

**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.

Noble Resources International Pte Limited,
No. 60, Anson Road, #19-01,
Maple Tree, Anson
Singapore 079914

Petitioner

SC FR No. 394/2015

Vs.

1. Hon. Ranjith Siyambalapitiya,
Minister of Power and Renewable Energy,
No. 72, Ananda Coomaraswamy Mawatha,
Colombo 07.
2. Dr. B.M.S. Batagoda,
Secretary , Ministry of Power and Energy,
No. 72, Ananda Coomaraswamy Mawatha,
Colombo 07
(Also member of the Standing Cabinet Appointed
Procurement Committee)
3. Lanka Coal Company Limited,
No.51/3, Dutugemunu Street,
Dehiwala.
4. Ceylon Shipping Corporation,
MICH Building,
No. 27, Sir Razik Fareed Mawatha,
Colombo 01.
5. G.S. Withanage,
Chairman,
Standing Cabinet Appointed Procurement
Committee,
Secretary,
Ministry of Foreign Employment.
6. M.C. Wickramasekara,
General Manager,
Ceylon Electricity Board.
7. A.K. Senevirathna,
Addl. Director General, Dept. of Fiscal Policy

8. G.R.L. Wasantha,
Director (Finance),
Sri Lanka Air Force.
9. S.A.N. Saranatissa,
Additional Secretary (Administration and
Procurement) ,
Ministry of Power and Energy,
[5th Respondent being the Chairman and the 6th,
7th, 8th and 9th Respondents being the other
members of the Standing Cabinet Appointed
Procurement Committee SCAPC]]
All of
No. 72, Ananda Coomaraswamy Mawatha,
Colombo 07.
10. D.K.B.S. Thilakasena,
Chairman,
Technical Evaluation Committee

Additional General Manager (Corporate
Strategy) Ceylon Electricity Board.
11. S.M.D.M. Dharmapriya,
General Manager,
Ceylon Shipping Corporation Ltd.
12. P.K.A. Sisara,
Manager (Finance),
Lanka Coal Company (Pvt) Ltd.
13. P.G.P. Indrasiri,
DGM (LVPS)
Ceylon Electricity Board.
14. S.M. Piyatissa,
Addl. Director General,
Department of National Budget.
15. Duminda Premarathna,
Deputy Director,
Board of Investment of Sri Lanka.
16. P.K.Kulatunga,
AFM (Corporate),
Ceylon Electricity Board.
17. M.G.A. Goonatilleke, Director (Technical),
Ministry of Power and Energy

18. S.A.R. Jayawardena,
Manager (Procurement),
Lanka Coal Company (Pvt) Limited.

[10th Respondent being the Chairman and the 11th to
18th Respondents being members of the Technical
Evaluation Committee (TEC)]

No. 72, Ananda Coomaraswamy i Mawatha,
Colombo 7.

19. Retd. Justice Hector Yapa

20. P.A. Prematilaka

21. C. Maliyadda

[19th Respondent being the Chairman and the
20th and 21st Respondents being members of the
Procurement Appeals Board (PAB)]

All of
Procurement Appeals Board ,
Presidential Secretariat,
Colombo 1.

22. Swiss Singapore Overseas Enterprises Pte
Limited
65 Chulia Street #48-05
OCBC Centre
Singapore 049513

23. SUEK AG
Vadianstrasse 59
9000, St. Gallen
Switzerland

24. Trafigura Pte Limited
10 Collyer Quay
#29-00
Ocean Financial Centre
Singapore 049315

25. Adani Global Pte Limited
80, Raffles Place
#33-20
UOB Plaza II
Singapore 048624

26. Liberty Commodities Limited
7, Hertford Street London W1J 7RH
United Kingdom
27. H E Maithripala Sirisena
Minister of Defence and Mahaweli
Development and Environment
28. Hon. Ranil Wickramasinghe,
Minister of Policy Planning and Economic
Affairs, Child, Youth and Cultural Affairs.
29. Hon. John Amarathunga,
Minister of Tourism Development and
Christian Religious Affairs
30. Hon. Gamini Jayawickrame Perera,
Minister of Sustainable Development
and Wild life,
31. Hon. Nimal Siripala de Silva,
Minister of Transport
32. Hon. Mangala Samaraweera
Minister of Foreign Affairs
33. Hon. S.B. Dissanayake,
Minister of Social Empowerment
and Welfare
34. Hon. W.D.J. Seneviratne
Minister of Labour and Trade
Union Relations
35. Hon. Lakshman Kiriella
Minister of University
Education and Highways
36. Hon. Rauff Hakeem
Minister of City Planning and Water Supply
37. Hon. Anura Priyadharshana Yapa
Minister of Disaster Management
38. Hon. Susil Premajayantha
Minister of Science, Technology and Research
39. Hon. Thilak Marapana
Minister of Law & Order and Prison Reforms

40. Hon. (Dr.) Rajitha Senaratne, Minister of Health,
Nutrition and Indigenous Medicine
41. Hon. Ravi Karunanayake,
Minister of Finance
42. Hon. Mahinda Samarasinghe
Minister of Skills Development and Vocational
Training
43. Hon. Vajira Abeywardena
Minister of Home Affairs
44. Hon. S.B. Navinne
Minister of Internal Affairs, Wayamba
Development and Cultural Affairs
45. Hon. Rishad Bathiudeen
Minister of Industry and Commerce
46. Hon. Patali Champika Ranawaka
Minister of Megapolis and Western
Development
47. Hon. Mahinda Amaraweera
Minister of Fisheries and Aquatic Resources
Development
48. Hon. Navin Dissanayake
Minister of Plantation Industries
49. Hon. Duminda Dissanayake
Minister of Agriculture
50. Hon. Vijith Vijayamuni Zoysa
Minister of Irrigation and Water Resources
Management
51. Hon. (Dr.) Wijayadasa Rajapaksa
Minister of Justice and Buddha Sasana
52. Hon. P. Harison
Minister of Rural Economy
53. Hon. Kabir Hashim
Minister of Public Enterprises Development
54. Hon. Ranjith Madduma Bandara
Minister of Public Administration and
Management

