

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

Sierra Construction Ltd.,
No. 112, Havelock Road,
Colombo 05.

Petitioner

SC/FR/135/2023

Vs.

1. Road Development Authority,
“Maganeguma Mahamedura”
No. 216, Denzil Kobbakaduwa Mawatha,
Koswatta, Battaramulla.
2. Project Director,
Miscellaneous Foreign Aided Projects
Division, Road Development Authority,
No. 465, Ganahena, Battaramulla.
3. Secretary,
Ministry of Transport and Highways,
7th Floor, Sethsiripaya Stage II,
Battaramulla.
4. Maga Engineering (Pvt) Ltd,
No. 200, Nawala Road,
Narahenpita, Colombo 05.
5. Tudawe Brothers (Pvt) Ltd,
No. 505/2, Elvitigala Mawatha,
Colombo 05.
6. International Construction Consortium
(Pvt) Ltd,

No. 70, S. De S. Jayasinghe Mawatha,
Nugegoda.

7. Nawaloka Construction Company (Pvt) Ltd,
No. 115, Sir James Pieris Mawatha,
Colombo 02.
8. Kanwel Constructions and Civil Engineering (Pvt) Ltd,
Wattegedara Road, 41A, Purana Road,
Maharagama 10280.
9. K. D. Ebert & Sons Holdings (Pvt) Ltd,
No. 5/41, Madiwela Road,
Embuldeniya,
Nugegoda.
10. Attorney General,
Attorney General's Department,
Colombo 12.
11. M.M.P.K. Mayadunne,
Chairperson,
12. L.V.S. Weerakoon,
Member,
13. P. K. Melani,
Member,
Ministry Procurement Committee for the
Tender for Rehabilitation/Improvements
to B 367 Piliyandala – Maharagama Road
Section from Piliyandala to Maharagama
(0+000km – 1+800km),
Ministry of Transport and Highways,
7th Floor, Sethsiripaya Stage II,
Bataramulla.

14. H.H.N.A. Hettiarachchi,
Chairperson,
15. R. P. K. P. R. Perera,
Member,
16. D.M.G. Abeyratne,
Member,
17. P.P. Jayasekara,
Member,
18. W.A.A. Pushpakumara,
Member,
Technical Evaluation Committee for the
Tender for Rehabilitation/Improvements
to B 367 Piliyandala – Maharagama Road
Section from Piliyandala to Maharagama
(0+000 km – 1+800 km),
Road Development Authority,
No. 465, Ganehena,
Battaramulla.

Respondents

Before: Hon. Justice S. Thurairaja, P.C.
Hon. Justice E.A.G.R. Amarasekara
Hon. Justice Mahinda Samayawardhena

Counsel: Suren Gnanaraj with Rashmi Dias for the Petitioner.
Nerin Pulle, P.C., A.S.G., with Nayanathara Balapatabendi,
S.C. for the 1st – 3rd and 10th – 18th Respondents.
Manoj Bandara with Mrs. Praveena Muhandiram for the
4th Respondent.

Argued on: 15.10.2024

Written submissions:

By the Petitioner on 22.11.2024

By the 1st – 3rd and 10th – 18th Respondents on 21.11.2024

By the 4th Respondent on 20.11.2024

Decided on: 10.02.2025

Samayawardhena, J.

The petitioner company invoked the fundamental rights jurisdiction of this Court, challenging the decision of the 1st to 3rd respondents (Road Development Authority) and the 11th to 18th respondents (Ministry Procurement Committee and Technical Evaluation Committee) to reject the petitioner's bid as substantially non-responsive and to award the tender to the 4th respondent. The tender pertains to the project titled "Rehabilitation/Improvements to B367 Piliyandala-Maharagama Road Section from Piliyandala to Maharagama (0+000 km-1+8000 km) Contract No. RDA/MFAP/ICB/OFID 2/08(a)", funded by the OPEC Fund for International Development (OFID). The petitioner contends that the decision is contrary to the bidding documents and the National Procurement Guidelines and is in breach of the petitioner's fundamental rights guaranteed by Articles 12(1) and 14(1)(g) of the Constitution.

