

**IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST**

**REPUBLIC OF SRI LANKA**

In the matter of an application under Articles  
17 and 126 of the Constitution of the  
Democratic Socialist Republic of Sri Lanka

1. Tirathai Public Co. Ld,  
516/1, Moo 4 Bangpoo Industrial  
Estate,  
Praksa Muang,  
Samutprakan 10280,  
Thailand.
2. H.R. Holdings (Pvt) Ltd.  
476/10, Galle Road,  
Colombo 03.

**Petitioners**

**SC/FR No. 108/2016**

- Vs -

1. Ceylon Electricity Board,  
No. 50, Sir Chittampalam Gardiner  
Mawatha,  
Colombo 02.
2. Dr. B.M.S. Batagoda,  
Secretary,  
Ministry of Power & Renewable  
Energy,  
72, Ananda Coomarswamy  
Mawatha,

Colombo 07.

3. Mr. S.A.N. Saranatissa,  
Chairman,  
Ministry Procurement Committee  
(Ministry of Power & Renewable  
Energy)  
Additional Secretary,  
72, Ananda Coomarswamy  
Mawatha, Colombo 07.
  
4. Mr. M.C. Wickramasekera,  
Member,  
Ministry Procurement Committee  
(Ministry of Power & Renewable  
Energy)  
General Manager,  
50, Sir Chittampalam A. Gardiner  
Mawatha,  
Colombo 02.
  
5. Dr. A.M. Asanga Dayarathne,  
Member,  
Ministry Procurement Committee  
(Ministry of Power & Renewable  
Energy),  
Additional Secretary,  
Ministry of Policy Planning,  
Economic Affairs, Child, Youth and  
Cultural Affairs,  
72, Ananda Coomarswamy  
Mawatha,  
Colombo 07.

6. Mr. L.D.J. Fernando  
Chairman,  
Technical Evaluation Committee,  
DGM (P&D), DD4  
Ceylon Electricity Board,  
No. 1, Fairline Road, Dehiwala
  
7. Mr. R.S. Wimalendra,  
Member,  
Technical Evaluation Committee,  
DGM (P&D), DD4  
Ceylon Electricity Board,  
No. 1, Fairline Road, Dehiwala
  
8. Mr. S.R. Weerasinghe,  
Member,  
Evaluation Committee,  
DGM (P&D), DD4  
Ceylon Electricity Board,  
Sri Devananda Mawatha,  
Piliyandala.
  
9. Mr. J.A. Gnanasiri,  
Member,  
Evaluation Committee,  
DGM (P&D), DD4  
Ceylon Electricity Board,  
Sri Devananda Mawatha,  
Piliyandala.
  
10. Mr. R.P.D.A. Premalal,  
Member,

Technical Evaluation Committee,  
Chief Finance Manager (Ministry of  
Power & Renewable Energy)  
Additional Secretary,  
72, Ananda Coomarswamy  
Mawatha, Colombo 07.

11. Mrs. Indrani Vithanage,  
Senior Assistant Secretary (Tenders)  
Ministry of Power & Renewable  
Energy,  
72, Ananda Coomarswamy  
Mawatha, Colombo 07.

12. Mrs. Champa Satharasinghe,  
Project Director  
(LECO Supply Source Enhancement  
Project)  
Deputy General Manager – (P&HM)  
Ceylon Electricity Board,  
Sri Devananda Mawatha,  
Piliyandala.

13. General Manager,  
Ceylon Electricity Board,  
No. 50, Sir Chittampalam Gardiner  
Mawatha, Colombo 02.

14. Emco Limited,  
N-104, MIDC Area, Mehrun,  
Jalgaon – 425003,  
Maharashtra, India

15. Queens Radio Marine Electronics  
(Pte) Limited,  
861, Aluthmawatha Road,  
Colombo 01.

16. Sociate Elettromeccanica  
Arzignanese SPA,  
Via L Da Vincl, 14 C.P. 50 36071  
Tezze Di Arzignano (IV), Italy.

17. Crompton Greaves Ltd.,  
CG House, 6<sup>th</sup> Floor,  
Dr. Annie Besant Road,  
Worli,  
Mumbai – 400 030, India.

