IN THE SUPREME COURT OF BANGLADESH
HIGH COURT DIVISION
(SPECIAL ORIGINAL JURISDICTION)

WRIT PETITION NO. 1932 OF 2017
AND
WRIT PETITION NO. 3636 OF 2017

IN THE MATTER OF:

Applications under Article 102 of the Constitution of the People's Republic of Bangladesh.

-AND-

IN THE MATTER OF:

Asian Traffic Technologies Ltd.
.....Petitioner
-Versus-

The Government of Bangladesh represented by the Secretary, Road, Transport and Highways Division, Ministry of Road, Transport and Bridges, Bangladesh Secretariat, Dhaka-1000 and others
..... Respondents

(In both the Writ Petition Nos. 1932 of 2017 and 3636 of 2017)

Mr. Md. Ramzan Ali Sikder, Advocate
.....For the petitioner in both the Writ Petition Nos. 1932 of 2017 and 3636 of 2017.

Mr. Khaled Hamid Chowdhury, Advocate
....For the respondent no. 1 in the Writ Petition No. 3636 of 2017.

Mr. S. M. Jahurul Islam, Advocate
.....For the respondent no. 11 in both the Writ Petition Nos. 1932 of 2017 and 3636 of 2017.

Heard on 27.07.2017, 03.08.2017, 06.08.2017, 07.08.2017, 17.08.2017, 04.10.2017 and 05.10.2017.
Judgment on 18.10.2017 and 19.10.2017.

Present:
Mr. Justice Moyeenul Islam Chowdhury
-And-
Mr. Justice J. B. M. Hassan

**MOYEENUL ISLAM CHOWDHURY, J:**

As the facts and circumstances of both the Writ Petition Nos. 1932 of 2017 and 3636 of 2017 are intertwined, they have been heard together and this consolidated judgment disposes of them.

In the Writ Petition No. 1932 of 2017, a Rule Nisi was issued calling upon the respondents to show cause as to why the Memo No. 35.00.0000.030.07.003.15-06 dated 03.01.2017 (Annexure-'A' to the Writ Petition) issued by the respondent no. 2 cancelling the Invitation For Proposal No. 01/EOI/SE/SRC/2014-2015 dated 29.09.2015 (Annexure-'D-1' to the Writ Petition) and directing issuance of fresh requests for Expression of Interests (EOIs), publication of requests for Expression of Interests (EOIs) bearing Memo Nos. 418 and 434 both dated 24.01.2017 (Annexures- 'B' & 'B-1' to the Writ Petition respectively) in "The Daily Kaler Kantho" dated 26.01.2017 inviting fresh Expression of Interests (EOIs), non-communication of the reasons for cancellation of the Invitation For Proposal No. 01/EOI/SE/SRC/2014-2015 dated 29.09.2015 pursuant to the petitioner's application dated 12.01.2017 (Annexure-'M' to the Writ Petition) and failure of the respondent no. 11 to take any action in response to the petitioner's complaint dated 26.01.2017 (Annexure-'N' to the Writ Petition) should not be declared to be without lawful authority and of no legal effect and why the respondents should not be directed to approve the Combined Technical and Financial Evaluation dated 18.02.2016 (Annexure-'F-1' to the Writ Petition)

and award the contract in favour of the petitioner for the work covered under the Invitation For Proposal dated 29.09.2015 (Annexure-'D-1') within a stipulated period and/or such other or further order or orders passed as to this Court may seem fit and proper.

In the Writ Petition No. 3636 of 2017, a Rule Nisi was issued calling upon the respondents to show cause as to why the publication of a request for Expression of Interest (EOI) bearing Memo No. 1002 dated 22.02.2017 (Annexure-'A' to the Writ Petition) in "The Daily Jugantor" dated 24.02.2017 inviting a fresh Expression of Interest (EOI) in respect of Sherpur Bridge Toll Plaza should not be declared to be without lawful authority and of no legal effect and why the respondents should not be directed to approve the Combined Technical and Financial Evaluation dated 18.02.2016 (Annexure-'F-1' to the Writ Petition) and award the contract in favour of the petitioner for the work covered under the Invitation For Proposal dated 29.09.2015 (Annexure-'D' to the Writ Petition) and/or such other or further order or orders passed as to this Court may seem fit and proper.

The case of the petitioner, as set out in both the Writ Petitions, in short, is as follows:

The petitioner-company is a private limited company incorporated under the Companies Act, 1994. This company is the leading supplier, installer and operator of Computerized Toll System, Truck Scale, Gate Control & Security System, Weight In Motion System, RFID Human & Vehicle Access Control System and Design, Supply and Upgradation in Bangladesh. This company is also the market leader of Electronic Toll Collection System and Operation and

Maintenance (ETC) for Roads & Highways of Bangladesh. Anyway, the respondent no. 11 (Superintending Engineer) issued a request for Expression of Interest (EOI) on 22.04.2015 in the website of the Central Procurement Technical Unit (CPTU) for Supply, Installation & Operation of Web-based Modern Electronic/Computerized Toll Management System for Toll Collection, Operation & Management including upgradation of Computerized Toll Collection System of (i) Sherpur Bridge Toll Plaza at 204$^{th}$ km of Dhaka (Katchpur)- Bhairab-Jagadishpur-Shaistaganj-Sylhet-Tamabil-Jaflong Road (N-2), (ii) Fenchuganj Bridge Toll Plaza at 36$^{th}$ km of Moulvibazar-Rajnagar-Fenchuganj-Sylhet Road (N-208) and (iii) Hazrat Shah Paran (R.) Bridge Toll Plaza at 7$^{th}$ km of Sylhet Town Bypass Road (N-210) under Sylhet Road Division of Sylhet Road Circle, Sylhet (Toll Management System) for 3 (three) years. In the aforesaid request for EOI, the respondent no.11 set out the assignment, experience, resources and delivery capacity required and other details and asked the interested participants to submit their respective EOIs to the office of the respondent no.11. Thereafter the petitioner submitted its EOI on 28.05.2015 to the office of the respondent no.11 since it has the requisite qualifications as to experience, resources and delivery capacity and has previous experience of supplying, installing, managing and operating such Toll Management System. However, the respondent no.11, after due scrutiny of the EOIs, selected only 5 (five) service providers including the petitioner and accordingly issued RFP documents and Letter of Invitation bearing Memo No. 3547 dated 29.09.2015 (LOI). At a subsequent stage, the petitioner and 4(four) other service providers submitted their respective Technical and Financial

Proposals to the office of the respondent no. 11 on 28.10.2015. The office of the respondent no. 11 duly scrutinized and found all the five service providers qualified in the Evaluation of the Technical Proposals. Afterwards the respondent no. 9 (Additional Chief Engineer, Sylhet Road Zone) issued a letter bearing Memo No. ASZ/29/356 dated 10.02.2016 asking the petitioner and the other 4(four) service providers to remain present in the office of the respondent no. 7 on 18.02.2016 when the Financial Proposals would be opened. Accordingly, the Financial Proposals were opened and the respondent no. 9, Chairman of the PEC, issued a letter dated 23.03.2016 informing the petitioner that its proposal dated 28.10.2015 for the Toll Management System had become the 1st-ranked service provider in the Combined Technical and Financial Evaluation. By his Memo No. ASZ/29/736 dated 03.04.2016, the respondent no. 9 forwarded the Combined Evaluation report (Annexure-'F-1') to the respondent no. 7 (Chief Engineer) for his approval. On 27.06.2016, the respondent no. 7 (Chief Engineer) approved the same and recommended to take necessary steps for approval by the higher authority (respondent no. 1). While the petitioner was awaiting final approval of the proposal and consequential work order, to its utter surprise and dismay, it came to learn from reliable sources that the respondent no. 2 (Additional Secretary) had already cancelled the total tender process and directed the respondent no. 7 to invite EOIs afresh. This was done arbitrarily, mala fide and without affording the petitioner any opportunity of being heard and in violation of the relevant provisions of the Public Procurement Act of 2006 (hereinafter referred to as the

PPA of 2006) and the Public Procurement Rules of 2008 (hereinafter mentioned as the PPR of 2008).

Anyway, the petitioner collected a copy of the Memo dated 03.01.2017 (Annexure-'A' to the Writ Petition No. 1932 of 2017) by which the respondent no. 2 had cancelled the Invitation For Proposal No.01/EOI/SE/SRC/2014-2015 dated 29.09.2015 (Annexure-'D-1'). It is worth mentioning that the respondent no. 11 did not communicate the impugned order of cancellation of the Invitation For Proposal as required under Rule 35(1) of the PPR of 2008. This being the situation, the petitioner verbally and also in black and white requested the respondents to inform the petitioner of the reasons for such arbitrary cancellation of the Invitation For Proposal dated 29.09.2015 (Annexure-'D-1'); yet the respondents neither communicated the reasons for cancellation nor made any response to the petitioner's requests. As the respondents failed to respond to the petitioner's requests, it further addressed a letter dated 12.01.2017 as per Rule 35(2) of the PPR of 2008 requesting the respondents to inform the reasons for such arbitrary cancellation of the Invitation For Proposal. But the respondents deliberately failed to communicate the reasons for the cancellation of the Invitation For Proposal dated 29.09.2015 (Annexure-'D-1') and this failure is violative of the provisions of Rule 35(2) of the PPR of 2008. Since the respondents failed to give any response whatsoever, the petitioner was compelled to lodge a complaint with the respondent no. 11 (Procuring Entity) on 26.01.2017 under Rule 57 of the PPR of 2008. While the complaint lodged by the petitioner was awaiting disposal by the respondent no. 11, the respondent no. 10 arbitrarily published two notices bearing Memo Nos.

