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

WRIT PETITION NO.8664 of 2024

IN THE MATTER OF:

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

And IN THE MATTER OF:

Consortium of Bashundhara Multi-Trading Company Ltd., Equentia Natural Resources Pte. Ltd. and Atro International FZE.

- Petitioner

-VS-

Government of Bangladesh and others. For the Respondents.

And

Mr. Mustafizur Rahman Khan, Senior Advocate

Mr. Mamun Chowdhury, Advocate with

Mr. Suhan Khan, Advocate and

Ms. Quazi Irtiza Anjum, Advocate

.... For the Petitioner.

Mr. Aneek R. Haque, Advocate,

...... For the Respondent No.5

Mr. Sheikh Mohammad Morshed, Senior Advocate with

Mr. Ramjan Ali Sikder, Senior Advocate with

Mr. Md. Saiful Alam Chowdhury, Advocate

... For the Added Respondent No.6

Ms. Shathika Hossain, D.A.G with

Mr. Md. Mohaddesh-Ul-Islam (Tutul), D.A.G with

Mr. Md. Obaidur Rahman Tarek, A.A.G and

Ms. Sabikun Nahar Tithi, A.A.G

....For the Respondents-government.

Heard on:21.08.2024, 28.08.2024 01.09.2024, 03.09.2024, 04. 09.2024 And judgment on: 05.09.2024

Present:

Mrs. Justice Farah Mahbub.

And

Mr. Justice A.K.M. Rabiul Hassan

Farah Mahbub, J:

In this Rule Nisi, issued under Article 102 of the Constitution of the People's Republic of Bangladesh, the respondents have been called upon to show cause as to why the impugned judgment and order dated 04.07.2024 passed by the Review Penal No.3 of Bangladesh Public Procurement Authority (former Central Procurement Technical Unit), IMED, Ministry of Planning in Review Petition No.062 of 2024 upon disposing of the appeal filed by the petitioner in connection with Tender Invitation Reference No.27.32.0000.008.07.003.23.2862 dated 15.11.2023 floated by the respondent No.5 for procurement and delivery of imported coal at plant jetty (CDP) for Matarbari 2X600 MW Ultra-Super Critical Coal Fired Power Plant (Annexure-A), should not be declared to have been passed without lawful authority and hence, of no legal effect.

At the time of issuance of the Rule the operation of the impugned judgment and order dated 04.07.2024 passed by the Review Penal No.3 of Bangladesh Public Procurement Authority (former Central Procurement Technical Unit), IMED, Ministry of Planning in Review Petition No.062 of 2024 was stayed by this Court including all further proceedings of Tender Invitation Reference No.27.32.0000.008.07.003.23.2862 dated 15.11.2023 floated by the respondent No.5 for procurement and delivery of imported coal at plant jetty (CDP) for Matarbari 2X600 MW Ultra-Super Critical Coal Fired Power Plant (Annexure-A), for a prescribed period.

Challenging the interim order of stay the added respondent No.6,

Consortium of Unique Cement Industries Limited and Aditya Birla

Global Trading Singapore Pte. Limited moved before the Hon'ble Appellate Division by filing Civil Petition for Leave to Appeal No.2458 of 2024. However, after hearing the respective contending parties the Hon'ble Judge in Chamber of the Appellate Division vide order dated 25.07.2024 stayed the interim order of stay passed by the High Court Division for a prescribed period with direction upon this Bench to dispose of the Rule on merit.

Facts, in brief, are that the petitioner is a consortium of 3(three) private limited companies namely, (i) Bashundhara Multi-Trading Company Ltd., a private limited company incorporated under the Companies Act ,1994 and is engaged in the business of trading of products and/or goods, (ii) Equentia Natural Resources Pte. Ltd., a foreign private limited company incorporated and registered under the laws of Singapore and (iii) Atro International FZE, a foreign private company incorporated and registered under the law of the United Arab Emirates. The petitioner is the market leader for the importation and supply of imported coal in the respective market of Bangladesh. It imports and supplies coal for the Maitree Super Thermal Power Plant project at Rampal and is playing a critical role in ensuring Bangladesh's energy security.

On 15.11.2023, the respondent No.5 as being the procuring entity floated an international tender vide Tender Invitation Reference No. 27.32.0000.008.07.003.23.2862 for procurement and delivery of imported coal at plant jetty (CDP) for Matarbari 2X600 MW Ultra-Super Critical Coal Fired Power Plant for a period of 36 months following the One Stage Two Envelop tendering method. However, keeping in view of the nature

of the coal being classified as a flammable and sensitive good the authority concerned fixed the original qualification requirements and technical criteria for those aspirant bidder or partner of the consortium who are:

- 1) Coal mine owner; or
- 2) Holding company of a coal mine owner; or
- 3) An international trading company.

If, however, the bidder is a coal mine owner or holding company of a coal mine owner, then the coal mine owner should have exported at least 12 million metric tones (12.0 MMT) of thermal coal in aggregate during the last 5(five) years, reckoned from the date of opening of technical proposal.

If the bidder is an international trading company then it or any one of the partners of the consortium should have performed transportation through sea route using ocean going vessel of at least 10 (ten) million metric tons (10 MMT) of the thermal coal during the past 5 (five) years, reckoned from the date of opening of technical proposal.

The petitioner being aspirant to participate in the said bid purchased the tender documents on 04.12.2023 as the original bid closing date was fixed on 09.01.2024.(Annexure-B). At this juncture, the respondent No. 5, the procuring entity allegedly in order to protect the interest of the vested quarters and precisely to give undue advantage to one particular bidder i.e., the added respondent No.6 had amended the technical criteria on 03.01.2024 (Annexure-C1) and included the "importer of coal" just before 3(three) working days of the original bid closing date. At the same time, the experience of supply of "iron ore, fertilisers, chemicals, cement, etc. or grain" had been enlisted by the said authority as a qualifying

experience in addition to the coal supply experience. Along with the said amendment the procuring entity had also refixed the last date of selling tender document i.e. on 30.01.2024 including the bid opening and closing date and time on 31.01.2024 (Annexure-C4).

On 25.01.2024, the respondent No.5 made a further amendment in the technical criteria (Annexure-C2) upon deleting the words "importer of coal" and replaced the same with the word "importer". Said respondent had also included "a long term sales contract of coal with any power utility or its holding company for at least 06 (six) million metric tons for a minimum period of 03 (three) years" as another option of coal supply experience. However, with the subsequent amendment the bid closing date was re-fixed on 08.02.2024.

The petitioner along with the added respondent No.6 and two other participants submitted their respective bid on 08.02.2024. The petitioner, however, submitted their bid in two envelopes, one containing a technical proposal with all relevant documents and the other containing financial proposal including price schedule as per the terms of the bid documents as stipulated by the respondent No. 5 company.

Accordingly, on 08.02.2024 the bids of the respective bidders including the petitioner were opened and their proposals /offers were evaluated by the Tender Evaluation Committee (in short, TEC) of the respondent No. 5. However, till May, 2024 the TEC of the respondent No. 5 did not ask for any clarification from the petitioner.

In this regard, the respondent No. 5 company has produced before this Court a photocopy of the evaluation report of the technical proposal submitted by the TEC on 30.04.2024. From the said report dated

30.04.2024 it appears that the TEC after careful examination and evaluation of the technical proposals of the respective bidders found 3 (three) bidders including the petitioner as technically non-responsive. The offer of the petitioner was not accepted for non-compliance of the condition of bid security as well as Invitation for Bids (IFB) clause 5.2(ii). However, the bid of the added respondent No.6 was found technically responsive.

Meanwhile, on 04.05.2024 the petitioner came to learn from a reliable source that its bid was rejected as being non-responsive. Accordingly, it made repeated applications on 08.05.2024, 09.05.2024, and 12.05.2024 respectively addressing the Company Secretary of the respondent No.5 with a prayer to review their bid as being a qualified and experienced bidder and capable of supplying the good in question. In response thereof the Company Secretary of the said respondent vide Memo dated 13.05.2024 (Annexure-D4) informed the petitioner that the tender evaluation process was ongoing. However, on the very next day i.e. on 14.05.2024 (Annexure-D5) said respondent informed the petitioner that the TEC on completion of technical evaluation found the petitioner as technically non-responsive.

