

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

An application in terms of Articles 17 and 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

**SC (FR) Application No. 104/2017**

1. Senadipathige Neville Gratiaen Stanley Rodrigo.
2. Senadipathige Sudesh Priyankara Rodrigo.
3. Senadipathige Chamara Prasanna Rodrigo.
4. Warnakulasuriya Anita Grace Peiris.

All of No. 12, Marian Place, Negombo, carrying on business under the name, style and firm of 'Rodrigo Suppliers.'

**PETITIONERS**

Vs.

1. G.S. Vithanage,  
Secretary (Former),  
Ministry of Foreign Employment,  
No. 30, Janadhipathi Mawatha, Colombo 1.
2. Eng. Karunasena Hettiarachchi.
- 2A. Kapila Waidyaratne, PC.
- 2B. Major General (Retd.) Kamal Gunarathne,  
Secretary, Ministry of Defence.
3. P. Ranepura,  
Secretary,  
Ministry of Skills Development and  
Vocational Training,  
'Nipunatha Piyasa,' Elvitigala Road,  
Narahenpita, Colombo 5.
4. D.U.S. Wickramarachchi,  
Chief Finance Office,  
Sri Lanka Customs,  
No. 40, Main Street, Colombo 11.

5. A.R. Deshapriya,  
Director General,  
Department of National Budget,  
Ministry of Finance, Colombo 1.
6. Vice Admiral Ravindra Wijegunaratne.
- 6A. Vice Admiral Travis Sinniah.
- 6B. Vice Admiral Sirimevan Ranasinghe.
- 6C. Vice Admiral Priyal de Silva.
- 6D. Vice Admiral Nishantha Ulugethenna,  
Commander of the Navy.
7. D.A.W. Wanigasooriya,  
Chief Accountant,  
Presidential Secretariat, Colombo 1.
8. Samanthi Weerasinghe,  
Senior Assistant Secretary  
(Parliamentary and Civil Affairs),  
Ministry of Defence.
9. W.H.D. Priyadarshana,  
Head of Division (Sales and Agricultural Branch),  
Ministry of Defence.
10. Indika Ranathunga,  
Director (Corporation and Statutory),  
Ministry of Industry and Commerce,  
73/1, Galle Road, Colombo 10.
11. M.P. Perera,  
Assistant Director (Administration),  
Department of Census and Statistics,  
"Sankyna Mandiraya," Battaramulla.
12. Commander Y.M.G.B. Jayathilake,  
Sri Lanka Navy.  
6<sup>th</sup>, 6A – 6D and 12<sup>th</sup> Respondents at  
Naval Headquarters, Colombo 1.

13. S.M. Jayasinghe,  
Accountant (Funds),  
Ministry of Defence.
14. W.G.C. Chandrika,  
Director, Department of Public Finance,  
Ministry of Finance, Colombo 1.
15. D.N.K. Hettiarachchi,  
Chief Accountant.  
  
2<sup>nd</sup>, 2A, 2B, 8<sup>th</sup>, 9<sup>th</sup>, 13<sup>th</sup> and 15<sup>th</sup>  
Respondents at Ministry of Defence,  
15/5, Baladaksha Mawatha, Colombo 3.
16. Rodesha Enterprises (Pvt) Ltd.,  
No. 25, Charles Place,  
Rawathawatta, Moratuwa.
17. Hon. Attorney General,  
Hulftsdorp, Colombo 12.

#### **RESPONDENTS**

- Before:** P. Padman Surasena, J  
Kumudini Wickremasinghe, J  
Arjuna Obeyesekere, J
- Counsel:** Chamantha Weerakoon Unamboowe with Lumbini Kohilawatte for  
the Petitioners  
  
Dr. Avanti Perera, Deputy Solicitor General for the 2B, 15<sup>th</sup> and 17<sup>th</sup>  
Respondents
- Argued on:** 19<sup>th</sup> January 2022
- Written  
Submissions:** Tendered on behalf of the Petitioners on 8<sup>th</sup> February 2022  
  
Tendered on behalf of the 2B, 15<sup>th</sup> and 17<sup>th</sup> Respondents on 5<sup>th</sup> March  
2021
- Decided on:** 27<sup>th</sup> July 2022

**Obeyesekere, J**

The Petitioners, carrying on business under the name, style and firm of 'Rodrigo Suppliers' [*the Petitioners/Rodrigo Suppliers*] are engaged in the supply of dry fish, seafood and meat items on a wholesale basis. The Petitioners state that since 1985, they have supplied the said items to the Armed Forces and have produced copies of the agreements entered into with the Sri Lanka Navy for the years 2012-13, 2013-14, 2014-15 and 2016. The Petitioners state further that there have not been any complaints with regard to the quality of the dry fish supplied by them or the timeliness of delivery.

