performance, quality of samples, delivery offered and product registration." He was repeating the criteria set out in clause 29 (1) of the tender document which we have set out above. Whatever the alleged "past practice" may have been, there is no doubt that as far as **this tender** was concerned, registration was necessary, and therefore, the Tender Board, quite properly took that into account.

The Chairman of the Tender Board states in paragraph 14 (i) of his affidavit dated the 5th of March 1997 that the Tender Board took past performance and quality of samples into account in arriving at its decision to award the contract for the supply of Rubella vaccine to Biocine S.p.A. The Technical Evaluation Committee does not in its report that samples were received from all the tenderers, but it states nothing with regard to their quality. Whereas SmithKline Beecham Biologicals S.A. had supplied that vaccine in the previous year, and had their product registered at the date of the opening of the tenders, viz. 3rd July 1996, Biocine S.p.A. had neither supplied

Rubella vaccine earlier, nor was its product registered at the relevant time. The Technical Evaluation Committee in its report said that the product of SmithKline Beecham Biologicals S.A., were registered, but stated that none of the other tenderers had registered their products. The Technical Evaluation Committee in its report stated that SmithKline Beecham Biologicals S.A., had been a previous supplier and in the column "Past Complaints" stated "No complaints". With regard to the other tenderers, including Biocine S.p.A., the Committee states that they were not previous suppliers and in the column "Past Complaints" states "Not applicable". The Managing Director of the State Pharmaceutical Corporation in his note dated the 9th of December 1996, which eventually persuaded the Tender Board to change its mind, states that "none of the items of Biocine, Italy have been purchased in the past", and "therefore" suggests that 25% (i.e. 1,125 million doses) be awarded to Biocine, Italy, as "a sample order". The Cabinet Appointed Tender Board decided to award a contract for supply restricted to 2 million doses to Biocine, Italy, for the stated reason that it was a "new supplier". In the circumstances, how could the Chairman of the Tender Board truthfully say that the Tender Board took account either of the past performance and the quality of the product of Biocine S.p.A. to whom the contract was awarded? The Tender Board was unable to recommend the acceptance of the Biocine S.p.A. bid with confidence, and therefore recommends acceptance "on the basis that each consignment would be suitably tested before despatch to hospitals." The balance quantity of supplies are to be awarded to Biocine S.p.A. "If the supplies of this vaccine are timely and in order and complied with quality assurance tests.

In his letter dated the 1st of November 1996, the Managing Director refers to the fact that "two companies have submitted their samples for testing and reports are awaited." The Cabinet Tender Board at its meeting on 10th December 1997 found itself, as it says in its minutes, "confronted with the matters mentioned in the note by MD/SPC to the CATB dated 9.12.1996." Although in his letter dated November 1 1996, the Managing Director of the

State Pharmaceutical Corporation acknowledged the fact that the three other companies which had quoted were "unfortunately ... not registered", in his note dated the 9th of December 1996 he stated that "**Now** the following two companies have registered: (1) Biocine S.p.A., Italy (2) Serum Institute India," The emphasis is mine.

Although the Managing Director had recommended that 25% (i.e. 1, 125 million doses) be awarded as "a sample order" to Biocine from whom no products had been previously ordered, and that 75% (i.e. 3,375 million does) be awarded to Serum Institute India which he said was "a past supplier for many vaccines", (but not advertent to the relevant fact that its **Rubella vaccine** had not been registered when the tender closed) the Tender Board decided to make an award of 2.0 million doses to Biocine, Italy, "the price being the lowest responsive offer." It was the lowest offer, but not the lowest **responsive** offer, for the product of Biocine S.p.A. was not registered, and therefore, Biocine S.p.A. was not qualified to tender.

Quotations were called for 4,500,000 doses to be delivered as follows: 2.5 million doses in January 1997 and 2 million doses in May 1997. The tender submitted by SmithKline Beecham Biologicals SA on 19th June 1996 was for 4,500,000 doses. The Tender Board at its meeting on the 2nd of September 1996, recommended the award of the contract to SmithKline Beecham Biologicals without any variation of the total doses or the manner of delivery. However, at its meeting on the 1st of November 1996, whilst confirming its earlier decision that SmithKline Beecham SA's offer should be recommended, it stated as follows: "The T.B. also noted that there are 2 million more doses to be ordered in 1997. **By that time it is hoped that more parties would be registered.** The emphasis is mine.

Three things should be pointed out:

(1) It is not the parties but the drug that must be registered, for it is the quality of the drug that matters.

