

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

Writ Petition No. 11868 of 2021

With

Writ Petition No. 11008 of 2021

In the matter of:

An application under article 102(2)(a)(ii) of the Constitution of the People's Republic of Bangladesh.

AND

In the matter of:

Identification System for Enhancing Access to Services (IDEA) Project (2nd Phase), a Project of the Election Commission of Bangladesh, represented by the Chief Election Commissioner,

...Petitioner(In W.P. No. 11868/2021)

With

Jamuna Star Save Guard Services Limited represented by its Managing Director Md. Salim Raza

... Petitioner(In W.P No.11008/2021)

-Versus-

Central Procurement Technical Unit(CPTU), Implementation Monitoring and Evaluation Division, Ministry of Planning, Sher-E-Bangla Nagar, Dhaka, represented by the Director-General,

...Respondents (In W.P.No.11868/2021)

Bangladesh Election Commission represented by the Chief Election Commissioner of Nirbachan Bhaban, Agargaon, Dhaka and others,

...Respondents (In W.P.No.11008/2021)

Mr. Towhidul Islam, Advocate,

..For petitioner (In W.P.No.11868/2021)

Mr. Mahbub Shafique with

Mr. Sifat Mahmud, Advocates,

..For petitioner (In W.P.No.11008/2021)

Mr. Mahbub Shafique with

Mr. Sifat Mahmud, Advocates,

..For respondent (In W.P.No.11868/2021)

Mr. Towhidul Islam, Advocate,

..For petitioner (In W.P.No.11008/2021)

Judgment on: 15.03.2022

Present:

**Mr. Justice Md. Khasruzzaman
and**

Mr. Justice Md. Mahmud Hassan Talukder

Md. Khasruzzaman, J.

Since on single judgment and order dated 10.11.2021 passed by the Review Panel No.02, Central Procurement and Technical Unit (CPTU) in Review Appeal No. 076 of 2021 both the aforesaid two *Rules Nisi* have arisen and since the facts and law involved in both the *Rules Nisi* are same and similar and since the *Rule Nisi* in Writ Petition No. 11868 of 2021 has been directed to be heard along with Writ Petition No. 11008 of 2021, both the *Rules Nisi* are taken up for hearing and disposal together and are being disposed of by this single judgment.

In Writ Petition No. 11868 of 2021 under article 102 of the Constitution, on 12.12.2021 *Rule Nisi* was issued in the following terms:

“Let a Rule Nisi be issued calling upon the respondents to show cause as to why the impugned judgment and order dated 10.11.2021 passed by the respondent Nos. 2 to 5 in Review Application 076 of 2021 in respect of Tender process of Invitation of Tender No. ECS/IDEA Project (2nd Phase)/ NCS-9/2021 dated 11.06.2021 for Package No. NCS-9, Lot No.01 for ‘Section for Service Providing Firm for Delivery of Scanning & Equipment Maintenance Operators’ for Identification System for Enhancing Access to Services (IDEA) Project (2nd Phase) (Annexure-R) shall not be declared illegal and has been done without lawful authority and is of no legal effect and/or pass such other or further order or orders as to this Court may seem fit and proper.”

In Writ Petition No. 11008 of 2021 under article 102 of the Constitution, on 22.11.2021 *Rule Nisi* was issued in the following terms:

“Let a Rule Nisi be issued calling upon the respondents to show cause as to why the respondents should not be directed to implement the judgment and order dated 10.11.2021 passed by the Review Panel No.02, Central Procurement and Technical Unit(CPTU) in Review Appeal No. 076 of 2021 (Annexure-J) and/or pass such other or further order or orders as to this Court may seem fit and proper.”

Upon going through the terms of both the *Rules Nisi* as quoted above, we are of the view that for proper adjudication of the issue involved in both the *Rules Nisi*, Writ Petition No. 11868 of 2021 is required to be taken up at first for disposal since the finding and decision of same will govern the *Rule Nisi* in Writ Petition No. 11008 of 2021.