55. Hon. Gayantha Karunathilaka
Minister of Parliamentary Reforms and Mass
Media
56. Hon. Sajith Premadasa
Minister of Housing and Construction
57. Hon. Arjuna Ranatunga
Minister of Ports and Shipping
58. Hon. M.K.A.D.S. Gunawardana
Minister of Lands
59. Hon. U. Palani Digambaram
Minister of Hill Country New Villages,
Infrastructure and Community Development
60. Hon. (Mrs) Chandrani Bandara
Minister of Women and Child Affairs
61. Hon. (Mrs) Thalatha Atukorala,
Minister of Foreign Employment,
62. Hon. Akila Viraj Kariyawasam
Minister of Education,
63. Hon. M.H.A. Haleem,
Minister of Posts, Postal Services and Muslim
Religious Affairs
64. Hon. Faizer Musthapha P.C.
Minister of Provincial Councils and Local
Government,
65. Hon. D.M.Swaminathan,
Minister of Rehabilitation, Resettlement and
Hindu Religious Affairs,
66. Hon. Chandima Weerakkody
Minister of Petroleum Resources Development,
67. Hon. Dayasiri Jayasekara,
Minister of Sports,
68. Hon. Sagala Ratnayake,
Minister of Southern Development,
69. Hon. Harin Fernando,
Minister of Telecommunication and Digital
Infrastructure

70. Hon. Mano Ganesan
Minister of National Dialogue,
71. Hon. Daya Gamage
Minister of Primary Industries,
72. Hon. Malik Samarawickrema
Minister of Development Strategies and Internal
Trade
[27th to 72nd Respondents being Members of the
Cabinet of Ministers]

All of

Office of the Cabinet of Ministers
Republic Building
Sir Baron Jayatilake Mawatha,
Colombo 1.

73. Mr. Sumith Abeysinghe
Secretary to the Cabinet of Ministers
Office of the Cabinet of Ministers
Republic Building,
Sir Baron Jayatilaka Mawatha,
Colombo 1.

74. Ceylon Electricity Board,
Sir Chittampalam A. Gardiner Mawatha,
Colombo 1.

75. Hon. Attorney General
Attorney General's Department
Colombo 12.

Respondents

BEFORE : K. Sripavan, C.J.
P. Dep, P.C., J.
Upaly Abeyrathne, J.

COUNSEL Romesh de Silva P.C. with Maithree Wickramasinghe
P.C., Sugath Caldera and Suren de Silva instructed by H.
Chandrakumar de Silva for Petitioner

S. Rajaratnam P.C., Additional Solicitor General with
Yuresha de Silva and Dr. Avanti Perera Senior State
Counsel for the 1st, 2nd, 4th, 5th, 7th, 8th, 9th, 11th, 14th,
17th, 27th to 75th Respondents

Sanjeewa Jayawardena P.C. with Rajeev Amarasuriya and Charitha Rupasinghe for the 3rd Respondent.

Faisz Musthapha, P.C. with Faizer Makar and Ms. Thushani Machado for the 6th, 10th, 13th, 16th and 74th Respondents.

Ikram Mohamed P.C. with Roshan Hettiarachchi and Charith Jayawickrama for the 19th, 20th and 21st Respondents instructed by Mr. G.G. Arulpragasam.

R. Arsecularatne P.C. with Riad Ameen, Sasheen Arsecularatne, Pradeepa Balendran, Udara Muhandiramge, Thejitha Korallage, Nimeshika Patabendige and M. Perera for the 22nd Respondent.

Chandimal Mendis with Viraj Vithanage for the 26th Respondent.

ARGUED ON : 16.03.2016; 25.05.2016 and 02.06.2016

WRITTEN SUBMISSIONS FILED ON : 28.03.2016 - Petitioner
20.05.2016 - 1st, 2nd, 4th, 5th, 7th, 8th, 9th, 11th, 14th, 17th, 27th – 75th Respondents.
28.03.2016) - 6th, 10th, 13th, 16th & 74th
20.05.2016) Respondents.

28.03.2016) - 22nd Respondent
24.05.2016) -

DECIDED ON : **24. 06.2016**

K. SRIPAVAN, C.J.,

The Petitioner is a Company incorporated under the laws of Singapore and has its registered Office and /or principal place of business in Singapore. The Petitioner pleads that it has supplied coal to the Third Respondent since November 2010. The Petitioner further alleges that there has never been any complaint of the quality of the coal supplied and/or late delivery of coal to the Third Respondent.