Accordingly, said report of the TEC was placed before the Board of Directors of the respondent No.5 company along with all necessary documents for final decision. The Board of the respondent No.5 company in its 05/2024th Board meeting dated 01.05.2024 took decision to approve the evaluation report of the TEC on technical proposal with further decision to open the financial proposal of the added respondent No.6 as being that only responsive bidder. Said decision of the Board was

subsequently approved in the 06/2024th Board meeting of the respondent No.5 company dated 31.05.2024 (Annexure–F). On 08.05.2024 with notice to the added respondent No.6, the TEC on opening the financial proposal of the said respondent found its offer significantly high and accordingly, gave recommendation as under:

- "(1) Financial proposal of Consortium of Unique Cement Industries Limited and Aditya Birla Global Trading Singapore Pte. Limited could not be accepted due to significantly higher price considering long term contract;
- (1) TEC's report can be placed before the approving authority for next course of action."

On 31.05.2024, the Board of the respondent No. 5 company in its 06/2024th Board meeting took decision to give direction upon the TEC to negotiate with the added respondent No.6 on landing price. Relevant part of the said resolution dated 31.05.2024 (Annexure-F) is quoted below:

"দরদাতা Consortium of Unique Cement Industries Ltd. and Aditya Birla Global Trading (Singapore) Pte. Ltd. এর Quoted price 108.87 USD/Mt যার মধ্যে FOB 86.73 USD এবং Ocean Freight 22.14 USD / উপরোক্ত প্রস্তাবিত FOB 86.73 USD বিগত এক বছরের ICI3 এর গড়বাজারদর অপেক্ষা ৪.৫২ (৮৬.৭৩- ৮২.২১) বেশি এবং বিডিং ডকুমেন্ট অনুযায়ী ICI3 Reference Base Index (Date 05.01.2024) অপেক্ষা ৭.৩৮ USD বেশি (৮৬.৭৩-৭৯.৩৫) / এছাড়াও দরদাতার প্রস্তাবিত FOB বাংলাদেশের অন্যান্য কয়লা ভিত্তিক বিদ্যুৎ কেন্দ্রের কয়লার FOB Price অপেক্ষা ৫% হতে ৬.৬৫% বেশি।

Directorate General of Shipping (DG Shipping) 4 Bangladesh Shipping Corporation (BSC) হতে Ocean Freight এর যে cost Estimate দেওয়া হয়েছে তা অপেক্ষা দরদাতার Ocean Freight ১০৫% থেকে ১০৭% বেশি। এছাড়াও দরদাতার প্রস্তাবিত landed price (FOB + Freight) এর সাথে বাংলাদেশের অন্যান্য কয়লা ভিত্তিক বিদ্যুৎ কেন্দ্রের কয়লা ক্রয়ের দরের সাথে তুলনা করলে দেখা যায় য়, দরদাতার প্রস্তাবিত দর BCPCL অপেক্ষা ৮.০২ ডলার (১০৮.৮৭-১০০,৮৫) এবং RNPL অপেক্ষা ৫.৮ ডলার (১০৮.৮৭-১০৩.০৭) বেশি। দরদাতার প্রস্তাবিত দর BIFPCL অপেক্ষা 1.44

ডলার (১০৮.৮৭-১১০,৩১) কম। যেহেতু মাতারবাড়ি বিদ্যুৎ কেন্দ্রে Panamax Vessel এর মাধ্যমে কয়লা পরিবহন হবে এবং মাতারবাড়ির GCV 5000 Keal/kg BCPCLRNPL সেহেতু দরদাতার প্রস্তাবিত পর বাজারদর significantly বেশী মূল্যায়ন প্রতিবেদনে উল্লেখ করে।

জाणीয় शुक्रष्व वित्विष्ठनाয় দেশে नित्रविष्टिয় विपार अत्ववाश्यश्च छाणीয় श्रीए७ Voltage Frequency Stable ताथात सार्थ माणतवाि विपार क्टिसि ठालू ताथा खणीव छाजित। खविश्व करतन या, जिभििकाितित्यल এत माणतवाि विपार क्टिसि छाल्या या विपार क्रिसि छाणामी छुन २०२४ मिलाइन छेन काला भाउता थात, या पिरा विपार क्टिसि खाणामी छुन २०२४ भर्यस्त ठालात मखन स्त्व। खा ३२०० या. ३. क्रमणत माणतवाि विपार क्टिसि खाणामी छुन २०२४ वस्त हाला पाला मिला नित्रविभित विक्र अत्वतार विग्न घरेत, जार्विक लािएशिछ वृद्धि भात। भण छानुसाति २०२४ ममरात्र भत्र स्टल खांखािक वािष्ठा क्रिसि भात। भण छानुसाति २०२४ ममरात्र भत्र स्टल खांखािक वािष्ठा क्रिसि भात। भण छानुसाति २०२४ ममरात्र भत्र स्टल खांखािक वािष्ठा क्रिसि भात। भण छानुसाति २०२४ ममरात्र भत्र स्टल खांखािक वािष्ठा क्रिसि भात। क्रिसि छाना क्रिसि छाना क्रिसि खाना क्रिसि छाना छाना विपार विपार क्रिसि भात। छेक ममरात्र भागात्र माणानि क्रम मत्र शािक विस्वरि छिन खनााना विपार क्रिसि अस्त माणि क्रम मत्र धािक क्रमाना विष्ठिक खनााना विपार क्रिसि अस्त माणि क्रमान प्रारे क्रिसि छाना मित्र। घाठिल भूत्रा माणि छाना छाना हाला विपार छेन भात्र। याठिल भूत्र मिला विपार छेन भान वाह्र विपार हिता विपार छेन भात्र। स्ति विपार छेन भात्र। स्ति विपार छेन भात्र छाना साहिल विपार छेन भात्र छाना विपार छेन भात्र विपार छेन भात्र छाना हिता स्ति विपार छेन भात्र छाना हिता साहिल विपार छेन भात्र छाना हिता साहिल विपार छेन भात्र छाना विपार छेन भात्र छाना हिता साहिल विपार छेन साहिल विपार छेन भात्र छाना साहिल विपार छेन भात्र छाना विपार छेन भात्र छाना साहिल छोना साहिल विपार छेन साहिल विपार छेन साहिल विपार छेन साहिल विपार छिन साहिल विपार छोन साहिल विपार छान साहिल साहि

জाতীয় গুরুত্ব বিবেচনায়, পাবলিক প্রকিউরমেন্ট বিধিমালা ২০০৮ এর বিধি ৯৯(১)(গ) অনুযারী যদি সর্বনিয় মূল্যায়িত গ্রহণযোগ্য দরদাতার উদ্ধৃত দর তাৎপর্যপূর্ণ মাত্রায় দাপ্তরিক প্রাক্কলিত ব্যয়ের অতিরিক্ত হয়, তাহা হইলে ক্রয়কারী উক্ত অতিরিক্ত ব্যয়ের অনুসন্ধান করিবে এবং কার্য সম্পাদনের ব্যাপ্তি য়াস বা ঝুঁকি এবং দায়িত্ব পুনঃবন্টনের মাধ্যমে চুক্তিমূল্য য়াস করার উদ্দেশ্যে সর্বনিম্ন মূল্যায়িত দরপত্রদাতার সহিত নিগোসিয়েশন করিতে পারিবে।"

মাতারবাড়ি বিদ্যুৎকেন্দ্রের পরিচালনার জন্য যে কয়লা প্রয়োজন তা সিপিজিসিবিএল এর নিজস্ব অর্থায়নে করা হবে। পাবলিক প্রকিউরমেন্ট বিধিমালা ২০০৮ এর বিধি ১১(৩) অনুযায়ী- "কোম্পানী আইন, ১৯৯৪ (১৯৯৪ সনের ১৮ নং আইন) এর অধীন নিবন্ধিত কোন কোম্পানী যদি কোন কয়ের ক্ষেত্রে সরকারী রাজস্ব বা উয়য়ন বাজেটের আগুতায় প্রাপ্ত সরকারী তহবিল ব্যবহার করে, তাহা হইলে মূল্যায়ন প্রতিবেদন এবং চুক্তি সম্পাদনের অনুমোদন প্রদানের ক্ষেত্রে, উক্ত কোম্পানী, কোম্পানী আইনের অধীন প্রযোজ্য নিজস্ব প্রশাসনিক এবং আর্থিক ক্ষমতা অর্পণ সংক্রান্ত বিধি বিধান অনুসরণ করিবে।"