Facts necessary for disposal of the *Rule Nisi* of Writ Petition No. 11868 of 2021, in short, are as follows:

That the petitioner through the Project Director published a Invitation for Tender vide Tender Reference No. ECS/IDEA Project (2nd Phase) Pro/ NCS-9/2021 dated 10.06.2021 in two national dailies for the supply of 519 personnel Scanning and Equipment Maintenance Operators for the Identification System for Enhancing Access to Services (IDEA) Project (2nd Phase) (Annexure-A). As many as 12 Manpower Supplying Firms including the respondent No.6 have purchased the said tender documents and submitted the same along with all necessary papers in accordance with law. Thereafter, the petitioner authority by letter dated 11.08.2021

requested the Inspector General, Department of Inspection of Factories and Establishment (DIFE) to give updated information of the aforesaid firms (Annexure-C). In reply, the Department of Inspection of Factories and Establishment by its Memo dated 16.08.2021 gave updated information of those 12 firms including the respondent No.6 (Annexure-D) stating *inter alia* that the respondent No.6 held a 'B' category licence under Licence No. 025/2016-17 which was valid upto June, 2021 and the respondent No. 6 is competent to supply manpower upto 500 persons at maximum as evident from the chart enclosed with the said Memo of the Department of the Inspection of Factories and Establishments. However, 06(six) Manpower Outsourcing Firms participated in the competition including the respondent No.6 and the Tender Evaluation Committee evaluated those 6 tenderers on 11.08.2021 and submitted Evaluation Report on 12.09.2021 finding four tenderers as non-responsive in primary evaluation including the respondent No.6 and also finding two tenderers as responsive and they were recommended for further financial evaluation. The technical evaluation report was accepted and approved by the petitioner vide Memo dated 15.09.2021(Annexure-F) and thereafter, the respondent No.6 by its Memo dated 06.10.2021 and 14.10.2021 requested the relevant authority to re-evaluate their tender proposals but the same were not considered by the petitioner. In the meantime, the technically responsive two tenderers were financially evaluated on 20.09.2021 and the Committee submitted financial evaluation report to the Election Commission vide Memo dated 04.10.2021 recommending to sign a

two year contract with Firm namely 'i People Limited' (Annexure-I) and the same was accepted vide Memo dated 11.10.2021 (Annexure-J) and letter of acceptance was issued vide Memo dated 13.10.2021 to the responsive firm. In the meantime, on 19.10.2021 the respondent No.6 had filed Review Appeal No. 076 of 2021 before the Review Panel of the CPTU as per rule 57(12) of the Public Procurement Rules, 2008 whereupon the Director General, CPTU by letter dated 21.10.2021 directed the petitioner not to issue any notification of award in respect of the tender (Annexure-O). The Chairperson of the Review Panel-2 of the CPTU also by letter dated 27.10.2021 directed the respondents not to issue any notification of award in respect of the tender. On 31.10.2021 the petitioner project submitted a written reply to the respondent No.2 in the Review application denying all the allegations raised by respondent No.6 and also submitted the reasons and grounds for determining the respondent No.6 as being non responsive to the tender process (Annexure-P). However, after hearing both the parties, the Review Panel No.2 of the CPTU vide judgment and order dated 10.11.2021 allowed the said review appeal declaring the respondent No.6 to be technically responsive with direction upon the authority to conclude the financial evaluation of the respondent No.6 by the judgment and order dated 10.11.2021(Annexure-R).

Finding no other alternative, the petitioner has challenged the aforesaid judgment and order dated 10.11.2021 in the instant writ petition No. 11868 of 2021 in the form of certiorari under article 102 of the Constitution and obtained the *Rule Nisi* in the manner

as quoted hereinabove. On the other hand, the respondent No.6 has filed Writ Petition No. 11008 of 2021 seeking direction upon the present petitioner to execute the aforesaid judgment and order dated 10.11.2021 passed by the Review Panel No.02, CPTU in Review Appeal No. 076 of 2021 and obtained the *Rule Nisi* in the manner as quoted hereinabove.