In paragraph 25 of the petition, the petitioner states that on 04.05.2022, the 1st respondent opened and read out the bids of all bidders, including that of the petitioner. The petitioner has also provided a table detailing the names of the bidders and their respective bid prices.

The notice of award dated 02.05.2023 was published by the 2nd respondent (Project Director) on the 1st respondent's (Road Development Authority) website on or about 03.05.2023 and a copy of which has been

tendered by the petitioner marked P9. The body of the notice of award reads as follows:

1. *The Government of Sri Lanka has applied for a loan (US \$ 50 mn) from the OPEC Fund for Development (OFID) towards the cost of the Miscellaneous Foreign Aided Projects (MFAP) and a part of this loan will be utilized for payments under the Contract named above.*
2. *The Road Development Authority (“the Employer”) invited separate sealed bids from eligible bidders for the said project. Bids were received at the deadline for submission on 04th May 2022 at 14:00hrs for the above Contract package.*
3. *The bidders who have submitted complete bids along with bid prices were read out at the bid opening held on 04th May 2022 and the evaluated bid prices are as follows for the substantially responsive bidders.*

<i>Name of Bidder</i>	<i>Read out Bid Price (including all PS items & Contingencies) (LKR)</i>	<i>Corrected & Discounted Bid Price (including all PS items & Contingencies) (LKR)</i>
<i>Maga Engineering (Pvt) Ltd</i>	<i>1,150,504,236.88</i>	<i>1,050,691,912.98</i>
<i>Tudawe Brothers (Pvt) Ltd</i>	<i>1,192,057,671.57</i>	<i>1,192,057,671.57</i>
<i>International Construction Consortium (Pvt) Ltd</i>	<i>1,264,776,772.65</i>	<i>1,264,776,773.90</i>

4. *As per the evaluation criteria given in the bidding document the substantially responsive and financially lowest bidder is as follows:*

<i>Maga Engineering (Pvt) Ltd</i>	<i>1,050,776,773.90</i>
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5. *All appeals should be submitted on or before 12th May 2023.*

The petitioner promptly responded to this notice by a letter dated 04.05.2023 addressed to the 2nd respondent requesting “the grounds for rejection” of its bid and “a debriefing” in terms of Clause 39.2 of the Instructions to Bidders contained in the Bidding Document marked P3. This letter written in amicable terms was tendered as P10. In reply, the 2nd respondent by letter dated 12.05.2023 marked R5, informed the petitioner that the details regarding the debriefing on the rejection of the petitioner’s bid had already been communicated to the Secretary of the Line Ministry who is the Chief Accounting Officer, and that the Secretary would convey the reasons to the petitioner.

The petitioner later changed its mind and wrote P11 dated 08.05.2023 to the same 2nd respondent in a hostile tone. In this letter, the petitioner referred to paragraph 5 of the Notice of Award marked P9, which stated, “All appeals should be submitted on or before 12th May 2023”, and requested “strictly without prejudice” that P11 be treated as its formal appeal against the rejection of its bid and the awarding of the tender to another party.

Before responding to P10 and P11, the petitioner filed this fundamental rights application dated 09.05.2023 on 10.05.2023. The gravamen of the complaint of the petitioner is that although “its bid was substantially responsive in respect of all the criteria set out in the bidding documents, and the bid price it offered was substantially lower than that of the 4th respondent”, awarding the tender to the 4th respondent is violative of its fundamental rights enshrined in Articles 12(1) and 14(1)(g) of the Constitution. In addition to the formal declarations, in the prayer to the petition, the petitioner seeks as substantive reliefs directions on the 1st respondent or any other respondent to accept the petitioner’s bid as the substantially responsive and financially lowest bid and award the tender to the petitioner.

I must state at this stage that, according to the National Procurement Guidelines and the Bidding Document, the bid price is not the sole determining factor in deciding whether a bid should be accepted. Both price and quality are crucial considerations. The tender process should aim to select suppliers who provide the most financially advantageous terms while also meeting the highest quality standards, thereby ensuring the best outcome for the country.