418 and 434 both dated 24.01.2017 in "The Daily Kaler Kantho" on 26.01.2017 inviting fresh Expression of Interests (EOIs) for Toll Collection, Operation and Management including upgradation of Computerized Toll Collection System at (i) Hazrat Shah Paran (R.) Bridge Toll Plaza and (ii) Fenchuganj Bridge Toll Plaza for three years which constituted the subject matter of the earlier Invitation For Proposal No. 01/EOI/SE/SRC/2014-2015 dated 29.09.2015 for which the petitioner was declared as the 1st-ranked service provider. Against this backdrop, the impugned Memo bearing No. 35.00.0000.030.07.003.15-06 dated 03.01.2017 (Annexure-'A' to the Writ Petition No. 1932 of 2017) issued by the respondent no. 2 cancelling the Invitation For Proposal No. 01/EOI/SE/SRC/2014-2015 dated 29.09.2015 and directing issuance and publication of a fresh request for Expression of Interests (EOIs) bearing Memo Nos. 418 and 434 both dated 24.01.2017 (Annexures-'B' & 'B-1' to the Writ Petition No. 1932 of 2017 respectively) are without lawful authority and of no legal effect.

On 13.02.2017, the High Court Division issued the Rule Nisi in the Writ Petition No. 1932 of 2017 and passed an interim order staying the operation of the impugned Memo bearing No. 35.00.0000.030.07.003.15-06 dated 03.01.2017 and the notices published in "The Daily Kaler Kantho" dated 26.01.2017 for a period of 6(six) months. In view of this interim order of stay, the petitioner's bid was valid. By that reason, the fresh publication of the Memo dated 22.02.2017 (Annexure- 'A' to the Writ Petition No. 3636 of 2017) by the respondent no. 10 in "The Daily Jugantor" dated 24.02.2017 inviting a fresh Expression of Interest (EOI) in respect of Sherpur Bridge Toll Plaza is a

sheer disregard of the stay order passed by the High Court Division in the Writ Petition No. 1932 of 2017 and a colourable abuse of the executive power of the respondents. That being so, the impugned notice of EOI as evidenced by Annexure-'A' to the Writ Petition No. 3636 of 2017 is also without lawful authority and of no legal effect.

Both the respondent nos. 1 and 11 have contested the Rules by filing 2(two) separate Affidavits-in-Opposition. Their case, in short, is as under:

As per Rule 11(2) of the PPR of 2008, the approving authority reserves the right to accept or reject any tender/proposal. Accordingly the authority cancelled the proposal assigning reasons under Section 8 of the PPA of 2006 and directed the respondent no. 7 (Chief Engineer, Roads and Highways Department) vide Memo No. 35.00.0000.030.07.003.15-06 dated 03.01.2017 to issue Expression of Interests (EOIs) afresh for 3(three) bridges separately including Operation and Maintenance (O & M) of Aushkandi Axle Load Control Station for better management. The approving authority duly informed the responsive tenderers that the proposal had been cancelled. On 26.01.2017, the petitioner wrote a letter to the respondent no. 11 (Procuring Entity) requesting him to apprise the reasons for cancellation of the Invitation For Proposal. The Procuring Entity received the said letter on 29.01.2017 and replied thereto within the stipulated time on 02.02.2017 assigning the reasons for cancellation of the proposal. Therefore there is no violation of Rules 35 and 57(4) of the PPR of 2008. As a consequence, the respondent no. 10 rightly published 3(three) fresh EOIs in the newspapers.

However, the Writ Petitions are not maintainable inasmuch as no appeal was preferred before the Review Panel of the CPTU in accordance with Rules 57(10) and 58 of the PPR of 2008. In other words, the Writ Petitions are incompetent because of non-exhaustion of the alternative remedy by way of appeal before the Review Panel of the CPTU. The recommendation for approval of the petitioner's proposal has no force of law and this does not constitute any legitimate expectation of the petitioner as well. The impugned order dated 03.01.2017 cancelling the bid (proposal) of the petitioner-company by the respondent no. 2 is very much lawful, bona fide and in accordance with the provisions of the relevant law.

In the Affidavit-in-Reply dated 24.05.2017, the petitioner-company has stated that the respondents did neither issue nor communicate any such alleged letters dated 03.01.2017 and 02.02.2017. The respondent no. 11 filed Civil Petition For Leave To Appeal No. 1035 of 2017 before the Appellate Division against the interim order of stay dated 13.02.2017 passed by the High Court Division in the Writ Petition No. 1932 of 2017. In the Appellate Division too, the respondent no. 11 did neither make any submission that his office had issued the letters dated 03.01.2017 and 02.02.2017 nor did he produce them. The respondent no. 11 has produced the purported letters dated 03.01.2017 and 02.02.2017 for the first time in the Writ Petitions at this belated stage. Though the contesting respondents have annexed the purported letters dated 03.01.2017 and 02.02.2017 to their Affidavits-in-Opposition and stated that the aforesaid letters were served upon the petitioner, yet they failed to annex any postal receipts or courier receipts or acknowledgement receipts to that effect. In

cancelling the invitation for EOI dated 29.09.2015, the respondent no. 2 did not show any specific or express reason whatsoever. So it is easily deducible that there was neither any change in the policy of the Government nor the cancellation was done in public interest. What is worthy of notice is that the respondent no. 2 directed issuance of a separate EOI for Sherpur Bridge Toll Plaza inclusive of Aushkandi Axle Load Control Station; but strangely enough, Aushkandi Axle Load Control Station was not included in the subsequent tender notice dated 24.02.2017 which is under challenge in the Writ Petition No. 3636 of 2017. The respondents acted in complete and sheer disregard of the law, arbitrarily and unlawfully cancelled the invitation for EOI dated 29.09.2015 and directed issuance of EOIs anew in respect of the 3(three) Toll Plazas separately.

At the outset, Mr. Md. Ramzan Ali Sikder, learned Advocate appearing on behalf of the petitioner-company, submits that admittedly the petitioner was declared as the 1st-ranked service provider in the Combined Technical and Financial Evaluation by the authority concerned and the Head of the Procuring Entity forwarded the bid of the petitioner to the approving authority, that is to say, Secretary of the Road, Transport and Highways Division for approval; but the respondent no. 2, under the order of the Secretary (respondent no. 1), arbitrarily, mala fide and illegally cancelled the bid of the petitioner-company by the impugned Memo dated 03.01.2017 and directed issuance of fresh EOIs in respect of Fenchuganj Bridge Toll Plaza, Hazrat Shah Paran (R.) Bridge Toll Plaza and Sherpur Bridge Toll Plaza inclusive of Aushkandi Axle Load Control Station separately as a result of which Annexure-‘B’ and Annexure-‘B-

1' both dated 24.01.2017 to the Writ Petition No. 1932 of 2017 were published in "The Daily Kaler Kantho" on 26.01.2017 and Annexure-'A' to the Writ Petition No. 3636 of 2017 dated 22.02.2017 was published in "The Daily Jugantor" on 24.02.2017 and in such a posture of things, the impugned Memo dated 03.01.2017 and the subsequent tender notifications pursuant thereto are all without lawful authority and of no legal effect.

Mr. Md. Ramzan Ali Sikder further submits that the impugned order dated 03.01.2017, it appears, was rendered in complete contravention of Section 8 of the PPA of 2006 and Rule 11(2) of the PPR of 2008 and in this perspective, the impugned order dated 03.01.2017 has no legs to stand upon.

Mr. Md. Ramzan Ali Sikder also submits that the principle of "Audi Alterm Partem" was not adhered to prior to issuance of the impugned order dated 03.01.2017 and as the petitioner-company was condemned unheard, the impugned order is without jurisdiction and hence it is unsustainable in law.

Mr. Md. Ramzan Ali Sikder next submits that although the impugned order dated 03.01.2017 is conspicuously silent about the reasons for rejection of the bid of the petitioner-company, yet in their Affidavits-in-Opposition, the respondent nos. 1 and 11 have stated that by the impugned order dated 03.01.2017, the respondent no. 2 directed issuance of fresh EOIs for Fenchuganj Bridge Toll Plaza, Hazrat Shah Paran (R.) Bridge Toll Plaza and Sherpur Bridge Toll Plaza separately for better management and the plea taken by the contesting respondents in their Affidavits-in-Opposition for better management of all the three Toll Plazas at a belated stage is clearly an afterthought.

Mr. Md. Ramzan Ali Sikder also submits that although Aushkandi Axle Load Control Station was supposed to be managed and operated along with Sherpur Bridge Toll Plaza as per the impugned order dated 03.01.2017, yet indisputably Aushkandi Axle Load Control Station was not included in the subsequent tender notification dated 22.02.2017 which was published in "The Daily Jugantor" on 24.02.2017 and this phenomenon ex-facie exposes the mala fides (bad faith) of the respondents in issuing the impugned order dated 03.01.2017.