Respondent No. 6 has filed affidavit-in-opposition contending *inter alia* that section 3A of the Bangladesh Labour Act, 2006 is not applicable for the petitioner project as per section 1(4)(ka) of the said Ain since the project is admittedly funded by the Government of Bangladesh and as such, the petitioner project do not have any legal authority to ask for the Manpower Outsourcing Licence as per the provision of the Bangladesh Labour Act, 2006. It is stated that there is no bar/restriction in law on the contractor to supply more than the number mentioned in its category of licence and as such, the contention of the petitioner that the respondent No.6 is competent to supply manpower up to 500 persons at maximum is not only misconceived but also misleading. Therefore, on 06.10.2021 the respondent No.6 submitted written complaint before the authority as per section 29 of the Public Procurement Act, 2006 read with rules 56 and 57 of the Public Procurement Rules, 2008. But the petitioner did not pay any heed to the same and as such, on 11.10.2021 and 14.10.2021 the respondent No.6 submitted written complaints before the authority, but the same did not see the light of the day. Hence, the respondent No.6 had filed Review Appeal No. 76 of 2021 before the Review Panel of the

CPTU as per rule 57(12) of the Public Procurement Rules, 2008 whereupon the Director General, CPTU by letter dated 21.10.2021 directed the petitioner not to issue any notification of award in respect of the tender. The Chairperson of the Review Panel-2 of the CPTU also by letter dated 27.10.2021 directed the petitioner not to issue any notification of award in respect of the tender. However, after hearing both the parties, the Review Panel No.2 of the CPTU vide judgment and order dated 10.11.2021 allowed the said review appeal declaring the respondent No.6 to be technically responsive with direction upon the authority to conclude the financial evaluation of the respondent No.6 by the judgment and order dated 10.11.2021. It is alleged that although the said judgment and order dated 10.11.2021 passed by the Review Panel-2, CPTU was communicated to the petitioner authority, they did not implement the same till date. Hence, the respondent No.6 made representation dated 11.11.2021 requesting the authority to implement the aforesaid judgment and order dated 10.11.2021 passed by the Review Panel-2, CPTU but they did not take any steps on the same. Lastly, the respondent No.6 issued notice demanding justice upon the petitioner authority along with relevant authority on 16.11.2021 to implement the judgment and order dated 10.11.2021 passed by the Review Panel-2 of the CPTU but they did not pay any heed to the same. Hence, the respondent No.6 has filed Writ Petition No. 11008 of 2021 in the form of mandamus and obtained the *Rule Nisi* and as such it is prayed that the *Rule Nisi* in Writ Petition No. 11868 of 2021 is liable to be discharged and that of Writ Petition No. 11008 of 2021 is liable to be made absolute.

Mr. Md. Tawhidul Islam, the learned Advocate appearing on behalf of the petitioner (in writ Petition No. 11868 of 2021) submits that the respondent No.6 having accepted the terms and conditions of the tender document participated in the tender process and as such, now he cannot deny adherence to any provisions, terms and conditions of the tender document. He further submits that admittedly the respondent No.6 is holding 'B' category licence pursuant to which he is competent to supply manpower upto 500 persons at maximum not beyond that and as such, the same do not meet the requirement of the tender notice and therefore, the Technical Evaluation Committee has rightly declared the respondent No.6 to be non responsive in the primary evaluation process but the Review Panel No.02, CPTU without considering this legal aspect has passed the judgment and order which is not sustainable in the eye of law. Referring to section 3A of the Bangladesh Labour Act, 2006 the learned Advocate for the petitioner also submits that the manpower supplying contractor has to have licence from the Government to carry on the manpower supplying activities and since the respondent No.6 does not have any such licence he is incompetent to supply manpower as per the requirement of the tender document to the petitioner. Referring to rule 60 of the Public Procurement Rules, 2008 he submits that the CPTU is empowered under the law to make recommendations or suggestions in a tender process i.e. it does not have any authority to declare any tenderer as responsive either technically or financially and as such, the judgment and order passed by the Review Panel No.2 of the CPTU declaring the petitioner as

technically responsive is beyond the law and as such the same has no binding effect in the eye of law. Referring to the finding of the Review Panel No.2, CPTU to the effect that “the issuance of the letter of acceptance during the pendency of the objection of the respondent No.6 is not in accordance with law” is not sustainable because such letter of acceptance was issued on 13.10.2021 which is much before the petitioner has received the letter dated 21.10.2021 from the office of the CPTU requesting the petitioner not to further proceed with the signing of contract with the successful tenderer and as such, the finding and decision arrived at by the Review Panel No.02, CPTU being not based on proper appreciation of fact and law, the same suffers from legal infirmities and as such call for interference by this Division. Hence, the *Rule Nisi* issued in the instant writ petition No. 11868 of 2021 is liable to be made absolute.