In the bidding document marked P3, Section 1 is dedicated to “Instructions to Bidders”, and Clause 38 thereof which deals with “Award Criteria” reads as follows:

38.1 The employer shall award the Contract to the Bidder whose offer has been determined to be the lowest evaluated bid and is substantially responsive to the Bidding Document, provided further that the Bidder is determined to be qualified to perform the Contract satisfactorily.

According to Clause 38.1, for the tender to be awarded, three criteria must be satisfied:

- (a) The bid should be the lowest evaluated bid;
- (b) The bid should be substantially responsive to the Bidding Document; and
- (c) The bidder is determined to be qualified to perform the contract satisfactorily.

Section 3 of the Bidding Document marked P3 is dedicated to “Evaluation and Qualification Criteria”. Clause 2.4 thereof deals with “Experience”. Clause 2.4.2(a) requires the bidder to satisfy that the bidder has previous experience in “Contracts of Similar Size and Nature”. It reads as follows:

Participation as contractor, management contractor, or subcontractor, in at least 1 contract of road construction, rehabilitation with asphalt concrete pavement within the last 5 years, with a value of at least US\$ 2.38 Million that has been successfully or is substantially completed and that is similar to the proposed works. The similarity shall be based on the physical size, complexity, methods, technology or other characteristics as described in Section 6 (Employer's requirements).

Under "Contracts of Similar Size and Nature", the petitioner has provided the details of 5 Contracts and their descriptions as stated in paragraph 5 of the petition are as follows:

- (a) Rehabilitation/ Improvement of 77km of Rural Roads in Nuwara Eliya District – Contract 1 including Performance based Maintenance for three years [(Contract No. RDA/ABD/iROAD(CP)/NCB/CP/RR(NE1)] for a contract sum of USD 7,864,327.36;*
- (b) Rehabilitation/ Improvement of 39km of Rural Roads in the Nuwara Eliya District – Contract 2 including Performance based Maintenance for three years [(Contract No. RDA/ABD/iROAD(CP)/NCB/CP RR(NE2)] for a contract sum of USD 4,023,614.58;*
- (c) Rehabilitation/ Improvement of 65km of Rural Roads in the Nuwara Eliya District – Contract 3 including Performance based Maintenance for three years [(Contract No. RDA/ABD/iROAD(CP)/NCB/CP RR(NE3)] for a Contract sum of USD 8,089,525.76;*
- (d) Rehabilitation/ Improvement of 77km of Rural Roads in the Kandy District – Contract 1 including Performance based Maintenance for three years [(Contract No.*

RDA/ABD/iROAD(CP)/NCB/CP RR(KA1)] for a Contract sum of USD 5,600,632.46;

(e) Rehabilitation/ Improvement of 71km of rural roads in the Kandy District – Contract 2 including Performance based Maintenance for three years [(Contract No. RDA/ABD/iROAD(CP)/NCB/CP RR(KA 2)] for a Contract sum of USD 5,878,867.22.

Upon the direction given to the 1st respondent by this Court, the 1st respondent tendered the Ministry Procurement Committee Report and the Technical Evaluation Committee Report marked R1 and R2 respectively. According to these Reports, out of the 8 contractors who collected bid documents, 7 submitted their bids on time, and only 3 were deemed substantially responsive: K.D. Ebert & Sons Holdings (Pvt) Ltd and Nawaloka Construction Company (Pvt) Ltd had non-performing contracts. Kanwel Constructions & Civil Engineering (Pvt) Ltd failed to provide the required contract value of US\$ 2.38 million for the construction experience. The petitioner failed to provide evidence of contracts of similar size and nature as required in the Bidding Document.

It is the position of the respondents that the afore-mentioned 5 contracts are not “Contracts of Similar Size and Nature” to consider the petitioner as a substantially responsive bidder, primarily because those projects involve “Rural Roads”. According to the several affidavits filed by a number of respondents at different times including those of the 14th respondent who was the Chairman of the Technical Evaluation Committee and the appeal decision marked R6 dated 22.12.2023, the proposed contract pertains to a B Grade Road located in an urban area of Colombo and a complex project. The 14th respondent in paragraph 10 of his affidavit dated 17.11.2023 *inter alia* states that in terms of sections 2.4.2(a) and 6.3.2 of the Bidding Document “the bidder was intended to

have experience in the construction of standard two-lane road of National High way in high traffic density.”