18. Hon. Attorney General,  
Attorney General's Department,  
Colombo 12.

**Respondents**

Before : Priyasath Dep PC, CJ  
Priyantha Jayawardena PC, J  
Nalin Perera, J

Counsel : Romesh de Silva, PC with Palitha Kumarasinghe, PC and Ms. Pubudini  
Wickramaratne for the Petitioners

Viraj Dayaratne, SDSG with Surekha Ahamed, SC for the 1<sup>st</sup> – 13<sup>th</sup> and  
18<sup>th</sup> Respondents.

Argued on : 16<sup>th</sup> of January, 2017

Decided on : 11<sup>th</sup> of October, 2018

**Priyantha Jayawardena, PC, J**

The 1<sup>st</sup> Petitioner is a company incorporated in Thailand and the 2<sup>nd</sup> Petitioner is its local agent appointed to act on the 1<sup>st</sup> Petitioner's behalf for the tender that is the subject matter of this Application. The Ceylon Electricity Board is the 1<sup>st</sup> Respondent.

The 1<sup>st</sup> Respondent called for tenders for the supply and delivery of four numbers of 10 MVA 33kV/11kV, 3 Phase Power Transformers with "On Load Tap Changer and Transformer Control Panel" for the Katubedda and Angulana Primary Substations by notice bearing No. DD4/LSSEP/ICB/2015/002/M (hereinafter referred to as the 'Tender').

The Petitioners submitted a bid for the Tender. Including the Petitioners' bid, only five bids had been received for the Tender.

The Tender was opened on the 23<sup>rd</sup> of September, 2015 and a representative of the opening committee read out the names of the Bidders, the details listed in the price schedule including the FOB price, the freight component, and the local clearing and delivery charges.

Thereafter, Tenders were assessed by the Technical Evaluation Committee (hereinafter referred to as the 'TEC') and the Ministerial Procurement Committee (hereinafter referred to as the 'MPC') who were appointed by the Secretary to the Line Ministry (hereinafter referred to as the 2<sup>nd</sup> Respondent). The MPC consisted of the 3<sup>rd</sup> to 5<sup>th</sup> Respondents while the TEC consisted of the 6<sup>th</sup> to 10<sup>th</sup> Respondents. The 2<sup>nd</sup> Respondent did not sit on either committee.

By a letter dated 16<sup>th</sup> November, 2015 the Project Director of the LECO Supply Source Enhancement Project (hereinafter referred to as the '12<sup>th</sup> Respondent') informed the 1<sup>st</sup> Petitioner that the MPC had endorsed the recommendation of the TEC to negotiate for a discount in light of the fall in steel and copper prices. At the meeting on 20<sup>th</sup> November 2015, the 1<sup>st</sup> Petitioner stated that although copper prices had fallen, silicon and steel prices had risen which prevented any reduction in price.

The Senior Assistant Secretary (Tenders) of the Ministry of Power and Renewable Energy (hereinafter referred to as the '11<sup>th</sup> Respondent') notified all unsuccessful bidders by a letter dated 5<sup>th</sup> January 2016, that the MPC had recommended the award of the Tender to the 1<sup>st</sup> Petitioner and that any representations against this recommendation must be made to the 2<sup>nd</sup> Respondent in his capacity as the Secretary to the Line Ministry within one week in terms of Clause 8.5 of the Procurement Guidelines 2006 (Goods and Works) (hereinafter referred to as the 'Procurement Guidelines').

By a letter dated 2<sup>nd</sup> February 2016, the 11<sup>th</sup> Respondent invited the Petitioners to a Joint Committee meeting on 11<sup>th</sup> February, 2016. The Joint Committee was composed of the members of the MPC, namely the 3<sup>rd</sup> to 5<sup>th</sup> Respondents, and members of the TEC, the 6<sup>th</sup> to 10<sup>th</sup> Respondents. The 2<sup>nd</sup> Respondent sat as the chairperson of the said Joint Committee.