Mr. Mahbub Shafique, the learned Advocate appearing on behalf of the respondent No.6 (in Writ Petition No. 11868 of 2021) submits that as per the provision of sections 1(4)(a), 2(31) and 2(65) of the Bangladesh Labour Act, 2006 the requirement of Manpower Outsourcing Licence under section 3A of the said Ain, 2006 is not applicable for the instant tender and as such, the Review Panel No.02, CPTU has rightly considered the legal aspect of the case and allowed the appeal by the judgment and order dated 10.11.2021 declaring the petitioner as technically responsive. He further submits that although the outsourcing licence is not required in case of the petitioner, the petitioner also filed such

licence along with the tender document and the respondents did not mention regarding category of licence in the tender document and as such, the Review Panel-2 CPTU considering this aspect rightly allowed the appeal by the impugned judgment and order in this *Rule Nisi*. He also submits that as per rule 60(5) of the Public Procurement Rules, 2008 the decision of the Review Panel stands as final and all concerned parties must act upon such decision and as such, the respondents are under a legal obligation to execute the judgment and order dated 10.11.2021 passed by the Review Panel No.02, CPTU in Review Appeal No. 076 of 2021 and hence he has prayed for discharging the *Rule Nisi* in Writ Petition No. 11868 of 2021 with a direction to implement the aforesaid judgment and order of Review Panel No.2 CPTU in accordance with law as sought for in Writ Petition No.11008 of 2021. Regarding the binding effect of the aforesaid impugned judgment and order the learned Advocate for the petitioner in Writ Petition No. 11008 of 2021 has relied in the case of **Bangladesh Telecommunications Company Limited, Telephone Revenue Bhaban, Sher-e-Bangla Nagar, Dhaka Vs. Netas Telekomunikasyon A.S. Turkey, 10 ADC (2013) 909** and submits that the decision of the Review Panel shall be final and that all relevant parties shall act as per the aforesaid decision. Finally he submits that the Review Panel constituted by the CPTU is part and parcel of the Public Procurement Ain, 2006 and the Public Procurement Rules, 2008 and as such, the decision of the Review Panel cannot be ignored or avoided by the respondent authority. In support of his submission, he has relied in the case of **Bangladesh Telecommunication Regulatory Commission**

(BTRC) and another Vs. KM Alam and Company and others, 19 BLC (AD) (2014) 134. Upon making the aforesaid submissions, the learned Advocate for the respondent No.6 has prayed for discharging the *Rule Nisi* in writ Petition No. 11868 of 2021 and thereby making the *Rule Nisi* in Writ Petition No. 11008 of 2021 absolute with a direction as prayed for therein.

Heard the learned Advocates appearing on behalf of their respective parties and perused the writ petition along with supplementary affidavit, affidavits-in-opposition and papers annexed thereto.

To determine as to whether the impugned judgment and order of the Review Panel No.02, CPTU is lawful and in accordance with law, we need to see the legal and factual aspect of the case of the both the parties.

It is not disputed that on 11.06.2021 the respondent has issued the tender for supply of 519 Personnel Scanning and Equipment Maintenance Operators for the project office operations. Admittedly, the respondent No.6 is holding a 'B' category Licence under Licence No. 025/2016-17. From the materials on record, it appears that 06(six) outsourcing firms were participated in the competition including the instant respondent No.6 and the tenders submitted by them were evaluated on 11.08.2021 by the Tender Evaluation Committee and after evaluation, the said committee submitted its report dated 12.09.2021 showing four tenderers including the respondent No.6 as non responsive in primary evaluation and the rest two tenderers were found technically

responsive and as such, they were recommended for further financial evaluation. After evaluating those two technically responsive tenderers in the Financial Evaluation process, one 'iPeople Limited' was recommended by the Committee for signing a two year contract. Now, the question is whether the finding and declaring the respondent No.6 to be non responsive is in accordance with law.