In describing the complexity, the 11th respondent, the Chairperson of the Ministry Procurement Committee, in R6 *inter alia* states:

The ARB observed that, above projects given by the appellant to substantiate this criterion has several numbers of rural roads which are categorized in PRDA and Pradeshiya Sabha roads. The proposed contract is B class road located in urban area of Colombo district. Also proposed contract differs from physical size (per km cost, 4 lane 600m section with the width of 18.4m and 2 lane 1200m section with the width of 13.0m), complexity (There are total of 4 intersections within a 600m length such as 2 intersections are in 4 lane. Configuration and 2 intersections are in 4 lane and 2 lane configuration) methods, technology (Geometry and Design criteria) or other characteristics mention in Section 6 (Employer’s requirements) and hence, Contract given by the petitioner does not come under similar size and nature.

Although the petitioner later alleges bias, the Expert Panel nominated by this Court with the concurrence of the parties to assist the Court, in its Report dated 10.03.2024 also came to the same conclusion.

The petitioner did not file any report expressing expert opinion to the contrary. Neither the Court nor the petitioner possesses the requisite expertise, resources and capacity to challenge through a fundamental rights application the accuracy of the findings in the several reports filed by the Technical Evaluation Committee, the Ministry Procurement Committee, and the Expert Committee appointed by the Court. Based on the facts and circumstances of the case, the findings in those reports are not perverse and are *prima facie* acceptable to the Court. In such cases,

in exercising its writ or fundamental rights jurisdiction, this Court must exercise caution in revisiting decisions that are highly technical in nature. This restraint is necessitated by the Court's institutional limitations.

If the petitioner truly wishes to challenge the findings of those reports, the petitioner would have to go before a different forum, and this cannot practically be done within the context of a fundamental rights application decided on limited pleadings without oral evidence, and meant to be concluded within two months of its filing, as stipulated by Article 126(5) of the Constitution. Those are statutory limitations.

I am aware that the contours of the applicability of Article 12(1), the right to equality, have expanded significantly over the years to encompass virtually any violation under its purview. However, every procedural or substantive error does not and cannot attract the invocation of the fundamental rights jurisdiction of the Supreme Court.

In *Wijesinghe v. Attorney General and Others* [1978-79-80] 1 Sri LR 102, the petitioner contended that her termination from service as a sub-post mistress was effected without any charges being brought against her and without being afforded an opportunity to be heard, thereby violating the equal protection and non-discrimination guarantees under Articles 12(1) and 12(2) of the Constitution. The Supreme Court, while recognizing that the petitioner may have suffered an injustice, held that it did not constitute a violation of a fundamental right guaranteed by Article 12 of the Constitution. Wanasundera J. at pages 105-106, quoting, *inter alia*, *Siddappa v. State of Mysore & Another* AIR 1967 (Mysore) 67, *Budhan Chowdhary v. State of Bihar* AIR 1955 (SC) 191 and *Snowden v. Hughes* (1944) 321 US 1,88 L. ed. 497 opined:

This Court is undoubtedly the guardian and protector of the fundamental rights secured for the people and our powers are given in very wide terms; but our authority is not absolute for these powers are subject to certain well defined principles and we have to concede that there are limits which we cannot transgress, however hard and unfortunate a case may be. We have to take cognizance of the distinction between ordinary rights and fundamental rights, and it is only a breach of a fundamental right that calls for our intervention. Every wrong decision or breach of the law does not attract the constitutional remedies relating to fundamental rights. Where a transgression of the law takes place, due solely to some corruption, negligence or error of judgement, I do not think a person can be allowed to come under Article 126 and allege that there has been a violation of the constitutional guarantees. There may also be other instances where mistakes or wrongful acts are done in the course of proceedings for which ordinarily there are built-in safe-guards or adequate procedures for obtaining relief.