বোর্ডকে আরও জানানো হয় যে, বিদ্যুৎ সেক্টরে কোম্পানি আইন ১৯৯৪ অনুসারে গঠিত BIFPCL এবং BCPCL তাদের নিজস্ব ফান্ড ব্যবহার করে ইতোপূর্বে OTM এ কয়লা এনয়ের ক্ষেত্রে সর্বনিম্ন responsive bidder এর সাথে price negotiation করতঃ চুক্তি সম্পন্ন করেছে। এমতাবস্থায়, Coal Procurement জরুরী বিবেচনায় এবং মাতারবাড়ি বিদ্যুৎ কেন্দ্রটি চালু রাখার স্থার্থে Consortium of Unique Cement Industries Ltd. and Aditya Birla Global Trading (Singapore) Pte. Ltd. এর দরপ্রস্তাবটি বেশী হলেও তা negotiation করে যৌক্তিক পর্যায়ে নিয়ে আসা যায় কিনা সে বিষয়ে উদ্যোগ নেয়ার পক্ষে বোর্ড সভায় সর্বসম্মতিক্রমে একমত পোষণ করা হয় এবং সর্বনিম্ন দরদাতার সাথে নিগোসিয়েশন করার জন্য TEC কে দায়িত্ব দেয়ার জন্য বোর্ড সভায় মতামত ব্যক্ত করা হয়।

বিদ্যমান পরিস্থিতিতে জাতীয় গুরুত্ব বিবেচনায় নিরবচ্ছিন্নভাবে মাতারবাড়ি বিদ্যুৎকেন্দ্র চালু রাখার স্বার্থে Coal Procuremnet এর আবশ্যকতা বিবেচনায় Coal এর Landing Price (FOB + Ocean Freight) যৌক্তিক পর্যায়ে কমিয়ে আনার লক্ষ্যে দরদাতা Consortium of Unique Cement Industries Ltd. and Aditya Birla Global Trading (Singapore) Pte. Ltd. এর সাথে negotiation করার জন্য TEC কে দায়িত্ব প্রদান করার সিদ্ধান্ত গৃহীত হলো। "

Meanwhile, the petitioner made a complaint on 16.05.2024 (Annexure-F) to the Managing Director of the respondent No. 5 under the Public Procurement Act, 2006 (in short, Act, 2006) read with Public Procurement Rules, 2008 (in short, Rules 2008). Having receipt no response thereof accordingly, respective complaint was made to the respondent No.1 on 29.05.2024, but again there was no response.

Having no other avenue available to vantilate its respective grievances the petitioner preferred Review Petition No.062 of 2024 before the respondent No. 4, CPTU under the Act, 2006 and Rules, 2008.

On receipt thereof a review panel was constituted by the respondent No. 4 to hear the appeal of the petitioner. However, upon hearing the respective contending parties the review panel vide the impugned judgment and order dated 04.07.2024 (Annexure-A) disposed of the appeal upon negating the prayer of the petitioner with the respective observations

and findings and gave direction upon the respondent No.5 to re-evaluate the financial proposal of the added respondent No.6.

Being aggrieved by and dissatisfied with the petitioner has preferred the instant application under Article 102 of the Constitution and obtained the present Rule Nisi.

Mr. Mustafizur Rahman Khan, the learned Senior Advocate appearing for the petitioner categorically submits that none of the consortium partners of the added respondent No.6 have supplied coal for any government project in Bangladesh, who is mainly a supplier of commodities like cement, grain, fertilizer, etc. Thus, it is apparent that the respondent No. 5 has amended the technical cricteria of the tender document with a view to fit in and accommodate the consortium of the added respondent No.6; otherwise, said respondent would not have qualified technically. In this regard, referring to the observations and findings of the Review Panel he goes to argue that the impugned judgment and order is self-contradictory, for, the Review Panel has clearly observed that the amendments relating to the respective technical qualification criteria component were done in contravention of the Rules, 2008. Despite the said clear observation the Review Panel did not pass any order for remedying or rectifying the breach under Rule 60 of the Rules, 2008; hence, goes to violate the fundamental rights of the petitioner as guaranteed under Articles 27, 31 and 40 of the Constitution.

He further submits that the Review Panel has miserably failed to give due regard to the technical proposal submitted by the petitioner and without analysing the documents and contentions of the petitioner has arbitrarily found that the technical evaluation of the respective bidders including the petitioner by the TEC was lawful.

He again goes to submit that the TEC after due evaluation of the financial offer of the only responsive bidder i.e. added respondent No.6 opined, inter-alia, that the "Financial proposal of Consortium of Unique Cement Industries Ltd. & Aditya Birla Global Trading Singapore Pte. Ltd. could not be accepted due to significantly higher price considering long term contract". Fact remains that the added respondent No. 6 did not challenge the said findings of the TEC under Rules, 2008. Despite the said findings of the TEC, the respondent No. 5 most illegally took the decision to enter into a negotiation with the added respondnet No.6 for reduction of price in flagrant violation of the Rules, 2008 particularly Rule 99/56(10) of the Rules 2008. On the face of the said position of fact he submits that giving direction by the Review Panel upon the respondent No. 5, the procuring entity to re-evaluate the financial proposal of the added respondent No. 6 without referring to any provision of the Act, 2006 or Rules, 2008 cannot be mandated as lawful.

Further assertion of the learned Advocate of the petitioner is that it is apparent from the decision of 05/2024th Board meeting of the respondent No.5 dated 01.05.2024 that the technical evaluation of the bid documents of all the bidders including the petitioner was completed before 01.05.2024. The respondent No. 5, however, in its board meeting No. 05/2024 dated 01.05.2024 approved that the added respondent No.6 was the only responsive bidder and at the same time declared the technical proposal of other bidders including the petitioner non-responsive.

Accordingly, the respondent No. 5 took decision to open the financial proposal of the added respondent No.6 on 08.05.2024. In this connection, he goes to contend that vide office letter dated 13.05.2024 the respondent No.5 informed the petitioner that the evaluation of the bid documents submitted by the petitioner was ongoing and on 14.05.2024 the petitioner was informed that they had been considered as technically non-responsive. Such correspondences on the part of the respondent No.5 undeniably proves that the respondent No. 5 has, in fact, provided a false statement to the petitioner and further, proves their conspiracy and corrupt practices and establishes the wrongful and dishonest behaviour towards the petitioner.

He also submits that clause 5.11 of the bid document clearly states that the bid security shall have to be provided for an amount equal to USD 6,000,000/-. Accordingly, the petitioner provided the bid security in USD 6,000,000/- and also, stated the equivalent amount in BDT which stands at BDT 660,000,000/- (Annexure-I). The respondent No. 5 at the time of evaluating the bid submitted by the petitioner sought an opinion from the respondent No. 4 vide Memo dated 19.03.2024 to clarify the issue of bid security submitted by the petitioner. In response thereof the respondent No. 4 being the governing entity for any public procurement opined, *interalia* that "যেহেতু equal to অর্থাৎ সমতুল্য উল্লেখ করা হয়েছে সেহেতু দরপত্র জামানতে উল্লিখিত তারিখে ইস্যুকারী ব্যাৎকের রেটে ডলারের বিপরীতে বাংলাদেশী মুদ্রার মূল্যমান USD 6,000,000.00 এর সমতুল্য হলে পত্রে বর্ণিত দরপত্র জামানত গ্রহণ করা যেতে পারে।

সূত্রে উল্লিখিত পত্রের মাধ্যমে প্রেরিত তথ্যের ভিত্তিতে যথাযথ কর্তৃপক্ষের অনুমোদন সাপেক্ষে এ মতামত প্রদান করা হলো। এ মতামত শুধু সূত্রে উল্লিখিত পত্রের বিষয়ে প্রযোজ্য হবে।"

The respondent No.5 without considering the said opinion of the

respondent No.4 declared the petitioner as non-responsive. The Review Panel, respondent No.2 while knocking down the prayer of the petitioner with the findings "এই ক্ষেত্রে বিপিপিএ এর মতামত পাওয়া গেলেও উক্ত মতামত আবশ্যকভাবে গ্রহণযোগ্য নয়। প্রকৃতপক্ষে দরপত্র ডকুমেন্টের আলোকে নিরাপত্তা জামানত মূল্যায়ন ও এর গ্রহণযোগ্যতা নিরূপন মূল্যায়ন কমিটির এখতিয়ারভুক্ত।" did not at all consider to employ the power as provided under Rule 98(5) (6) and (7) of the Rules, 2008.

