

## LOCALS FACE BASELESS BIAS

*The Daily News* of Tuesday, September 15, 1998 published a fresh circular by the Secretary, Ministry of Finance & Planning, Dixon Nilaweera, under the caption – "Treasury Secy. issues fresh circular on bidding for large scale Govt. projects". It is reliably understood from finance ministry sources, that the government had back peddled on its policy decision taken previously, that foreign investors or contractors bidding on large scale government tenders and BOO/BOT projects over a value of Rs. 250 million should enter into a valid agency agreement with a local company listed on the Colombo Stock Exchange, with a market capitalisation not less than Rs. 500 million. Such cabinet decision as reported had been taken on the basis of the cabinet memorandum dated June 10, 1998 under the hand of President Chandrika Bandaranaike Kumaratunga, as the Minister of Finance & Planning.

It is disclosed that such policy decision was being changed by the government to permit "liaison offices" in Sri Lanka of foreign companies to also participate in the promotion of public sector projects and tenders of a value of Rs. 250 million, thereby amending and/or varying the original cabinet decision. Had such back peddling by the government on its original cabinet decision been as a consequence of influence peddling and/or strong lobbying by the influential local "liaison offices" of foreign companies ? If not, how ? .

The cogent question was also raised of the market capitalisation level of Rs. 500 million stipulated in the original cabinet decision in respect of local listed public companies, to qualify to participate as agents of foreign companies in the promotion of public sector projects and tenders of a value of over Rs. 250 million, questioning further, as to how many listed public companies with a market capitalisation of Rs. 500 million were in existence, particularly at a time when the Colombo stock market has taken a steep tumble and virtually crashed, and furthermore, at what point of time in the processing of a project or tender such valuation was to be reckoned ?

### NEW POLICY OF GOVERNMENT !



Chairman, Ceylon Chamber of Commerce, Ken Balendran — Does this policy support local private sector growth?



Finance Secretary Dixon Nilaweera — Do only locals resort to undue influence and corrupt practices; not foreign liaison offices?

The government's new policy decision reported in the *Daily News* of September 15, 1998 on the basis of a fresh circular issued by the Secretary, Ministry of Finance & Planning, Dixon Nilaweera, amending and/or varying the original cabinet decision has essentially been as follows:

1. The market capitalisation of listed public companies to qualify to function as local agents of foreign companies bidding on government projects or tenders of a value of Rs. 250 million has been reduced to Rs. 200 million from the originally decided level of Rs. 500 million. Such market capitalisation value is to be reckoned as at December 31, of the year immediately preceding the date on which the tender is called and will remain unchanged till December 31 of the current year.
2. The new policy decision of the government further stated – "If international bidders or tenderers wish to participate in a project without an accredited agent, which is a listed company, they may do so, provided the international company concerned has set up a local liaison office directly owned by the parent company, with necessary staff to perform the functions of a local agent".

The *Daily News* confirmed that the latest government circular is further to the one issued on June 29 this year and that – "Mr. Nilaweera's June 29 circular also emphasised that the justification for public listed companies representing reputed international suppliers, contractors and investors was that they are compelled to operate more transparently than unlisted private or public company and with a greater degree of accountability towards shareholders" –Furthermore, public listed companies are required to comply with the continuing listing requirements of the Securities & Exchange Commission including regular financial disclosures. Moreover, the benefit of such alliances would accrue to a large number of domestic shareholders as shares of listed public companies are more widely held than unlisted companies. – He had also pointed out that the new procedures were intended to benefit the national economy by obtaining the best possible terms from the bidders and benefits to local companies and their shareholders".

### **LOCALS BANNED !!**

The policy of permitting local liaison offices of foreign contractors and investors to participate in the promotion of large scale public sector projects and tenders, banning all forms of local entrepreneurs and business organisations, including proprietorships, partnerships, private/public companies and listed public companies with a market capitalisation of less than Rs. 200 million, cannot in any way whatsoever, be reconciled with the reported dicta of Dixon Nilaweera's circular that – "the new procedures were intended to benefit the national economy". On the contrary, to benefit the national economy ought not the entire spectrum of the local private sector have been permitted to participate as agents and/or liaison offices of foreign contractors and investors to develop the nascent and growing local private sector ?

