

**In the Supreme Court of Bangladesh  
High Court Division  
(Special Original Jurisdiction)**

**Writ Petition No. 10829 of 2011**

**IN THE MATTER OF :**

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

**And**

**IN THE MATTER OF**

Japan-Bangladesh Security Printing and  
Papers Ltd., Represented by Salim  
Prodhan, Chairman, NSC Tower (19<sup>th</sup>  
Floor), Of-62/3 Purna Paltan, Dhaka and  
another

.....petitioners

**-Versus-**

Government of Bangladesh, represented  
by Secretary, Ministry of Commerce,  
Bangladesh Secretariat, Ramna, Dhaka and  
others

.....**Respondents**

Mr. Awsafur Rahman with  
Mr. Md. Borhan Uddin, Advocate.

.....**for the petitioners**

Mr. Mohammed Mutahar Hossain, Adv.

.....for the Respondent No. 4

Mr. A. B. M. Altaf Hossain, D.A.G with  
Ms. Yehida Zaman, A.A.G

.....**for the Respondents**

**Heard on: 23.02.2012 and**

**Judgment on: 27.02.2012**

**Present:**

**Mr. Justice A.H. M. Shamsuddin Choudhury**

**And**

**Mr. Justice Jahangir Hossain**

**A. H. M. Shamsuddin Choudhury, J:**

The Rule under adjudication, issued on 04.01.2012, was in following terms:

“Let a Rule Nisi be issued, calling upon the respondents to show cause as to why a mandatory direction should not be given to issue Notification of Award/Work Order in favour of the petitioner by cancelling all other proceedings taken earlier, should not be declared void, illegal unauthorized, done without lawful authority, and/or why such other or further order or orders as to this Court may deem fit and proper, should not be passed.”

The averments figured by the petition are, briefly, as follows:

The petitioners is a joint stock company which has been working under the name and style, Japan-Bangladesh Security Printing & Papers Ltd (JBSPPL).

The company obtained the International Standard Quality Management Systems ISO 9001: 2008; Information and Security Management Systems Certificate ISO 27001: 2005 and

Environment Management Certificate ISO 14001: 2004. It has been successfully Printing MICR Cheque of 22 government, private and foreign Banks, 28 government and private universities certificates, dividend warrant with securities feature of many corporate office, and companies like MetLife Alico Policy, ICAB, national and international examination papers, Bangladesh University of Personal Certificates (An institution of Bangladesh Army), Muktijuddah Security Certificates Printing (Muktijodda Montronaloy) database, data entry and software works, with satisfaction.

The Export Promotion Bureau of Bangladesh (EPP) has been invited a tender for procurement of goods printing/ supplying of EU Complaint GSP Form-A, issued on 6<sup>th</sup> May 2009. A total of five companies have participated in the said tender. The bids were duly opened on 28.07.2011. JBSPPL emerged as the successful lowest bidder which Quoted Price Tk. 1,30,00,000/- as against the 2<sup>nd</sup> lowest bidder named GGB which

Quoted Tk. 1,93,90,000/-: difference between the two being of Tk. 63,90,000/-.

The purchaser (EPB), violating the Provisions of Public Procurement Act, 2006, Section 97(7), did not give Tender opening (Evaluation) sheet to the petitioners. As per the provisions of the Public Procurement Act, 2006, Sec-36(6) Schedule (3), the purchaser (EPB) is bound to supply the necessary information regarding the tender evaluation within specified time to the tender participants. As such the petitioner submitted an application to the Director Export Promotion Bureau dated 17.10.11 to obtain the information.

Thereafter the petitioner brought the matter to the know Vice Chairman, Export Promotion Bureau.

Having obtained no response from the Head of the Procuring Entity (HOPE) of Export Promotion Bureau, the petitioner took the matter up with the Secretary, Ministry of Commerce and Industry as well as with the Hon'ble Minister, Ministry of Commerce, because by virtue of the appointed

protocol, Minister is the Chairman of the Export Promotion Bureau. But till date the petitioner has not been blessed with a reply either from the purchasing authority of the Export Promotion Bureau or from the officiating Chairman or from the Secretary, Ministry of Commerce or even from the Head of the Procuring Entry (HOPE) of Export promotion bureau.