Representatives of the unsuccessful bidders were present at the aforementioned Joint Committee meeting; namely Emco Limited of India, Queens Radio Marine Electronics (Pte) Limited of Sri Lanka, Sociate Elettromeccanica Arzignanese SPA of Italy (hereinafter the '14<sup>th</sup> Respondent', the '15<sup>th</sup> Respondent' and the '16<sup>th</sup> Respondent', respectively). Each of the said representatives held discussions separately with the members of the Joint Committee.

At the Joint Committee meeting, the 2<sup>nd</sup> Respondent had informed the 2<sup>nd</sup> Petitioner's Managing Director that although the 2<sup>nd</sup> Petitioner's bid was commercially and technically responsive, it was of a higher value in comparison to the other unsuccessful bidders.

The 2<sup>nd</sup> Petitioner's Managing Director had informed the Joint Committee, that the inability to reduce price was due to a rise in silicon steel prices which had been explained to and accepted by the TEC at the meeting held on 20<sup>th</sup> November, 2015.

The 2<sup>nd</sup> Respondent further informed that three rival bidders had appealed against the award of the Tender and although one company had a bid bond issue, the other two only had technical issues and further documentation would be requested from them.

By letters dated 11<sup>th</sup> February, 2016 and 1<sup>st</sup> March, 2016, the 1<sup>st</sup> Petitioner had objected to the request of further documents being called and/or clarifications from unsuccessful bidders, on the basis that it was contrary to the Procurement Guidelines.

The Petitioners, through their Attorney-at-Law, had sent a Letter of Demand dated 01<sup>st</sup> March, 2016 to the 2<sup>nd</sup> Respondent stating that failure to implement the decision of the MPC to award the Tender to the 1<sup>st</sup> Petitioner was illegal.

As the Petitioners did not receive a favourable response, the Petitioners filed the instant Fundamental Rights Petition on the 24<sup>th</sup> of March, 2016 and prayed for, *inter alia*, the following:

- a) A declaration that the Petitioner's Fundamental Right guaranteed under Article 12(1) of the Constitution had been infringed by the 2<sup>nd</sup> Respondent and/or 2<sup>nd</sup> to 13<sup>th</sup> Respondents or in the alternative, for a declaration of imminent infringement of their Article 12(1) right;
- b) A declaration that the purported decision of the 2<sup>nd</sup> Respondent to appoint a Joint Committee consisting of the 2<sup>nd</sup> Respondent and the members of the TEC and the MPC to consider the representations against the decision of the MPC to award the Tender to the 1<sup>st</sup> Petitioner is wrongful, unlawful and in violation of Procurement Guidelines 2006 and is void; and
- c) An order directing the 1<sup>st</sup> and/or 2<sup>nd</sup> and/or 13<sup>th</sup> Respondents to implement the MPC's original recommendation to award the Tender to the 1<sup>st</sup> Petitioner.

Having heard the submissions of the Learned President's Counsel for the Petitioners and the Senior Deputy Solicitor General appearing for the 1<sup>st</sup> – 13<sup>th</sup> and 18<sup>th</sup> Respondents, the court had granted leave to proceed on the 09<sup>th</sup> of November, 2016, for the alleged violation of the Petitioners' Fundamental Rights, enshrined in Article 12(1) of the Constitution.

### **Submissions on behalf of the Petitioners**

The learned President's Counsel for the Petitioners submitted, *inter alia*, that they had complied with the Tender conditions and provided a bid that was the sole commercially and technically responsive bid. Further, the TEC and the MPC had made recommendations that the Tender be awarded to the Petitioners.

It was further submitted that the 2<sup>nd</sup> Respondent chairing the Joint Committee violated Procurement Guidelines as the Procurement Guidelines do not empower the 2<sup>nd</sup> Respondent to sit as a member of the Joint Committee by virtue of his post as Secretary to the Line Ministry.

Moreover, the Procurement Guidelines state that the representations made against a notice of award must be considered at a joint meeting of the TEC and MPC and their recommendation must be implemented by the 2<sup>nd</sup> Respondent in his capacity as Secretary to the Line Ministry.

Additionally, the 3<sup>rd</sup> Respondent sat as the Chairman of the Joint Committee and was neither a member of the MPC nor the TEC. Therefore, he was not entitled in law to participate, or chair the Joint Committee meeting.