Whilst banning such a vast spectrum of the established private sector, ironically, international bidders and/or tenderers have been permitted to participate in large scale public sector projects and tenders without an accredited local agent, provided the international company concerned has set up a local liaison office directly owned by the parent company with necessary staff to perform the functions of a local agent. Who would decide and how would it be decided, whether the local liaison office directly owned by the international company would have the necessary staff to perform the functions of a local agent ? How could it ever be postulated with any sanity that the local business organisations outside the league of listed public companies with a market capitalisation of Rs. 200 million do not have the necessary staff to perform the functions of a local agent ?

One thing that is quite clear is that the foreign companies participating in large scale public sector projects and tenders must necessarily be represented by a local agent. The local agent could either be a local listed public company with a market capitalisation of Rs. 200 million or a local liaison office directly owned by the foreign company, with the proviso that such local liaison office should have the necessary staff to perform the functions of a local agent, leaving it in limbo as to how one would gauge whether such local liaison office directly owned by a foreign company has the necessary staff to perform the functions of a local agent !

### **FALLACIOUS POSTULATIONS !**

Does not such government policy stultify and stifle the growth of local entrepreneurs, particularly the growing younger business generation, including all proprietorships, partnerships, private/public companies and listed public companies with a market capitalisation of less than Rs. 200 million and be patently unfairly and unjustly discriminatory of the local private sector ? Why is there such bias against the local private sector, particularly in an era where the country is endeavouring to promote the growth of the local private sector to develop the economy ? Is it that the local agency business, which is the legitimate right and entitlement of the nationals of this country has also now been given to foreigners ? Surely, would not the local private sector be far more geared with the necessary staff to function as local agents ? Would not the exposure as agents or otherwise of the local private sector to such foreign companies participating on large scale public sector projects and tenders tangibly contribute towards developing the local private sector, itself ?

Would it not be a fallacy for the Secretary, Ministry of Finance & Planning, Dixon Nilaweera to have postulated, that the new procedures on bidding for large scale government projects and tenders, which enable reputed international contractors or investors to directly deal with ministries and government agencies involved in calling for tenders, contracts or investment projects, would benefit the national economy by obtaining the best possible terms from the bidders ? Would not the exposures on Ceylon Steel Corporation, Orient Lanka, Air Lanka and Sri Lanka Telecom support the contention that such postulation is untenable ?

As exposed the rationale for excluding such a very large spectrum of the local private sector from the business of functioning as local agents of foreign companies participating on large scale public sector projects and tenders, had been evident from the Cabinet Memorandum of June 10, 1998 which had stated – "It is important that the local agents of companies bidding for such projects do not unduly influence public officials or resort to corrupt practices in concluding deals which at times are unfavourable to the government".

Therefore would it not stand to logical reason, that such a very large spectrum of the local private sector has been banned from the business of participating as agents in the promotion of large scale public sector projects and tenders, only because that such a large spectrum of the private sector is deemed to unduly influence public officials or resort to corrupt practices in concluding deals which at times are unfavourable to the government ? Could this be a fair, just and reasonable postulation ?

On the other hand, would it not stand to logical reason, that it had been deemed that listed public companies with a market capitalisation of Rs. 200 million and local liaison offices directly owned by foreign companies, participating as agents in the promotion of large scale public sector projects and tenders do not unduly influence public officials or resort to corrupt practices in concluding deals, which at times are unfavourable to the government ? Could this be a fair, just and reasonable postulation ? Have not the exposures revealed otherwise ?

## **UNDUE INFLUENCE & CORRUPT PRACTICES ?**

Analytical exposures have been made on the privatisation of the plantation companies, particularly Agalawatte, Horana, Kegalle, Kotagala, Bogawantalawa and Kelani Valley considered to have been the most profitable plantation companies by the Public Enterprise Reform Commission [PERC]. The 51% majority shareholdings of all these profitable plantation companies were sold to the exclusively pre-selected management companies at the nominal value of Rs. 10/- per share only, including affording to the management companies convertible debentures in the respective plantation companies, whereby the management companies were given a much greater shareholding than 51% of the respective plantation companies at the nominal value of Rs. 10/- per share. The exposures revealed that by such ingenious strategy of convertible debentures the respective management companies had been afforded 60.8% shareholding of Agalawatte, 60.8% shareholding of Horana, 60.8% shareholding of Kegalle, 69.4% shareholding of Kotagala, 70.7% shareholding of Bogawantalawa and 71.2% shareholding of Kelani Valley at the nominal value of Rs. 10/- per share.