In this backdrop, the Petitioner states that the Standing Cabinet Appointed Procurement Committee (hereinafter referred to as "SCAPC") extended an invitation on behalf of the Third Respondent to submit a bid for the supply of coal for the 900MW Puttalam Coal Power Plant (hereinafter referred to as the "Plant"). The Petitioner submitted its bid on 8th April 2015 in accordance with the provisions of the Bid documents together with the Bid security. The Petitioner claimed that its bid was the lowest and the tender be awarded in accordance with the evaluation procedure contained in the Bid document which the Technical Evaluation Committee (hereinafter referred to as the "TEC") and the SCAPC were required to follow. However, the Petitioner claims that the decision to award the tender not to the Petitioner but to the 22nd Respondent was ex-facie:-

- (a) Unlawful;
- (b) Unreasonable and irrational;
- (c) Violative of the Petitioner's legitimate expectations;
- (d) In gross violation of the tender procedures;
- (e) Violative of the Petitioner's fundamental rights;
- (f) Contrary to the terms and conditions of the Bid document; and
- (g) the Procurement Guidelines and the Procurement Manual marked **X6** and **X6d** respectively.

On 02.11.2015 Court granted leave to proceed for the alleged violation of the Petitioner's fundamental rights guaranteed in terms of Articles 12(1) and 14(1)(g) of the Constitution by the 1st to 21st and 27th to 74th Respondents. When the application was taken up for hearing on 16.03.2016, Mr. S. Rajaratnam , Additional Solicitor General, raised the following two preliminary objections on the ground that the Petitioner does not have locus standi to invoke the jurisdiction of this Court under Article 126 of the Constitution :

- (1) That the Petitioner is a Company registered under the laws of Singapore has invoked the jurisdiction of this Court all by itself without a local agent, representative or an Attorney at Law enjoining him as a Petitioner.
- (2) That the affidavit submitted in support of the Petition is from a Director of the Petitioner Company who has affirmed or sworn the affidavit in Hong Kong before the Justice of Peace based in Hong Kong for the said affidavit to be accepted as a

testimony before this Court without recourse to the mechanism set out in the Consular Functions Act No. 04 of 1981.

The Parties filed their written submissions on the Preliminary Objections raised. While I must acknowledge with gratitude my indebtedness to the learned Counsel for the great assistance rendered, the Court has to examine the arguments objectively and dispassionately. The Court is mindful that the fundamental rights provisions in the Constitution must be interpreted having regard to the constitutional objectives and goals and in the light of the action taken by the Governmental Authority at a given point of time. As it is essential to the maintenance of the rule of law that every organ of the State must act within the limits of its power and carry out the duty imposed upon it in accordance with the provisions of the Constitution and the law, the Court cannot close its eyes and allow the actions of the State or the Public Authority go unchecked in its operations, in the public interest. If the Petitioner with a good case is turned away, merely because he is not sufficiently affected or the Petitioner has no "locus standi" to maintain this application, that means that some Government Agency is left free to violate the law and this is not only contrary to the public interest but also violate the Rule of Law, the object of which is to protect the citizens from unlawful governmental actions. It will be a travesty of justice if, having found as a fact that a fundamental right has been infringed or is threatened to be infringed, the Court yet dismisses the application on a preliminary objection raised by the Respondents. This Court has been given power to grant relief as it may deem just and equitable. The Court therefore decided to go into the merits of the case as some of the events that took place, in the award of the tender to the 22nd Respondent shocks the conscience of the Court, especially when the awarding of the tender involves "public funds".

The Government Procurement Guidelines – 2006 (**X6**) under the heading "Detailed Bid Evaluation" in Clause 7.9.10 states thus :-

"7.9.10- Bids shall be first evaluated strictly according to the criteria and methodology specified in the bidding documents and such evaluated Bids shall be compared to determine the lowest evaluated substantially responsive Bid."

The TEC had recommended to SCAPC “The lowest Evaluated Delivered Price per MT (at the jetty of the Plant) has been made by NOBLE RESOURCES INTERNATIONAL PTE LTD,” as evidenced by the document marked **X7(b)**. Out of the nine Members of the TEC, eight Members have signed the said document **X7(b)**.

Thereafter, on 15.06.2015, the SCAPC held a meeting at which the Members of TEC decided to invite Noble Resources International Pte Ltd. for a clarification on “parcel size” (Vide **X7A**). At the subsequent meeting with the Petitioner, on 17.06.2015 the SCAPC requested the Petitioner to submit further discounts on the pricing. On 18.06.2015, Petitioner wrote a letter to the Third Respondent regretting that no further discounts would be offered on the price. (Vide **X8**). The Petitioner states that having confirmed to the Petitioner at the Meeting held on 17.06.2015, that the Petitioner was the party that had submitted the responsive lowest bid, the Petitioner received a letter dated 06.07.2015 informing that the SCAPC has recommended that the Bid be awarded to the 22nd Respondent (Vide **X9**).

The Petitioner claims that minutes of the SCAPC Meeting held on 29.06.2015 (**X10**) shows that SCAPC received a letter dated 29.06.2015 from the 22nd Respondent and a Meeting of SCAPC was convened on the same day and directed the TEC to re-evaluate the Bids ignoring steps 1.3 and 1.4 of the Evaluation Procedure contained in Clause 5.4 of “Instructions to Bidders (ITB)” and to report back to the SCAPC.

Learned President’s Counsel for the Petitioner drew the attention of Court to the Bidding Document for the supply of coal for Lakvijaya Power Plant marked **X2**. Clause 2.3 of **X2** which deals with the “Amendment of Bid Documents” reads thus :-

“At any time prior to the deadline for submission of Bids, LCC may, for any reason, whether at its own initiative or in response to a clarification requested by a prospective Bidder, amend the Bid Documents by issuing an Addendum. Notice of any amendments will be made available in writing and electronically by email (confirmed by telefax) or telefax to all prospective Bidders who have purchased the Bid Documents and will be binding on them. Bidders are required to immediately acknowledge receipt using the Addendum Receipt provided in Annex A 6 for any such amendment. It will be assumed that the information contained therein will have

been taken into account by the Bidder in the Bid.

