

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

Writ Petition No. 8501 of 2023

In the matter of:

An application under article 102 of the Constitution of the People's Republic of Bangladesh.

- AND-

In the matter of:

Mim Development Engineering Ltd.

.....**Petitioner.**

-Versus-

Government of the People's Republic of Bangladesh, represented by the Secretary, Secondary and Higher Education Division, Ministry of Education, Bangladesh Secretariat, Dhaka and others,

..... **Respondents.**

Mr. Mahbub Shafique, Advocate with

Mr. Shifat Mahmud Advocate

.....**For the petitioner.**

Mr. Bivuti Tarofder, Advocate

.....**For respondent No.3.**

Mr.Md. Quamrul Islam, Advocate with

Mr. Zishan Mahmud, Advocate and

Ms. Munmun Nahar, Advocate

.....**For respondent No.6.**

Mr. Bepul Bagmar DAG with

Mr. Mohammed Rezaul Hoque AAG

.....**For respondent No.1.**

Judgment on: 06.12.2023

Present:

Mr. Justice Md. Khasruzzaman

And

Mr. Justice K M Zahid Sarwar

Md. Khasruzzaman, J:

In this application under article 102 of the Constitution, on 10.07.2023 the *Rule Nisi* under adjudication was issued in the following terms:

“ Let a Rule nisi be issued calling upon the respondents to show cause as to why the impugned notification of Award dated 04.07.2023 issued under the signature of the respondent No.4 in favour of respondent No.6 for “construction of 10-storied academic building with 10 storied foundation in/c sanitary, water supply and electrification works at BoroBongram Government High School, Shahmokhdum, Rajshahi” under Tender ID: 762696, Invitation Reference No. 37.07.0000.016.14.012.20.316 dated 10.08.2022 in violation of the order dated 08.08.2022 passed by the Review Panel-4, Central Procurement Technical Unit (CPTU) in Appeal Petition No.021 of 2023 (Annexure-J) should not be declared to have been issued 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.”

At the time of issuance of the aforesaid *Rule Nisi*, all further proceedings of Tender ID:762696, Invitation Reference No.37.07.0000.016.14.012.20.316 dated 10.08.2022 in violation of the order dated 08.08.2022 passed by the Review Panel-4, Central Procurement Technical Unit (the CPTU) in Appeal Petition No. 021 of 2023 (Annexure-J) was stayed for a period of 06(six) months from date.

Facts relevant for disposal of the Rule in short are that the petitioner is a private limited company incorporated on 22nd day

of July, 2018 under the Companies Act, 1994. Before incorporation as a company, the petitioner used to run its business as a proprietorship business vide Annexures-A and A-1 to the writ petition. On 07.12.2022 respondent No.4 i.e. Executive Engineer, Education Engineering Department, Rajshahi published a Tender Notice vide Tender ID No. 762696 and Invitation Reference No. 37.07.0000.016.14.012.20.316 dated 10.08.2022 via e-GP portal for “construction of 10-storied academic building with 10 storied foundation in/c sanitary, water supply and electrification works at BoroBongram Government High School, Shahmokhdum, Rajshahi” As per the said tender notice, the petitioner purchased the tender document by paying required fees and participated in the tender process by submitting its bid proposal vide Annexure-B to the writ petition. Four other bidders including respondent No.6 namely, TBL-ME-R & B JV also submitted their respective bid proposals. But in the tender opening sheet dated 27.12.2022 the respondent No.6 has been shown as lowest responsive bidder and the petitioner company has been shown as second responsive bidder vide Annexure-C to the writ petition. The respondent No. 6 Joint Venture Company was not formed in accordance with law. Joint Venture Contract Agreement (in short, the JVCA) dated 21.12.2022 shows that the said joint venture is the composition of three business entities out of them the first party is the lead partner and 2nd

and 3rd parties are Managing Partners. Condition 5 of the said contract also shows that Managing Partners shall be in charge of all financial and legal nature related activities with all responsibilities. Whereas rule 54(4) of the Public Procurement Rules, 2008 provides that each partner of the Joint Venture shall be jointly and severally liable for the execution of the contract and also jointly and severally liable for all liabilities and ethical and legal obligations in accordance with the contract terms. As such, condition 5 of the contract is in violation of rule 54(4) of the PP Rules, 2008. Again as per condition 11 of the contract the respondent No.6 JV nominated two authorized representatives to deal with contract administration and management having authority to conduct all business for and on behalf of any and all the partners of the JV during the tendering process and during execution of contract including the receipt of payments for and on behalf of the JV. Whereas, rule 54(5) of the Public Procurement Rules, 2008 provides that the JV shall nominate one representative to deal with contract administration and management having authority to conduct all business for and on behalf of any and all the partners of the JV during the tendering process and during execution of contract including the receipt of payments for and on behalf of the JV. As such, the condition 11 of the contract is also violation of rule 54(5) of the Public Procurement Rules, 2008.