(2) The decision of the Tender Board on the 2nd of September 1996 was to recommend the acceptance of the Tender of SmithKline Beecham Biologicals S.A. as the only tenderer whose product was registered, for the delivery of the entire required quantity stipulated in the tender document, namely 4.5 million doses, which, according to the tender document were required to be delivered as follows: 2.5 million doses to be delivered in January 1997 and 2 million doses in May 1997. However, the Tender Board at its meeting on the 1st of November 1996, took account of the letter of the Managing Director of the State Pharmaceutical Corporation dated the 1st November 1996 in which it was stated that, although other tenderers who had quoted less were "unfortunately ... not registered", moves were afoot to have them registered. The Managing Director suggested that the Tender Board should therefore postpone its decision for two or three weeks. However, the Tender Board, fearing that "a delay in placing orders could lead to stocks running out" recommended the acceptance of the offer of SmithKline Beecham Biologicals S.A., as the "lowest acceptable tender of a registered party", **but limited the supply to the 2.5 million doses required by the tender document to be delivered in January 1997.** See the minutes of the meeting of the Tender Board dated 1st November 1996 and paragraph 3.3 of the Cabinet Memorandum. The tender document had called for the supply of a quantity of 4.5 million doses. In terms of Financial Regulation 697 (2) (a) a Tender Board has the power to accept any tender or portion of a tender. However, it is required to record the reason for its decision. There is no record in the minutes of the Tender Board for limiting the award to 2.5 million doses. However, the minutes do state as follows: "The T.B. also noted that 2 million more doses [are] to be ordered in 1997. By that time it is hoped that more parties (sic.) would be registered." While the view of the Managing Director of the State Pharmaceutical Corporation that the decision of the Tender Board should be postponed so as to enable some of the unsuccessful tenderers to have their products registered was not accepted because stocks of supplies might run out, the Tender Board, shared the Managing Director's hope that the unsuccessful tenderers would in time have their products registered so that the contract for the supply of the balance

quantity of 2 million doses could be awarded to one or more of them. This is made clear in paragraph 3.3 (d) of the Cabinet Memorandum which states as follows:

" Considering State Pharmaceuticals Corporation Managing Director's letters Tender Board considered, the other parties who had applied for registration could register for the balance quantity of 2 million doses to be delivered in may 1977."

(3) 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. If there are to be negotiations in regard to the variations in conditions or specifications or to any other matter pertinent to the final adjudication other than clarifications, they may be made only after due notice being given to all the tenderers: See paragraph 132, Part I, of the **Guidelines**, 1996. It is in that way that a "level playing-field" on which there is equal opportunity for persons to participate and compete on identical terms and conditions, and transparency and uniformity of the evaluation procedure of the tender process can be achieved: Cf. paragraph 2 (d), (e) and (h) of the **Guidelines**, 1996. It cannot be permitted that if, by some stratagem or neglect, the decision of a Tender Board to the Cabinet is not made in due time as required by paragraph 136 of the **Guidelines**, a position of advantage could be gained for a party.

At the relevant date, namely, the 3rd of July 1996, none of the tenderers for the supply of Rubella vaccine had their products registered except SmithKline Beecham Biologicals S.A.. SmithKline Beecham Biologicals S.A. was, therefore, the only person who had made a responsive bid conforming with the tender document at the relevant date.

The Tender Board, when it was "confronted" by the information furnished by the Managing Director of the State Pharmaceutical Corporation by his note dated the 9th of December 1996 that "now two companies have registered: (1) Biocine, S.p.A., Italy

(2) Serum Institute, India", misdirected itself in believing that therefore the products of those two tenderers could also be considered. The level playing-field principle enunciated in the Preface to the **Guidelines** required that the claims of tenderers should be decided as at the date stipulated, and not as and when they satisfied the conditions of the tender document. There is no other way in which Government procurements can be made in a fair manner, ensuring "equal opportunity for interested parties and persons to participate and compete on identical terms": Paragraph 2 (e) of the **Guidelines**; and ensuring "transparency and uniformity of the evaluation procedure": Paragraph 2 (h) of the **Guidelines**.

It is also in that way that equal treatment required by Article 12 (1) of the Constitution can be meted out. Paragraph 2(g) of the **Guidelines**, 1996 states that the Tender process should, *inter alia*, ensure compliance with the law. There must be compliance with requirements that ensure an equal opportunity for persons to participate and compete on identical terms and conditions (see paragraph 2(e) Part I Chapter 1 of the **Guidelines**, 1996) if there is to be compliance with Article 12 (1) of the Supreme Law – the Constitution.