He also submits that the price quotation of coal submitted by the added respondent No.6 is 9.6% higher than the FOB price and the transportation quotation submitted by the same is 105% higher than the prevailing market price. Accordingly, he submits that if the respondent No. 5 being a state-owned entity, enters into a contract with the added respondent No.6 the entire project will roughly cost an additional amount of BDT 12,000,000,000/- (Twelve Hundred Crores Taka).

Accordingly, he submits that upon making the Rule absolute the impugned judgment and order dated 04.07.2024 (Annexure-A) passed by the respondent No.2 is liable to be declared to have been passed without lawful authority and hence, of no legal effect.

Conversely, Mr. Aneek R. Haque, the learned Advocate by filing affidavit-in-oppositon on behalf of the respondent No.5, the procuring entity goes to submit that vide clause 6 of the Invitation for Bid, the procuring entity i.e. the instant respondent has the right to modify the invitation for bid without assigning any reason whatsoever. In this regard, he goes to contend that all the tenderers including the petitioner participated in the tender without raising any objection regarding the amendments of the technical qualification; as such, the petitioner is now

stopped from raising such objection at this belated stage after becoming non-responsive in the technical evaluation.

He further submits that after completing the tender evaluation process on 05.05.2024, its report was duly placed before the Board of the respondent No.5 company for its consideration; whereupon the Board in its Board Meeting approved the technical evaluation report with direction upon the TEC for opening the financial bid of the added respondent No.6, the only responsive bidder. However, on receipt of repeated letters from the petitioner, the respondent No. 5 duly informed the petitioner on 13.05.2024 that the tender evaluation was ongoing since during the relevant period financial evaluation was still pending.

He also submits that as per tender condition every participants in the tender must furnish unconditional bank guarantee for US\$6 million. The petitioner, however, while submitting its bid security for USD 6 million restricted the same by stating the equivalent amount of BDT 660,000,000 only. Consequently, the respondent No.5-procuring entity would not be able to recover an amount more than BDT 660,000,000/since the conversion rate of USD to BDT is fluctuating/increasing every day. Resultantly, the petitioner was found non-responsive on the said count.

Moreover, the petitioner has also failed to fulfill clause 5.1.2 as each members of the petitioner consortium individually failed to fulfill any of the criteria as provided in clause 5.2(ii) (as amended on 31.01.2024). In addition, one of the partners of the petitioner consortium i.e. Equentia Natural Resources Pte. Limited failed to fulfill clause 5.2 (iii). As a result, the TEC found the tender bid of the petitioner as non

responsive, which was duly approved by the respondent No.5 company in its Board Meeting.

He again goes to argue that although the TEC in its report dated 30.04.2024 opined that the price of the added respondent No.6 was quite high, but considering the importance of the matter to ensure uninterrupted supply of coal immediately including the fact that the price might go up in case there was any delay in execution of the contract the Board of the respondent No.5 took decision to proceed for price negotiation with the added respondent No.6 as per Rule 99 of the Rules, 2008. In this regard, he further submits that the recommendation of the Technical Evaluation Committee is not binding upon the Board of the respondent No.5. However, considering the fact that the other power plant namely Bangladesh India Friendship Power Company Limited was purchasing coal at a price of US\$110.31 whereas the added respondent No.6 has quoted price at USD 108.67 as per the market price prevailing at the relevant time. In that view of the matter the Board of the respondent No.5 took decision to proceed for negotiation with the said respondent and that during the process of negotiation the added respondent No.5 has agreed to reduce the price of coal from USD 108.67 to USD 106.87. Accordingly, he submits that the petitioner having failed to substantiate its respective grounds, this Rule is liable to be discharged.

In support of the arguments so have been advanced on behalf of the respondent No.6 company, Mr. Sheikh Mohammad Morshed, the learned Senior Advocate appearing with Mr. Ramjan Ali Sikder, the learned Senior Advocate for the added respondent No.6 submits that the petitioner filed the present writ petition with an ulterior motive to hinder the

execution of contract in favour of the added respondent No.6 and thereby resorts to create a monopolistic business in the business of supply of coal to the respective power plants operating in Bangladesh, for, the petitioner is already supplying coal to another power plant in Bangladesh.

He further submits that as per tender condition every participant in the tender must furnish unconditional bank guarantee for US\$6 million. In the instant case, the petitioner restricted its bid security to 6(six) million USD by stating the equivalent amount to BDT 660,000,000 only. Accordingly, he submits that since the conversion rate of USD to BDT is fluctuating/increasing everyday, the respondent No.5 will not be able to recover an amount more than BDT 660,000,000/-.

Moreso, he submits that the petitioner has also failed to fulfil Clause 5.1.2 of the tender documents since each member of the petitioner consortium individually failed to fulfil the criteria as provided in clause 5.2(ii) of the tender document, as amended on 31.01.2024.

He also goes to argue that the added respondent No.6 having fulfilled all the required conditions of the tender document has become both technically and financially responsive; as such, the Notification of Award is required to be issued in its favour.

He lastly submits that the petitioner in filing the present writ petition has failed to appreciate that the procuring entity has the right to amend the tender documents and also, to accept or reject any or all the bids without assigning any reason whatsoever as per clauses 3, 6 and 12 of the Invitation for Bid. However, the amendment so made by the procuring entity in the tender document in question is to widen the scope of competitive participation of the aspiring bidders. Further, the petitioner

while submitting its bid had full knowledge of the said amendment but did not raise any objection thereto; hence, is now estopped from raising objection to that effect.

Considering the above context, he submits, this Rule being devoid of any substance is liable to be discharged.

Coal Power of Generation Company Bangladesh Ltd. (CPGCBL), an enterprise of the Government of the People's Republic of Bangladesh, acting as the employer invited sealed bid from the eligible bidders vide Invitation Reference No.27.32.0000.008.07.003.23.2862 dated 15.11.2023 (Annexure-B) for procurement and delivery of imported coal at plant jetty (CDP) for Matarbari 2x600 MW Ultra Super Critical Coal Fired Power Plant at Maheshkhali Upazilla of Cox's Bazar District under Chattogram Division, Bangladesh following single stage two envelope bidding procedure (Envelope-1: Technical Proposal and Envelope -2: Financial Proposal) as per the scope of work as mentioned in the tender document. However, last date and time for receipt of bid (Envelope 1 and 2) was fixed on 09.01.2024 upto 12:00 hours (BST) and opening date and time of Envelope-1 (Technical proposal) was fixed on 09.01.2024 at 12:30 hours (BST). The date of opening of Envelope-2 (Financial Proposal) was to be intimated by the authority concerned separately after evaluation of Envelope-1 (Technical Proposal).

Further condition, among others, was that all bids must be accompanied by bid security for an amount of USD 6,000,000.00 (US Dollar six million) only. Any bid not accompanied by an acceptable bid security in a separate sealed envelope shall be rejected by the respondent No.5 company as being non-responsive.