Having found the above mentioned anomalies in the JVCA, respondent No.4 vide his Memo No.নি:প্র:/ইইউ/রাজ/২০২৩/৪৪ dated 17.01.2023 sought opinion of the Director General, Central Procurement Technical Unit(hereinafter referred to as the CPTU) whereupon the CPTU vide its letter dated 02.02.2003 issued under the signature of Director provided opinion stating that tender evaluation committee may take decision on the applicability of Joint Venture Agreement in the light of rule 54(4) of the Public Procurement Rules, 2008 as well as the instruction provided in ITT and GCC of the tender document (Annexure-E and E-1 to the writ petition). Despite of receiving opinion from the CPTU, the respondent No.4 being the Procuring Entity as well as Chairperson of the Tender Evaluation Committee most illegally evaluated the respondent No. 6-JVC as technically responsive bidder. Afterwards, on 09.03.2023, 19.03.2023 and 29.03.2023 respectively the petitioner company submitted written complaints as per rule 57 of the PPR, 2008 before the respondent Nos. 4, 3 and 2 respectively (Annexures-F,F-1 and F-2 to the writ petition). But the respondents did not respond to the said written complaints of the petitioner company.

Under such circumstances, the petitioner company preferred Appeal Petition No.021 of 2023 before the Review Panel No. 4 of the CPTU as per rule 57(12) of the PPR, 2008 (Annexure-G to the writ petition). After hearing and on perusal

of the materials on record, the said review panel vide its order dated 08.05.2023 allowed the review appeal of the petitioner company and directed the Procuring Entity to re-evaluate the bid proposals and issue NoA to the technically responsive bidder following PPR, 2008 (Annexure-H to the writ petition). Since the JV agreement of the respondent No. 6 was grossly flawed and the recommendation made by the Tender Evaluation Committee (in short, the TEC) was thoroughly biased as found by the Review Panel in its order, the petitioner company being the second highest responsive bidder is legally entitled to get the work order. But, all of a sudden the respondent nos. 4 and 5 most illegally and arbitrarily recommended to approve the bid proposal submitted by respondent No.6 company in violation of the order dated 08.05.2023 passed by the Review Panel of the CPTU in Appeal Petition No.021 of 2023 vide Annexure-I to the writ petition. Thereafter, the respondents most illegally issued the impugned notification of award dated 04.07.2023 in favour of the respondent No.6 company in violation of the order dated 08.05.2023 passed by the Review Panel No.4 of CPTU in Appeal Petition No.021 of 2023 (Annexure-J to the writ petition).

Under such circumstances, the petitioner has challenged the said notification of award dated 04.07.2023 issued under the signature of respondent No.4 in favour of respondent No. 6 JV company and obtained *Rule Nisi* in the instant writ petition as quoted hereinabove.

At the time of issuance of the *Rule Nisi* on 10.07.2023, all further proceeding of Tender ID No. 762696 in pursuance to the impugned NoA dated 04.07.2023 (Annexure-J) was stayed for a period of 06 (six) months.

Challenging the aforesaid interim order of stay, the respondent No.6 filed Civil Petition for Leave to Appeal No. 2606 of 2023 before the Appellate Division, and after hearing both the parties and on perusal of the impugned order as well as other materials on record, the Appellate Division vide its judgment and order dated 09.10.2023 disposed of the civil petition for leave to appeal directing this Bench to hear and dispose of the Rule as expeditiously as possible preferably within 02(two) months from the date of receipt of the order.

As per order of the Appellate Division, we have fixed the Rule for hearing on 30.10.2023 and heard the learned Counsels for both the parties in extenso.

Respondent No.3, Chief Engineer, Education Engineering Department (EED) filed affidavit-in-opposition stating *inter alia* that the writ petition is not maintainable. The review panel of the CPTU by allowing appeal filed by the petitioner asked the Procuring Entity to re-evaluate the bid proposals and issue NoA to the technically responsive bidder following PPR, 2008 and also directed to refund the security money deposited by the complainant. As per the aforesaid direction of the CPTU, the Procuring Entity was empowered to re-evaluate the bid

proposals and accordingly, they re-evaluated the bid proposals and found that the writ respondent No. 6 was being the lowest bidder and technically responsive bidder following PPR, 2008 and issued the Notification of Award to the respondent No.6 on 04.07.2023. To determine the responsibility of all the partners, the joint venture agreement has to be considered as a whole and accordingly, the Procuring Entity considered clauses 6 and 8 along with 5 and 11 of the JVCA while evaluating the bid proposals and as such, there is no illegality in issuing NoA to the respondent No. 6. It is stated that the formation of review panel suffers from *corum non judice* inasmuch as rule 58(2)(ga) of the PPR, 2008 provides that there must be at least 03(three) members and one of them shall be the Chairman but in the instant case the order was passed and signed by two members and hence the order was in violation of rule 58(2)(ga) of the PPR, 2008 and consequently, the same has no any binding effect on the parties. Hence the *Rule Nisi* is liable to be discharged.