In order to afford prospective Bidders reasonable time in which to take the amendment into account in preparing their Bid, LCC may, at its discretion, extend the deadline for the submission of Bids to provide at least a period of two (2) weeks from the date of last amendment if required.” (emphasis added)

Counsel also drew the attention of Court the “Evaluation Criteria” referred to in Clause 5.3.20 of the Government Procurement Guidelines – 2006 (X6). The said Clause is reproduced below for convenience

“5.3.20 (a) *If Bids based on alternative designs, materials, completion schedules, payment terms, etc., are permitted, conditions for their acceptability and the method of their evaluation shall be expressly stated.*

*(b) **The disclosed criteria shall not be modified or additional criteria shall not be introduced during evaluation.***” (emphasis added)

These Clauses which have been brought in, in the Bid Document and the Government Procurement Guidelines in order to provide safeguards to all Bidders and to ensure transparency, justice and equality of treatment in evaluating Bids have to be strictly observed by the SCAPC. It postulates that **no one**, neither the State nor the SCAPC shall act contrary to the Bid Documents and the Government Procurement Guidelines. It is of utmost importance that all the necessary safeguards laid down therein should be complied with fully and strictly and any departure from them make the evaluation process void. Procedural safeguards which are so often imposed for the benefit of persons affected by the exercise of administrative powers are normally regarded as mandatory so that it is fatal to disregard them.

Fernando J. in the case of *Jayawickrama Vs. Prof. W.D. Lakshman, Vice Chancellor, University of Colombo and Others* (1998) 2 S.L.R. 235 at 249, while making an order against the

Postgraduate Institute of Medicine noted as follows:-

“As of now, this Court must proceed on the basis that the purpose of regulations 5.3(b) was to enable aspiring Consultants to acquire some knowledge, skill or experience which local training could not provide. ...

*It is true that the regulations can be amended. But even the authority which made the regulations is bound by them, unless and until they are duly amended; and **disregarding its own regulations is not a method by which that authority can amend them.**”* (emphasis added)

Thus, it is the duty of the SCAPC to comply with the conditions and the Clauses referred to the Bid Documents and the Government Procurement Guidelines. The SCAPC cannot disregard Clause 2.3 of the Bid document, which specifically states that the amendments to the Bid document may be done at any time prior to the deadline for submission of Bids and not during the evaluation of the Bids. Even such an amendment had to be made by the Third Respondent and by nobody else. If SCAPC while exercising its power of evaluation of Bids exceeds its authority or if the power is exercised without authority the purported exercise of power may be pronounced invalid. The authority or power given to SCAPC must be exercised (i) in good faith (ii) for the purposes for which they are given and not for any extraneous purpose; and (iii) with due regard to relevant considerations and without being influenced by irrelevant considerations.

The SCAPC has failed to satisfy the aforesaid requirements as the SCAPC directed the TEC to re-evaluate the Bids ignoring steps 1.3 & 1.4 of the Evaluation Procedure and I have no alternative but to declare the decision of the SCAPC to award the tender to the 22nd Respondent cannot stand valid in the eye of the law.

Mr. Romesh de Silva, P.C. brought to the notice of Court to Clause 5.5 of the Bidding document (ITB) marked **X3** which reads as follows:-

*“Subject to Clause 5.2 no Bidder shall contact LCC or **any other person or organization involved on any matter relating to its Bid**, from the time of the opening*

of Bids to the time the Contract is awarded.

Any effort by a Bidder to influence LCC in LCC's Bid evaluation, Bid comparison or Contract Award decisions may result in rejection of the Bid." (emphasis added)

The document **X10** indicates that SCAPC received a letter dated 29.06.2015 from the 22nd Respondent. This shows that the 22nd Respondent has contacted the SCAPC after the opening of the Bids. The Chairman and Managing Director of the 3rd Respondent by his Affidavit dated 24th November 2015 states that he received a letter dated 30.06.2015 (**3R5**) issued on behalf of the 2nd Respondent forwarding a copy of the minutes of the SCAPC whereby a decision was taken by SCAPC to direct the TEC to re-evaluate the bids received. When the said letter was issued to the 3rd Respondent for his information and necessary action by letter dated 02.07.2015 marked **3R6**, he responded as follows:-

3R6

"TOP URGENT (PRIVATE & CONFIDENTIAL)

*My No. LCC/MD/15/078
July 02nd, 2015
Secretary
Ministry of Power & Energy
No. 80, Sir Ernest de Silva Mw
Colombo-07.*

Dear Sir,

Sub: Procurement of Coal for Lakvijaya Power Plant (900MW) – Puttalam

I am in receipt of your letter No: PE/TEN/SCAPC/SS/2014/38 dated 30.06.2015, and have drawn my attention to 1st para of main observations made in the said letter.

I am shocked that the SCAPC which has carefully scrutinized the LCC bid document [para 2 of "Main Observations Made" has not seen the Clause 5.5 of the LCC bid document (ITB Page – 19)]

5.5 – Contacts with LCC

"Subject to Clause 5.2, no Bidder shall contact LCC or any other person or organization involved on any matter relating to its Bid, from the time of the opening of Bids to the time the Contract is awarded.

Any effort by a Bidder to influence LCC in LCC's Bid evaluation, Bid comparison or Contract Award decision organization in any matter relating to its bids shall be rejected from the bid.

Accordingly, if one carefully reads the LCC bid document, any bidder who contacts LCC or any other person or organization in any matter relating to its bids shall be rejected from the bid."

