

**12 SCOB [2019] HCD**

**HIGH COURT DIVISION**

**(SPECIAL ORIGINAL JURISDICTION)**

Writ Petition No. 4730 of 2017  
With

Writ Petition No. 11134 of 2017  
**Softesule Private Limited**  
... Petitioner

**-Vs-**

**Govt. of Bangladesh represented by the  
Secretary Ministry of Health,  
Bangladesh Secretariat, Dhaka, and  
others**

.....Respondent

Mr. Sheikh Fazle Noor Taposh with  
Mr. Mohammad Mehidi Hasan  
Chowdhury

Mr. Sayed Abdullah Al Mamun Khan and  
Mrs. Jausna Parveen and

Mrs. Upoma Shaha, Advocates  
... Petitioner

( In both the writ petitions)  
AND

Mr. Md. Mokleshur Rahman, DAG with  
Mr. Samarendra Nath Biswas, AAG and  
Ms. Farida Yeasmin, AAG  
....for respondent No.2

(In writ petition No.11134/2017)  
Ms. Tasmia Proadhan, Advocate  
.....for respondent No.9

( In both the writ petitions)

Heard on: 01.11.2017 and 23.11.2017  
Judgment on: 04.01.2018

**Present:**

**Ms. Justice Naima Haider  
&  
Mr. Justice Zafar Ahmed**

**CPTU, Rule 60 of the PPR, Review Panel, NOC;**

**It has been settled by this Division that when a proceeding is initiated which affects the rights of a party, the party whose right would be affected is to be given the opportunity to represent its case, whether statutory contemplated or not. ... (Para 19)**

**The Review Panel found the petitioner “non responsive” and found the respondent No.9 responsive. This means that the Review Panel, in exercising its powers, substituted its judgment over the Selection Panel’s finding. The powers of the Review Panel, as set out in Rule 60 of the PPR are clear. The Review Panel is not conferred with the power of “substitution of judgments”. Rule 60 of the PPR also does not confer any residuary power upon the Review Panel. The powers conferred are exhaustive. The Review Panel cannot, in exercising powers under Rule 60 of the PPR, proceed to assume more powers than actually conferred. In the instant case, the Review Panel has done exactly this. In the instant case, the Review Panel has exceeded jurisdiction and therefore, its findings cannot be sustained. ... (Para 20)**

**JUDGMENT**

**NAIMA HAIDER J:**

1. As both the writ petitions are interconnected, these are taken up together and disposed of by this single judgment.

2. In Writ Petition No. 4730 of 2017, this Division issued Rule Nisi be issued calling upon the respondents to show cause as to why the impugned order dated 29.08.2016 passed in Review Application No. 30 of 2016 by the Review Panel No. 2 of Central Procurement Implementation Monitoring and Evaluation Division of Ministry of Planning under the signature of Respondent Nos. 6, 7 and 8 whereby the CPTU has declared “Ranata Limited” as “Responsive” and the Petitioner Company as “Non-responsive” in relation of certain goods and ancillary services, viz supply of “Vitamin-A capsule (200000 IU)” against Package No. G-1540(Lot-03), IFB No. CMSD/G- 1540/ICB/2015-16/D-6/35 dated, 02.03.2016 for Procurement of “Vitamin-A Capsule” under Health Sector Development Program (HSDP) (Annexure-B) should not be declared to have been issued without any 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.

3. In Writ Petition No. 11134 of 2017, this Division issued Rule Nisi be issued calling upon the respondent to show cause as to why the illegal acts of the Respondents not issuance of No. Objection Certificate (NOC) for the year of 2015-2016 in favour of the Petitioner for supplying 2,70,00,000/-(Two Crore Seventy Lac) Pcs Vitamin A Capsules under Package No. G-1540 (Lot-03), IFB No. CMSD/G-1540/ICB/2015-16/D-6/35 dated 02.03.2016 for procurement of “Vitamin-A Capsule” under Health Sector Development Program (HSDP) should not be declared illegal and without any lawful authority and as to why No Objection Certificate (NOC) will not be issued for the year of 2015-2016 in favour of the Petitioner for supplying 2,70,00,000/-(Two Crore Seventy Lac) Pcs of Vitamin A Capsules under Package No. G-1540(Lot-03) IFB No. CMSD/G-1540/ICB/2015-16/D-6/35 date 02.03.2016 for procurement of “Vitamin-A Capsule” under Health Sector Development Program (HSDP) and/ or pass such other or further order or orders as to this Court may seem fit and proper.