Mr. Md. Ramzan Ali Sikder further submits that the cancellation of the bid of the petitioner was never communicated to it keeping in view Rule 35 of the PPR of 2008, though it is the claim of the contesting respondents that the respondent no. 11 conveyed the rejection of the bid to the petitioner in due course; but surprisingly enough, the respondent no. 11 has failed to furnish any postal/courier receipt or any other acknowledgement receipt in the Court indicating that the petitioner-company had received the impugned order dated 03.01.2017 and had the respondent no. 11 really communicated the impugned order dated 03.01.2017 to the petitioner, the respondent no. 11 would have definitely said so when he received the letter of the petitioner-company as evidenced by Annexure-'M' dated 12.01.2017 to the Writ Petition No. 1932 of 2017 and it is astounding that the respondent no. 11 maintained mysterious silence thereabout and this is confirmatory of the non-communication of the impugned order to the petitioner-company.

Mr. Md. Ramzan Ali Sikder also submits that on filing the Writ Petition No. 1932 of 2017, the petitioner obtained a Rule Nisi along with an interim

order of stay and being aggrieved by the interim order of stay dated 13.02.2017 passed in that Writ Petition, the respondent no. 11 preferred Civil Petition For Leave To Appeal No. 1035 of 2017 before the Appellate Division; but no plea was taken by the respondent no. 11 in the Appellate Division that they had communicated the impugned order dated 03.01.2017 to the petitioner and this conduct of the respondent no. 11 amply demonstrates that the petitioner was all through in the dark about the issuance of the impugned order dated 03.01.2017 till it came to know thereabout from reliable sources and thereafter it sent the letter dated 12.01.2017 to the respondents to know about the reasons for cancellation of its bid.

Mr. Md. Ramzan Ali Sikder further submits that the petitioner along with 4(four) other service providers was declared responsive and compliant and among all the service providers, undeniably the petitioner was ranked as the 1st service provider in the Combined Technical and Financial Evaluation thus arousing legitimate expectation in its mind and consequentially its bid was approved by the Procuring Entity as well as the Head of the Procuring Entity and eventually the approving authority failed to approve the bid without any apparent cause and the non-application of the mind of the approving authority in this regard constitutes bad faith on its part.

Mr. Md. Ramzan Ali Sikder next submits that the petitioner being declared as the 1st-ranked service provider in the Combined Technical and Financial Evaluation has some interest stemming from its legitimate expectation, though not, strictly speaking, a legal right in the project and the

non-disclosure of any reason by the approving authority (respondent no. 1) for cancellation of the bid of the petitioner has defeated its legitimate expectation.

Mr. Md. Ramzan Ali Sikder also submits that undeniably the petitioner lodged a complaint with the Procuring Entity (respondent no. 11) and albeit the petitioner did not approach either the Head of the Procuring Entity or the Review Panel of the CPTU for necessary redress; yet the Writ Petition is maintainable in view of the fact that the impugned order dated 03.01.2017 is mala fide and that being so, the petitioner is entitled to cross the threshold under Article 102 of the Constitution and given this scenario, the petitioner can not be shown the door.

In support of the above submissions, Mr. Md. Ramzan Ali Sikder adverts to the decisions in the cases of Bangladesh Soya-Protein Project Ltd….Vs…Secretary, Ministry of Disaster Management and Relief, Bangladesh Secretariat, Dhaka, 22 BLD (HCD) 378; Dhaka City Corporation…Vs…Firoza Begum and others, 65 DLR (AD) 145; Shamsur Rahman (Md)…Vs…Government of Bangladesh and others, 15 BLC (HCD) 482; Mrs. Jebon Nahar and others…Vs…Bangladesh and others, 18 BLD (HCD) 141; Abdul Rauf and others…Vs…Abdul Hamid Khan and others, 17 DLR (SC) 515; Government of Bangladesh represented by the Secretary, Ministry of Works…Vs…Md. Jalil and others, 48 DLR (AD) 10; Star Enterprises and others…Vs…City and Industrial Development Corporation of Maharashtra Ltd. and others decided by the Supreme Court of India on 30.05.1990 in Civil Appeal Nos. 2076-2078 of 1990 (equivalent citation: (1990) 3 SCC 280) and Ram Pravesh Singh and others…Vs…State of Bihar

and others decided by the Supreme Court of India on 22.09.2006 in Case No. Appeal (Civil) 4191 of 2004 which were downloaded from the internet.

Per contra, both Mr. Khaled Hamid Chowdhury, learned Advocate appearing for the respondent no. 1 and Mr. S. M. Zahurul Islam, learned Advocate appearing for the respondent no. 11, contend that although no express reason was assigned in the impugned order dated 03.01.2017 passed under the directive of the approving authority (respondent no. 1); yet the fact remains that the reason for cancellation of the bid of the petitioner is inferable in that for better management, the approving authority rejected the bid of the petitioner and directed issuance of fresh EOIs for Fenchuganj Bridge Toll Plaza, Hazrat Shah Paran (R.) Bridge Toll Plaza and Sherpur Bridge Toll Plaza separately and this implied reason for rejection of the petitioner's bid can not be sneezed at and lost sight of in any view of the matter.

Both Mr. Khaled Hamid Chowdhury and Mr. S. M. Zahurul Islam also contend that as the bid of the petitioner was not finally approved by the approving authority (respondent no. 1), it can not come up with any plea of legitimate expectation and as no legal right has accrued in its favour, the alleged plea of legitimate expectation should be rejected out of hand.

Both Mr. Khaled Hamid Chowdhury and Mr. S. M. Zahurul Islam further contend that although the petitioner was declared as the 1$^{st}$-ranked service provider in the Combined Technical and Financial Evaluation, that did not give the petitioner any vested right to get its bid finally approved by the approving authority and on this count alone, both the Rules should be discharged.

Both Mr. Khaled Hamid Chowdhury and Mr. S. M. Zahurul Islam next contend that there had been a change in the policy of the Government and as such the approving authority, without approving the bid of the petitioner, directed issuance of fresh EOIs for Fenchuganj Bridge Toll Plaza, Hazrat Shah Paran (R.) Bridge Toll Plaza and Sherpur Bridge Toll Plaza separately and on this score, the impugned order dated 03.01.2017 can not be objected to.

Both Mr. Khaled Hamid Chowdhury and Mr. S. M. Zahurul Islam further contend that the impugned Memo dated 03.01.2017 issued under the order of the respondent no. 1 is lawful, bona fide and it does not contain any tinge of arbitrariness and this being the position, it is not liable to be interfered with under Article 102 of the Constitution.

Both Mr. Khaled Hamid Chowdhury and Mr. S. M. Zahurul Islam next contend that there was a direction in the impugned Memo dated 03.01.2017 for inclusion of Aushkandi Axle Load Control Station in Sherpur Bridge Toll Plaza; but nevertheless because of some practical and pragmatic reason, Aushkandi Axle Load Control Station was not included in Sherpur Bridge Toll Plaza in the subsequent tender notification dated 22.02.2017 which was published in "The Daily Jugantor" on 24.02.2017 vide Annexure-'A' to the Writ Petition No. 3636 of 2017; but even then, the impugned Memo dated 03.01.2017 stands valid owing to change in the policy of the Government and for better management of all the three Bridge Toll Plazas.

Both Mr. Khaled Hamid Chowdhury and Mr. S. M. Zahurul Islam also contend that the petitioner did not comply with the provisions of Rule 35(2) of the PPR of 2008 when admittedly the Annexure-'M' to the Writ Petition No.

1932 of 2017 was addressed to many public functionaries including the Minister-in-Charge of the Administrative Ministry and as the Annexure-'M' is not in consonance with Rule 35(2), it can not be said that the petitioner acted in compliance therewith.

Both Mr. Khaled Hamid Chowdhury and Mr. S. M. Zahurul Islam further contend that it is the admitted position that although the petitioner lodged a formal complaint with the Procuring Entity (respondent no. 11), yet it did not approach either the Head of the Procuring Entity or the other higher echelons including the Review Panel of the CPTU as contemplated by the PPR of 2008 and considered from this perspective, the Writ Petitions, without exhaustion of the higher fora, are not maintainable and as such the petitioner is not entitled to get any relief by invoking the writ jurisdiction of the High Court Division under Article 102 of the Constitution.

In order to buttress up the above contentions, both Mr. Khaled Hamid Chowdhury and Mr. S. M. Zahurul Islam rely upon the decisions in the cases of P.T.R. Exports (Madras) Pvt. Ltd. and others…Vs…Union of India and others, AIR 1996 SC 3461; Dipak Kumar Sarkar and others…Vs…State of W. B. and others decided by the Calcutta High Court on 05.12.2003 (equivalent citation: AIR 2004 Cal 182) and Concord Pragatee Consortium Limited…Vs…Bangladesh Power Development Board decided by the High Court Division on 05.02.2014 in the Writ Petition No. 2782 of 2013 (equivalent citation: 66 DLR (HCD) 475) which were downloaded from the internet.

We have heard the submissions of the learned Advocate Mr. Md. Ramzan Ali Sikder and the counter-submissions of the learned Advocates Mr. Khaled Hamid Chowdhury and Mr. S. M. Zahurul Islam and perused the Writ Petitions, Affidavits-in-Opposition, Affidavit-in-Reply and relevant Annexures annexed thereto.

The case of the petitioner mainly rests upon three propositions, namely, mala fides, violation of the principle of natural justice and legitimate expectation. Now let us examine the decisions of various jurisdictions on the signification and scope of the concepts of mala fides (bad faith), principle of natural justice and legitimate expectation.