By an advertisement published in the 'Daily News' newspaper of 12<sup>th</sup> May 2016, the Chairman of the Standing Cabinet Appointed Procurement Committee [SCAPC] of the Ministry of Defence had invited applications for pre-qualification of suppliers for the supply of dry and fresh food to the Naval camps referred to in the said advertisement, for the period 1<sup>st</sup> January to 31<sup>st</sup> December 2017. The Petitioners had duly responded to the said advertisement and had been registered as a supplier to the Sri Lanka Navy for the year 2017.

The Bidding Document issued by Sri Lanka Navy for 2017 pursuant to the above pre-qualification process, consisted of nine sections, with Sections I, II and III being the Instructions to Bidders [ITB], Bid Data Sheet, and Evaluation and Qualification Criteria, respectively. The sections containing the General Conditions of Contract, Contract Data and Special Conditions of Contract have not been tendered to this Court by either party.

Pursuant to the pre-bid meeting held on 8<sup>th</sup> November 2016, the Petitioners had submitted individual bids for the supply of seven items of dry fish to thirteen Naval camps situated around the country. It must be noted that the Petitioners maintained price uniformity in respect of each item across all thirteen camps, irrespective of their location and proximity to Colombo – e.g. the price quoted for 'Dry fish (*balaya*)' was Rs. 144 per kg, for each of the thirteen camps.

The Petitioners state that bids were opened on 18<sup>th</sup> November 2016 in the presence of the authorised representatives of those who had submitted bids, and the prices

quoted by each of the bidders in respect of each camp had been announced. Accordingly, the prices quoted by the Petitioners for dry fish had been the lowest in respect of all thirteen camps.

By letter dated 23<sup>rd</sup> December 2016, the 15<sup>th</sup> Respondent, the Secretary to the SCAPC, had informed Rodrigo Suppliers that their bid for the supply of dry fish had been accepted in respect of five camps mentioned in the said letter. This letter was silent with regard to the awarding of the tender in respect of the balance eight camps in that it did not specify if the Petitioners' bid for the said eight camps has been rejected or whether the tender for the said camps had been awarded to any other person. Aggrieved by the decision to award them the tender only in respect of five camps, the Petitioners, by letter dated 28<sup>th</sup> December 2016, had requested the 1<sup>st</sup> Respondent, the Chairman of the SCAPC, that the tender in respect of the balance eight camps be awarded to Rodrigo Suppliers, as they had quoted the lowest price. The 1<sup>st</sup> Respondent had thereafter invited the Petitioners for a meeting on 16<sup>th</sup> February 2017. The Petitioners claim that they were informed at the said meeting that the tender for the supply of dry fish for the balance camps had been awarded to the 16<sup>th</sup> Respondent, and that the award made in favour of the 16<sup>th</sup> Respondent could not be cancelled.

By a petition filed on 9<sup>th</sup> March 2017, the Petitioners complained to this Court that they were the lowest substantially responsive bidder in respect of all camps, and as the prices quoted by them did not differ from camp to camp, the decision of the SCAPC (a) to award the tender in respect of five camps to Rodrigo Suppliers, and (b) to award the tender for the balance eight camps to the 16<sup>th</sup> Respondent, was inexplicable, unreasonable and arbitrary, and is thus a violation of their fundamental rights guaranteed by Articles 12(1) and 14(1)(g) of the Constitution. It must be noted that the petition did not contain any details with regard to the basis for the selection of the 16<sup>th</sup> Respondent nor had the Petitioners challenged the basis of selection of the 16<sup>th</sup> Respondent. The Petitioners had also sought an order that the tender awarded to the 16<sup>th</sup> Respondent be cancelled and be awarded to the Petitioners. This Court had accordingly granted leave to proceed in respect of the alleged violation of the said Articles.