Finding no alternative, the petitioner addressed the Chairman Review Panel, Central Procurement, Technical Unit (CPTU) Export Promotion Bureau on 16.11.2011 for adjudication of the dispute. It was registered as a Review Petition.

Section 44(1) and 94(1) of Public Procurement Act, 2006 stipulates that the purchaser (EPB) must sell their tender documents just after publication of tender notification. But the purchaser (EPB) refused to sell tender documents to the petitioner till 05.07.2011 as such they have violated the legal provisions as contained in Section 44(1) and 94(1) of Public Procurement Act, 2006.

The petitioner wrote a letter dated 5.7.11 to the Vice-Chairman, Export Promotion Bureau, with a view to purchase tender documents but the purchaser did not pay any attention to that letter and lastly without assigning any reason, the Export Promotion Bureau extended the submission date of the said tender documents till 28-07-2011 by amending the previous tender notification and published the information in the Daily Star on 08.07.2011. This time also the purchaser (EPB) intentionally refused to sell tender documents to the petitioner till 21-07-2011. So the petitioner sent an application to the purchaser (EPB) for the supply of tender documents. The petitioner, called on the Vice Chairman, Export Promotion Bureau (EPB) and after several request the purchaser (EPB) sold the tender documents and supplied the sample to the petitioner on 24.07.2011. This intentional and malafide delay, caused by the purchaser (EPB), was violative of the provisions of section 31(1,b,c) 45(1&2) and 94(1)(5) of the public Procurement Act, 2006.

The following discrepancies and errors are observed in the tender documents;

- (a) On cover page of the tender documents the issued date was shown 06.05.2009 and on page-3, tender publishing date was shown as 08.07.2011 instead of June 2011 and amended on 08.07.2011.
- (b) At page-3 it was stated that in the sample serial No. will be 6 digits but supplied sample stated 7 digits and to follow the sample.
- (c) For the clarification of tender document time was fixed as 7 days before the date of tender submission date but the schedule were sold 4 days before the submission date of tender documents.
- (d) As per terms of tender documents, purchaser (EPB) should specify the delivery schedule, but the purchaser did not do so.

The sample and its description provided by the purchaser (EPB) along with the tender was prepared by violating the provisions of the Public Procurement Act-2006 Sec-15, Sec-18(2).

The European Commission approved the petitioner's sample yet it was not communicated to the petitioner. That reflects discrimination against the petitioners.

One of the main objectives of the Export Promotion Bureau is to encourage the local product and to discourage the imported products to save foreign currency of the country. In this case the petitioner is the local producer with international standard, ISO certified, and the purchaser (EPB) violating their objectives and favoured the imported products.

Finding no alternative, the petitioner filed an appeal to the Director General, Central Procurement Technical Unit (C.P.T.U), Implementation, Monitoring and Evaluation Division (IMED), Ministry of Planning, Sher-E-Bangla Nagar, Dhaka-1207, for proper adjudication of this dispute for the ends of justice.



Under Rule 57(12) of the Public Procurement Rule-2008; the hearing took place on 01.12.2011 3 points was taken for determination, they are;

- (1) Whether the complaint is maintainable or not.
- (2) Whether making no-response to the complaint is valid or not.
- (3) Whether award can be given in favour of the complainant or not.

After through discussion and finding, the following decision has been taken as follows:-

### DECISION

“In view of the facts and circumstances discussed above it is found that the complainant has rightful grounds to be considered and bid of the JBSPPL has been made non-response illegally, conspiratorially and violating all the reasonable terms and condition of PPR as has been discussed earlier. This illegal decision of EPB not only violated rules of PPR but also violated

rules, law and norms of natural justice, prevailing in the country for which EPB or government has to incur huge financial loss. All these ill deeds have implicitly been done by a few officials of EPB including the then Vice-Chairman, DG-1, DG-2, Director (Information) etc. amounting to professional misconduct, offences under section 64(1) of the PPA, 2006 and are subjected to action under Government Servants (Discipline and Appeal) Rules, 1985 and also under relevant section of the Prevention of Corruption Act, 1947. These Officers may also be debarred from any other EPB or government purchase as per Rule-127(4) (ga) of the PPR. Hence it is decided that:

- (i) Decision of the Evaluation Committee making tender bid of JBSPPL non-responsive is illegal, unethical and void. The appropriate authority will take necessary action to compensate loss of the government and of the complainant.