In *Roman Dayaran Shetty v. The International Airport Authority of India and Others*⁽¹⁰⁾, a notice inviting tenders was issued by the International Airport Authority of India, a statutory public corporation. The notice stated in paragraph (1) that "sealed tenders in the prescribed form are hereby invited from Registered 2nd Class Hoteliers having at least 5 years' experience for putting up and running a 2nd Class Restaurant and two snack bars at the Airport for a period of three years." The latest point of time up to which the tenders could be submitted was stipulated in the notice to be 12 p.m. on the 25th of January 1977 and it was stated that the tenders would be opened on that date at 12.30 hours. There were six tenderers. Five of them were found to have submitted incomplete tenders in that they had failed to comply with clause 9 of the terms and conditions of the tender document by not furnishing with their tenders some or all of the following documents: income tax

certificates, affidavits concerning their immovable properties and solvency certificates. The only tender which fully complied with the terms and conditions set out in the **tender form** was that of the 4th respondent. Moreover, the offer of the 4th respondent was the highest. While submitting his tender, the 4th respondent had pointed out in a letter that they had ten years experience in catering to reputed commercial houses, training centres, banks and factories and that they were also doing considerable outdoor catering for various institutions. However the letter showed that the 4th respondent had experience only of running canteens and not restaurants and that they did not satisfy the description of "registered 11nd Class Hotelier having at least 5 years experience" as set out in paragraph (1) of the **Notice** inviting tenders. In response to letters from the Airport Authority inquiring whether the 4th respondent was registered and requiring the 4th respondent to furnish supporting documentary evidence, the 4th respondent, after describing its services, stated that its proprietor had "experience equivalent to that of a 2nd Class or even 1st Class hotelier." This satisfied the Airport Authority which proceeded to accept the tender of the 4th respondent. The appellant, who was not a tenderer, challenged the award. Bhagwati, J, (as he then was) said at pp. 1633-1634:

"Now it is true that the terms and conditions of the tender form did not prescribe that the tenderer must be a registered 2nd class hotelier having at least 5 years experience nor was any such stipulation to be found in the form of agreement annexed to the tender but the notice inviting tenders published in the newspapers clearly stipulated that tenders may be submitted only by registered 2nd class hoteliers having at least 5 years experience and this tender notice was also included amongst the documents handed over to prospective tenderers when they applied for the tender forms ... Now, here the expression used in paragraph (1) of the Notice was "registered 2nd class hotelier" and there can be no doubt that by using the expression the 1st respondent intended to delineate a certain category of persons who alone should be eligible to submit a tender. The 1st respondent was not acting aimlessly or insensibly in insisting

upon this requirement not was it indulging in a meaningless or futile exercise. It had a definite purpose in view when it laid down this condition of eligibility in paragraph (1) of the Notice ... The test of eligibility laid down was an objective test and not a subjective one ... Now, unfortunately for the 4th respondents, they had over 10 years experience of running canteens but **at the date when they submitted their tender**, "(the emphasis is mine)" they were not running a II grade hotel or restaurant. Even if the experience of the 4th respondents in the catering line were taken into account from 1962 onwards, it would not cover a total period of more than 4 years 2 months so far as catering experience in 2nd Grade hotels and restaurants is concerned. The 4th respondents thus did not satisfy the condition of eligibility laid down in paragraph (1) of the notice and in fact this was impliedly conceded by the 4th respondents in their letter dated 26th February 1977 where they stated that they had "experience equivalent to that of a 2nd Class or even 1st Class hotelier". The 4th respondents were, accordingly, not eligible for submitting a tender and the action of the 1st respondent in accepting their tender was in contravention of paragraph (1) of the notice."

The Tender of Biocine S.p.A. was incomplete in that it failed to annex a photocopy of the current registration certificate to their tender as required by clause 19 of the tender document. Nor could it furnish a registration number in the Schedule as required by clause 19. It was unable to do so for the reason that its product was not registered as required by clause 19. Compliance with the conditions of the tender had to take place by the 3rd of July 1996 – the prescribed final date for the submission of tenders. If late compliance was to be permitted only in some cases, that would place burdens on some while conferring an unfair advantage on others and that would be in violation of the guarantee of equality of treatment and the equal protection of the law enshrined in Article 12 of the Constitution. Over a century ago Justice Field observed that "no greater burdens should be laid upon one than are laid upon others in the same calling and condition": *Barbier v. Connolly*⁽¹¹⁾.