4. Writ Petition No. 4730 of 2017 was filed in light of the relevant factual backgrounds: the petitioner was set up in 1962 and has revolutionized Soft Gelatin Capsule manufacturing in India. The petitioner has received acknowledgements from ISO and World Health Organization.

5. The petitioner participated in a competitive in light of Tender Notice published by the respondent No.5 for procurement of “Vitamin A Capsule” under Health Populations and Nutrition Sector Development Program (HPNSDP), Credit No. 4954-BD. The petitioner was successful and subsequently, the petitioner signed the NOA. Thereafter, the respondent No.5 sent a letter to the respondent No. 2 for issuance of a No Objection Certificate in favour of the petitioner.

6. In the meantime, the respondent No. 5 issued an L/C in favour of the petitioner for supply of 2,70,00,000 (Two Cores Seventy Lac) pieces of Vitamin A Capsules and on 02.08.2016, the petitioner issued the Pro-forma Invoice in connection with supply of the said Vitamin A Capsules. Suddenly, the respondents requested the petitioner to delay shipment given that one of the bidders have appealed in the Review Panel of CPTU regarding the tender. In the meantime, the respondent No. 2 requested the respondent No. 5 to issue NOC in favour of the petitioner and on 23.08.2016, the respondent No.2 requested the Secretary, Ministry of Health to issue instruction regarding issuance of NOC in favour of the petitioner.

7. In light of the request for delaying shipment, the respondent No. 5 sent a letter to the Executive Director of Bangladesh Bank for amendment of the LC issued in favour of the petitioner.

8. On 30.10.2016, the respondent No. 5 sent a letter to the petitioner informing it that the Review Panel 2 of CPTU declared “Renata Limited” as “responsive” and the petitioner was declared “non responsive in relation to Lot 3. In the meantime, the petitioner exchanged correspondence with the respondents regarding the issuance of NOC. The petitioner inquired and found out that on 29.08.2016, the Review Panel 2 of CPTU in Review Application No. 30 of 2016 declared Renata Limited as responsive and declared petitioner as “non responsive”. In the said proceedings, the petitioner was not made a party and the said order dated 29.08.2016 was passed without offering the petitioner any opportunity to represent its case.

9. Being aggrieved, the petitioner moved this Division and obtained Rule Nisi.

10. The Rule was opposed by the respondent No.9-Renata Limited by filing an Affidavit in Opposition. According to respondent No.9, the order dated 29.08.2016 was passed in accordance with law. The respondent No.9 points out that the petitioner was not a qualified bidder to start with in light of the Notification dated 02.06.1998 issued from the Prime Minister’s Office which provides that any medicine that is produced in ample within Bangladesh cannot be imported from overseas. The Tender Evaluation Committee did not take into consideration the aforesaid notification and illegally declared the petitioner to be responsive. The respondent No.9 further points out that since the petitioner does not have a NOC, it cannot be regarded as a responsive bidder. The respondent No.9, through its Affidavit in Opposition argued that it has met the required selection criteria and that it should be declared responsive.