- (ii) The Ministry of Commerce should investigate into the matter and take action as per rules and regulations indicated in the findings of the case.

The security deposit furnished by the complainant may be refunded by CPTU.

In the light of decision, dated 01.12.2011, of CPTU the petitioner is the successful lowest bidder of the said tender, Yet the respondents has been made the petitioner non-responsive, with malafide intention, which has been done illegally, conspiratorially and without lawful authority and as such is liable to be declared void, illegal, malafide, conspiratorially and violating all the reasonable terms and conditions of PPR and the petitioner is legally entitled to get the Notification of Award/Work order. But the purchaser (EPB) illegally and arbitrarily violated the legal and fundamental right of the petitioner. But the purchaser (EPB) has not yet taken any positive steps to issue Notification of Award/Work Order in favour of the petitioner as per decision dated 01.12.2011 passed by the Review Panel 4, which is a

contempt of the decision of Review Penal-4. As such of a mandamus should be issued.

The petitioners has filed a supplementary affidavit figuring the following statements:

It is clear From the Review Panels decision that EPB intentionally issued work order in favour of GGB with a back date, which is seriously illegal.

On the basis of the Review Panel decision the back dated work order issued in favour of GGB and all other proceedings taken on the basis of the back dated work order is necessarily required to be declared void by this Hon'ble Court. Otherwise the dishonest officers of the EPB shall be favored.

The respondent No. 4 has filed an affidavit in opposition figuring the following statements:

It is denied that the petitioners became the successful lowest bidder. The respondent No. 2-Bureau invited a tender for procurement of certain goods of European Union ("EU"). The respondent No. 4, participated in the said tender. The Tender

Evaluation Committee-1 (“TEC”) in its meeting held on 21.09.2011, 22.09.2011 and 25.09.2011 found the added-responder No. 4 to be the only responsive bidder and, accordingly, the responder No. 2-Bureau issued Work Order/Notification of Award in favour of the responder No. 4 as the successful lowest bidder. On the other hand, the Technical Evaluation Committee declared the petitioners non-responsive and, hence, the statement of the petitioners that they were the lowest bidder against the said tender is misleading and incorrect.

Although the petitioner No. 1 quoted Tk. 1,30,00,000/- (Taka One Core and Thirty Lac Only), the said amount is not inclusive of VAT and tax. On the contrary, the responder No. 4’s quotation of Tk. 1,93,90,000/- (Taka One Core Ninety-Three Lac and Ninety Thousand Only) was inclusive of VAT and tax. Nevertheless, the petitioner No. 1’s bid could not have any bearing on the final outcome of the aforesaid tender-inviting notice as it was found to be non-responsive.

There are disputed question of fact, which cannot be raised before this Hon'ble Court. It is apparent that the Comparative Study Paper was published during the initial stage of the tender process and, thereafter, TEC found the petitioners and the respondent No. 4 to be only active participants against the said tender-inviting notice. Thereafter, the TEC issued letters in favour of the aforesaid bidders to submit further clarification as per the requirement of the said tender documents, whereupon the aforesaid two bidders furnished further explanation. Upon scrutiny of the said clarification, the TEC found the petitioner No. 1 to be non-responsive, while the respondent No. 4 was found to be the only responsive bidder and, accordingly, TEC recommended issuing the Work Order/Notification of Award in favour of the respondent No. 4.

Section 1(F) of the Tender Documents under the heading of "Instruction to Tenders" and sub-heading of "Tender: confidentiality", provides that after the opening of tenders, information relating to the examination, clarification and

evaluation of Tenders and recommendations for award shall not be disclosed to Tenderers or other persons not officially concerned with the evaluation process until after the award of the Contract is announced. Section 1(F) of the Tender Documents, under the heading of “Instruction to Tenderers” and sub-heading of “Tenderer; contacting the Purchaser”, provides that following the opening of tenders and until the Contract is signed, no tenderer shall establish any unsolicited communication with the Purchaser or try in any way to influence the Purchaser’s examination and evaluation of the tenders. Accordingly, upon the opening of the tenders, the petitioners had no scope to even contact the respondent No. 2-Bureau for any information till executing the Contract with the successful bidder and, hence, the respondent No. 2-Bureau were duty-bound to maintain confidentiality in respect of all further proceedings relating to the evaluation of the tenders. Thereafter, the TEC proceeded in accordance with the provision of the said Tender Document and

the Public Procurement Act, 2006 (“the Act 2006”) to issue Notification of Award in favour of the respondent No. 4.