In *Farook v. Dharmaratne, Chairman, Provincial Public Service Commission, Uva* [2005] 1 Sri LR 133, the petitioner alleged an infringement of his fundamental rights guaranteed under Article 12(1) arising from his transfer as the principal of a school to which he had been appointed without possessing the required qualifications. Refusing to grant relief, Bandaranayake J. observed at page 140:

When a person does not possess the required qualifications that is necessary for a particular position, would it be possible for him to obtain relief in terms of a violation of his Fundamental Rights on the basis of unequal treatment? If the answer to this question is in the affirmative, it would mean that Article 12(1) of the Constitution would be applicable even in a situation where there is no violation

of the applicable legal procedure or the general practice. The application of Article 12(1) of the Constitution cannot be used for such situations as it provides to an aggrieved person only for the equal protection of the law where the authorities have acted illegally or incorrectly without giving due consideration to the applicable guidelines.

In *Jayawardena v. Dharani Wijayathilake, Secretary, Ministry of Justice and Constitutional Affairs and Others* [2001] 1 Sri LR 132 at 158, Mark Fernando J. stated that “*while each and every breach of the law does not amount to a denial of the protection of the law, yet some fundamental breaches of the law will result in denying the protection of the law*” which attracts fundamental rights jurisdiction of this Court.

In *Chamal Sanjeewa v. Keheliya Rambukwella and Others* (SC/FR/371/2022, SC Minutes 26.05.2023), the petitioner, a government medical officer, was interdicted from service after publicly sharing unauthorized and inaccurate findings on child malnutrition following a medical clinic. He filed an application alleging, *inter alia*, that his fundamental rights under Article 12(1) had been violated. In addressing the application of Article 12(1) to arbitrary decisions, Priyantha Fernando J. observed:

The fact that a decision is not in one’s favour does not make it arbitrary. In accordance with the rule of law, if a decision is predictable and in accordance with existing rules and principles, it cannot be arbitrary.

William Wade and Christopher Forsyth, in *Administrative Law*, 11th Edition (2014), at page 574, citing *R v. Lord Chancellor ex p Hibbit and Saunders* [1993] COD 326—where a firm of shorthand writers complained that their tender for Court services was unfairly rejected, but

the matter was held to be purely commercial and ineligible for judicial review—state: “*Contractual and commercial obligations are enforceable by ordinary action and not by judicial review.*” I see no reason why the same reasoning cannot be logically extended to cases invoking fundamental rights jurisdiction.

If every breach of the law or violation of a right or breach of a contract were treated as a violation of a fundamental right, it would open the floodgates to a multitude of claims, thereby diluting the Supreme Court’s role in addressing genuine violations of fundamental rights. The hearing of fundamental rights applications is not the sole function of the Supreme Court. As outlined in Article 118 of the Constitution, the Court plays numerous crucial roles, including matters of constitutional importance and the exercise of final appellate jurisdiction over the judgments of all other Courts. In this case, for example, the substantive relief sought by the petitioner is the annulment of the decision to award the tender to the 4th respondent and the subsequent awarding of the tender to the petitioner. In my view, this does not constitute a violation of a fundamental right guaranteed by Article 12 of the Constitution.

The petitioner, in the petition, asserts that the petitioner had a legitimate expectation that the contract would be awarded to it, as, in its assessment, the bid was substantially responsive to all the specified criteria. However, legitimate expectation, in the legal sense, cannot be established merely on the basis of a subjective assessment by the petitioner. In *Siriwardana v. Seneviratne and Four Others* [2011] 1 Sri LR 1 at 2, Bandaranayake C.J. while quoting with approval of the judgment in *Union of India v. Hindustan Development Corporation* 1994 AIR 998 held that a “*a mere hope or an expectation cannot be treated as having a legitimate expectation.*”

In *Union of India v. Hindustan Development Corporation*, Reddy J. at page 1015 held:

Time is a three-fold present: the present as we experience it, the past as a present memory and future as a present expectation. For legal purposes, the expectation cannot be the same as anticipation. It is different from a wish, a desire or a hope nor can it amount to a claim or demand on the ground of a right. However earnest and sincere a wish, a desire or a hope may be and however confidently one may look to them to be fulfilled, they by themselves cannot amount to an assertable expectation and a mere disappointment does not attract legal consequences. A pious hope even leading to a moral obligation cannot amount to a legitimate expectation. The legitimacy of an expectation can be inferred only if it is founded on the sanction of law or custom or an established procedure followed in regular and natural sequence. Again it is distinguishable from a genuine expectation. Such expectation should be justifiably legitimate and protectable. Every such legitimate expectation does not by itself fructify into a right and therefore it does not amount to a right in the conventional sense.