Respondent No. 6, TBL-ME-R & B JV, filed affidavit in opposition denying all material allegations made in the writ petition. It appears that since on similar statements as stated above the respondent No. 3 has filed the affidavit in opposition, it is not necessary to repeat the same. However, by filing the affidavit in opposition the respondent No.6 prays for discharging the Rule.

Mr. Mahbub Shafique, the learned Advocate appearing on behalf of the petitioner submits that as per rule 60(5) of the PPR, 2008 the respondent Nos. 4 and 5 being the Chairperson and Member Secretary of the Tender Procuring Entity are bound to follow the order of the Review Panel of the CPTU and as such, there is no scope to approve the bid proposal of the respondent No.6 company. Despite of such legal position, the respondent Nos. 4 and 5 most illegally and arbitrarily recommended to approve the bid proposal of respondent No.6 and consequently, the notification of award (NoA) was issued under the signature of respondent No.4 in favour of respondent No.6 and as such, the same is liable to be declared to have been issued without lawful authority and is of no legal effect. Referring to the decisions in the case of **K.M.Alam and others Vs. People's Republic of Bangladesh and others, 18 BLC(2013) 221** which was affirmed by the Appellate Division in **19 BLC(Ad)134**, Mr. Mahbub Shafique, the learned Advocate submits that if such type of irregularity and illegality in the procuring process is allowed, it will encourage the corrupt people to get illegal opportunity in the procuring process causing huge damage to the public interest, that is not the intention of the legislature in promulgating the PP Act, 2006 and PPR, 2008. In placing the aforesaid submissions, the learned Advocate prays for making the *Rule Nisi* absolute.

Mr. Bivuti Tarofder, the learned Advocate appearing on behalf of the respondent No.3 submits that as per direction of the Review Panel of the CPTU, the Procuring Entity re-evaluated the bid proposals and found the respondent No.6 to be the lowest bidder and technically responsive bidder following PPR, 2008 and accordingly, issued NoA to the respondent No.6 on 04.07.2023. According to him, the joint venture agreement has to be considered as a whole for the purpose of determination of the responsibilities of all the partners of the company. He further submits that clause 6 of the said agreement provides that all partners will be responsible for the implementation of the project. Clause 8 of the said agreement also provides that the net profit amount would be distributed excluding project expenditure, VAT, Tax and Government duties as per participation ratio and each partner of the JV shall be jointly and severally liable for all liabilities and as such, it can not be said that JV agreement was framed in violation of section 27 of the PP Act, 2006 and rule 54(4) of the PPR, 2008 and hence, there is no scope to say that the respondent No.6 is a non-responsive bidder.

Mr. Bivuti Tarofder, the learned Advocate also submits that the Review Panel, who passed the judgment and order, was not constituted properly as required by rule 58(2)(ga) of the PPR, 2008 and as such, the Review Panel of the CPTU did not have the jurisdiction to hear the concerned review petition.

Accordingly, he submits that since the very formation of the Review Panel of the CPTU suffers from *corum non iudice*, the order passed by the said Review Panel has no legal binding force. In this respect, he has relied in the case of **Hasina Khatoon and others Vs. Bangladesh and others, 48 DLR(AD)13; Salim (Md) Vs. Assistant Commissioner of Land and Chairman, Settlement Board and others, 54 DLR 72; and Secretary, Ministry of Public Works Vs. Bangladesh Abandoned Buildings, 18 BLD(HCD)583.**

Lastly, the learned Advocate for the respondent No.3 submits that as per direction of the Review Panel of the CPTU the matter was re-evaluated and they issued the Notification of Award in favour of the respondent No. 6 and as such, there arises a fresh cause of action against which the petitioner could have filed appeal before the Review Panel and in not doing so, the writ petition is not maintainable and the Rule issued therein is also liable to be discharged.

Mr. Md. Qamrul Islam, the learned Advocate appearing on behalf of the respondent No. 6 submits that the procuring entity did not commit any illegality in re-evaluating and issuing NoA in favour of the respondent No. 6. However, by adopting the submissions advanced by the respondent No. 3, Mr. Md. Qamrul Islam, the learned Advocate submits that the *Rule Nisi* is liable to be discharged.

We have heard the learned Advocates of the respective parties and considered the writ petition and other papers annexed thereto as well as the decisions as referred to by the parties.