However, qualifying requirements for the respective bidders have been prescribed in clause 5 of the tender document. In this regard clause 5.1.1, 5.1.2 and 5.2(ii) of the tender documents (Annexure-A) are required to be looked into and are accordingly quoted below:

- "5.1 Qualification Criteria:
- 5.1. A bidder should be a firm meeting the technical criteria stipulated at Clause 5.2 (i), (5.2 (ii), 5.2 (iii) and financial criteria mentioned at Clause 5.3.
- 5.1.2 A bidder can be a consortium of a maximum of three (03) firms, collectively meeting the technical criteria stipulated at Clause 5.2 (i),5.2 (ii),5.2 (iii), hereunder and financial criteria mentioned at Clause 5.3.

Each partner of the consortium shall meet at least any one of the technical criteria requirements stipulated at Clause 5.2 and at least 25% of the Financial Criteria mentioned at Clause 5.3.

The consortium shall necessarily identify one of the partners as lead partner who shall meet on its own at least 40% of Financial Criteria mentioned at Clause 5.3.

- 5.2 Technical Criteria:
- (i)
- (ii) Bidder or any partner of the consortium must be;
- (1) coal mine owner; or
- (2) holding company of a coal mine owner; or
- (3) an international trading company

Meanwhile, the respondent No.5 company caused amendment in the tender document on 03.01.2024 (Annexure-C1) upon replacing clause 5.2(iii) with regard to technical criteria. For ready reference clause 5. 2(iii), as it then was before amendment, is quoted below:

"5.2 (iii) Bidder or any one of the partner of the consortium should have performed transportation, through sea route, using Ocean Going Vessel(s) (OGV) of at least ten million metric tonnes (10

MMT) of thermal coal during the past five (5) years, reckoned from the date of opening of Technical Proposal."

After amendment on 03.01.2024 clause 5. 2(iii) stands as under:

"5.2 (iii) Bidder or any one of the partner of the consortium should have performed transportation, through sea route, using Ocean Going Vessel(s) ("OGV") of at least ten million metric tonnes (10 MMT) of dry (bulk) solid commodity(ies), like Coal, Iron ore, Fertilizers, Chemicals, Cement etc. or Grain in bulk during the past five (5) years, reckoned from the date of opening of Technical Proposal."

The petitioner as being the aspirant bidder participated in the tender process along with 3 (three) others including added respondent No.6 with submission of tender documents. On 08.02.2024, the bid of the respective bidders were opened by the TEC. The bid of the 4th bidder namely consortium of Akij Cement Company Ltd. Century Commodities Solution Pte Ltd. were ousted for not filing technical proposal but only financial proposal. The bid of the 2nd bidder namely Bary Chemical Private Ltd. was also not considered for non-compliance of bid security. The bid of the 3rd bidder, the petitioner, was ousted for non-compliance of bid security for stating- "not exceeding in total an amount of USD 6,000,000.00 (US Dollar Six Million) only equivalent to BDT 66.00.00.000.00 (Sixty Six crore) only" despite having opinion from the Bangladesh Public Procurement Authority (BPPA) in favour of the petitioner vide Memo dated 21.04.2024 and also, for non-compliance of clause 5.2(ii) and 5.1.2 of the tender document.

Ultimately, vide order dated 14.05.2024 (Annexure-D5) the Company Secretary of the respondent No.5 company informed the petitioner that it has been declared as non-responsive after evaluation of

its technical proposal by the TEC. Subsequently, upon hearing the respective contending parties the Review Penal vide the impugned judgment and order dated 04.07.2024 disposed of the appeal negating the prayer of the petitioner with direction upon the TEC to re-evaluate the financial proposal offered by the added respondent No.6.

In this regard the categorical contention of the petitioner is that the petitioner is a consortium of 3(three) establishments who as a consortium jointly performed various coal supply contracts across Bangladesh. The same consortium members that is the petitioner has a long-term sales contract of coal dated 07.06.2023 with Bangladesh India Friendship Power Company Ltd. for supply of 8 million metric tones of coal within 3(three) years. The members of the petitioner consortium previously had jointly performed various coal supply work and such experience of the petitioner consortium fulfils the technical criteria as stipulated in clause 5.2(ii) of the bid document. Further, the consortium partner of the petitioner namely Equentia Natural Resources Pte. Ltd, fulfilled clause 5.2(iii) of the technical criteria and demonstrated experience of transporting 10.04 million metric tonnes of coal for the last five years of reckoning the bid closing date. The respondent No.5, however, with malafide intention came up with a futile interpretation of the above mentioned clauses and purposefully had declared the petitioner as nonresponsive for protecting the interest of the vested quarters.

Also, it has been contended that in compliance of clause 4 of the tender document the petitioner did submit bid security for an amount of USD 6,000,000.00 (USD six million) and also, stated the equivalent amount in BDT which stands at Tk. 660,000,000/-. In this connection, on

21.04.2024 (Annexure-I-1) the respondent No.4, a government entity for any public procurement while giving reply to the query so made by the respondent No.5 company opined, *inter-alia*:

"..... যেহেতু equal to অর্থাৎ সমতুল্য উল্লেখ করা হয়েছে সেহেতু দরপত্র জামানতে উল্লিখিত তারিখে ইস্যুকারী ব্যাংকের রেটে ডলারের বিপরীতে বাংলাদেশী মুদ্রার মূল্যমান USD 6,000,000.00 এর সমতুল্য হলে পত্রে বর্ণিত দরপত্র জামানত গ্রহণ করা যেতে পারে।

সূত্রে উল্লিখিত পত্রের মাধ্যমে প্রেরিত তথ্যের ভিত্তিতে যথাযথ কর্তৃপক্ষের অনুমোদন সাপেক্ষে এ মতামত প্রদন করা হলো। এ মতামত শুধু সূত্রে উল্লিখিত পত্রের বিষয়ে প্রযোজ্য হবে।"

In this regard, the findings of the Review Panel are quoted below: "এই ক্ষেত্রে বিপিপিএ এর মতামত পাওয়া গেলেও উক্ত মতামত আবশ্যকভাবে গ্রহণযোগ্য নয়। প্রকৃতপক্ষে দরপত্র ডকুমেন্টের আলোকে নিরাপত্ত জামানত মূল্যায়ন ও এর গ্রহণযোগ্যতা নিরুপন মূল্যায়ন কমিটির এখতিয়ার ভুক্ত।....."

In this connection, Rule 98(5),(6) and (7) of the Public Procurement Rules, 2008 being relevant are quoted below:

- "৯৮(৫) দরপত্র মূল্যায়ন কমিটি কোন দরপত্রকে গ্রহণযোগ্য হিসেবে বিবেচনা করিয়া মূল্যায়ন করিতে পারিবে, যদি উহাতে গুরুত্বপূর্ণ কোন বিচ্যুতি (material deviation) বা কোন আপত্তিকর বিষয় (reservation) না থাকে এবং উহা দরপত্র দলিলের অবশ্য পালনীয় শর্ত প্রতিপালনপূর্বক দাখিল করা হইয়া থাকে।
- (৬) নিম্নবর্ণিত যে কোন বিষয় অতীব গুরুত্বপূর্ণ বিচ্যুতি বা আপত্তিকর বলিয়া গণ্য হইবে, যদি উহা-
- (क) कान कार्यंत्र व्याश्वि, यान वा कार्य-সম্পाদনকে গুরুত্বপূর্ণভাবে প্রভাবিত করে
- (খ) দরপত্র দলিলের সহিত সঙ্গতিপূর্ণ নহে এই রূপ কোন বিষয় হয়, যাহা কোন চুক্তির অধীন ক্রয়কারী অধিকার বা দরপত্রদাতার আইনগত বাধ্যবাধকতা উল্লেখযোগ্যভাবে সীমিত করে: এবং
- (গ) এরূপ কোন সংশোধন হয়, যাহা অন্যান্য গ্রহণযোগ্য দরপত্রদাতাদের প্রতিযোগিতামূলক অবস্থানকে অন্যায্যভাবে প্রভাবিত করে।
- (৭) দরপত্র মূল্যায়ন কমিটি কোন দরপত্রকে গ্রহণযোগ্য দরপত্র হিসাবে বিবেচনা করিতে পারিবে. যদি উহাতে—
- (ক) দরপত্র দলিল উল্লিখিত কারিগরি বিনির্দেশ, বৈশিষ্ট্য এবং বাণিজ্যিক বা অন্য কোন শর্তের অর্থবহ পরিবর্তন হইবে না এমন গৌণ বা কম গুরুত্বপূর্ণ বিচ্যুতি থাকে এবং উক্তরূপ বিচ্যুতি যথাসম্ভব আর্থিকভাবে (quantify in monetary terms) পরিমাপ করিতে হইবে; বা
- (খ) কোন ক্রটি বা অসাবধানতাজনিত ভুল থাকে, যাহা পরবর্তীতে সংশোধন করা হইলেও দরপত্রের মুখ্য উদ্দেশ্য পরিবর্তিত হইবে না। ''

Considering the above provision of law as well as the opinion so made by the respondent No.4 stating equivalent amount in BDT by the petitioner with the amount of USD 6(six) million while submitting bid security in compliance of clause 4 of the tender document, does not appear to be a material deviation in order to knock out the technical proposal of the petitioner on the said count.