At the hearing of this application, the learned Deputy Solicitor General, while explaining the reasons for the non-selection of Rodrigo Suppliers, raised two

preliminary objections with regard to the maintainability of this application. The first was that this application is futile as the tender was for the supply of dry fish in 2017, and has already been performed by the 16<sup>th</sup> Respondent. Although this position is correct, it only affects part of the relief claimed by the Petitioners. I therefore agree with the submission of the learned Counsel for the Petitioners that this does not prevent the Petitioners from seeking a declaration that their fundamental rights guaranteed by Articles 12(1) and 14(1)(g) have been infringed.

The second objection was that the application is time-barred. The learned Deputy Solicitor General drew our attention to the provisions of Article 126(2) of the Constitution, which stipulates that, “*Where any person alleges that any such fundamental right or language right relating to such person **has been infringed** or is about to be infringed by executive or administrative action, he may himself or by an attorney-at-law on his behalf, **within one month thereof**, in accordance with such rules of court as may be in force, apply to the Supreme Court by way of petition in writing addressed to such Court ...*” [emphasis added].

She submitted that the imposition of a time-limit in Article 126(2) demonstrates with certainty the need for the prompt invocation of the jurisdiction of this Court – *vide Kumarasiri v Bandara* [SC (FR) Application No. 277/2009; SC minutes of 28<sup>th</sup> March 2014] – and that the consequence of not complying with this requirement in Article 126(2) is that a petition which is filed after the expiry of a period of one month from the time when the alleged infringement occurred, would be time-barred and unmaintainable.

In **Demuni Sriyani De Soyza and Others v Dharmasena Dissanayake, Chairman, Public Service Commission and Others** [SC (FR) Application No. 206/2008; SC minutes of 9<sup>th</sup> December 2016] Justice Prasanna Jayawardena, PC, considered a long line of jurisprudence on this matter, including **Edirisuriya v Navaratnam and Others** [1985 (1) Sri LR 100] and held as follows:

*“The rule that, an application under Article 126 which has not been filed within one month of the occurrence of the alleged infringement will make that application unmaintainable, has been enunciated time and again from the time*

*this Court exercised the Fundamental Rights jurisdiction conferred upon it by the 1978 Constitution.”*

*“[T]he general rule is clearly that, this Court will regard compliance with the ‘one month limit’ stipulated by Article 126(2) of the Constitution as being mandatory and refuse to entertain or further proceed with an application under Article 126(1) of the Constitution, which has been filed **after the expiry of one month from the occurrence of the alleged infringement** or imminent infringement” [emphasis added].*

Having laid down the above rule and the circumstances in which this Court has not applied the time-bar, this Court went on to state as follows:

*“However, this Court has consistently recognized the fact that, the duty entrusted to this Court by the Constitution to give relief to and protect a person whose Fundamental Rights have been infringed by executive or administrative action, requires **Article 126(2) of the Constitution to be interpreted and applied in a manner which takes into account the reality of the facts and circumstances which found the application.** This Court has recognized that it would fail to fulfill its guardianship if the time limit of one month is applied by rote and the Court remains blind to facts and circumstances which have denied a Petitioner of an opportunity to invoke the jurisdiction of Court earlier” [emphasis added].*

This brings me to the factual circumstances relating to the objection that this application is time-barred.

Referring to the averments contained in paragraphs 11, 14 and 19 of the petition, the learned Deputy Solicitor General submitted that the infringement that the Petitioners are complaining of, consists of two components – the first is the failure to award the tender for the balance eight camps to the Petitioners; the second is the decision to award the tender for the said camps to another bidder. These two, however, are intertwined and cannot be separated from one another.

Having identified the infringement, I shall now consider the date on which the Petitioners became aware of the said infringement as in my view, the time bar should

begin to operate from that date. The Petitioners admit that by the aforementioned letter dated 23<sup>rd</sup> December 2016, they were informed as follows:

“2017 වර්ෂය සඳහා ත්‍රිවිධ හමුදාවන් වෙත ආහාර සැපයීම (අමු හා වියළි සලාක) සඳහා වන ප්‍රසම්පාදනයට, අමාත්‍ය මණ්ඩලය මගින් පත් කරන ලද ස්ථාවර ප්‍රසම්පාදන කමිටුවෙහි අනුමැතිය ලැබී ඇත. ඒ අනුව ඔබ ආයතනය සඳහා ඇමුණුමේ දැක්වා ඇති පරිදි ශ්‍රී ලංකා නාවික හමුදාවේ ආහාර කාණ්ඩයන් වෙනුවෙන් එක් එක් කඳවුරු සඳහා ආහාර සැපයීමට සුදුසුකම ලබා ඇති බව සතුටින් දැන්වා සිටීම.