Therefore, you are well aware that these matters may end-up before the Procurement Appeal Board (PAB) as per section 8.3 of the Procurement Guide Lines – 2006 in such event, these violations shall only strengthen the case of a prospective bidder.

The SCAPC is well aware that during this tender, LCC had already called for 02 Pre-Bid Meetings and the bidders submitted a considerable amount of queries which was replied by the TEC to the best of their ability.

As you are aware, LCC has done everything possible to conduct a very fair and transparent tender. This has been commended by one of the bidders as a very transparent tender.

Accordingly, at meeting No. 12 of the SCAPC, and the observations made in para 02 & 03 of the said observations clearly indicated that the financial proposals were opened on the 11th of June, 2015 and the TEC expeditiously submitted its final report on 13th June 2015 . This was mainly done due to the urgent need of the procurement, as we have been already indicated that there is a possibility of a short fall of coal by mid of September.

Further, I wish to bring to your kind attention that the Non-interpretation of the tender Documents will bring disrepute to the SCAPC and the Minister of Power & Energy.

On the 16th of June, 2015, Hon. Udaya Gamanpila had made a false accusation regarding the present procurement. We were able to answer the said allegations on the instructions of the Hon. Minister as we had followed a very transparent process. Herewith I annexed the said articles and my reply. (sic)

Therefore, I kindly urge you to take all the above matters into serious consideration, when evaluating this tender. **As any deviation will bring serious allegation** to the MOPE and the Minister at this crucial stage. (emphasis added)

Thanking you,
Yours faithfully,
LANKA COAL COMPANY 9PVT0 LTD.

Sgd. Maithri Gunaratne,
Chairman/Managing Director

Copies to Mrs Indrani Vithanage, SAS(Tenders) – MOPE
Mr. G.S. Withanage, Secretary- Ministry of Foreign Employment
Dr. B.m.s. Batagoda, Secretary – MOPE
Mr. A.K. Senevirathne, Addl. Director General – Dept. of Fiscal Policy
Mr. M.C. Wickremasekara, General Manager – CEB
Mr. S.A.N. Saranatisa, Addl. Secretary (Admin & Proc.) – MOPE
Mr. D.KB.S. Thilakasena, AGM (Corporate Strategy) – CEB
Mr. S.A.R. Jayawardene, Manager (Procurement) – LCC "

The SCAPC if at all, should have proceeded to reject the bid of the 22nd Respondent for violating Clause 5.5 of ITB. Instead, it evaluated the Bids, based on the recommendation of the TEC taking into consideration the letter sent by the 22nd Respondent. When the act of

SCAPC was in excess or abuse of the power granted to it, it has made an obvious and palpable error which makes its determination as one made without jurisdiction. I would like to re-iterate the observations made by Sharvananda J. in the case of *Sirisena & Others Vs. Kobbekaduwa*, Minister of Agriculture and Lands 80 N.L.R. page 1 at page 169.

*“Rule of law is the very foundation of our Constitution and the right of access to the Courts has always been jealously guarded. Rule of Law depends on the provision of adequate safeguards against abuse of power by the executive. Our Constitution promises to usher in a welfare state for our country. In such a state, the Legislature has necessarily to create innumerable administrative bodies and entrust them with multifarious functions. They will have power to interfere with every aspect of human activity. If their existence is necessary for the progress and development of the country the abuse of power by them, **if unchecked, may defeat the legislative scheme and bring about an authoritarian or totalitarian state. The existence of the power of judicial review and the exercise of same effectively is a necessary safeguard against such abuse of power.**”* (emphasis added)

Having given my anxious consideration to the contentions raised on behalf of the parties, I consider the act or decision made by the SCAPC was outside its jurisdiction and therefore becomes null and void for all purposes

The Petitioner preferred an appeal dated 10th July 2015 (X12) to the Procurement Appeal Board (hereinafter referred to as the PAB) in terms of Clause 8.3 of the Procurement Guidelines – 2006 (X6), against the recommendation of SCAPC, inter alia, stated as follows:-

“Any changes to the Bid Document (including amending any part of ITB Clause 5.4 of the Bid Document and/or amending or dispensing with any part of the Evaluation Procedure contained in Clause 5.4 of the ITB of the Bid document or any other part of the Bid Document) after the deadline of the submission of Bids (i.e., after April 8, 2014) would be :-

- (a) a violation of the Fundamental Right of Equality of Law enshrined in Article 12(1) of the Constitution available to every Bidder;*
- (b) a breach of ITB Clause 2.3 of the Bid Document;*
- (c) a breach of ITB Clause 5.4 of the Bid Document; and*”

Even though the PAB invited the Petitioner to be present for a hearing before the PAB on 3rd August 2015 (**X16**), it did not hear the Petitioner in view of certain allegations set out in a newspaper as to the integrity and impartiality of the Members of the PAB. However, the Ministry of Power and Energy responded to the said newspaper article and claimed that the said allegations were not made by the Second Respondent. The Petitioner by letter dated 7th September 2015 marked **X23** wrote to the Chairman and Members of the PAB as follows:-

“This is with reference to our above captioned appeal dated 10th July 2015 and the hearing which was to be held at 1 P.M. on 3rd August 2015 before the Procurement Appeals Board at the Presidential Secretariat.

We were present at the said hearing at 1 P.M. on 3rd August 2015 along with our legal Counsel. However, no hearing was held and we were informed by the Procurement Appeals Board at the Presidential Secretariat that a communication on the matter would be sent to us.