On perusal of the Tender, it appears that clause C to the Tender Data Sheet (Section-2) has provided qualification criteria wherein it has been stated as follows:

- (i) A proven track record of at least 5(five) years' experience in conducting large scale recruitment and selection of outstanding staff in projects of similar nature.*
- (ii) Must have Manpower Outsourcing valid License.*
- (iii) Experience of conducting Computer bases examination.*
- (iv) Experience to work with different semi government/government organizations/multinational/ financial sector/donor agency like UNDP, World Bank, Asian Development Bank etc."*

The most important and key criteria for being qualified or responsive in the tender process is that the Manpower Supplying Firm must have Manpower Outsourcing valid Licence. The respondent No.6 although argued that section 3A of the Bangladesh Labour Act, 2006 is not applicable in case of the respondent No.6 but it claims that the respondent No.6 has such type of licence issued by the authority under section 3A and 326 of

the Bangladesh Labour Act, 2006 read with rules 7(7) and 355(1) of the Bangladesh Labour Rules, 2015 which has been annexed as Annexure-E to the writ petition No. 11008 of 2021. It appears from section 3A of the Bangladesh Labour Act, 2006 that notwithstanding anything contained in any other law, any contractor firm in whatever the name, who supplies manpower in different posts to different organizations, cannot carry on such type of activities without having any valid licence from the Government. In section 3Ka(2) of the said Act, it has been provided that the contractor firm must obtain the licence from the Government within 06(six) months from the date of promulgation of Bangladesh Labour Rules and in section 3A(4) it has been stated that the issuance of registration/licence will be guided by the provision of the Bangladesh Labour Rules. Admittedly, Bangladesh Labour Rules, 2015 has come into force on and from 15.09.2015 vide SRO No. 291-Ain/2015. The relevant provision regarding issuance of licence to a manpower has been provided in rules 7 and 355 of the Rules, 2015. In rule 355(1) it has been stated that the Inspector General of the Mills and Factories on receiving the fees specified in schedule-7 attached to the Rules shall issue licence under form-78 to the applicant in respect of the number of manpower to be supplied. If we go through the schedule-7 of the Rules then it will make us clear that a chart has been given under serial No.6 wherein it is found that against outsourcing firm under 'B' category licence, the number of manpower/personnel to be supplied, has been shown as 201 to 510. Admittedly, the respondent No.6 is 'B' the category licence holder and as such, his capacity to supply

manpower is from 201 to 510 personnel but not more than that. In the instant case, the petitioner has asked for delivery of 519 personnel scanning and equipment maintenance operators. As such, the Tender Evaluation Committee in primary evaluation found the respondent no.6 as non-responsive in the bids. As such, the findings of the Review Panel No.02 of the CPTU to the effect that "তাছাড়া category কোন আইনগত বিষয় হতে পারে না। ইহা কেবলই প্রশাসনিক বিষয় যা পরিবর্তনশীল" made in the judgment and order in respect of the manpower licence of the petitioner is illegal and without lawful authority. When law provides in section 3A(3) of the Bangladesh Labour Act, 2006 that the labours supplied to different authorities by the contractor firm would be treated and termed as the labour of the concerned contractor firm and they will be governed by the Labour Ain and as such, the findings of the Review Panel No.02 of the CPTU to the effect that "নির্বাচন কমিশনের কর্মচারীগণকে কোন ভাবেই শ্রমিক হিসেবে গণ্য করা যায় না। কাজেই শ্রম আইনকে এখানে গৌণ বিষয় ধরা বাঞ্ছনীয় ছিল। এছাড়াও শ্রম আইন সরকার বা সরকারের অধীনস্থ অফিসের কর্মচারী নিয়োগের ক্ষেত্রে প্রযোজ্য নয়।" is illegal and inconsistent with the law. In respect of the observation of the Review Panel of the CPTU that the issuance of the Letter of Acceptance during the pendency of the objection before it in the appeal is not in accordance with law, we have already found that the financial evaluation report was accepted and approved by the respondent on 11.10.2021 and the project authority has issued letter of acceptance under Memo dated 13.10.2021 to the said responsive firm namely, iPeople Limited notifying that their proposal dated 15.07.2021 has been approved by the respondent. On the other hand, the petitioner project has received the letter dated