2. 2016.12.31 දිනට ප්‍රථම නාවික හමුදාව සමග නියමිත පරිදි ගිවිසුම් වලට එළඹීමට කටයුතු කල යුතු අතර ඒ අනුව 2017 වර්ෂය සඳහා වන සැපයීම් විධිමත් පරිදි ඉටු කරන ලෙස කරැණිකව දන්වම.

3. තවද මාස 3ක් ගතවූ පසු භාණ්ඩ සැපයීම පිළිබඳව විධිමත් ඇගයීමක් සිදු කරනු ලබන අතර ඒ අනුව ඉදිරි සැපයීම් කටයුතු තිරණය කරනු ලබන බව තව දුරටත් දැන්වා සිටීම.”

It was the position of the learned Deputy Solicitor General that, having submitted a bid for thirteen camps and having been informed of the award only for five camps, together with the fact that the agreements for the supply of dry fish to those five camps were required to be signed by 31<sup>st</sup> December 2016, was sufficient to make the Petitioners aware that the tender for the balance eight camps had not been awarded to them. She submitted further that with the receipt of the above letter, the Petitioners became aware of the alleged infringement on 23<sup>rd</sup> December 2016 and therefore, the time period of 30 days stipulated in Article 126(2) commenced from that date. As the application has been filed on 9<sup>th</sup> March 2017, she submitted that the application is clearly out of time, and should be rejected.

There is merit in this argument, for two reasons.

The first is that, in terms of the agreement that Rodrigo Suppliers had entered into with the Sri Lanka Navy for the year 2016, Rodrigo Suppliers was the supplier of dry fish for the period of 1<sup>st</sup> January 2016 – 31<sup>st</sup> December 2016 to eleven camps, including seven of the camps for which they were not selected for the year 2017. Thus, the fact that its current agreement to supply to these seven camps would cease by 31<sup>st</sup> December 2016, together with the absence of any *ad hoc* extension of the 2016 agreement, was adequate to make the Petitioners aware that they have not been selected in respect of seven of the eight camps in question, if not all eight.



The second is that, in previous years, although the Petitioners had been the successful bidder in respect of several camps, the parties had entered into one single agreement in respect of all camps for which they had been selected. Thus, when Rodrigo Suppliers was informed by letter dated 23<sup>rd</sup> December 2016 to enter into an agreement in respect of five camps by 31<sup>st</sup> December 2016, that was sufficient to indicate that the tender for the supply of dry fish to the other eight camps is not being awarded to them.

It must be noted that the petition does not contain any explanation with regard to the failure to invoke the jurisdiction of this Court within one month of the above letter. Pursuant to the objection of the time-bar being raised in the affidavit of the Secretary of the SCAPC – the 15<sup>th</sup> Respondent – the response of the Petitioners in their counter-affidavit was that it was only at the meeting held on 16<sup>th</sup> February 2017 that they were informed by the 1<sup>st</sup> Respondent that the 16<sup>th</sup> Respondent had been selected in respect of the balance eight camps.

In the written submissions filed on their behalf, the Petitioners, while reiterating the above position, have stated further that:

- (a) The letter dated 23<sup>rd</sup> December 2016 did not state that ‘Rodrigo Suppliers’ was unsuccessful in respect of the other eight camps;
- (b) The said letter does not state who the successful bidder is;
- (c) They could not have invoked the jurisdiction of this Court until they had this information; and
- (d) The petition has been filed within one month of being informed of this fact at the meeting of 16<sup>th</sup> February 2017.