In the decision in the case of Bangladesh Soya-Protein Project Ltd….Vs…Secretary, Ministry of Disaster Management and Relief, Bangladesh Secretariat, Dhaka reported in 22 BLD (HCD) 378, it was spelt out in paragraph 23:

> "23. Now let us first consider what is meant by the word 'legitimate expectation'. This phrase was first coined by Lord Denning in the case of Schmidt…Vs...Secretary of State for Home Affairs (1969) 2 Ch 149. The question, in that case, was whether the Home Secretary ought to have given a hearing to the foreign alien students before their prayer for extension of stay in the United Kingdom was refused. Lord Denning

M. R. referring to the decision of the House of Lords in Ridge…Vs…Baldwin (1964) AC 40 held at p. 170 EF as follows:

> "…an administrative body may, in a proper case, be bound to give a person who is affected by their decision an opportunity of making representations. It all depends on whether he has some right or interest, or, I would add, some legitimate expectation, of which it would not be fair to deprive him without hearing what he has to say."

But this phrase 'legitimate expectation' was limited at that time, first of all, to a legal right which was contravened. The legal position prevalent at that time was explained by Lord Denning himself referring to foreign alien students in the following manner at p.171AB:

> "He has no right to enter this country except by leave: and, if he is given leave to come for a limited period, he has no right to stay for a day longer than the permitted time. If his permit is revoked before the time limit

> expires, he ought, I think, to be given an opportunity of making representations: for he would have a legitimate expectation of being allowed to stay for the permitted time. Except in such a case, a foreign alien has no right-and, I would add, no legitimate expectation-of being allowed to stay. He can be refused without reasons given and without a hearing."

The 'ratio decidendi' of this case shows, as explained by Lord Denning himself, that the legitimate expectation of a person can only be enforced if he has got a legal right, but not otherwise.

But there was already a change in the legal outlook which would be apparent from the decision in Reg…Vs…Criminal Injuries Compensation Board, Ex Parte Lain (1967) 2 QB 864 where expectations which, although strictly speaking, were not legally enforceable but had some reasonable basis, were treated as legitimate expectations.

In the case of Findlay…Vs…Secretary of State, (1984) 3 All ER 801, Lord Scarman, explained the principle of legitimate expectation, at p. 830B-C, in the following manner:

> "The doctrine of legitimate expectation has an important place in the developing law of judicial review. It is, however, not necessary to explore the doctrine in this case, it is

> enough merely to note that a legitimate expectation can provide a sufficient interest to enable one who can not point to the existence of a substantive right to obtain the leave of the Court to apply for judicial review."

In the case of Food Corporation of India…Vs…M/S Kamdhenu Cattle Feed Industries, AIR 1993 SC 1601 in denying the highest tenderer's right to have his tender accepted, the principle of legitimate expectation was also considered by the Supreme Court of India. J. S. Verma, J. held as follows:

> "There is no unfettered decision in public law: A public authority possesses powers only to use them for public good. This imposes the duty to act fairly and to adopt a procedure which is 'fair-play in action'. Due observance of this obligation as a part of good administration raises a reasonable or legitimate expectation in every citizen to be treated fairly in his interaction with the State and its instrumentalities, with this element forming a necessary component of the decision-making process in all State actions. To satisfy this requirement of non-arbitrariness in a State action, it is, therefore,

necessary to consider and give due weight to the reasonable or legitimate expectations of the persons likely to be affected by the decision or else that unfairness in the exercise of the power may amount to an abuse or excess of power apart from affecting the bona fides of the decision in a given case. The decision so made would be exposed to challenge on the ground of arbitrariness. Rule of law does not completely eliminate discretion in the exercise of power, as it is unrealistic, but provides for control of its exercise by judicial review. (Paragraph-7).

The mere reasonable or legitimate expectation of a citizen, in such a situation, may not by itself be a distinct enforceable right, but failure to consider and give due weight to it may render the decision arbitrary, and this is how the requirement of due consideration of a legitimate expectation forms part of the principle of non-arbitrariness, a necessary concomitant of the rule of law. Every legitimate expectation is a

relevant factor requiring due consideration in a fair decision-making process. Whether the expectation of the claimant is reasonable or legitimate in the context is a question of fact in each case. Whenever the question arises, it is to be determined not according to the claimant's perception but in larger public interest wherein other more important considerations may outweigh what would otherwise have been the legitimate expectation of the claimant. A bona fide decision of the public authority reached in this manner would satisfy the requirement of non-arbitrariness and withstand judicial scrutiny. The doctrine of legitimate expectation gets assimilated in the rule of law and operates in our legal system in this manner and to this extent." (Paragraph-8).

(Emphasis laid is ours.)

In the case of Union of India…Vs…Hindustan Development Corporation, AIR 1994 SC 988, in order to create a healthy competition between the big manufacturers who formed a cartel and small manufacturers, the railway authorities introduced a dual pricing policy which was challenged. The Supreme Court of India in this case considered the question of legitimate

expectation in detail referring to a number of decisions of home and abroad. K. Jayachandra Reddy, J. explained the principle as follows:

> "… it is generally agreed that legitimate expectation gives the applicant sufficient locus standi for judicial review and that the doctrine of legitimate expectation is to be confined mostly to right of a fair hearing before a decision which results in negativing a promise or withdrawing an undertaking is taken. The doctrine does not give scope to claim relief straightaway from the administrative authorities as no crystallized right as such is involved. The protection of such legitimate expectation does not require the fulfillment of the expectation where an overriding public interest requires otherwise. In other words, where a person's legitimate expectation is not fulfilled by taking a particular decision, then the decision-maker should justify the denial of such expectation by showing some overriding public interest. Therefore even if substantive protection of such expectation is contemplated, that does not grant an absolute right to a particular

person. It simply ensures the circumstances in which that expectation may be denied or restricted. A case of legitimate expectation would arise when a body by representation or by past practice aroused expectation which it would be within its powers to fulfil. The protection of legitimate expectation is limited to that extent and a judicial review can be within those limits. But as discussed above, a person who bases his claim on the doctrine of legitimate expectation, in the first instance, must satisfy that there is a foundation and thus has locus standi to make such a claim. In considering the same, several factors which give rise to such legitimate expectation must be present. The decision taken by the authority must be found to be arbitrary, unreasonable and not taken in public interest. If it is a question of policy, even by way of change of old policy, the Courts can not interfere with a decision. In a given case, whether there are such facts and circumstances giving rise to a legitimate expectation, it would primarily be a question

> of fact. If these tests are satisfied and if the Court is satisfied that a case of legitimate expectation is made out, then the next question would be whether failure to give an opportunity of hearing before the decision affecting such legitimate expectation is taken, has resulted in failure of justice and whether on that ground the decision should be quashed. If that be so, what should be that relief is again a matter which depends on several factors." (Paragraphs- 33 and 34).
>
> (Underlinings are ours.)

The learned Judge then concluded as follows:

> "However, it is generally accepted and also clear that legitimate expectation being less than right operate in the field of public and not private law and that to some extent such legitimate expectation ought to be protected, though not guaranteed." (Paragraph- 35).

The principle of legitimate expectation again came up for consideration before the Supreme Court of India in the case of Madras City Wine Merchants' Association…Vs…State of T. N., (1994) 5 SCC 509. S. Mohan, J. held as follows:

> "…legitimate expectation may arise-

(a) if there is an express promise given by a public authority; or

(b) because of the existence of a regular practice which the claimant can reasonably expect to continue;

(c) Such an expectation must be reasonable.

However, if there is a change in policy or in public interest the position is altered by a rule or legislation, no question of legitimate expectation would arise." (Paragraph- 48).

The Supreme Court of India again considered the principle of legitimate expectation in relation to a change of policy of the Government in the case of Punjab Communications Ltd…Vs…Union of India, AIR 1999 SC 1813. M. Jagannadha Rao, J. on consideration of a large number of cases observed as follows:

"...the doctrine of legitimate expectation in the substantive sense has been accepted as part of our law and that the decision-maker can normally be compelled to give effect to his representation in regard to the expectation based on previous practice or past conduct unless some overriding public interest comes in the way." (Paragraph-37).

(Emphasis given is ours.)

In the case of Nur Muhammad and others…Vs…Moulvi Mainuddin Ahmed and others, 39 DLR (AD) 1, their Lordships of the Appellate Division referred to the case of Federation of Pakistan…Vs…Saeed Ahmed, PLD 1974 (SC) 151(168) wherein Hamoodur Rahman, C. J. expressed himself in the following terms:

> "Indeed mala fide acts stand on the same footing as acts done without jurisdiction. Similarly coram non judice also stand on the same footing because these words would literally mean that they have been done by an authority or body exercising judicial or quasi-judicial powers which was not properly constituted even under the law under which it was set up and that its decision is not a decision of a competent authority. If this be so, then such acts do not also qualify for validation and they have not been saved from scrutiny by the ouster clause, no matter how widely that ouster clause may be worded."

A mala fide act is, by its nature, an act without jurisdiction. No Legislature when it grants power to take action or pass an order contemplates a mala fide exercise of statute. It may be explained that a mala fide order means one which is passed not for the purpose contemplated by the enactment

granting the power to pass the order, but for some other collateral or ulterior purpose.

In the case of Mrs. Lalima Begum and another…Vs…The Chairman, 1st Court of Settlement, Dhaka and another, 17 BLD (HCD) 270, it was observed in paragraph 14:

> "14. The principle of fairness in Government action requires that the Government functionaries must act according to law and must perform their duties in good faith. Public accountability and acceptance demand that the Government actions must correspond to good conscience and fairplay..."