However, fact remains that the offer of technical proposal of the petitioner was also turned down by the TEC on two other counts i.e. for non-compliance of clause 5.2(ii) and 5.2(iii) respectively of the tender documents. In this regard, the relevant part of the findings of the report of TEC dated 30.04.2024 is quoted herein below:

"

5.2(11)	Purchase contract
	of 10.00 MMT dry
	of 10.00 MMT dry bulk commodities or sales contract of 6 MMT coal
	or sales contract of
	6 MMT coal

Bashundhara Multi Trading Ltd (Lead partner) and Atro International FZE (Partner-2) of consortium has submitted 8.00 MMT sales contract of coal with BIFPCL (Contract Ref BIFPCL/MSTPP/COAL/8.0MMT/C A/945/; Dated 07.06.2023). No other individual sales contract has been submitted

As per IFB, in case of Joint Venture experience or Consortium experience of the bidder, bidder have to submit experience certificate from seller/ purchaser/ its client (clearly mentioning bidder's scope of works, bidder's (%) of share in the Joint Venture or Consortium) along with certificate(s) from the statutory auditor(s) of the bidder or any other relevant authentic document.

Bidder did not submit any experience certificate from seller/ purchaser/ its client. Bidder submitted only contract document where bidder's scope of works or % of share not found

The above two partners of the consortium have shown the same 8.0 MMT coal sales contract as reference. From the submitted coal sales contract document, it is found

Partners
(Bashundara
Multi Trading
Ltd and Arto
International
FZE) of the
consortium did
not comply
IFB clause
5.2(ii)
individually.

		that Bashundhara Multi Trading Ltd. Equentia Natural Resources Pte. Ltd. and Atro International FZE performed the said 8.0 MMT coal sales contract jointly.	
5.2(iii)	ogv transportation of 10.00 MMT dry bulk commodities	Proven documents found 9.66 MMT (coal)	Not complied

,,

The Review Panel, respondent No.2 while discarding the contentions of the petitioner on those counts observed, *inter-alia*,

"…… উপরন্ত দরদাতা Constortium of Basudhara Multi Trading Limited M/S Equentia Natural Resources Pte Lmited and M/S ATRO International FZE IFB 5.(ii) and 5.1.2 শর্তে বর্ণিত কারিগরি নির্ণায়ক প্রতিপালন করেননি। এমতাবস্থায় উপরে বর্ণিত দুই দরপত্রদাতাকে কারিগরি মূল্যায়নে অগ্রহণযোগ্য ঘোষণা সঠিক মর্মে প্রতীয়মান হয়েছে।"

The above observations of the respondent No.2 in the light of the findings of TEC does not appear to have been tainted with illegality.

The other categorical contention of the petitioner is that on 30.04.2024 the TEC after evaluation of the technical proposal of the petitioner along with 3 (three) other bidders had declared the offer of the petitioner and another i.e. Bary Chemical Private Ltd. as non-responsive and the offer of the added respondent No.6 as responsive. Said opinion of the TEC was subsequently approved by the Board of Directors of the respondent No.5 company in its 05/2024th Board meeting dated 01.05.2024.

On the face of the said position of fact it has been alleged that informing the petitioner by the officer concerned of the respondent No.5 vide office letter dated 13.05.2024 (Annexure-D4) that evaluation process

was still ongoing and on the next date i.e. on 14.05.2024 again informing the petitioner that its technical proposal had been negated as being non-responsive, is an act of providing false statement as well as a demonstration of conspiracy and corrupt practices on the part of the respondent No.5 company.

Moreso, it has been contended that vide Rule 35(1) of the Rules, 2008 the procuring entity is required to inform the petitioner within 7(seven) days of the decision taken by the Board of the respondent No.5 company, which has not been done in the present case.

Countering the said assertions of the petitioner, Mr. Aneek R. Haque, the learned Advocate and Mr. Sheikh Mohammad Morshed, the learned Senior Advocate conjointly submit referring to Rule 68Gha(4) of the Rules, 2008 that prior to issuance of Notification of Award (in short, NOA) the procuring entity is not required to inform the bidder whose technical proposal has been found non-responsive. In the instant case, he submits, till date no Notification of Award has been issued by the procuring entity in favour of the added respondent No.6. As such, for issuance of office letter dated 13.05.2024 by the respondent No.5 pursuant to the repeated representations of the petitioner dated 08.05.2024, 09.05.2024 and 12.05.2024 respectively informing, inter-alia, that evaluation process was going on, cannot be branded as false statement, for, till that period process of evaluation of financial proposal was still pending, which was finally decided by the Board of the respondent No.5 company in its 06/2024th Board meeting dated 31.05.2024 with direction upon the TEC to make negotiation with the added respondent No.6 over the landing price (FOB+ Ocean Freight). Hence, it has been contended

that the allegation so brought forth to that effect has no substance in the eye of law as well as facts.

We find substance to the said contention of the respondent No.5 and the added respondent No.6, for, Rule 68Gha(4) clearly provides that " ৬৮ঘা এক ধাপ দুই খাম দরপত্র পদ্ধতিতে আর্থিক প্রস্তাব উন্মুক্ত ও মূল্যায়ন।—

- (১)
- (₹).....
- (9)

(৪) ক্রয়কারী কৃতকার্য দরপত্রদাতার সহিত চুক্তি স্বাক্ষরের পর, কারিগরি প্রস্তাব মূল্যায়নের নন-রেসপনসিভ বিবেচিত দরপত্রদাতাদের নন-রেসপনসিভ হওয়ার বিষয়টি অবহিত করিবে এবং আর্থিক প্রস্তাব উন্মক্ত না করিয়া ফেরত দিবে।।".

In view of the said provision of law prior to issuance of NOA the procuring entity is not required to inform the bidder of its technical offer being found non-responsive. Moreover, from record it appears that the recommendation of the TEC on the technical proposal of the respective bidders were approved by the Board of the respondent No.5 on 01.05.2024 and that financial proposal of the added respondent No.6, the only responsive bidder on its technical proposal, was opened by the TEC with notice to the said bidder on 07.05.2024. Ultimately, the Board in its 6/2024th Board meeting dated 31.05.2024 took decision to negotiate with the added respondent No.6 with regard to landing price. In the given context stating, *inter-alia*, ''টেভার ডকুমেন্ট অনুযায়ী দরপত্রের মূল্যায়ন কার্যক্রম যথাযথ প্রক্রিয়া অনুকরণপূর্বক চলমান রয়েছে,'' cannot be termed as "false statement", as alleged by the petitioner.

Next assertion of the petitioner is the amendment so made in the qualification criteria of the tender documents on 03.01.2024 (Annexure-C1) prior to closing date of bid, fixed earlier on 09.01.2024 and subsequently re-fixed on 31.01.2024 (Annexure-C) by incorporating the

experience of supply of "iron ore, fertilizers, chemicals, cement etc. or grain" along with "coal" in order to widen the qualification criteria to fit in and accommodate the added respondent No.6.