This submission of the learned Counsel of the Petitioners must be viewed in the light of Clauses 20.4, 41 and 43 of the ITB, which are re-produced below:

Clause 20.4

*“The bid security of unsuccessful bidders shall be returned as promptly as possible upon the successful bidder furnishing the Performance Security pursuant to ITB Clause 43.”*

#### Clause 41 – Notification of Award

*“41.1 Prior to the expiration of the period of bid validity, the Purchaser shall notify the successful bidder, in writing, that its bid has been accepted;*

*41.2 Until a formal contract is prepared and executed, the notification of award shall constitute a binding contract.*

*41.3 Upon the successful bidder’s furnishing of the signed contract form and performance security pursuant to ITB Clause 43, **the purchaser will promptly notify each unsuccessful bidder** and will discharge its bid security, pursuant to ITB Sub-Clause 20.4” [emphasis added].*

#### Clause 43 – Performance Security

*“43.1 Within fourteen days of the receipt of notification of award from the purchaser, the successful bidder, if required, shall furnish the performance security in accordance with the Conditions of Contract, using for that purpose the Performance Security Form included in Section III. **The purchaser shall promptly notify the name of the winning bidder to each unsuccessful bidder** and discharge the bid securities of the unsuccessful bidders pursuant to ITB Sub-Clause 20.4.*

*43.2 Failure of the successful bidder to submit the above-mentioned performance security or sign the Contract shall constitute sufficient grounds for the annulment of the award and forfeiture of the bid security and execution of the bid-securing declaration. In that event, **the SCAPC may award the contract to the next lowest bidder**, whose offer is substantially responsive and is determined by the SCAPC to be qualified to perform the contract satisfactorily” [emphasis added].*

The cumulative effect of the above provisions is that a bidder is entitled to (a) be informed in writing of the selection of the successful bidder, and (b) entertain expectations of being awarded the tender until the receipt of such notification. Neither party has filed any document issued to the Petitioners as required by Clauses

41.3 and 43.1. As previously discussed, even though the argument that the Petitioners ought to have known by 31<sup>st</sup> December 2016 that they had not been selected for the balance eight camps has merit, I cannot disregard the above provisions which have been inserted in the Bidding Document to safeguard the interests of bidders and ensure transparency in the bidding process. In these circumstances, the argument of the learned Counsel for the Petitioners that it was only on 16<sup>th</sup> February 2017 that the Petitioners became aware that the tender has been awarded to the 16<sup>th</sup> Respondent has to be accepted, with the result that the jurisdiction of this Court has been invoked by the Petitioners within the time period stipulated by Article 126(2).

I shall now consider the argument of the Petitioners that theirs was the lowest substantially responsive bid, and therefore, the decision to reject their bid in respect of the balance eight camps was arbitrary and unreasonable.

The 15<sup>th</sup> Respondent, while admitting that the prices quoted by the Petitioners were lower than those of the 16<sup>th</sup> Respondent, had stated in his affidavit that in the past, the Ministry of Defence had come across suppliers who quote unrealistic prices in order to secure the contract and once accepted, are unable to supply throughout the contract period at the quoted prices and hence default on their obligations to deliver, or else supply food of inferior quality which is not fit for human consumption, thus causing great inconvenience. Needless to state, such circumstances would then require the authorities to resort to emergency purchases at exorbitant prices.

In order to avoid the recurrence of this situation, Paragraphs 14.7 and 14.8 of the ITB issued by Sri Lanka Navy for 2017 provided as follows:

Clause 14.7

*“During evaluation, if the TEC found an unrealistically low price, the price shall be subjected to the Cost Realism Evaluation by the TEC. For the purpose of the Cost Realism Evaluation, the criterion that shall be used to demarcate an unrealistic price is below 70% of the best price which is determined by the Procurement Committee.”*

#### Clause 14.8

*“If any price is found unrealistic as per the above criterion, the Procurement Committee shall have the right to reject or accept any particular item or category.”*

I must observe that the above provisions have been reproduced in Section II of the Bidding Documents – *vide* Clauses 35.3(d)(a) and 35.3(d)(b), and in Section III. It must be noted that in their petition, the Petitioners have not challenged the legality of the above clauses and the ability of the TEC/SCAPC to reject a bid, even though Section 7.9.11 of the Government Procurement Guidelines (2006) requires for an explanation to be called where unrealistic prices have been quoted by a bidder, and for rejection to take place only thereafter.

Thus, in terms of Clause 14.7, where the TEC and the SCAPC determine that the best price for an item is Rs. 100, bids which are less than Rs. 70 are liable to be rejected on the basis that the price is unrealistic. Although the presence of the above provision in three different places of the Bidding Document demonstrates in no uncertain terms the objective sought to be achieved, the importance of the said requirement and due compliance thereof by all bidders, yet, the decision whether to reject such bidders quoting less than 70% of the best price was left to the discretion of the TEC and SCAPC.