It appears that the respondent No.4 i.e. Executive Engineer, Education Engineering Department, Rajshahi published a tender on 07.12.2022. As many as 05(five) bidders participated in the bid. Ultimately, respondent No.6 namely, TBL-ME-R & B JV was found to be the lowest and technically responsive bidder as appears from the tender opening sheet dated 27.12.2022.

In this respect, the petitioner has stated and submitted that since the joint venture company i.e. respondent No.6 was not constituted in accordance with law as appearing in clauses 5 and 11 of the JVCA, its bid proposal cannot be dealt with and considered as per the tender notification and consequently, the petitioner made representation to the authority for reviewing the matter and re-evaluating the bid proposal.

Afterwards, the respondent No.4 sought opinion. After getting opinion from the CPTU, the procuring entity evaluated the bid of the respondent No.6 to be technically responsive bidder. Ultimately, the matter was brought to the Review Panel of the CPTU by filing Appeal Petition No.021 of 2023 by the petitioner. The review panel of the CPTU vide its judgment and order dated 08.05.2023 allowed the appeal and remanded the

matter back to the Procuring Entity to re-evaluate the bid proposals and issue NoA to the technically responsive bidder following the PPR, 2008.

Afterwards, the Tender Evaluation Committee (TEC) evaluated the bid proposals and recommended to approve the bid of the respondent No.6 as technically responsive bidder on 19.06.2023. Eventually, the respondents issued notification of award dated 04.07.2023 to the respondent No.6 who thereafter submitted performance guarantee(PG) .

Now, by filing the instant writ petition the petitioner alleged that the order of the review panel of the CPTU was not complied while re-evaluating and issuing the NoA in favour of the respondent No.6 as the very formation of the Joint Venture Company of respondent No.6 is not in accordance with law.

In contra, the respondent No.6 by filing affidavit-in-opposition candidly stated and submitted that the constitution of the very review panel of the CPTU suffers from *corum non judice* and therefore, any order or decision passed by the said Review Panel has no any legal and binding force in the eye of law. It is also stated that for the purpose of determination of responsibilities of all partners of JVC, the agreement should be considered as a whole including clauses 6 and 8 of the JVCA. So, the submission of the petitioner on the formation of JVC by the JVCA is not sustainable in the eye of law as claimed by the petitioner.

In the circumstances, we need to justify as to whether the review panel itself in fact had jurisdiction to entertain the said appeal petition as that goes to the very root of all issues in so far the writ petition is concerned.

Admittedly, the appeal petition was heard and disposed of by the review panel consisting of a Chairperson and one Member. The mandatory provision of rule 58 of the PPR, 2008 for formation of review panel is required to be followed wherein it has been provided that review panel must be constituted with three members having expertise in three areas as provided by sub-rule(2) of rule 58 of the said PPR. Sub-rule (4) of rule 60 of the PPR also provided that the majority decision of the review panel shall be regarded as the decision of the review panel. So, it is clear that the provision of sub-rule(4) of rule 60 of the PPR, 2008 further strengthens the position that there has to be three members in a review panel which may hear a review petition filed by under the relevant provisions of the PPA, 2006 and the PPR, 2008. So, this being the position in law, we are of the view that the review panel did not have jurisdiction to hear the said review petition. This view finds support in an unreported case of **A.K. Traders Limited Vs. Government of Bangladesh and others (Writ Petition No.5930 of 2018 judgment delivered on 11.10.2018); Hasina Khaton and others Vs. Bangladesh and others, 48 DLR(AD)13; Salim (Md) Vs. Assistant Commissioner of Land and Chairman, Settlement Board**

and others, 54 DLR 72; and Secretary, Ministry of Public Works Vs. Bangladesh Abandoned Buildings, 18 BLD(HCD)583

Consequently, the observation and discussion as made by the said review panel in the judgement and order dated 08.05.2023 have become immaterial for the very fact that the decision became a decision of *corum non-judice*. Therefore, we are of the view that, the matter should be heard by a competent review panel wherein the parties will be at liberty to raise the issues as raised by them before this Court.

Accordingly, the judgment and order dated 08.05.2023 and NoA dated 04.07.2023 are hereby set aside. The respondent Nos. 3 and 4 are hereby directed to assign this matter to a review panel comprising of three members in strict compliance of the provisions of rule 58 of the PPR,2008 within a period of 7(seven) days from the date of receipt of the copy of this order. The said review panel thereafter shall dispose of the Appeal Petition No.021 of 2023 filed by the petitioner within 7 (seven) working days. The parties will be at liberty to raise all their concerned issues before the said review panel.

With the above order, observation and directions, the *Rule Nisi* is disposed of. There will be no order as to costs.

Communicate the order.

K M Zahid Sarwar, J.

I agree.