The Tender Board stated that it was recommending the offer of Biocine S.p.A. because it was the lowest quotation. Had the opportunity been given to others, there might, perhaps, have been even lower quotations. What was the new date for qualification? In order to expeditiously and fairly deal with the matter, it was imperative to fix a definite date at which eligibility should be determined. Such a date was fixed. That date was the 3rd of July 1996. Only complete tenders from tenderers who had complied with the terms, conditions and specifications set out in the tender document could have been evaluated and accepted. The others should have been rejected. That is how the State, in its defined and publicly announced procedures, had stated its procurements, or those made on its behalf, should be obtained: Paragraph 134 **Guidelines; Financial Regulation** 697. Those procedures, *inter alia*, profess the standards by which the State in the procurement of Rubella vaccine in the tender under consideration were to be judged. The State (and its agencies) were obliged to scrupulously observe them and must be rigorously held to them, not only because, as we have seen it is a requirement of administrative law, but also because, conformity with Article 12 of the Constitution requires it. In general, that Article requires (1) the law, including the standards by which the State (or its agencies) have professed to govern itself as set out in regulations, rules, procedures, guidelines, directions, schemes and so on, should be uniform; and (2) that such law should be administered uniformly, according to the stated criteria and measures, with evenness in respect of all persons similarly situated; unless, either in the formulation of the law or in its application there are rational explanations for differentiation.

In *Roman Dayaran Shetty*, (*supra*) the appellant who objected to the award of the contract to the 4th respondent was himself not a tenderer. Bhagwati, J observed at pages 1650-1651 as follows:

“If there was no acceptable tender from a person who satisfied the condition of eligibility, the 1st respondent could have rejected the tenders and invited fresh tenders on the basis of a

less stringent standard or norm, but it could not depart from the standard or norm prescribed by it and arbitrarily accept the tender of the 4th respondents. When the 1st respondent entertained the tender of the 4th respondents even though they did not have 5 years experience of running a 2nd class restaurant or hotel, it denied equality of opportunity to others similarly situate in the matter of tendering for the contract. There might have been many other persons, in fact the appellant himself claimed to be one such person, who did not have 5 years experience of running a 2nd class restaurant, but who were otherwise competent to run such a restaurant and they might also have competed with the 4th respondents for obtaining the contract, but they were precluded from doing so by the condition of eligibility requiring five years experience. The action of the 1st respondent in accepting the tender of the 4th respondents, even though they did not satisfy the prescribed condition of eligibility, was clearly discriminatory since it excluded other persons similarly situate from tendering for the contract and it was also arbitrary and without reason. The acceptance of the tender of the 4th respondents was, in the circumstances invalid as being violative of the equality clause of the Constitution as also of the rule of administrative law inhibiting arbitrary action."

In the matter before us, on the relevant date, namely, the 3rd of July 1996 – the date when the Tenders were closed, the only tenderer who was qualified was SmithKline Beecham Biologicals S.A. since only its Rubella Viral Vaccine was registered as required by the Tender document (P1). The only responsive bid was therefore that of SmithKline Beecham Biologicals S.A. although it was not the lowest bid. The only tenderer who was able to comply with the requirement in Clause 19 that a copy of the certificate of registration should be annexed to the Tender was SmithKline Biologicals Beecham S.A. Therefore the only complete tender was that of SmithKline Beecham Biologicals and therefore it was the only tender that qualified for evaluation. The Tender Board misdirected itself by believing that it was obliged to recommend the acceptance

of the tender of Biocine S.p.A. because its price was "the lowest responsive offer". It may have been the lowest offer, but at the relevant date, namely the 3rd of July 1996 it was not a "responsive" offer at all, for Biocine S.p.A. had failed to comply with the condition of registration .

For the reasons stated in my judgment, I declare that the decisions and recommendations of the Technical Evaluation Committee on the 12th August 1996 and the decisions and recommendations of the Cabinet Appointed Tender Board on the 2nd of September 1996 are in conformity with the procedures prescribed by the Government for the procurement of 4.5 million doses of Rubella Viral Vaccine Live BP 93 referred to as Item SR 9165 in the Schedule to the Tender Document (P1) under and in terms of Tender Ref. DHS/27/6/97, and that those decisions are in conformity with Article 12(1) of the Constitution.

For the reasons stated in my judgment, I declare that the decisions and recommendations of the Cabinet Appointed Tender Board on the 1st of November 1996 and on the 10th of December 1996 relating to the procurement of 4.5 million doses of Rubella Viral Vaccine Live BP 93 referred to as Item SR 9165 in the Schedule to the Tender Document (P1) under and in terms of Tender Ref. DHS/27/6/97 violate Article 12(1) of the Constitution and are therefore of no force or avail in law.

I make order that the State shall pay a sum of Rs. 25,000 to each of the petitioners as costs.

WADUGODAPITIYA, J. – I agree.

DR. GUNAWARDENE, J. – I agree.

Relief granted.