11. Mr. Sheikh Fazle Noor Taposh, the learned Counsel for the petitioner takes us through the writ petition and submits that the order dated 29.08.2016 is without lawful authority. In this regard, Mr. Taposh submits that the Review Panel does not have the jurisdiction to make the petitioner non responsive and the respondent No.9 responsive in light of Rule 60 of the Public Procurement Rules 2008 (“ hereinafter referred to as PPR”). According to Mr. Taposh, under Rule 60 of the PPR, Review Panels can only reject appeal, set out Rule and procedures governing the subject matter of appeal, recommend remedial measures in appropriate circumstances, suggest annulment of non compliant actions and suggest compensation. Mr. Taposh referring to Rule 60 points out that the Review Panel does not have jurisdiction to declare the petitioner non responsive. Mr. Taposh also points out that the order dated 29.08.2016 was without lawful authority as the same was in violation of the principles of natural justice. With regard to the contentions raised in the Affidavit in Opposition, Mr. Taposh submits that the terms of the Tender Document clearly contemplates that the local manufacturers may not be able to carry out the obligations contemplated in the Tender Document and hence foreign participation was invited; on this count, Mr. Taposh submits that there was never any violation of the order issued by the Prime Minister’s Office. Mr. Taposh further points out that when the respondents themselves have repeatedly recommended for the issuance of No Objection Certificate, the failure to issue the same cannot be attributed on the petitioner; accordingly it is a misconceived submission that the petitioner is not otherwise qualified to participate. Mr. Taposh lastly makes elaborate submission on the eligibility of the respondent No.9 and contends that respondent No.9 was

correctly described as non responsive by the Selection Committee. On the above counts, he prays that the Rule should be made absolute.

12. Mr. Md. Mokleshur Rahman, the learned Deputy Attorney General on behalf of respondent No. 2 in writ petition No. 11134 of 2017 submits that now a days, as many as eight pharmaceuticals industries in our country had given registration to produce Vitamin A 200000IU Capsule to resolve the demand all over the country on the other hand those industries are earning foreign currency by export in such medicine and as a result of which NOC could not be issued in favour of the petitioner company.

13. He further submits that as per the decision/instruction of the Hon'ble Prime Minister as well as respondent no. 1, some restriction has been imposed in respect of importation of such medicine including the medicine in question which has been manufacturing locally and adequately and now a days, since the medicine in question has been manufacturing in country adequately, the respondent no. 2 by the letter date 27.06.2016 (Annexure-2 series to this writ petition), refused to issued NOC in favour of the petitioner company for supplying "Vitamin A Capsule" but without challenging the said order of refusal of the instant writ petition has been filed and as such considering this aspect of the case be the Rule is liable to be discharged.

14. Ms. Tasmia Prodhan, the learned Counsel appearing for the respondent No.9 submits that the respondent No. 9 should have been declared responsive by the Selection Committee and that the petitioner was correctly declared non responsive. She next submits that as per Public Procurement Rule 2008 the decision by the Review Panel shall be final and all concerned parties will act upon such decision. The review Panel of CPTU can only recommend or advice is not correct proposition. Furthermore they have full authority to make decision and binding upon the concerned parties. Hence, as a government institution, CMSD is obliged to follow the order of CPTU.

15. She further submits that the Technical Evaluation Committee of the said tender failed to take into consideration the ITB Clause 16.4 of the Bidding Document which states that, "Products offered from overseas manufacturers must be registered with the National Regulatory Authority from the country of origin and bidder should submit a copy of the Product Registration Certificate". She lastly submits that the Rule is liable to be discharged on the maintainability ground because there is other efficacious and alternative remedy to agitate petitioner' grievances and prayer that the Rule be discharged.

16. We have heard the learned Counsels at length and perused the Writ Petitions supplementary affidavits and the Affidavit in Opposition and other materials on record.