It was further submitted that the role of the Secretary who did not chair the MPC is limited to convening a Joint Committee.

Moreover, Section 8.5.1(b) of the Procurement Guidelines which states that findings/recommendations of the Joint Committee must be forwarded to the 2<sup>nd</sup> Respondent in his capacity as Secretary. The learned President's Counsel for the Petitioners submitted that Section 8.5.1(b) thus acted as a restriction against the Secretary sitting on or chairing the Joint Committee.

The learned President's Counsel for the Petitioners further relied on *Nobel Resources International Private Limited v Hon Ranjith Siyamabalapitiya and Others* SC FR No. 394/2015; wherein Chief Justice Sripavan held that if the Procurement Guidelines are departed from, the evaluation process is rendered void.

### **Submissions on behalf of the 1<sup>st</sup> to 13<sup>th</sup> and 18<sup>th</sup> Respondents**

The learned Senior Deputy Solicitor General who appeared for the above Respondents submitted that, in terms of Section 2.7.4 of the Procurement Guidelines, the Chief Accounting Officer or an officer not less than the rank of an Additional Secretary to the Line Ministry shall be the Chairperson of the MPC. It was further submitted that since the Secretary to the Line Ministry is the Chief Accounting Officer (hereinafter referred to as the 'CAO'), he was lawfully entitled to act as a Chairperson to the MPC.

Moreover, it was submitted that at the Joint Committee of the MPC and TEC, the senior most official of the two committees should chair the meeting and thus, the 2<sup>nd</sup> Respondent chaired the Joint Committee meeting as he was the most senior officer present.

Learned Senior Deputy Solicitor General further submitted that the decision to obtain clarifications from unsuccessful bidders was taken by the Joint Committee and not solely by the 2<sup>nd</sup> Respondent.

He further contended that out of the five bids, the 1<sup>st</sup> Petitioner had submitted the highest bid and the price difference between the said bid and the lowest bid was Rs. 42,569,718.88/- and the purpose of the Joint Committee was to obtain the best option in terms of cost and quality.

Furthermore, a letter dated 08<sup>th</sup> June, 2016 was produced during the hearing which was issued by the Department of Public Finance, which stated that there was no reason to prevent the Secretary to the Line Ministry from acting as the Chairperson of the MPC. This position was confirmed in a second letter issued by the National Procurement Commission.

The Respondents further contended that in the absence of an express bar to the Secretary chairing the Joint Committee in the Procurement Guidelines, the Secretary can lawfully be the Chairperson; therefore, the actions of the 2<sup>nd</sup> Respondent were lawful.

**Is a Secretary to the Line Ministry empowered to chair the Joint Committee meeting?**

***The Procedure for Government Procurement***

Government procurement procedure is governed by the Procurement Guidelines and the Procurement Manual as amended. The procurement process is initiated by a Procurement Entity.

Page xi of the Procurement Guidelines states as follows;

*“... a Government ministry, provincial council, Government Department, statutory authority, government corporation, government owned company, local authority or any subdivision thereof or any other body wholly or partly owned by the Government of Sri Lanka or where the Government of Sri Lanka has effective control of such body, that engages in Procurement.”*

In the instant Application, the Procuring Entity is the Line Ministry, due to the value of the Procurements.

Section 2.2.1 of the Procurement Guidelines states:

*“The responsibility of Procurement actions shall be vested with the Secretaries of the respective Line Ministries, who are deemed to be the Chief Accounting Officers of such Ministries.”*

This is a blanket provision which vests the responsibility of the procurement process with the Secretary to the Line Ministry. Thus, it is necessary to consider the powers of the Secretary in the procurement process.