*We have not yet received any such communication and would be grateful if we were informed as to the status **on the hearing of our appeal.***

Thanking you.” (emphasis added)

The Petitioner in the meantime received a letter dated 07th September 2015 marked **X24** requesting the Petitioner to extend the validity periods of the Bid Security up to 9th November 2015 and the Bid up to 9th October 2015. In compliance with the said letter sent by the Third Respondent, the Petitioner extended the validity periods as requested and as evidenced by the document marked **X25**.

Learned Counsel for the Petitioner contended that the PAB having provided an opportunity to the Petitioner to make representations coupled with a hearing in support of its appeal did not give that opportunity thereafter. The attention of Court was drawn to Clause 8.4.1(b) of the Government Procurement Guidelines -2006, which reads as follows:-

“After investigating into such representations, the Appeal Board shall submit its independent report to the Cabinet of Ministers, with copy to the Secretary of the Line Ministry and such report shall

(i) provide their reasons for endorsement of the decision of the Cabinet Appointed Procurement Committee; or

- (ii) *for rejecting same together with their independent recommendation of contract award.”*

It therefore postulates that an investigation into the representation of the Petitioner by the PAB is a condition precedent to a decision by the PAB. Having given an expectation that the Petitioner would be heard before the PAB, it would make it unfair or inconsistent with good administration to deny the Petitioner such a hearing. It also noted that no reply was sent to the letter marked **X23** informing the Petitioner that no hearing would be given as indicated in the letter marked **X16**. In exceptional cases of urgency and emergency where an immediate, prompt and preventive action is urgently required to be taken, the principles of natural justice need not be complied with. Thus, where a dangerous building is required to be demolished to save human lives or where a dangerous and desperate person is required to be detained, or where a Passport is required to be impounded in the public interest a pre-decisional hearing may not be necessary. In *Mohinder Singh Gill Vs. Chief Election Commissioner of India* [(1978) AIR SC 851 at 871, 872] the Election Commissioner, pursuant to the report submitted by the Returning Officer about violence at election, cancelled the poll in the exercise of his powers under Article 324 of the Constitution. Before the cancellation no hearing was given to the persons who were candidates at the election. The said action was challenged as being in violation of the rules of natural justice. Upholding the contention, Krishna Iyer, J. observed:-

*“Once we understand the soul of the rule as fair play in action, we much hold that it extends to both the fields. After all, administrative power in a democratic set up is not allergic to fairness in action and discretionary executive justice cannot degenerate into unilateral injustice. Nor is there ground to be frightened of delay, inconvenience and expense, if natural justice gains access. For fairness itself is flexible, pragmatic and a relative concept not a rigid, ritualistic and sophisticated abstraction. It is not a bull in a China shop, nor a bee in one’s bonnet. **Its essence is good conscience in a given situation; nothing more but nothing less.**” (emphasis added)*

The terms “fairness of procedure”, “fair play in action”, “duty to act fairly” are used as alternatives to “natural justice”. But Prof. Paul Jackson [Natural Justice – 2nd Edition – page

11] points out that such phrases may sometimes be used to refer not to the obligation to observe the principles of natural justice, but on the contrary the standard of behavior the Courts are required to be followed even in circumstances where the duty to observe natural justice is inapplicable. Thus, the Courts apply the broader notion of “fairness” and “fair procedure” than the “duty to act judicially”. In the leading case of *Kesava Mills Co. Vs. Union of India* [(1973) AIR SC 389] Mukherjea J. rightly stated that the administrative authority concerned should act fairly, impartially and reasonably. The legitimacy of an action/expectation can be inferred if it is founded on the sanction of law or custom or established practice or procedure in regular or natural sequence, otherwise, it would betray the expectation of the Petitioner to present his appeal before the PAB. Whilst the PAB had finally recommended to the Cabinet of Ministers to cancel the tender and to call for international bids again, I am of the view that the PAB was duty bound to act fairly and reasonably in dealing with the rights and/or interests of the people and in case of any breach thereof the Court should act upon in striking down, any order made by the PAB in the exercise of the Courts’ jurisdiction and direct the concerned authorities to exercise its functions fairly, reasonably in compliance with the Guidelines, the established practice or procedure and in accordance with legal and constitutional provisions.

Hence, having given an expectation to the Petitioner, the failure on the part of the PAB to afford a hearing to the Petitioner is in violation of the principles of “natural justice”. As I have observed above, if the PAB had considered the appeal of the Petitioner, without giving the Petitioner an opportunity of being heard, any decision taken by the PAB as evidenced by **X30** would be in violation of the *audi alteram partem* rule, which is the quest of justice under the rule of law and has been considered a universally and most spontaneously acceptable principle, render the decision made by the PAB bad in law. Paragraph 3 of page number three of the Report of the PAB states that the decision not to inquire the appeals is due to a report published in a newspaper. This is not acceptable and it is not proper for not holding any inquiry as this is a tender of National importance. The Court is of the view that if the Appeal Board has given a chance to submit oral submissions to all the concerned parties a justifiable and correct decision could have been arrived at.