The principle of natural justice is applied to administrative process to ensure procedural fairness and to free it from arbitrariness. Violation of this principle results in jurisdictional errors. Thus in a sense, violation of this principle constitutes procedural ultra vires. It is, however, impossible to give an exact connotation of this principle as its contents are flexible and variable depending on the circumstances of each case, i.e., the nature of the function of the public functionary, the rules under which he has to act and the subject-matter he has to deal with. This principle is classified into two categories-(i) a man can not be condemned unheard (audi alteram partem) and (ii) a man can not be the judge in his own cause (nemo debet esse judex in propria causa). The contents of the principle vary with the varying circumstances and those

can not be petrified or fitted into rigid moulds. They are flexible and turn on the facts and circumstances of each case. In applying the principle, there is a need to balance the competing interests of administrative justice and the exigencies of efficient administration. The principle was applied originally to courts of justice and now extends to any person or body deciding issues affecting the rights or interests of individuals where a reasonable citizen would have legitimate expectation that the decision-making process would be subject to some rules of fair procedure. These rules apply, even though there may be no positive words in the statute requiring their application.

Lord Atkin in R. v. Electricity Commissioners ([1924] 1 KB 171) observed that the rules of natural justice applied to 'any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially'. The expression 'having the duty to act judicially' was used in England to limit the application of the rules to decision-making bodies similar in nature to a court of law. Lord Reid, however, freed these rules from the bondage in the landmark case of Ridge v. Baldwin ([1964] AC 40). But even before this decision, the rules of natural justice were being applied in our country to administrative proceedings which might affect the person, property or other rights of the parties concerned in the dispute. In all proceedings by whomsoever held, whether judicial or administrative, the principle of natural justice has to be observed if the proceedings might result in consequences affecting the person or property or other right of the parties concerned.

In England, the application of the principle of natural justice has been expanded by introducing the concept of 'fairness'. In Re Infant H(K) ([1967] 1 All E.R. 226), it was held that whether the function discharged is quasi-judicial or administrative, the authority must act fairly. It is sometimes thought that the concepts of 'acting fairly' and 'natural justice' are different things, but this is wrong as Lord Scarman correctly observes that the Courts have extended the requirement of natural justice, namely, the duty to act fairly, so that it is required of a purely administrative act (Council of Civil Service Union V. Minister for the Civil Service [1984] 3 All E.R. 935). The 'acting fairly' doctrine has at least proved useful as a device for evading some of the previous confusions. The Courts now have two strings to their bow. An administrative act may be held to be subject to the requirements of natural justice either because it affects rights or interests and therefore involves a duty to act judicially, in accordance with the classic authorities and Ridge V. Baldwin; or it may simply be held that in our modern approach, it automatically involves a duty to act fairly and in accordance with natural justice. The Indian Supreme Court has adopted this principle holding "…this rule of fair play must not be jettisoned save in very exceptional circumstances where compulsive necessity so demands" (Swadeshi Cotton Mills…Vs...India, AIR 1981 SC 818).

The English Courts have further expanded the horizon of natural justice by importing the concept of 'legitimate expectation' and holding that from promise or from established practice, a duty to act fairly and thus to comply with natural justice may arise. Thus the concepts of 'fairness' and 'legitimate expectation' have expanded the applicability of natural justice beyond the

sphere of right. To cite a few examples, not only in the case of cancellation of licence which involves denial of a right, but also in the case of first time grant of licence and renewal of licence, the principle of natural justice is attracted in a limited way in consideration of legitimate expectation. An applicant for registration as a citizen, though devoid of any legal right, is entitled to a fair hearing and an opportunity to controvert any allegation levelled against him. An alien seeking a visa has no entitlement to one, but once he has the necessary documents, he does have the type of entitlement that should now be protected by due process, and the Government should not have the power to exclude him summarily.

In the case of Chingleput Bottlers V. Majestic Bottlers reported in AIR 1984 SC 1030, the Indian Supreme Court has made certain observations which create an impression that the rules of natural justice are not applicable where it is a matter of privilege and no right or legitimate expectation is involved. But the application of the rules of natural justice are no longer tied to the dichotomy of right-privilege. It has been stated in "Administrative Law" by H.W.R. Wade, 5th edition at page-465: " For the purpose of natural justice, the question which matters is not whether the claimant has some legal right, but whether the legal power is being exercised over him to his disadvantage. It is not a matter of property or of vested interests, but simply of the exercise of Governmental power in a manner which is fair…" In the American jurisdiction, the right-privilege dichotomy was used to deny due process hearing where no right was involved. But starting with Gonzalez V. Freeman (334 F. 2d 570), the Courts gradually shifted in favour of the privilege cases

and in the words of Professor Schwartz, “The privilege-right dichotomy is in the process of being completely eroded” (“Administrative Law”, 1976, Page-230). Article 31 of our Constitution incorporating the concept of procedural due process, the English decisions expanding the frontiers of natural justice are fully applicable in Bangladesh.

In English law, the rules of natural justice perform a function, within a limited field, similar to the concept of procedural due process as it exists in the American jurisdiction. Following the English decisions, the Courts of this sub-continent have held that the principle of natural justice should be deemed incorporated in every statute unless it is excluded expressly or by necessary implication by any statute.

The basic principle of fair procedure is that before taking any action against a man, the authority should give him notice of the case and afford him a fair opportunity to answer the case against him and to put his own case. The person sought to be affected must know the allegation and the materials to be used against him and he must be given a fair opportunity to correct or contradict them. The right to a fair hearing is now of universal application whenever a decision affecting the rights or interest of a man is made. But such a notice is not required where the action does not affect the complaining party.

It is often said that mala fides or bad faith vitiates everything and a mala fide act is a nullity. What is mala fides? Relying on some observations of the Indian Supreme Court in some decisions, Durgadas Basu J held, “It is commonplace to state that mala fides does not necessarily involve a malicious intention. It is enough if the aggrieved party establishes: (i) that the authority

making the impugned order did not apply its mind at all to the matter in question; or (ii) that the impugned order was made for a purpose or upon a ground other than what is mentioned in the order." (Ram Chandra…Vs… Secretary to the Government of W.B, AIR 1964 Cal 265).

To render an action mala fide, "There must be existing definite evidence of bias and action which can not be attributed to be otherwise bona fide; actions not otherwise bona fide, however, by themselves would not amount to be mala fide unless the same is in accompaniment with some other factors which would depict a bad motive or intent on the part of the doer of the act" (Punjab…Vs…Khanna, AIR 2001 SC 343).

The principle of reasonableness is used in testing the validity of all administrative actions and an unreasonable action is taken to have never been authorized by the Legislature and is treated as ultra vires. According to Lord Greene, an action of an authority is unreasonable when it is so unreasonable that no man acting reasonably could have taken it. This has now come to be known as Wednesbury unreasonableness. (Associated Provincial Picture…Vs…Wednesbury Corporation [1948] 1 KB 223).

In the decision in the case of Sirajul Islam (Md) and others…Vs…Bangladesh and others reported in 60 DLR (HCD) 79, it has been held that the mere reasonable or "legitimate expectation" of a citizen, in such a situation, may not by itself be a distinct enforceable right, but failure to consider and give due weight to it may render the decision arbitrary, and this is how the requirement of due consideration of "legitimate expectation" forms part of the principle of non-arbitrariness, a necessary concomitant of the rule of

law. Every "legitimate expectation" is a relevant factor requiring due consideration in a fair decision-making process. Whether the expectation of the claimant is reasonable or legitimate is essentially a question of fact in each case.

In the decision in the case of The Chairman, Bangladesh Textile Mills Corporation…Vs…Nasir Ahmed Chowdhury and others reported in 22 BLD (AD) 199, it has been held that an expectation could be based on an express promise or representation or by an established past action of settled conduct and the representation must be clear and unambiguous. It could be a representation to an individual or generally to a class of persons. It has been further held in that decision that 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.

In the case of Dhaka City Corporation…Vs…Firoza Begum and others, 65 DLR (AD) 145 relied on by Mr. Md. Ramzan Ali Sikder, it was observed in paragraph 24(v):

> "24.(v) A person basing his claim on the doctrine of legitimate expectation has to satisfy that he relied on the representation of the authority and the denial of that expectation would work to his detriment. The Court can interfere only if the decision taken by the authority is found to be arbitrary, unreasonable or in gross abuse of

> power or in violation of the principle of natural justice and not taken in public interest."

It has further been held in the above-mentioned case (65 DLR (AD) 145) that the root of the principle of legitimate expectation is constitutional principle of rule of law which requires regularity, predictability and certainty in the Government's dealing with the public.

In the case of the Government of Bangladesh represented by the Secretary, Ministry of Works…Vs…Md. Jalil and others, 48 DLR (AD) 10 referred to by Mr. Md. Ramzan Ali Sikder, it was spelt out, amongst others, in paragraph 16:

> "16…The High Court Division could interfere with the findings of a Tribunal of fact under its extraordinary jurisdiction under Article 102, only if it could be shown that the Tribunal had acted without jurisdiction or made any finding upon no evidence or without considering any material evidence/facts causing prejudice to the complaining party or that it had acted mala fide or in violation of any principle of natural justice..."