Section 2.7.4 of the Procurement Guidelines was amended by “Supplement 7” to the Procurement Manual dated 11<sup>th</sup> October, 2006 (hereinafter referred to as “Supplement 7”) which provides:

*“The CAO shall appoint the MPC to handle Procurement actions as indicated in Guideline 2.7.4 ...”*

The composition of the MPC for major contracts is set out in the said “Supplement 7” of the Procurement Manual:

- “a) The number of members in a MPC shall be three;*
- b) The CAO or an officer not less than the rank of an Additional Secretary to the Line Ministry shall be the chairperson.*
- c) Where the Ministry is not the Procuring Entity, one member shall be the Head of Department or Project Director of the PE.*
- d) The third member shall be from outside the ministry who is conversant in subject of procurement.*

*The Chairperson of the TEC or his nominee – from amongst the members of the TEC, shall participate as a non member at all meetings of MPC to make clarifications.*

*The Procurement Liaison Officer of the Procuring Entity shall be the non member Secretary for MPC. If Liaison Officer is unavailable, a senior officer from the Line Ministry, not below the rank of an Assistant Director (or equivalent) may serve as the non member Secretary for MPC.”[emphasis added]*

The appeal procedure in the Procurement Guidelines depends on whether the Tender was awarded by the Standing Cabinet Appointed Procurement Committee (‘SCAPC’), the Cabinet Appointed Procurement Committee (‘CAPC’) or the MPC.

In the instant Application, the Tender was awarded by the MPC and therefore, the applicable appeal procedure is found in Section 8.5 of the Government Procurement Guidelines which is set out below:

*“8.5.1*

*(a) The Secretary to the Line Ministry shall within one week of being informed of the determination of the MPC inform in writing simultaneously to all the bidders:*

- (i) of the selection of the successful bidder and the intention to award the contract to such bidder.*
- (ii) to make their representations, (if any) to him/her against the determination of the MPC within one week of being so notified. Such representations should be self-contained.*

*(b) If any representations are received within the said one week period, the Secretary to the Line Ministry in consultation with the Chairperson of MPC and TEC shall organise a joint meeting of the MPC and TEC to consider such representations.*

*(c) The Joint Committee so appointed shall adopt its own procedure for expeditious inquiry and disposal.*

*(d) The findings/recommendations of the Joint Committee will be forwarded to the Secretary of the Line Ministry no later than fourteen (14) days of appointment of such committee and the Secretary shall act in accordance with such findings/recommendations.*

#### 8.5.2

*If no such representations are received, the Secretary to the Line Ministry shall promptly award the contract to the successful bidder.” [Emphasis added]*

A careful consideration of the aforementioned sections show that in terms of the applicable Government Procurement Guidelines in respect of the instant application, the Secretary to the Line Ministry is the one who is empowered to award a tender.

#### ***Procedure for appeals by the unsuccessful bidders***

If representations are made against a decision to award a tender by the MPC, the Secretary shall organise a joint meeting in consultation with the Chairperson of the MPC and TEC. The Joint Committee shall consider such representation and submit its findings/recommendations to the Secretary, and he shall act in accordance with such findings/recommendations.

In view of the above provisions the following steps should be taken in respect of an appeal;

- (a) the Secretary in consultation with the Chairperson of the MPC and TEC shall organize a Joint meeting to consider the representations of the unsuccessful bidders,

- (b) the Joint Committee shall forward its findings/recommendations to the Secretary of the Line Ministry, and
- (c) the Secretary to the Line Ministry shall act in accordance with such findings/recommendations.

***The issues that need to be considered in the instant application***

Based on the responsibilities and duties stated above, the following questions will arise for consideration, in this application;

- (a) The guidelines requires the Secretary to appoint a Joint Committee to consider the representation in consultation with the Chairperson of the MPC and TEC,

Thus, is it possible for the Secretary of the Line Ministry to appoint himself as the Chairperson of the Joint Committee?

- (b) The Joint Committee shall submit its findings/recommendations to the Secretary.

If the Secretary is a member of the Joint Committee, can he submit the findings/recommendations to himself?

- (c) Further, the Secretary is required to act in accordance with the findings/recommendations of the Joint Committee.

If the Secretary is a member of the Joint Committee, is it lawful to implement his own findings/recommendations?

- (d) Moreover, it is necessary to consider whether the decision of the 2<sup>nd</sup> Respondent to sit as the Chairman of the Joint Committee is contrary to the principles of natural justice.

- (e) Is “Supplement 7” of the Procurement Guidelines violating the principles of Natural Justice?