In this regard, the contention of the petitioner is that without the purported amendment by the respondent No.5, the added respondent No.6 would not have technically qualified, for, none of the consortium partners of the added respondent No.6 have supplied coal for any government project in Bangladesh and that the consortium members of the added respondent No.6 is mainly a supplier of commodities like cement, grain, fertilizer etc.

Accepting the said assertion of the petitioner the respondent No.2, the Review Panel while passing the impugned order dated 04.07.2024 observed, *inter-alia*:

(খ) এই দরপত্রটি (এক ধাপ দুই খাম বিশিষ্ট অর্থ্যাৎ প্রক্রিয়াটি প্রতিযোগিতামূলক। প্রতিযোগিতামূলক পদ্ধতিতে ক্রয়তব্য পণ্যের কারিগরি, ব্যবহারিক ও বানিজ্যিক विভिন্ন আবশ্যিকতা পূরণকল্পে দরপত্র দলিলে সমধর্মী পণ্য সরবরাহের অভিজ্ঞতা চাওয়া হয়ে থাকে যা একটি পাস/ফেইল ভিত্তিক যোগ্যতার নির্ণায়ক। এই শর্তে সাধারণত প্রস্তাবিত পণ্যের উপযুক্ত আবশ্যিকতার সঙ্গে সামঞ্জস্যতা রয়েছে এমন ধরনের পণ্যকেই সমধর্মী পণ্য হিসেবে বিবেচনা করা হয়ে থাকে। দরদাতার সমধর্মী অভিজ্ঞতা (যে পণ্যের জন্য দরপত্র আহবান করা হয়েছে সেই পণ্য বা তার সরবরাহের অভিজ্ঞতা) কৃত বছরের, এবং প্রতিটি চুক্তি কত মূল্যের-ডাটা সিটে উল্লেখ করতে হয়। এই দরপত্রে সমধর্মী অভিজ্ঞতা সংশোধন করে কয়লার ক্ষেত্রে যে সকল পণ্য (কয়লা অথবা লোহা, সার, অনুচ্ছেদ ৩(খ) অনুযায়ী শর্ত সংশোধন করা হয়েছে তার মধ্য দিয়ে যোগ্যতার এই निर्ণाয়কের মূল উদ্দেশ্যই ব্যাহত হয়েছে। এ প্রাক দরপত্র সভায় সরবরাহকারী নানাবিধ শর্ত বা শর্ত শিথিল চাইবেন. সেটি কখনও নিজের স্বার্থে কখনও প্রতিযোগিতা সম্প্রসারণের স্বার্থে। সূতরাং চাইলেই সেটির অনুকূলে সিধান্ত গ্রহণ করতে হবে এমন কোন বাধ্যবাধকতা নেই।(তদুপরি এই সংশোধনটি যদি দরপত্রদাতাদের অনুরোধে করা হয়েও থাকে সেটি বিধিসম্মত হতে হবে, এখানে যার কোন ক্রয়কারির এইরূপ অনুযায়ী ঘটেছে। সংশোধন বিধি ব্যত্যয়

গ্রহণযোগ্য নয়)।......একইসঙ্গে প্রস্তাবিত পণ্যে সমধর্মী হিসেবে নানাবিধ পণ্যের নাম ব্যবহার করে দরদাতার অভিজ্ঞতা নিরূপনের সুযোগ অবারিত করা সংক্রান্ত ক্রয়কারির এইরূপ উদ্যোগ সুস্পষ্টভাবে অগ্রহণযোগ্য মর্মে মনে করে।

On the face of the above findings making the ovservations, interalia, by the Review Panel "তবে বিবেচ্য দরপত্রের ক্ষেত্রে যেহেতু কারিগরি অন্যান্য শর্তে কোল আমদানী/সরবরাহের শর্ত প্রতিপালনের বিষয়টি রয়েছে সেহেত শিখিলকত বর্ণিত শর্ত দরপত্র প্রক্রিয়ায় কোন প্রভাব ফেলতে পারেনি মর্মে প্যানেল বিবেচ্য ক্রয়ে বিষয়টি উপেক্ষা করছে।" and giving direction upon the procuring entity to include similar experience in the qualification criteria in future " (ক) দরপত্র ডকুমেন্টে ভবিষ্যতে পণ্য সরবরাহের সমধর্মী অভিজ্ঞতা (Similar Experience) শর্ত বিবেচ্য ক্ষেত্রের ন্যায় উন্মুক্ত/অবারিত করা যাবে না কারণ এটি ক্রয়তব্য বস্তুর (Proposed goods) সমধর্মী অভিজ্ঞতা এবং এটি সঠিক ও যোগ্য দরদাতা নির্বাচনের অন্যতম উপযুক্ত পাস/ফেইল নিৰ্ণায়ক;", are clearly self contradictory and thereby frustrates the object for promulgation of the Act No.24 of 2006 i.e., "সরকারি তহবিলের অর্থ দারা কোন পণ্য, কার্য বা সেবা ক্রয়ের ক্ষেত্রে স্বচ্ছতা ও জবাবদিহিতা নিশ্চিত করা এবং উক্তরূপ ক্রয়কার্যে অংশগ্রহণের ইচ্ছুক সকল ব্যত্তির প্রতি সম-আচরণ ও অবাধ প্রতিযোগিতা নিশ্চিত করিবার জন্য ". Thus, goes to make the entire process of tender being initiated and pursued by the respondent No.5 with reference to Tender Invitation No.27.32.0000.008.07.003.23.2862 Reference dated 15.11.2023, questionable.

Accordingly, we have no manner of doubt to find that respondent No.2 has miserably failed to perform it statutory duties being bestowed by the framers of the Rule under Rule 60 of the Rules, 2008.

Another contention of the petitioner is that on accepting the technical proposal of only one bidder the impugned tender process is being proceeded by the procuring entity. However, Rule 98(14) does not

delimit the minimum number for acceptance of bid rather has clearly spelt out that even if only one acceptable bid is received subject to evaluation and satisfaction of technical and financial proposal respective contract can be entered into.

In the instant case, with the negation of the technical proposal of 3(three) other bidders including the petitioner the only technical proposal which remained for consideration was the proposal of the added respondent No.6 which was duly accepted by the TEC as responsive. However, after evaluation of its financial proposal the TEC opined *interalia*:

" I. Financial Proposal of Consortium of Unique Cement Industries Ltd. and Aditya Birla Global Trading (Singapore) Ptd. Ltd. could not be accepted due to significantly higher price considering long term contract.

II. TEC's report can be placed before the approving authority for next courts of action"

Accordingly, the matter was placed before the Board of the respondent No.5 company. The Board after discussion in its 6th /2024 Board meeting dated 31.05.2024 took the following decision:

"বিদ্যমান পরিস্থিতিতে জাতীয় গুরুত্ব বিবেচনায় নিরবিচ্ছিন্নভাবে মাতারবাড়ি বিদ্যুৎকেন্দ্র চালু রাখার স্বার্থে Coal Procurement এর আবশ্যকতা বিবেচনায় Coal এর Landing Price (FOB+Ocean Freight) যৌক্তিক পর্যায়ে কমিয়ে আনার লক্ষ্যে দরদাতা Consortium of Unique Cement Industries Ltd. and Aditya Birla Global Trading (Singapore) Pte. Ltd. এর সাথে negotiation করার জন্য TEC কে দায়িত্ব প্রদান করার সিদ্ধান্ত গৃহীত হলো।"

However, while disposing of the appeal of the petitioner the respondent No.2 in this regard has decisively observed, *inter-alia*:

"(ঘ) ৬ /২৪ তারিখের বোর্ড সভায় দরপত্র মূল্যায়ন কমিটির সুপারিশ এর উপর

मिकान প্রদানের ক্ষেত্রে বোর্ড মূল্যায়ন কমিটির সুপারিশ (একমাত্র রেসপনসিভ দরদাতার মূল্য বাজার মূল্যের চাইতে তাৎপর্যপূর্ণভাবে ঊর্ধের) আমলে নিয়েছে এবং ৩(গ) অনুচ্ছেদে উল্লিখিত মত ব্যক্ত করে ৬/২৪ তারিখের সভায় বোর্ড সর্বনিম্ন দরদাতার সঙ্গে নেগোসিয়েশন করে মূল্য যৌক্তিক পর্যায়ে আনার যে নির্দেশনা দিয়েছে, সেটি বিধি বহির্ভূত। যদি মূল্যায়িত মূল্য দাপ্তরিক প্রাক্কলিত মূল্যের সঙ্গে সামঞ্জস্যপূর্ণ হয় তাহলে যে অফারটি দেয়া হয়েছে সে মূল্যেই নোটিফিকেশন অফ এওয়ার্ড প্রদান করতে হবে। এই ক্ষেত্রে নিম্নবর্ণিত ৪(৬) এর বিধান প্রণিধানযোগ্য,