The First Respondent in its Cabinet Memorandum dated 16th September 2015 (**X26**), inter alia, states at paragraph 4 as follows:-

*“As per the provisions under Section 8.3 of the Procurement Guidelines, the unsuccessful bidders were allowed to appeal against the decision taken by the Board with respect to this tender. The Appeal Board after consideration of these appeals has recommended to the Cabinet of Ministers **to cancel the tender** and request international bids again to select a suitable bidder.”*

It would appear from the Cabinet Memorandum **X26** which is also marked as **5R1**, approval of the Cabinet of Ministers was sought to award the tender to the lowest evaluated responsive bid submitted by M/s. Swiss Singapore International Company Ltd. (22nd Respondent), One does not know whether after the removal of the two evaluation criteria, namely, step 1.3 and step 1.4 contained in Clause 5.4 of ITB, the 22nd Respondent becomes the lowest evaluated responsive bidder. I have already held that those two steps referred to in Clause 5.4 of ITB should not have been ignored after the opening of the Bids violating Clause 5.3.20 of the Government Procurement Guidelines – 2006. The Cabinet of Ministers without knowing that the evaluation criteria has been modified by the SCAPC after the opening of the bids, directed the Secretary, Ministry of Power and Renewable Energy to take action to enter into a contract for a quantity of Coal required for one year with the Bidder recommended by the SCAPC.

The Cabinet Memorandum marked **5R1** filed along with the Affidavit of the 5th Respondent dated 30th October 2015 inter alia, states thus:-

“In this context, the SCAPC before taking a decision in this instance has taken a policy approval from the Cabinet of Ministers, a recommendation from the Hon. Attorney-General on legal issues and has done a careful technical study on scientific matters before arriving at a decision.

In spite of this, it appears that the Procurement Appeal Board has not considered any of these facts which has been carefully submitted by the TEC and the SCAPC. In

addition, the Appeal Board **has not given any opportunity to submit any scientific and technical clarifications when considering the appeals to any party.** In this instance also the Appeal Board has recommended to cancel the tender.

.....
*The Procurement Appeal Board has stated that the SCAPC has changed the conditions of the tender as the second reason which is not correct. **The SCAPC has only interpreted the conditions stated in the bid bond without changing any of the tender conditions.*** (emphasis added)

Thus, the Cabinet Memorandum too found fault with the PAB for not affording an opportunity of hearing to the parties concerned. Learned President's Counsel for the 22nd Respondent also submitted that the failure to give a hearing violated the principles of natural justice.

This Cabinet Memorandum misled the Cabinet of Ministers where in fact the SCAPC at its Meeting held on 29.06.2015 directed the TEC to re-evaluate the tenders without taking into consideration steps 1.3 and 1.4 for the evaluation of bids. A direction by the SCAPC to TEC to drop Steps 1.3 and 1.4 cannot by any means equated to interpretation of the conditions stated in the bid bond. Thus, the Cabinet decision taken on the Memorandum marked **5R1** was obtained by misleading the Cabinet of Ministers. The decision taken by the Cabinet of Ministers on 22.09.2015 marked **5R2** cannot be considered as a valid decision, in so far as it relates to the entering into a contract for one year with the bidder recommended by the SCAPC.

When specific provisions are laid down in the Government Procurement Guidelines – 2006 and in the Bid Documents, the rule of law will imply that the requirements of those provisions are not violated. The power of the State is conferred on the Members of the SCAPC and the PAB to be held in trust for the benefit of the public. The Supreme Court being the protector and guarantor of the fundamental rights cannot refuse to entertain an application seeking protection against infringement of such rights. The Court must regard it as its solemn duty to protect the fundamental rights jealously and vigilantly. It has an important role to play not only preventing or remedying the wrong or illegal exercise of

power by the authority but has a duty to protect the nation in directing it to act within the framework of the law and the Constitution.

Preliminary Objection raised by the State

The first Preliminary Objection of the learned Additional Solicitor General was that the Petitioner Company has no locus standi to have and maintain this application in as much as the Petitioner Company is incorporated in Singapore has invoked the jurisdiction of this Court by itself without a local agent, representative or an Attorney-at-Law.

In the case of *Environmental Foundation Ltd. Vs. Urban Development Authority* (2009) 1 S.L.R. 123, an objection was raised on the ground that as the Petitioner was an incorporated Company it was not entitled to the protection afforded under Article 12 as it was available on to persons and Article 14 was available only to citizens. S.N.Silva, C.J. observed that “persons” as appearing in Article 12(1) should not be restricted to “natural” persons but extended to all entities having legal personality. The Court further held “although Counsel contended that Article 14(1) should be read differently in view of the reference to a “citizen” that distinction does not carry with it a difference which would **enable a Company incorporated in Sri Lanka** to vindicate an infringement under Article 12(1) and disqualify it from doing so in respect of an infringement under Article 14(1)”. Thus Mr. Faisz Musthapha argued that the Court extended the protection afforded under Articles 12(1) and 14(1) only to incorporated companies in Sri Lanka. (emphasis added). I am in agreement with his submissions.

Dr. Amerasinghe, J. in the case of *Pamkaya (M) SND BHD(appearing by its Attorney, Hemachandra and another) Vs. Liyanarachchi, Secretary, Ministry of Transport and Highways and Another* (2001) 1 S.L.R. 118 at 122 noted as follows:-

“However, the third reason, namely the failure to submit the Certificate of Registration of the local agent was in my view, a valid ground for the rejection of the Bid of General & Railway Supplies (Pvt) Ltd, albeit not, as stated by the Committee under Clause 4, but in terms of Clause 29 of “Instruction to Bidders”. Clause 29 states that all persons who act as an agent or sub-agent, representative or nominee for or

on behalf of any bidder are required to register themselves before submission of Bids with Registrar of Contracts, Sri Lanka as required by Public Contracts Act No. 3 of 1987. The Certificate of Registration should be submitted with the Bid. The Bids of Bidders who fail to submit this Certificate shall be rejected.”

The underlying principle is that the Award of the 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 time and date must be rejected in the same way as a later offer. It must be noted that the 2nd Petitioner in this case was a Company registered in Sri Lanka and the first Petitioner was registered as the Agent, Sub-agent, representative or nominee of the Company in terms of the Public Contracts Act No. 3 of 1987.