I shall now consider whether the aforementioned procedure is in accordance with the principles of natural justice when a Line Ministry is procuring goods/services.

**“Supplement 7” of the Procurement Guidelines and the principles of Natural Justice**

As discussed above, in terms of section 2.2.1 of the Procurement Guidelines the responsibility of the Procurement action is vested with the Secretaries of the respective Line Ministries, who are deemed to be the Chief Accounting Officers of such Ministries.

“Supplement 7” to Section 2.7.4 of the Procurement Guidelines state that the Chief Accounting Officer shall appoint the MPC to handle Procurement actions.

Further, the MPC for major contracts shall consist of three persons. The CAO or an officer not less than the rank of an Additional Secretary to the Line Ministry shall be the chairperson of the MPC, in terms of “Supplement 7” read with Section 2.7.4 of the Procurement Guidelines.

Therefore, in terms of the said Supplement, a Secretary to a Line Ministry is empowered to sit as a member of the MPC by virtue of him being the Chief Accounting Officer.

Moreover, in terms of Section 8.5.1 of the Government Procurement Guidelines, the Secretary to the Line Ministry shall within one week of being informed of the determination of the MPC inform all the bidders of the selection of the successful bidder and the intention to award the contract to such bidder.

Further, he should inform the unsuccessful bidders to make representations to him against the decision of the MPC within one week (if any).

If there are any representations against an award of a tender, the Secretary of a line Ministry shall take steps to appoint a Joint Committee in consultation with the Chairman of the MPC and the TEC in terms of 8.5.1(b) the Procurement Guide Lines.

In this context it is pertinent to note that if a Secretary to a line Ministry sits as the Chairman of an MPC he is not only required to notify the successful bidder of the tender but also is empowered to receive the representations of the aggrieved parties.

Therefore, it is necessary to consider whether the said procedure violates the principles of natural justice.

**The decision of the 2<sup>nd</sup> Respondent to sit as the Chairman of the Joint Committee and the principles of natural justice.**

In terms of Section 8.5.1, if any representations are received, the Secretary to the Line Ministry in consultation with the Chairperson of the MPC and TEC, shall organise a joint meeting of the MPC and TEC to consider such representations.

However, if the Secretary sits as the Chairman of the MPC in terms of Section 8.5.1(b) of the Government Procurement Guidelines, the Secretary of a Ministry cannot consult the Chairman of the MPC as envisaged by the said section.

Moreover, the findings/recommendations of the Joint Committee will have to be forwarded to the Secretary of the Line Ministry no later than fourteen (14) days of appointment of such committee and the Secretary shall act in accordance with such findings/recommendations.

If the Secretary of a Line Ministry sits as the Chair of the Joint Committee to consider the representations of the unsuccessful bidders, such a Joint Committee cannot forward its findings/recommendations to the Secretary. This will lead to a conflict of interest and violation of the principles of natural justice.

One of the principle rules of natural justice is *nemo judex in causa sua* i.e. no man may be a judge in his own cause, to ensure fairness in decision making and the rule against bias.

Accordingly, a judge is disqualified from determining any case in which he may actually be or fairly suspected to be biased. The rule also applies in scenarios where there is an intermingling of functions whereby an adjudicator had been involved in the case in a different capacity.

This rule is relevant in this scenario as the Secretary is bound to implement the recommendations of the Joint Committee in terms of the Procurement Guidelines.

If a Secretary to a Line Ministry is permitted to participate in the decision making process, he is disqualified from handling appeals against such a decision leading to awarding of a tender and later considering the appeals of the unsuccessful bidders.

In *The King v Salford Assessment Committee, Ex parte Ogden* 1937 KB 1, an officer of a rating authority who took minutes regarding transactions of the authority was appointed as an acting clerk to an assessment committee which reviewed objections by the rating authority to a proposal to amend the valuation list. Despite the fact that the said officer did not participate in decision making in either of his roles and merely advised the assessment committee with regard to procedure, the Court of Appeal held;

*“It is the particular fact that Mr. Brown, who must be taken for all the reasons I have stated to have knowledge of all the transactions of the rating authority at*

*which he takes the minutes, advises the assessment committee of the same area on procedure which makes it impossible for me to hold that this a case where justice appears manifestly and undoubtedly to be done.”*

Similarly in *Cooper v Wilson* [1937] KB 309, the Court of Appeal held that where a police officer was purported to have been dismissed after an inquiry by the Chief Constable, the presence of the Chief Constable at the subsequent Tribunal, although he did not participate in the Tribunal’s decision making, was in violation of the principles of rule against bias.