In the case of Star Enterprises and others…Vs…City and Industrial Development Corporation of Maharashtra Ltd. and others which was decided

by the Indian Supreme Court on 30.05.1990 in Civil Appeal Nos. 2076-2078 of 1990, it was held in paragraph 10:

> "10. In recent times, judicial review of administrative action has become expansive and is becoming wider day by day. The traditional limitations have been vanishing and the sphere of judicial scrutiny is being expanded. State activity too is becoming fast pervasive. As the State has descended into the commercial field and giant public sector undertakings have grown up, the stake of the public exchequer is also large justifying larger social audit, judicial control and review by opening of the public gaze; these necessitate recording of reasons for executive actions including cases of rejection of the highest offers. That very often involves long stakes and availability of reasons for any action on the record assures credibility to the action; disciplines public conduct and improves the culture of accountability. Looking for reasons in support of such action provides an opportunity for an objective review in

> appropriate cases both by the administrative superior and by the judicial process. The submission of Mr. Dwivedi, therefore, commends itself to our acceptance, namely, that when the highest offers of the type in question are rejected, reasons sufficient to indicate the stand of the appropriate authority should be made available and ordinarily the same should be communicated to the concerned parties unless there be any specific justification not to do so."

In the case of Ram Pravesh Singh and others…Vs…State of Bihar and others which was decided by the Supreme Court of India on 22.09.2006 in Case No. Appeal (Civil) 4191 of 2004 adverted to by Mr. Md. Ramzan Ali Sikder, the Indian Supreme Court spelt out in paragraph 14:

> "14. <u>What is legitimate expectation? Obviously, it is not a legal right. It is an expectation of a benefit, relief or remedy, that may ordinarily flow from a promise or established practice. The term 'established practice' refers to a regular, consistent, predictable and certain conduct, process or activity of the decision-making authority. The expectation should be legitimate, that is,</u>

reasonable, logical and valid. Any expectation which is based on sporadic or casual or random acts, or which is unreasonable, illogical or invalid can not be a legitimate expectation. Not being a right, it is not enforceable as such. It is a concept fashioned by Courts, for judicial review of administrative action. It is procedural in character based on the requirement of a higher degree of fairness in administrative action, as a consequence of the promise made, or practice established. In short, a person can be said to have a 'legitimate expectation' of a particular treatment, if any representation or promise is made by an authority, either expressly or impliedly, or if the regular and consistent past practice of the authority gives room for such expectation in the normal course. As a ground for relief, the efficacy of the doctrine is rather weak as its slot is just above 'fairness in action' but far below 'promissory estoppel'. It may only entitle an expectant: (a) to an opportunity to show

> cause before the expectation is dashed; or (b) to an explanation as to the cause for denial. In appropriate cases, Courts may grant a direction requiring the Authority to follow the promised procedure or established practice. A legitimate expectation, even when made out, does not always entitle the expectant to a relief. Public interest, change in policy, conduct of the expectant or any other valid or bona fide reason given by the decision-maker, may be sufficient to negative the 'legitimate expectation'."

(Underlinings are ours.)

In the case of Dipak Kumar Sarkar and others…Vs…State of W. B. and others which was decided by the Calcutta High Court on 05.12.2003 relied on by both Mr. Khaled Hamid Chowdhury and Mr. S. M. Zahurul Islam, the relevant portion of paragraph 6 runs as follows:

> "6...According to me, unless and until a contract exists, no right can be claimed by the participants in the tender. If any right in such circumstances arises, that will be governed by the civil laws. Therefore, where is the scope of intervention of the Writ

> Court? The Writ Court is only concerned in respect of the legitimate expectation or, at best, in a case of promissory estoppel. This is not a case of promissory estoppel. Therefore, it is necessary to know whether any legitimate expectation arises in the circumstances to get an affirmative order finally in the writ petition or not. Admittedly, when no work order has been issued, no such right can be accrued or can be attached to any right of contractual obligation... ”

In the case of Concord Pragatee Consortium Limited…Vs…Bangladesh Power Development Board which was decided by the High Court Division on 05.02.2014 in the Writ Petition No. 2782 of 2013, it was observed in paragraph 60:

> “60. Our above view should not be misunderstood to be a conservative stand as we are not curtailing the power of the High Court Division nor this judgment is aimed at reduction of the number of briefs of the members of this Bar. This Court in the past has never hesitated or shall not be shaky in the future to entertain writ petitions in fit

> and proper cases, for example, where an action taken or order passed by the Government or any statutory body or even by any Constitutional body that is ex-facie illegal, mala fide, or the same suffers from malice-in-law or coram non judice in carrying out its functions within administrative capacity, inspite of the existence of other alternative forums."

Ultimately the High Court Division in the aforementioned case held that the Review Panel is an equally efficacious forum for adjudication of the grievance of the petitioner and on that count, the Rule was discharged on the ground of incompetency of the Writ Petition.

In the case of P.T.R. Exports (Madras) Pvt. Ltd. and others…Vs…Union of India and others, AIR 1996 SC 3461 relied on by both Mr. Khaled Hamid Chowdhury and Mr. S. M. Zahurul Islam, it was observed in paragraph 5:

> "5. It would, therefore, be clear that grant of licence depends upon the policy prevailing as on the date of the grant of the licence. The Court, therefore, would not bind the Government with a policy which was existing on the date of application as per previous policy. A prior decision would not bind the Government for all times to come.

> When the Government is satisfied that change in the policy was necessary in the public interest, it would be entitled to revise the policy and lay down new policy..."

The principle of legitimate expectation, as we see it, is predicated upon the following:

(a) The statement or practice giving rise to the legitimate expectation must be sufficiently clear and unambiguous, and expressed or carried out in such a way as to show that it was intended to be binding.

(b) The statement or practice must be shown to be applicable and relevant to the case in hand.

(c) Legitimate expectation is enforced in order to achieve fairness.

(d) If the statement said to be binding was given in response to any information from the citizen, it will not be binding if that information is less than frank, and if it is not indicated that a binding statement is being sought.

(e) He who seeks to enforce must be a person to whom (or a member of the class to which) the statement was made or the practice applied.

(f) Even though a case is made out, the legitimate expectation shall not be enforced if there is overriding public interest which requires otherwise.

Coming back to the case in hand, let us quote the impugned order dated 03.01.2017 (Annexure-'A' to the Writ Petition No. 1932 of 2017) verbatim for better appreciation:

"গণপ্রজাতন্ত্রী বাংলাদেশ সরকার
সড়ক পরিবহন ও সেতু মন্ত্রণালয়
সড়ক পরিবহন ও মহাসড়ক বিভাগ
নন-গেজেটেড সংস্থাপন ও এনটিআর অধিশাখা
www.rthd.gov.bd

স্মারক নং-৩৫.০০.০০০০.০৩০.০৭.০০৩.১৫-০৬ তারিখ: ০৩-০১-২০১৭ খ্রিস্টাব্দ

বিষয়: পুন:দরপত্র আহ্বান ও বিভাগীয়ভাবে টোল আদায় সংক্রান্ত।

সূত্র: (১) প্রধান প্রকৌশলী, সড়ক ও জনপথ অধিদপ্তরের পত্র নং-২০৬২- প্র: প্র:, তারিখ: ১৭-০৬-২০১৬ খ্রিস্টাব্দ
(২) প্রধান প্রকৌশলী, সড়ক ও জনপথ অধিদপ্তরের পত্র নং-৮৬০- প্র: প্র:, তারিখ: ১৮-১২-২০১৬ খ্রিস্টাব্দ

উপর্যুক্ত বিষয়ে Supply, Installation & Operation of Web-based Modern Electronic/Computerized Toll Management System for Toll Collection, Operation & Management including Upgrading of Computerized Toll Collection System of "Sherpur Bridge Toll Plaza" at 204th km of Dhaka (Katchpur)-Bhairab-Jagadishpur-Shaistaganj-Sylhet-Tamabil-Jaflong Road (N-2), "Fenchuganj Bridge Toll Plaza" at 36th km of Moulvibazar-Rajnagar-Fenchuganj-Sylhet Road (N-208) and "Hz. Shah Paran (R.) Bridge Toll Plaza" at 7th km of Sylhet Town Bypass Road (N-210) under Sylhet Road Division of Sylhet Road Circle, Sylhet for three (03) years সেবা ক্রয় সংক্রান্ত কাজের Invitation For Proposal No. 01/EOI/SE/SRC/2014-2015, Dated: 29.09.2015 বাতিল করে ০৩(তিনটি) সেতুর (শেরপুর সেতু, ফেঞ্চুগঞ্জ সেতু ও হযরত শাহ পরান (র:) সেতু) জন্য নিম্নোক্তভাবে EOI আহ্বানের জন্য নির্দেশক্রমে অনুরোধ করা হল:

(১) শেরপুর সেতুর টোল আদায় ও আউশকান্দি এক্সেল লোড কন্ট্রোল স্টেশন পরিচালনার জন্য একত্রে পরিচালনা প্রতিষ্ঠান উন্মুক্ত প্রতিযোগিতার মাধ্যমে নিয়োগ করা;

(২) ফেঞ্চুগঞ্জ সেতুর টোল আদায়ের জন্য পৃথক পরিচালনা প্রতিষ্ঠান উন্মুক্ত প্রতিযোগিতার মাধ্যমে নিয়োগ করা;