The sale price of Rs. 10/- per share had been determined on the basis of a ludicrously absurd pricing formula, where the sale price for the majority shareholding had been intriguingly based on the lowest price received on the "offer for sale" for the fragmented sale of 20% of the shareholdings to the public of the respective plantation companies. Obviously, it would have been quite well anticipated, that the lowest price that would be received would be the nominal value of Rs. 10/- per share, since one could not have made a bid lower than that ! How the public officials, in this instance PERC officials, decided upon such ludicrously absurd pricing formula is no doubt the most intriguing question that comes into focus ? Had the concerned public officials been unduly influenced or any corrupt practices resorted to in concluding these deals, which proved to be unfavourable to the government ? Notwithstanding the public exposures, the government however refrained from probing this matter – why ?

Exposures revealed that the sale of the majority shareholdings of these plantation companies, Agalawatte, Horana, Kegalle, Kotagala, Bogawantalawa and Kelani Valley had not only been unfavourable to the government, but had also caused very substantial losses to the government and thereby to the public, whilst the respective management companies had reaped a golden bonanza. The government promptly suspended the sale of the rest of the plantation companies on this highly questionable and intriguing basis, but however, curiously failed and neglected to take action against the persons responsible for having caused such substantial losses to the government, whilst conferring unfair benefit on some exclusively pre-selected parties, notwithstanding the government's own definition of "corruption" in the anti-corruption legislation that had been enthusiastically enacted by the government in October 1994 to deal with persons causing losses to the government and conferring benefits on others.

## **PRIVATE SECTOR LOBBY !**

At the time the government initiated the privatisation of the plantations companies, the then Chairman Planters' Association of Ceylon M. J.C. Amarasuriya, Deputy Chairman of Hayleys and Chairman of Commercial Bank had made written submissions dated August 1, 1995 to Chairman, PERC, R.N. Asirwatham. The said written submissions had, inter-alia, stated –

"This letter was the official intimation to the plantation management companies of the intention of the government to sell the controlling interest in the regional plantation companies to the private sector. It is therefore, unjust and unequitable to increase the quantum of the guarantee from Rs. 100,000 to a sum as excessive as Rs. 5 million – In all other previous sales of public enterprises either through the stock exchange or directly, there has been no requirement to submit a non-refundable guarantee to the value of Rs. 5 million".

"The requirement of such a large guarantee which is forfeitable if the MA is not in a position to meet the strike price, which could possibly be very high and not within the financial capability of the MA to meet, is an extremely unfair burden to be placed on MA's who have already made a commitment to purchase the controlling interest on the basis of the terms originally indicated – Insisting on this high guarantee might result in many MAs not taking up the offer and thereby, adversely affecting the privatisation of plantations – It is also unfair to place such a burden on the MAs, in the event of a MA not being able to meet the strike price, any other potential bidder, who is bidding on an all or nothing basis will not be subject to such a requirement".

It is clear that the then Chairman of the Planters' Association of Ceylon, M.J.C. Amarasuriya had shown concern on the ability of the management companies [MAs] to meet a Rs. 5 million commitment to secure an "exclusive option" to purchase the majority shareholdings of the respective plantation companies at the "strike price", which was to be on the basis of the ludicrously absurd pricing formula of determining the "lowest price", which could and would easily have been anticipated to be the ridiculous price of Rs. 10/- per share, as in fact, it did so happen without any surprise.

Would it not be curious, as to how PERC proceeded to deal exclusively with the management companies, when such concern had been shown on the management companies' ability to make a deposit of a mere Rs. 5 million for such a valuable "exclusive option" to purchase the majority shareholdings of these profitable plantation companies at the anticipatable nominal value of Rs. 10/- per share only ? Had such majority shareholdings of the plantation companies been offered for open competitive bidding on the trading floor of the Colombo Stock Exchange, then ofcourse the government would have realised a much higher price, as had been subsequently demonstrated by the sale of the majority shareholdings of even the then unprofitable plantation companies.

Was not the Rs. 5 million deposit to secure the "exclusive option" sans such open competitive bidding for such majority shareholdings of the plantation companies on the trading floor of the Colombo Stock Exchange ? In such context, how could one justify the mitigation to reduce such deposit to secure such profitable deals on such basis ? Why had PERC dealt with the management companies, knowingly that some of them at least were unable to pay even the deposit of Rs. 5 million as had been stated by none other than the Chairman of the Ceylon Planters' Association ?

*- Published in The Sunday Leader on 20.9.1998 by Nihal Sri Ameresekere under the pseudonym 'Bismark'*