Further, in *Regina v Barnesley Council, Ex parte Hook* [1976] WLR 1052, the Court of Appeal held that, where a person had participated in a decision to revoke a market licence and subsequently participated in the appeals related to that decision violated the rule against bias.

Thus, in the above instances, the courts have held that there is a violation of the rule against bias even though the people in question were not directly involved in decision making.

When addressing such instances, H.W.R. Wade and C.F. Forsythe (Administrative Law, 10<sup>th</sup> Edition) cautioned as follows at page 396:

“...[T]he court must try to avoid impeding the work of citizens who give their services in more than one capacity, while at the same time the principle of fair and unbiased decisions must at all costs be upheld.”

## **Conclusion**

In view of the above the following questions are answered as follows;

- (i) The guidelines require the Secretary to appoint a Joint Committee to consider the representation in consultation of the Chairperson of the MPC and TEC,

Thus, it is not possible for the Secretary of the Line Ministry to appoint himself as the Chairperson of the Joint Committee.

- (ii) The Joint Committee shall submit its findings/recommendations to the Secretary.



If the Secretary is a member of the Joint Committee, he cannot submit the findings/recommendations to himself, if he was the Chairman of the said committee.

- (iii) Further, the Secretary is required to act in accordance with the findings/recommendations of the Joint Committee.

If the Secretary is a member of the Joint Committee, which heard the representations of the unsuccessful bidders, the Secretary cannot implement his own findings/recommendations.

The composition of the MPC for major contracts is set out in the said “Supplement 7” of the Procurement Manual:

- “a) The number of members in a MPC shall be three;*  
*b) The CAO or an officer not less than the rank of an Additional Secretary to the Line Ministry shall be the chairperson. ...*  
*c) .....*  
*d) .....*  
 ..... .” [Emphasis added]

I am of the opinion that, if a Secretary of a Line Ministry sits as the Chairman of the MPC in terms of the above selection and later participates in the Joint Committee, he cannot perform the functions stated in Section 8.5.1 of the Government Procurement Guidelines.

Further, I am of the opinion that the current procedure set out in “Supplement 7” (b) creates a scenario that violates the principle of *nemo iudex in causa sua* which leads to a conflict of interest.

Therefore, I am of the opinion that the word “CAO” in “Supplement 7” of the Procurement Manual and all relevant sections in the Procurement Manual empowering the Secretary to chair the MPC and a Joint Committee, violates the principles of natural justice when a Line Ministry is the Procuring Entity for purposes of a procurement action.

Thus, I hold that a Secretary to a Line Ministry is disqualified in sitting at the MPC as well as sitting as the Chairman / member of the Joint Committee. Further, a Secretary of a Line Ministry shall refrain from participating in the deliberations of MPC as well as a Joint Committee.

Accordingly, we direct the Joint Committee to consider the representations made by the unsuccessful bidders without the participation of the 2<sup>nd</sup> Respondent.

We further direct that the Joint Committee shall not consider additional documents and/or clarifications.

I declare the decision of the 2<sup>nd</sup> Respondent to appoint a Joint Committee consisting of himself and members of the MPC and TEC to consider representations of the unsuccessful bidders violates the principles of natural justice and is unlawful.

The Procurement Manual has been amended by the State. Hence, taking into consideration of the facts and circumstances of this case, I hold that the State has violated the Fundamental Rights of the Petitioners, enshrined in Article 12(1) of the Constitution.

This judgement is applicable only to the instant application and for future procurement actions by Line Ministries, and shall not apply to the procurement actions that have been already awarded.

No Costs.

**Judge of the Supreme Court**

**Priyasath Dep, PC, CJ**

I agree

**Chief Justice**

**Nalin Perera, J**

I agree

**Judge of the Supreme Court**