(७) भिभिषात विधि ৯৮(२१) 'এकाधिक मतभज्ञ भूनाग्रारानत भत्र यपि मतभज्ञ भूनाग्रायन किमिित निकि প্রতীয়মান হয় যে, শুধু একিটি দतभज्ञ গ্রহণযোগ্য হইয়াছে এবং উক্ত দরপত্রের উদ্ধৃতমূল্য দাপ্তরিক প্রাক্কলিত মূল্যের কাছাকাছি এবং উহা বর্তমান বাজার মূল্যের সহিত সামঞ্জস্যপূর্ণ তাহা হইলে উক্ত কমিটি বিধি ৩৬ অনুযায়ী উক্ত দরদাতার সহিত চুক্তি সম্পাদনের সুপারিশ করিয়া অনুমোদনকারি কর্তৃপক্ষের নিকিট মূল্যায়ন পেশ করিবে।

(क) तिकर्छ भर्तीकारिस पिया यात्र क्रियकारित कर्ज्क श्रमीण पास्त्रितिक श्राक्किनिल पत स्टिक्ट् श्रिक रिन कान १६६.५० (এकम भक्षात्र पमित्रिक छत्र मृणा) गार्किन छनात्र। भूनागिरिक अक्रमाज पत्रपाणात छक्षण पत श्रिकि रिन १०५(अकम खाएँ) गार्किन छनात्र। स्रूम्भष्ट यि, छक्षण पत पास्त्रितिक पत्तित्र ठारेख कम अवः अिं अकिं खारेंनी विधान यि पास्त्रितिक श्राक्किनिल भूनगत सर्ग्य साम्रक्षसाभूर्ण पत स्टिन ला स्रमातिमयागा स्ति। अरे साम्रक्षसाभूर्णलात कान काम निर्मे। भूनाग्रेशन किंगिल कम स्ना लाइ भर्यभूर्ण प्राजात्र विभि प्रत्य स्टिन्से वाजात्र याठारे कत्रत्व अवः खिनालिक कम स्ना जाइ निक्छे व्याया ठारेत्। पत्रभज भूनाग्रेशन किंगिलि अरे क्षित्र खिनिक खनुस्तर्ग करिनि।

(ড়) भावनिक প্रकिউরমেন্ট আইন ২০০৬ এর ধারা ৪৯ এবং भावनिक প্রকিউরমেন্ট विधिमाना २००৮ এর পৰিধি ৯৯ অনুষায়ী প্রতিযোগিতামূলক পদ্ধতিতে সর্বনিম্ন দরদাতার সাথে (কয়েকটি ব্যতিক্রম ব্যতিত, যা বিবেচ্য ক্ষেত্রে প্রযোজ্য নয়) নেগোসিয়েশন করা যাবে না। এই কারণেই নেগোসিয়েন এর সংস্থান দরপত্র দলিলেও অন্তর্ভুক্ত নেই। এমতাবস্থায় এই দরপত্রে মূল্যায়িত দর যৌক্তিক পর্যায়ে আনার জন্য নেগোসিয়েশনের যে সিদ্ধান্ত দেয়া হয়েছে তা বিধি বহির্ভূত।"

Despite the said findings on the approval of the Board of respondent No.5 on the financial proposal of the added respondent No.6, the respondent No.2 ultimately, gave the following direction:

[&]quot; ৫. এমতাবস্থায় আদেশ হচ্ছে-(ক).....

- (খ) এই দরপত্র প্রক্রিয়ায় উপরে বর্ণিত প্যানেলের পর্যবেক্ষণের আলোকে দরপত্র মূল্যায়ন কমিটি আর্থিক প্রস্তাব পুনর্মূল্যায়ন করবে মর্মে নির্দেশনা দেয়া হলো;
- (গ) এই পুনর্মূল্যায়নে কোনভাবেই মূল্যায়িত সর্বনিম্ন বা একমাত্র দরদাতার সঙ্গে নেগোসিয়েশন করা যাবে না;

,,

On the face of the findings of the Review Penel on the amendment of the qualification criteria of the tender document "তদুপরি এই সংশোধনটি যদি দরপত্রদাতাদের অনুরোধে করা হয়েও থাকে সেটি বিধিসম্মত হতে হবে, এখানে যার ব্যত্যয় ঘটেছে। কোন ক্রয়কারির এইরূপ সংশোধন বিধি অনুযায়ী গ্রহণযোগ্য নয়।" and also, on the specific findings on negotiation "(ঘ) (৬/২৪ তারিখের বোর্ড সভায় দরপত্র মূল্যায়ন কমিটির সুপারিশ এর উপর সিদ্ধান্ত প্রদানের ক্ষেত্রে বোর্ড মূল্যায়ন কমিটির সুপারিশ (একমাত্র রেসপনসিভ দরদাতার মূল্য বাজার মূল্যের চাইতে তাৎপর্যপূর্ণভাবে উধ্বের্) আমলে নিয়েছে এবং ৩(গ) অনুচ্ছেদে উল্লিখিত মত ব্যক্ত করে ৬/২৪ তারিখের সভায় বোর্ড সর্বনিম দূরদাতার সঙ্গে নেগোসিয়েশন করে মূল্য যৌক্তিক পর্যায়ে আনার যে নির্দেশনা দিয়েছে, সেটি বিধি বহির্ভূত।......" giving direction upon the TEC to re-evaluate the financial proposal of the added respondent No.6 cannot sustain in the eye of law.

At this juncture, the emphatic contention of the respondent No.5 company, the procuring entity, is that the tender in question has been floated with the object to get urgent supply of coal to maintain production in the power generation plant at Matarbari, Chottogram to ensure uninterrupted power in the region.

In this connection, Mr. A.R. Aneek Hoque, the learned Advocate appearing for the respondent No.5 company submits that the other power plants such as Bangladesh India Friendship Power Company Ltd. (BTFPCH), one of the consortium members of the petitioner was purchasing coal at a price of USD 110.31. However, the added respondent No.6 offered 108.67 against the office estimated price of USD 155.6 and after negotiation, as being practiced by the respondent No.5

company even with the petitioner earlier while supplying coal to Rampal Power Plant, the price quotation now offered by the said respondent No.6 is at USD 106.87.

In this regard, he also submits that as per his instruction respective quantity of coal available at present for consumption at Matarbari Power Plant may sustain for another 10/12 days. In the said premises, if this Hon'ble Court directs to hold fresh tender the whole process may take about another 6(six) months; resultantly, entailing considerable risk of fluctuation of USD rates and obviously will go to interrupt in generation and supply of electricity to the common people of Bangladesh. Accordingly, he prays for passing order by this Hon'ble Court for proper dispensation of justice.

It is fact that price negotiation with the added respondent No.6 has not yet culminated in issuance of notification of award. In other words, the procuring entity is yet to make final decision on the negotiated price as quoted/offered by the added respondent No.6, the only responsive bidder.

Considering the exigency of the situation as is prevailing at the moment and above all, taking into consideration of the welfare of the State as well as national interest this Court refrains from giving direction upon the respondent No.5 to hold tender afresh for procurement of coal for the power plant in question and accordingly, leave the matter in question in the hand of the respondent No.5 company to make final decision on the proposal/offer so made by the added respondent No.6 to be taken with the approval of the respondent government.

With the above findings this Rule is accordingly disposed of.

Communicate the judgment and order to the respondents concerned at once.

A.K.M. Rabiul Hassan, J:

I agree.

Montu, B.O