For a claim of legitimate expectation to be upheld in law, it must be demonstrated that there was a clear and unequivocal representation or assurance made by the public authority that it will act or refrain from acting in a particular way. Legitimate expectation may also be created by an established practice. If a person has reasonably relied on such a representation or practice, the doctrine seeks to ensure that the public authority cannot arbitrarily rescind from it, thereby upholding principles of natural justice and fairness. This doctrine prevents public authorities from abusing their power by ensuring consistency and accountability in their actions.

However, a legitimate expectation must be founded on a lawful and legitimate basis, not on an illegal basis. This principle also applies to purportedly established practices, which are patently unlawful practices. Similarly, representations based on erroneous facts or mistakes cannot give rise to a legitimate expectation.

In this case, no evidence has been presented to establish that the petitioner was given a representation or assurance by the respondents that would give rise to a legitimate expectation in the legal sense. The petitioner's subjective belief or assessment of the bid's responsiveness does not suffice to create such a legitimate expectation enforceable in law.

In my view, the petitioner primarily challenges the decision to award the contract to the 4th respondent not on the merits, but rather on procedural irregularities.

The petitioner states that the 1st respondent violated Clause 39.2 of Section 1 of Part 1 of the Bidding Document. Clauses 39.1 and 39.2 read as follows:

39.1 Prior to the expiration of the period of bid validity, the Employer shall notify the successful Bidder, in writing, that its bid has been accepted.

39.2 At the same time, the Employer will publish in an English language newspaper or well-known freely accessible website the results identifying the bid and lot numbers and the following information: (i) name of each Bidder who submitted a Bid; (ii) bid prices as read out at bid opening; (iii) name and evaluated prices of each Bid that was evaluated; (iv) name of bidders whose bids were rejected and the reasons for their rejection; and (v) name of the winning Bidder, and the price it offered, as well as the duration and

summary scope of the contract awarded. After publication of the award, unsuccessful bidders may request in writing to the Employer for a debriefing seeking explanations on the grounds on which their bids were not selected within two weeks. The Employer shall promptly respond in writing to any unsuccessful Bidder who, after Publication of contract award, requests a debriefing.

The petitioner complains that in the notice of award P9 quoted previously, several elements listed under Clause 39.2 were not there and it amounts to violation of Article 12(1). P9 states that bid prices of all the bidders were read out at the bid opening on 04.05.2022 and there were only three substantially responsive bidders. The names and other details of the substantially responsive bidders are stated therein. The petitioner's name was not among the three. To put differently, the petitioner has not been considered a substantially responsive bidder. According to Clause 39.2, *"After publication of the award, unsuccessful bidders may request in writing a debriefing from the Employer, seeking explanations on the grounds for their bids not being selected, within two weeks. The Employer shall promptly respond in writing to any unsuccessful bidder who requests a debriefing after the publication of the contract award."* This implies that detailed reasons for the rejection of substantially non-responsive bids need not be provided in the notice of award, but only brief reasons for rejection. The grounds for rejection should be disclosed when such a request is made within two weeks of the publication of the notice of award.

The petitioner further alleges that the respondents failed to comply with Clause 8.5 of the National Procurement Guidelines 2006 which reads as follows:

8.5 Contract Award in relation to MPC

8.5.1 (a) The Secretary to the Line Ministry shall within one week of being informed of the determination of 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 organize 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.