(৩) হযরত শাহ পরান (র:) সেতুর টোল আদায়ের জন্য পৃথক পরিচালনা প্রতিষ্ঠান উন্মুক্ত প্রতিযোগিতার মাধ্যমে নিয়োগ করা।

০২। দরপত্র প্রক্রিয়া শেষ না হওয়া পর্যন্ত উল্লিখিত ৩(তিন)টি সেতু টোল প্লাজায় বিভাগীয়ভাবে টোল আদায় কার্যক্রম অব্যাহত রাখার জন্যও নির্দেশক্রমে অনুরোধ করা হল।

স্বাঃ অস্পষ্ট
৩/১/১৭
(মো: হুমায়ুন কবীর খোন্দকার)
যুগ্মসচিব
ফোন: ৯৫৭৪০৪৫

প্রধান প্রকৌশলী
সড়ক ও জনপথ অধিদপ্তর
সড়ক ভবন, তেজগাঁও, ঢাকা

অনুলিপি:

সচিবের একান্ত সচিব, সড়ক পরিবহন ও মহাসড়ক বিভাগ"

From a plain reading of the impugned order dated 03.01.2017, it transpires that it is conspicuously silent about the reasons, if any, for rejection of the bid of the petitioner as well as for directing issuance of fresh EOIs for Fenchuganj Bridge Toll Plaza, Hazrat Shah Paran (R.) Bridge Toll Plaza and Sherpur Bridge Toll Plaza inclusive of Aushkandi Axle Load Control Station separately. In this connection, Section 8 of the PPA of 2006 runs as follows:

> "৮। দরপত্র বা প্রস্তাব অনুমোদন, ইত্যাদি।- আর্থিক ক্ষমতা অর্পণ আদেশে বর্ণিত অনুমোদনকারী কর্তৃপক্ষ দরপত্র বা প্রস্তাব মূল্যায়ন কমিটির সুপারিশ অনুমোদন বা কারণ ব্যাখ্যাপূর্বক বাতিল করিয়া পুন:মূল্যায়ন বা পুন:প্রক্রিয়াকরণের নির্দেশ দিতে পারিবে।"

Again Rule 11(2) of the PPR of 2008 contemplates:

> "১১। দরপত্র বা প্রস্তাব অনুমোদন।- (১) ...
>
> (২) মূল্যায়ন কমিটির সুপারিশ সামগ্রিকভাবে বিবেচনা করিয়া অনুমোদনকারী কর্তৃপক্ষ-
>
> (ক) উক্ত সুপারিশ অনুমোদন করিতে পারিবে; বা

(খ) উক্ত সুপারিশ সম্পর্কিত কোন সুনির্দিষ্ট বিষয়ে ক্রয়কারীর মাধ্যমে উক্ত কমিটির নিকট হইতে ব্যাখ্যা আহবান করিতে পারিবে; বা

(গ) কারণ ব্যাখ্যাপূর্বক-

(অ) উক্ত সুপারিশ বাতিলক্রমে পুন:মূল্যায়নের জন্য উক্ত কমিটিকে অনুরোধ করিতে পারিবে; বা

(আ) উক্ত সুপারিশ বাতিল করিয়া আইন ও এই বিধিমালার বিধান অনুসরণক্রমে নুতনভাবে ক্রয় কার্য পুন:প্রক্রিয়াকরণের জন্য নির্দেশনা প্রদান করিতে পারিবে।”

It is undisputed that no explicit reasons were assigned or spelt out under Section 8 of the PPA of 2006 and Rule 11(2)(ga) of the PPR of 2008 for rejection of the bid of the petitioner and for directing issuance of fresh EOIs for procurement. Considered from this angle, a man of ordinary prudence would naturally come to the conclusion that by passing the impugned order dated 03.01.2017, the approving authority contravened the provisions of Section 8 of the PPA of 2006 and Rule 11(2)(ga) of the PPR of 2008.

As to the contention of both Mr. Khaled Hamid Chowdhury and Mr. S. M. Zahurul Islam that the reasons for rejection of the bid of the petitioner are very much implied in the impugned order dated 03.01.2017, we are not ex-facie impressed thereby in view of the aforesaid provisions of Section 8 of the PPA of 2006 and Rule 11(2)(ga) of the PPR of 2008. Precisely speaking, regard being had to those provisions, the approving authority ought to have

spelt out the reasons specifically for rejection of the bid of the petitioner in the impugned order dated 03.01.2017. The reasons having not been spelt out by the approving authority in specific terms, the impugned order dated 03.01.2017 is patently arbitrary and unreasonable.

There is another dimension of the matter. Although there was a direction for issuance of EOIs with regard to management and operation of Sherpur Bridge Toll Plaza along with Aushkandi Axle Load Control Station in the impugned order dated 03.01.2017; yet ultimately the authority resiled therefrom without any apparent cause in consequence of which Aushkandi Axle Load Control Station was not mentioned along with Sherpur Bridge Toll Plaza in the subsequent tender notification dated 22.02.2017 that was published in "The Daily Jugantor" on 24.02.2017. In this respect, we have not found any explanation on the side of the contesting respondents. This non-explanation is undoubtedly a pointer to the mala fides (bad faith) resorted to by the approving authority in the matter of issuance of the impugned order dated 03.01.2017. What is more, even the approving authority did not refer to either change of policy or better management or public interest in the impugned order dated 03.01.2017, though it is the assertion of the contesting respondent nos. 1 and 11 in their Affidavits-in-Opposition that for better management, the approving authority directed issuance of fresh EOIs for Sherpur Bridge Toll Plaza inclusive of Aushkandi Axle Load Control Station, Fenchuganj Bridge Toll Plaza and Hazrat Shah Paran (R.) Bridge Toll Plaza separately. For better management, according to the assertion of the contesting respondents, separate EOIs were issued; but what prompted the approving authority from mentioning

it in the impugned order dated 03.01.2017, we think, that is anybody's guess. This being the state of affairs, we are led to hold that the claim of the contesting respondents that for better management, all the three Bridge Toll Plazas were ordered to be notified separately is nothing but an afterthought. On this point, we are at one with Mr. Md. Ramzan Ali Sikder.

Paragraph 6 of the decision dated 05.12.2003 rendered in the case of Dipak Kumar Sarkar and others…Vs…State of W. B. and others (supra), we feel tempted to say that since 05.12.2003, the horizon of the concept of legitimate expectation has been expanded through judicial activism with the passage of time by the Supreme Courts of India and Bangladesh. In fact, we have come a long way from that decision dated 05.12.2003 rendered by the Calcutta High Court in Dipak Kumar Sarkar's Case. In this context, the non-issuance of any work order in favour of the petitioner in the present case will not disentitle him to his legitimate expectation. So the reliance of both Mr. Khaled Hamid Chowdhury and Mr. S. M. Zahurul Islam on paragraph 6 of the decision in Dipak Kumar Sarkar's Case does not help them at all.

There is no gainsaying the fact that the petitioner-company was adjudged to be the 1st-ranked service provider in the Combined Technical and Financial Evaluation and accordingly its bid along with necessary documentation was forwarded to the Head of the Procuring Entity. The Head of the Procuring Entity in his turn pre-eminently recommended awarding of the contract to the approving authority (respondent no. 1) in favour of the petitioner. But the approving authority, as discussed earlier, rejected the bid of the petitioner and directed issuance of fresh EOIs separately without assigning

any specific reason whatsoever. In this backdrop, we find it difficult to maintain the impugned order dated 03.01.2017 as the same has already been found to be arbitrary and unreasonable.

The adjudgment of the petitioner as the 1st-ranked service provider in the Combined Technical and Financial Evaluation necessarily aroused some expectation in the mind of the petitioner and that expectation is certainly based upon the past established practice of the Department. Had the approving authority assigned any specific reason in rejecting the bid of the petitioner, the scenario would have been otherwise. But as things stand now, although no legal right, strictly speaking, accrued in favour of the petitioner, yet suffice it to say that the responsiveness and compliance of the petitioner and the regular past practice adopted by the approving authority in view of the admitted adjudgment of the petitioner as the 1st-ranked service provider in the Combined Technical and Financial Evaluation, according to us, gave a solid basis to the legitimate expectation of the petitioner. This legitimate expectation, though not purely a legal right, by now has become enforceable by way of invocation of the writ jurisdiction of the High Court Division under Article 102 of the Constitution. It has already been discussed above that the doctrine of legitimate expectation can be nullified by having recourse to any change in the Government policy or in public interest or for some reason of a compelling nature; but obviously we do not find any of those elements or factors which prompted the approving authority to rescind the bid of the petitioner by issuing the impugned order dated 03.01.2017.

As we have arrived at the finding that the petitioner had a solid legitimate expectation, then necessarily he ought to have been afforded an opportunity of being heard prior to rescission of its bid by the impugned order dated 03.01.2017. That is required for fairness, transparency and accountability of the public functionary concerned. Had there been no legitimate expectation of the petitioner in the facts and circumstances of the case, the question of adhering to the legal dictum-"Audi Alterm Partem" would not have arisen. What we are driving at boils down to this: the impugned order dated 03.01.2017 is arbitrary, non-speaking, unreasonable, cryptic and mala fide.