The 15<sup>th</sup> Respondent had stated that the above provision relating to unrealistic prices was brought to the attention of all bidders, including the Petitioners, at the pre-bid meeting held on 8<sup>th</sup> November 2016. Whilst not denying this position, the Petitioners have stated that the Respondents failed to explain to the bidders the concept of *best price* and the basis of its calculation, an argument which cannot be accepted in view of Clause 35.3(f) of the ITB, which provides that the best price shall be determined based on a market survey.

The learned Deputy Solicitor General drew the attention of this Court to Clause 35.3(f) of the ITB, and Paragraph 3.3 of the Report of the TEC dated 21<sup>st</sup> December 2016 which explains that the best price in respect of each of the 688 items for which bids were invited and in respect of which evaluation was being carried out by the TEC, had been determined after taking into consideration the market prices, both wholesale and retail, for the years 2015 and 2016 obtained from the Hector Kobbekaduwa Agrarian

Research and Training Institute, the Department of Census and Statistics, Lak Sathosa, the Economic Centers, the Consumer Affairs Authority, leading supermarkets, manufacturers' price lists, and the prevailing exchange rates, fuel prices, labour charges, interest rates, etc. I must note that the Petitioners had no complaint with the manner in which the best price has been calculated or the price determined as being the best price.

The learned Deputy Solicitor General submitted further that the TEC, having determined the market price of all 688 items, had sought and obtained the approval of the SCAPC for the methodology it had adopted. The evaluation of the bids had been carried out by the TEC only thereafter. During this evaluation, it had been found that the price quoted by the Petitioners for the three items of dry fish in question – i.e. *Kumbala*, *Balaya* and *Keeramin* – was less than 70% of the best price determined for those three items and therefore the bid of the Petitioners was liable to be rejected.

The table below sets out the prices at which Rodrigo Suppliers have supplied the three items of dry fish in question since 2012, the average price for the period 2012-2016, the price at which it bid for the said items in 2017, the best price determined by the TEC/SCAPC for the year 2017, and the Petitioners' price for 2017 as a percentage of the best price.

<b>Year</b>	<b>Kumbala</b>	<b>Balaya</b>	<b>Keeramin</b>
2012/13	300	418	200
2013/14	330	430	350
2014/15	363	473	385
2016	324	450	420
Average price for 2012-2016 (rounded)	329	443	339
<b>2017</b>	<b>126</b>	<b>144</b>	<b>135</b>
2017 Best Price	335	457	445
Petitioners' price as a % of the best price	37.6%	31.5%	30.3%

In terms of Clause 14.8 as well as Clause 35.3(d)(b), the TEC had the discretion to accept or reject the bid. In view of the price of the Petitioners being very much below the 70% threshold, the TEC had the right and the justification to reject the bid of the Petitioners.

The TEC, however, did not either accept or reject the bid of the Petitioner. It instead adjusted the price quoted by the Petitioners by substituting the best price as the price of the Petitioners, and thereafter compared the adjusted price with the prices quoted by other bidders. For example, the best price for 1 kg of *balaya* was Rs. 457. The price quoted by the 16<sup>th</sup> Respondent for the Vakarai camp for *balaya* was Rs. 489. The price quoted by the Petitioners was Rs. 144. The price of the Petitioners had been adjusted to Rs. 457 by substituting it with the best price. Pursuant to this adjustment, the Petitioners' price was still the lowest and the Petitioners were therefore awarded the tender for the supply of *balaya* to the said camp, as well as four other camps, at Rs. 144 being the price quoted by the Petitioners.

In view of the aforementioned rationale for the fixing of a best price, I am of the view that the TEC and the SCAPC ought to have rejected the bid of the Petitioners, instead of awarding the tender in respect of five camps at a price which had been found to be unrealistic. The action of the TEC/SCAPC has attracted the very consequence that the 15<sup>th</sup> Respondent states the SCAPC was seeking to avoid – i.e., the failure on the part of a bidder to supply at such unrealistic prices.