The award of contract process is governed by two regimes: the Bidding Document and the National Procurement Guidelines. The OFID Bidding Document P3 sets out one process of “Award of Contract”, which expects the Employer (the 1st respondent Road Development Authority) to inform the decision to the bidders. The National Procurement Guidelines 2006, on the other hand, sets out another process of “Award of Contract” in

Chapter 8 and expects the Secretary to the Line Ministry to inform the decision to the bidders. It is inconceivable that notice of award should be informed both by the Road Development Authority and the Secretary to the Line Ministry.

Clause 1.3.3. of the National Procurement Guidelines states:

In the case of a Foreign Funded Project, if the Foreign Funding Agency mandates the use of Procurement Guidelines of such funding agency, such funding agency guidelines shall prevail over these Guidelines to the extent applicable. In the event of a conflict between these Guidelines and that of the funding agency, the funding agency guidelines shall take precedence over these Guidelines.

Although the project involved in this application is a foreign funded project, according to P2, it may be noted that this is not a grant but a loan. Accordingly, informing the decision of the award of contract by publishing it on the Road Development Authority website by the Employer is acceptable. The 11th to 18th respondents, the Chairpersons of the Ministry Procurement Committee and Technical Evaluation Committee and their Members, have followed the Bidding Document read with the National Procurement Guidelines in reaching their decisions.

The appeal presented by the petitioner through P11 was referred to the Secretary of the Line Ministry, who subsequently communicated the decision on the appeal by R6 dated 22.12.2023. Learned Additional Solicitor General in his post argument written submissions states that the delay in sending R6 was due to the ongoing Court proceedings, which is acceptable because the petitioner filed this fundamental rights application before waiting for the reply.

In any event, the non-compliance with procedural requirements pertains only to the process of awarding the contract and not to the evaluation of

bids, which directly relates to substantial justice. Therefore, as there has been no compromise on substantial justice, I am not inclined to place significant weight on procedural irregularities, particularly as no prejudice has been caused to the petitioner, as evidenced by P10 and P11.

The petitioner contends that failure to give reasons is violative of the right to equal protection of the law guaranteed under Article 12(1) of the Constitution.

It is widely accepted that ideally the decision-maker should give reasons at the time of making the decision and not afterwards. A decision devoid of reasons is fundamentally flawed and amounts to no decision. The requirement to provide reasons serves as a safeguard against arbitrariness and upholds the principles of justice, fairness and transparency in decision-making. However, if reasons were given but could not be communicated for some valid reason, the Court may allow the decision-maker to submit those reasons to the Court if the decision is challenged for failure to give reasons. Conversely, if reasons are suggested *ex post facto* for the first time in Court, they should be rejected as afterthoughts. The rationale is that reasons must precede the decision, not follow it. In other words, the decision-maker should not arrive at a decision based on extraneous factors first and then somehow attempt to justify it by contriving reasons.

In *Kusumawathie v. Aitken Spence Co. Ltd.* [1996] 2 Sri LR 18 at 28, S.N. Silva J. (as he then was) approved the tendering of reasons to the Court, with notice to the petitioner, when a judicial review of the order is initiated. Similarly, in *Karunadasa v. Unique Gem Stones Ltd.* [1997] 1 Sri LR 256, Mark Fernando J. remitted the case to the Court of Appeal for rehearing after calling for and examining the file maintained at the

Labour Department, which apparently contained reasons for the decision.

In the unique facts and circumstances of this case, although detailed reasons were not initially provided to the petitioner at the time of issuing the notice of award (P9), such reasons available at the time of taking the decision were subsequently communicated. These reasons satisfy the requirement, as they were not fabricated after the filing of this application.

I am not convinced that the 1st respondent or any one or more of the respondents have violated the fundamental rights of the petitioner guaranteed under Article 12(1) of the Constitution. Furthermore, the right guaranteed under Article 14(1)(g) of the Constitution, which ensures every citizen the freedom to engage by himself or in association with others in any lawful occupation, profession, trade, business or enterprise, has not been infringed upon. I dismiss the petitioner's application but without costs.

Judge of the Supreme Court

S. Thurairaja, P.C., J.

I agree.

Judge of the Supreme Court

E.A.G.R. Amarasekara, J.

I agree.

Judge of the Supreme Court