It is the argument of both Mr. Khaled Hamid Chowdhury and Mr. S. M. Zahurul Islam that the petitioner did not make any application under Rule 35(2) of the PPR of 2008; but none the less, the Procuring Entity apprised the petitioner of the rejection of its bid by the approving authority. By contrast, it is the argument of Mr. Md. Ramzan Ali Sikder that although his application dated 12.01.2017 (Annexure- 'M' to the Writ Petition No. 1932 of 2017) was not addressed to the Procuring Entity (respondent no. 11), yet a copy of that application was endorsed to the Procuring Entity and from this standpoint, it can be said that there was substantial compliance with the provisions of Rule 35(2) of the PPR of 2008.

It will be worthwhile to reproduce the provisions of Rule 35(2) of the PPR of 2008 which are as under:

> "৩৫। বাতিলের কারণ অবহিতকরণ।- (১) ...
> (২) ক্রয়কারী, আবেদনকারী বা দরপত্রদাতার লিখিত অনুরোধের পরিপ্রেক্ষিতে, দরপত্র কোটেশন বা প্রস্তাব বাতিলের কারণ অবহিত করিবে।"

Undeniably the petitioner did not submit the application dated 12.01.2017 (Annexure-‘M’ to the Writ Petition No. 1932 of 2017) directly to the Procuring Entity (respondent no. 11). However, it was addressed to the Joint Secretary, Secretary and the Minister-in-Charge of the Administrative Ministry and a copy thereof was endorsed, amongst others, to the Procuring Entity. This being the landscape, we are of the opinion that there was substantial compliance with Rule 35(2) of the PPR of 2008. So in this respect, we accept the argument of Mr. Md. Ramzan Ali Sikder and reject that of Mr. Khaled Hamid Chowdhury and Mr. S. M. Zahurul Islam.

It is the definite assertion on the part of the petitioner-company that it did not receive any copy of the impugned order dated 03.01.2017 from the Procuring Entity and it came to know thereabout from reliable sources and accordingly it made the application dated 12.01.2017 addressing the high-ups of the Administrative Ministry. Be that as it may, Annexure-‘1’ dated 03.01.2017 to the Affidavit-in-Opposition filed by the respondent no. 1 purporting to contain the impugned order, it transpires, was addressed to all the successful bidders including the petitioner. But the petitioner asserts that it did not receive it. This is, no doubt, a disputed question of fact. But nevertheless it is admitted that no postal receipt or courier receipt or any other proof has been submitted in the Court to substantiate the claim that Annexure-‘1’ dated 03.01.2017 was sent to the petitioner. Besides, no claim was made by the Procuring Entity (respondent no. 11) in Civil Petition For Leave To Appeal No. 1035 of 2017 that they sent Annexure-‘1’ dated 03.01.2017 to the petitioner. Moreover, in response to Annexure-‘M’ dated 12.01.2017, the Procuring Entity

could have sent a letter to the petitioner to the effect that they had already despatched Annexure-‘1’ dated 03.01.2017 to it; but they did not do so. Taking the whole gamut of the circumstances into consideration, we smell a rat in this regard.

Now let us deal with the question of maintainability or otherwise of the Writ Petitions. In Article 226 of the Indian Constitution, we do not come across the expression “if satisfied that no other equally efficacious remedy is provided by law”; but in our Constitution, this expression is very much there in Article 102(2)(a). So there is a constitutional bar to the invocation of the writ jurisdiction of the High Court Division under Article 102(2)(a) of the Constitution, if there is any other equally efficacious remedy provided by law.

In England, prerogative writs particularly writs of mandamus were not issued by the Court when any alternative remedy under the statute was available. This was a self-imposed rule of the Court on the ground of public policy. Issuance of writs when alternative remedies were not availed of would undermine the Subordinate Courts and Tribunals. Under the Pakistan Constitution of 1956, the Supreme Court and the High Courts in issuing prerogative writs used to follow the rule of the English Court. It was, however, pointed out that this rule of exhaustion of alternative remedies was the rule of the Court and did not affect the jurisdiction of the Court to entertain writ petitions. But the Pakistan Constitution of 1962 provided that the High Courts would interfere only when there was no other adequate remedy available to the petitioner. The same position has been maintained in our Constitution which

stipulates non-availability of efficacious remedy as a pre-condition for interference by the High Court Division.

In the case of Shafiqur Rahman…Vs…Certificate Officer, Dhaka and another reported in 29DLR SC 232, the Supreme Court noted the change and observed in paragraph 28:

> "... if the alternative remedy is adequate and equally efficacious, in that case, such an alternative remedy is a positive bar to the exercise of the writ jurisdiction, even though the writ concerned is in the nature of certiorari."

Article 102(2)(a) having incorporated the rule of exhaustion of statutory remedies, existence of any efficacious remedy will preclude reliefs thereunder. The bar of efficacious remedy is not attracted when an infringement of fundamental right is alleged.

In the case of Dhaka Warehouse Ltd. and another...Vs... Assistant Collector of Customs and others reported in 1991 BLD (AD) 327, it was held in paragraph 12:

> "12. In principle, where an alternative statutory remedy is available, an application under Article 102 may not be entertained to circumvent a statutory procedure. There are, however, exceptions to the rule. Without attempting an exhaustive enumeration of all possible

> extraordinary situations, we may note a few of them. In spite of an alternative statutory remedy, an aggrieved person may take recourse to Article 102 of the Constitution where the vires of a statute or a statutory provision is challenged; where the alternative remedy is not efficacious or adequate; and, where the wrong complained of is so inextricably mixed up that the High Court Division may, for the prevention of public injury and the vindication of public justice, examine that complaint. It is needless to add that the High Court Division is to see that the aggrieved person must have good reason for by-passing an alternative remedy."

If the impugned action is wholly without jurisdiction in the sense of not being authorized by the statute or is in violation of a constitutional provision, a Writ Petition will be maintainable without exhaustion of the statutory remedy. Over and above, on the ground of mala fides, the petitioner may come up with a Writ Petition by disregarding the statutory alternative remedy. It is well-settled that mala fides goes to the root of jurisdiction and if the impugned action is mala fide, the alternative remedy provided by the statute need not be availed of. Another exception has been made in the case of M. A. Hai and others...Vs...Trading Corporation of Bangladesh reported in 40 DLR (AD) 206 where the Appellate Division has held in paragraph 10 that availability of

alternative remedy by way of appeal or revision will not stand in the way of invoking the writ jurisdiction of the High Court Division raising purely a question of law or interpretation of any statute.

However, both Mr. Khaled Hamid Chowdhury and Mr. S. M. Zahurul Islam have emphatically relied upon the decision in Concord Pragatee Consortium Limited Case. In that case, the impugned order of the administrative authority has not been found mala fide and that's why, the High Court Division has held that without exhausting the Review Panel of the CPTU, that Writ Petition (Writ Petition No. 2782 of 2013) is not maintainable. But reverting to the present Writ Petitions before us, we have found the impugned order dated 03.01.2017 mala fide. Secondly, in the self-same decision rendered in Concord Pragatee Consortium Limited, the High Court Division has clearly, categorically and unequivocally observed that an aggrieved person can invoke the writ jurisdiction of the High Court Division without exhausting any statutory remedy, if the impugned action is mala fide. In other words, the invocation of Article 102 of the Constitution by an aggrieved party on the ground of mala fides has been reinforced by the decision in the case of Concord Pragatee Consortium Limited without exhausting the statutory alternative forum. This being the position, the reliance of both Mr. Khaled Hamid Chowdhury and Mr. S. M. Zahurul Islam on the decision in the case of Concord Pragatee Consortium Limited does not appear to be of any avail to them.

From the above deliberations, it is manifestly clear that inspite of statutory alternative efficacious remedy, any aggrieved person can invoke the

writ jurisdiction of the High Court Division under Article 102 of the Constitution provided the impugned action or order is mala fide or actuated by bad faith. In the instant case, as we have found that the impugned order dated 03.01.2017 is a mala fide order, the petitioner can maintain the present Writ Petitions even without exhausting the statutory higher fora including the Review Panel of the CPTU as provided by the PPA of 2006 and the PPR of 2008.

Regard being had to the discussions made above and in the facts and circumstances of the case, we find merit in both the Rules. Accordingly, the Rules are made absolute without any order as to costs.

The impugned Memo No. 35.00.0000.030.07.003.15-06 dated 03.01.2017 (Annexure-'A' to the Writ Petition No. 1932 of 2017) issued by the respondent no. 2 cancelling the Invitation For Proposal No. 01/EOI/SE/SRC/2014-2015 dated 29.09.2015 (Annexure-'D-1') and directing issuance of fresh requests for Expression of Interests (EOIs), publication of requests for Expression of Interests (EOIs) bearing Memo Nos. 418 and 434 both dated 24.01.2017 (Annexures- 'B' and 'B-1' to the Writ Petition No. 1932 of 2017 respectively) in "The Daily Kaler Kantho" dated 26.01.2017 and the impugned publication of request for Expression of Interest (EOI) bearing Memo No. 1002 dated 22.02.2017 (Annexure-'A' to the Writ Petition No. 3636 of 2017) in "The Daily Jugantor" dated 24.02.2017 are hereby declared to be without lawful authority and of no legal effect and the respondents are directed to approve the Combined Technical and Financial Evaluation dated 18.02.2016 (Annexure-'F-1' to the Writ Petition No. 1932 of 2017) and award

the contract in favour of the petitioner forthwith for the work covered under the Invitation For Proposal dated 29.09.2015 (Annexure-‘D-1’ to the Writ Petition No. 1932 of 2017) in accordance with law.

**J. B. M. HASSAN, J:**

I agree.