The adjustment of prices by the TEC is a violation of the following provisions of the Bidding Document:

- (1) Clause 29.1 of the ITB which stipulates that *“The SCAPC’s determination of the bid’s responsiveness is to be based on the contents of the bid itself.”*
- (2) Clause 29.2(c) of the ITB which provides that any rectification of a bid which would unfairly affect the competitive positions of other bidders presenting substantially responsive bids would amount to a material deviation of the former bid.
- (3) Clause 36.1 of the ITB which stipulates that, *“The SCAPC shall compare all substantially responsive bids to determine the lowest evaluated bid, in accordance with ITB Clause 35.”*
- (4) Clause 35.3(d)(c) of Section II of the Bidding Document which restricted the right of the TEC to correct any unrealistic rate arising only due to an arithmetical error.

This artificial adjustment by the TEC/SCAPC has accrued to the benefit of the Petitioners and resulted in them being the lowest bidder in respect of five camps, for which the tender was awarded to the Petitioners. However, in respect of the other eight camps, the Petitioners' bid was the second lowest, with the lowest bid having been submitted by the 16<sup>th</sup> Respondent. By adopting a procedure not provided for in the evaluation criteria laid down in the Bidding Document, the TEC and SCAPC have not only removed the advantage that other bidders enjoyed over the Petitioners, but this has resulted in a moving of the metaphorical goal posts, and a failure to maintain a level playing field among all bidders. The result is that the Petitioners are the beneficiaries of an irregularity committed by the TEC/SCAPC, and have no cause for complaint.

As I have already noted, the Petitioners did not challenge in their petition the basis adopted by the TEC/SCAPC in adjusting the prices and in selecting the 16<sup>th</sup> Respondent. Even after the basis was disclosed by the 15<sup>th</sup> Respondent, the Petitioners did not challenge the said basis in their counter-affidavit. However, the learned Counsel for the Petitioners has submitted in the written submissions that if the price quoted by the Petitioners was found to be unrealistic, the TEC/SCAPC ought to have acted in terms of Section 7.9.11(a) of the Government Procurement Guidelines, which reads as follows:

*"If such bidder [who has submitted the lowest substantially responsive bid] has quoted unrealistically low rates on critical or very important items, the bidder shall be requested to prove to the satisfaction of the TEC, how the bidder intends to procure such items / perform the Works / provide the Services as per the quoted rates, for such purposes the bidder may be asked to provide a rate analysis."*

The argument presented to this Court on behalf of the Petitioners was that the TEC/SCAPC have failed to follow the above provisions of Section 7.9.11(a). As noted earlier, the said requirement, quite apart from being impractical when evaluating bids for 688 items, is contrary to the provisions of Clause 14.8 of the ITB and Clause 35.3(d)(b) of the Bid Data Sheet, which conferred upon the TEC/SCAPC the right to reject a bid where the price is less than 70% of the best price. The Petitioners, having had no qualms regarding this provision in spite of it appearing in three different places

in the Bidding Document, and not having raised any issue with the said provision in their pleadings, cannot be allowed to raise this argument at this late stage, as the Respondents are deprived of a fair opportunity to respond. This, in itself, is a fatal blow to the Petitioners' case. But, even if I were to go one step further and consider the merits of that argument, I would still be disinclined to agree with the Petitioners, in view of the provisions of Section 2.7.2 of the Government Procurement Guidelines, which enable the Cabinet of Ministers to (a) approve the appointment of a SCAPC to cater to the extraordinary situations that require a SCAPC, and (b) permit a "*deviation from the general procurement procedures.*" Thus, while it appears that conditions laid down in the Government Procurement Guidelines can override those in the ITB and the Bid Data Sheet, the Respondents would have been in a position to apprise this Court if this is actually the position, had the Petitioners raised this issue in their pleadings.

In the above circumstances, I am of the view that the fundamental rights of the Petitioners guaranteed under Articles 12(1) and 14(1)(g) of the Constitution have not been infringed by the Respondents. This application is accordingly dismissed, with costs fixed at Rs. Two Hundred Thousand payable by the Petitioner to the 15<sup>th</sup> Respondent.

**JUDGE OF THE SUPREME COURT**

**P. Padman Surasena, J**

I agree.

**JUDGE OF THE SUPREME COURT**

**Kumudini Wickremasinghe, J**

I agree.

**JUDGE OF THE SUPREME COURT**