21.10.2021 from the office of the CPTU requesting the authority not to further proceed with the signing of contract with the successful tenderer. As such, the observation and findings on the issuance of the letter of acceptance in the judgment and order of the Review Panel No.02 of the CPTU is not a actual findings and not based on proper appreciation of fact.

Now comes to the submission of the learned Advocate for the petitioner made on the provision of rule 60 of the Public Procurement Rules, 2008 as stated hereinabove. Rule 60 is relating to disposal of appeal by the Review Panel. On perusal of the said rule 60, it appears that the Review Panel has been empowered to make recommendations or suggestions in respect of declaring any tenderer as responsive or non responsive either technically or financially in a tender process. But in the instant case the Review Panel No.02 of the CPTU has declared the respondent No.6 to be responsive and as such, the Review Panel has travelled beyond its jurisdiction by declaring him to be technically responsive which is not in accordance with law. The decisions referred to by the learned Advocate for the respondent no.6 has no manner of application in the facts and circumstances of the present case.

We have noticed that in one breath the respondent No.6 has argued that section 3A of the Bangladesh Labour Act, 2006 is not applicable and immediately in the same breath the respondent No.6 has claimed that he has such type of licence issued by the authority under the provision of the Bangladesh Labour Act and the authority could have considered the licence of the respondent

no.6 and as such, we are of the view that the respondent No.6 is playing hot and cold in the same breath to achieve the goal which he cannot approbate and reprobate that his tender ought to have considered by the authority. As a Rule of law, as per the terms of the tender notice a tenderer had to satisfy the eligibility criterion for technical capability and competence as well as financial capacity and organizational resources. In the present case, the respondent No.6 does not have the valid licence to compete the tender process which has been rightly looked into by the Evaluation Committee in accordance with law.

In view of the aforesaid discussions, the findings and decision arrived at by the Review Panel of the CPTU being not based on proper appreciation of law and fact, the same calls for interference by this Division in this *Rule Nisi* and as such the same does not bear any binding effect on the petitioner authority. Accordingly, we find merit in the *Rule Nisi* issued in Writ Petition No. 11868 of 2021 which is liable to be made absolute.

In the result, the *Rule Nisi* in Writ Petition No. 11868 of 2021 is made absolute and hence, the impugned judgment and order dated 10.11.2021 passed by the respondent Nos. 2 to 5 in Review Application 076 of 2021 in respect of Tender process of Invitation of Tender No. ECS/IDEA Project (2nd Phase)/ NCS-9/2021 dated 11.06.2021 for Package No. NCS-9, Lot No.01 for 'Section for Service Providing Firm for Delivery of Scanning & Equipment Maintenance Operators' for Identification System for Enhancing Access to Services (IDEA) Project (2nd Phase) (Annexure-R) is hereby

declared to have been passed without lawful authority and is of no legal effect.

It appears from the term of the *Rule Nisi* in Writ Petition No. 11008 of 2021 that *Rule Nisi* was issued as to why a direction should not be given upon the respondents to implement the aforesaid judgment and order of the Review Panel No.02, CPTU.

Since the judgment and order dated 11.10.2021 passed by the Review Panel No.02, CPTU in Review Application No. 076 of 2021 has been declared to be without lawful authority in Writ Petition No. 11868 of 2021, the *Rule Nisi* in Writ Petition No. 11008 of 2021 is liable to be discharged.

In the result, the *Rule Nisi* in Writ Petition No. 11008 of 2021 is discharged.

However, there will be no order as to costs.

Communicate the order.

MD. Mahmud Hassan Talukder, J.

I agree.