17. The Invitation for Bids dated 02.03.2016 issued by the respondents clearly contemplate both foreign and local participation. It further contemplate that local manufacturers shall be given preference. The relevant part of the Invitation for Bids reads as follows:

*"... A margin of preference will be granted for the goods manufactured in Bangladesh if it meets the criteria as specified in the bidding documents..."*

18. The petitioner has relied on the Invitation for Bid and submitted the bid. The petitioner was found responsive by the Selection Committee. Not only that, the respondents have opened L/C in favour of the petitioner and the respondents have repeatedly taken steps

to obtain NOC for the petitioner. At this stage, we do not think it was appropriate for the Review Panel to erroneously rely on the Notification dated 02.06.1998 issued from the Prime Minister's Office and hold that the petitioner is non-responsive. The tender document clearly contemplated participation of foreign bidders for supplying the Vitamin A Capsules. That be the position, we think that the respondents themselves have taken the view that it may not be possible for the local manufacturers to supply all the Vitamin A Capsules. Why else would the tender documents contemplate participation of foreign entities?

19. What is interesting is the manner in which the Review Panel proceeded with disposal of the review. In deciding the "responsiveness" of the petitioner, the Review Panel proceeded with the determination without the petitioner. It has been settled by this Division that when a proceeding is initiated which affects the rights of a party, the party whose right would be affected is to be given the opportunity to represent its case, whether statutorily contemplated or not. We fail to understand why the Review Panel proceeded with determination without hearing the petitioner. As a result, the decision of the Review Panel did not take into account the explanation(s) that could have been offered by the petitioner. The findings of the Review Panel also did not take account of the petitioner's explanation(s). In our view, the Review Panel proceeded with the determination and arrived at the decision in violation of the principles of natural justice.

20. The Review Panel found the petitioner "non responsive" and found the respondent No.9 responsive. This means that the Review Panel, in exercising its powers, substituted its judgment over the Selection Panel's finding. The powers of the Review Panel, as set out in Rule 60 of the PPR are clear. The Review Panel is not conferred with the power of "substitution of judgments". Rule 60 of the PPR also does not confer any residuary power upon the Review Panel. The powers conferred are exhaustive. The Review Panel cannot, in exercising powers under Rule 60 of the PPR, proceed to assume more powers than actually conferred. In the instant case, the Review Panel has done exactly this. In the instant case, the Review Panel has exceeded jurisdiction and therefore, its findings cannot be sustained.

21. Accordingly, we find merit in the Rule. The Rule issued in Writ Petition No. 4730 of 2017 is made absolute for the reasons set out aforesaid.

22. The petitioner filed Writ Petition No. 11134 of 2017 challenging the failure of the respondents to issue NOC in favour of the petitioner for the year 2015-2016 for 2,70,00,000 pieces of Vitamin A capsules under Package No. G-1540 (Lot3), IFB No. CMSD/G-1540/ICB/2015-16/D-6/35 dated 02.03.2016. The facts in this writ petition and the facts in Writ Petition No. 4730 of 2017 are overlapping. As such, we do not find it necessary to set out the factual backgrounds further.

23. From the facts set out and the documents annexed, it seems to us that the petitioner had been issued NOC previously and for the relevant year, different departments of the Government had repeatedly requested for issuance of the NOC in favour of the petitioner. The NOC to be issued is interconnected with the performance under the tender documents. It serves no purpose if the petitioner is awarded the tender but the NOC is not issued. Since the petitioner had been issued NOC in the past, even well after the issuance of the order dated 02.06.1998, the different departments of the Government have consistently recommended for issuance of the NOC in favour of the petitioner and the petitioner was awarded the tender and without the NOC the petitioner would not be able to perform the obligations under the tender. We find no reason as to why the respondents should not issue the NOC in favour of the

petitioner for the year 2015-2016. We take the view that the failure of the respondents in issuing the NOC is manifestly arbitrary and without lawful authority. Accordingly, we are inclined to make the Rule issued in Writ Petition No. 11134 of 2017 absolute with the following directions:

***“ The concerned writ respondents in Writ Petition No. 11134 of 2017 is directed to issue NOC in favour of the petitioner for the year 2015-2016 for 2,70,00,000 pieces of Vitamin A capsules under Package No. G-1540 (Lot3), IFB No. CMSD/G-1540/ICB/2015-16/D-6/35 dated 02.03.2016 within 15 days from the date of receipt of the copy of the judgment and order. ”***

24. Communicate the judgment at once.