The Bidding Document containing the Instructions to Bidders **(X3)** in Clause 1.1 specifically provides that the provisions of Public Contracts Act No. 3 of 1987 (hereinafter referred to as “PCA”) is applicable to this procurement. In terms of Section 6 of the PCA the duties of the Registrar, inter alia, includes:-

(a) to register

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

Clause 2(2) of the regulations framed under PCA reads thus:-

“Where :-

(a) any person is registered as an agent, sub-agent, representative or nominee for or on behalf of any tenderer; and

(b) a Public Contract is registered,

a Certificate of Registration, in such form as specified in Form PCA 3 and PCA 4 and set out in the First Schedule to these Regulations shall be issued by the Registrar.

Provided, however, the Certificate of Registration, to any person who is registered as an agent, sub-agent, representative or nominee for or on behalf of any tenderer, shall be issued by the Registrar, subject to the condition, that such person shall

apply for registration of the public contract in the performance in respect of which he was appointed as agent, Sub-agent, representative or nominee for or on behalf of the tenderer, within sixty days of the award of such public Contract to the tenderer. (emphasis added)

The proviso to Clause 2(2) necessarily implies as a pre-condition that unless there is an agent, sub-agent, representative or nominee for or on behalf of any tenderer and registered, he cannot subsequently apply for registration of the Public Contract within Sixty days of award of such Contract to the tenderer. Thus, it is mandatory that there has to be a registered agent or sub – agent or representative or nominee on behalf of a tenderer.

The Bid document presented by the Petitioner's Bid proposal marked **X5a** dated 2nd April 2015, was submitted by the Petitioner's authorized signatory, Mr. Manish Dahiya in his capacity as the Executive Director. His signature has been witnessed by two others, namely, Mr. Girish Koulgi, Vice President and Mr. Nikesh Pathak, Manager. Thus, the Petitioner Company has tendered its bid through an authorized signatory which would attract the provisions of the Public Contracts Act No. 3 of 1987 which makes it mandatory the registration of its agent, sub-agent, representative or nominee on behalf of the tenderer.

Section 9(2) of PCA provides that no person required to be registered under Section 8 shall have any dealing directly or indirectly, relating to a Public Contract with any Member of a Public Body, a Technical Committee, Tender Board or Evaluation Board without first producing a valid Certificate of Registration under PCA. For purposes of PCA "tenderer" means a Company of Firm incorporated or registered or has its principal place of business outside Sri Lanka. It is such a registered person as an Agent, sub-agent, representative or nominee for and on behalf of the Petitioner Company is entitled to institute action in terms of Article 126 of the Constitution, as the Petitioner Company is not incorporated in Sri Lanka. Therefore, the Petitioner Company per se which is incorporated in Singapore has no locus standi to invoke the jurisdiction of this Court, for the violation of its Fundamental Rights. As the First Preliminary Objection is entitled to succeed, I do not intend to consider the Second Preliminary Objection.

The application is therefore liable to be dismissed on the First Preliminary Objection subject, however, to the following direction issued by Court to the Third Respondent in terms of Article 126(4) of the Constitution.

It would be appropriate to quote the observation made by Wanasundera, J. in *Jayanetti Vs. The Land Reform Commission* (1984) 2 S.L.R. 172 at 179

“... we are empowered after such inquiries, as we consider necessary to grant such relief or make such direction in the case as we may deem just and equitable. This is an extensive jurisdiction and it carries with it all implied powers that are necessary to give effect and expression to our jurisdiction. We would include within our jurisdiction, inter alia, the power to make interim orders and to add persons without whose presence questions in issue cannot be completely and effectually decided. In fact, our present decision in no way widens the ambit of Article 126 but seeks to articulate its real scope and to make the remedy more effective”

In the words of Md Faizal Karim J, in the case of *SSA Bangladesh Ltd. Vs. Engineer, Mahmud – ul Islam* 9 BLC (AD)(2004), *“The judiciary has an important role to play not only preventing or remedying the wrong or illegal exercise of power by the authority but has a duty to guide the nation in shaping its destiny within the framework of the law and the Constitution. The Court of law would always jealously guard against any abuse or misuse of power/authority by the State functionary in dealing with the State property.”*

As I observed in the case of *State Electricity Board Accountants’ Association Vs. Hon. Patali Champika Ranawaka and Others*, in S.C. F.R. 18/15 (S.C. Minutes of 03.05.2016) that Constitutions do not change with the varying tides of public opinion and desire, the Courts should never allow a change in public sentiment to influence them in giving a construction not warranted by the intention of its founder. Thus, this application is dismissed in limine on the first preliminary objection raised by the Respondents. However, considering the procedural flaws, I have referred to above, the fact that the award of tender involved public funds, and the solemn duty of the Court to protect the Rule of Law embodied in the Constitution in order to ensure its credibility in the faith of the people, I consider it

appropriate to make the following directions:-

- (a) The Third Respondent may terminate the contract entered into with the 22nd Respondent for the supply of Coal to the Lakvijaya Coal Power Plant after giving reasonable' notice to the said Respondent; and*
- (b) call for fresh bids in terms of the law, for the supply of Coal for the said power plant following competitive Bidding procedure.*

Subject to the aforesaid, the application is dismissed. The parties are entitled to bear their own costs.

CHIEF JUSTICE.

P. DEP, P.C.,J.

I agree.

JUDGE OF THE SUPREME COURT

U. ABEYRATHNE,J.

I agree.

JUDGE OF THE SUPREME COURT