Section 57(4) of the Act 2006 does not create any such scope for the petitioners.

The petitioner No. 1 did not file any objection within the time limit as provided under Rule 57 of the Public Procurement Rules, 2008 (“the Rules 2008”).

The petitioner No. 1 was the first to purchase the Tender Documents, and having purchased the same on 24.07.2011 and, subsequently, on 25.07.2011 and 28.07.2011, the remaining tenderers, including the respondent No. 4, purchased the Tender Documents. The petitioners’ assertion of delay in selling tender documents is vehemently denied by the respondents and, as such, such disputed question of fact cannot be raised before this Hon’ble Court.

The respondent No. 2-Bureau preferred a Review Petition dated 11.01.2012 which is pending 05(five) entities participated in the said tender-inviting notice for printing/supplying of 4,00,000



(Four Lac) sets of EU Compliant GSP Form-A. It is palpably clear that the petitioner No. 1 purchased the Tender Document on 24.07.2011, while the respondent No. 4 purchased the same on 25.07.2011. True copies of the Cash Memo dated 24.07.2011 and other Cash Memos of the purchases.

The petitioner No. 1 has been treated equally with other tenderers throughout the tender process. The petitioner No. 1 failed to buy the tender schedule before 21.07.2011 and, hence, there was no fault on part of the respondent No. 2-Bureau. Moreover, it is evident that all other bidders purchased Tender Document after the petitioners purchased the same. Having failed to procure the Notification of Award, the petitioners have now raised the issue of time constraint in order to deprive the respondent No. 4 from its lawful rights and entitlement. The truth is that the technical requirement for GSP Form-A, as mentioned in the tender-inviting notice, was that Monocolour (Black) should be used for the said Forms. Accordingly, the petitioners knew and ought to have known from the very first day of publication of the

tender that Monocolour (Black) was required for the said Forms and, as such, the petitioners' assertion that they had no idea about the requirement of Monocolour (Black) until they got hold of the Tender Document is baseless, misleading and incorrect.

TEC in its meeting held on 21.09.2011, 22.09.2011 and 25.09.2011, upon completion of examination and evaluation of tenders, found that the respondent No. 4 was the only responsive bidder and, accordingly, recommended to issue Work Order/Notification of Award in favour of the respondent No. 4 as the successful lowest bidder.

The petitioner was declared as non-responsive tenderer for, amongst others, the following reasons as per TEC resolution (Annexure-“X-2”):

- (a) The petitioner failed to supply the GSP Form-A as per technical specification mentioned in the Tender Document. The petitioner supplied the GSP Form-A with Monocolour (blue) instead of the prescribed Monocolour (black).

- (b) The petitioner failed to furnish the required Work Experience Certificate of carrying out a single work of Taka 1,00,00,000/- (Taka One Crore Only) in last five years. Upon query, they submitted a work tender of Taka 1,53,00,000/- (Taka One Crore and Fifty-Three Lac only) which is not the same as a Work Experience Certificate.
- (c) The petitioner failed to submit up-to-date Income Tax Clearance Certificate. The petitioner submitted a TIN certificate as a newly registered assessee in 2011 which is not the required up-to-date Income Tax Clearance Certificate. As on 28.07.2011, the up-to-date Income Tax Clearance Certificate means that all taxes must be paid up to the assessment year of 2010-2011.

Thereafter, the recommendation of the TEC was forwarded to the respondent No. 1 for approval, whereupon the respondent No. 1 was pleased to approve the decision of the TEC and the

said approval was forwarded from his office to the respondent No. 2.

In pursuant to the approval granted by respondent No. 1, a Notification of Award was issued by the respondent No. 2 vide in favour of the applicant in respect of the printing/supplying of 4,00,000 (Four Lac) sets of EU Compliant GSP Form-A.

Subsequently, the respondent No. 4 informed the respondent No. 2 of its acceptance of the Notification of Award dated 12.10.2011.

Thereafter, in view of above, a Contract was executed between the respondent No. 2-Bureau and respondent No. 4, being Contract Agreement dated 16.10.2011 in respect of printing/supplying of 4,00,000 (Four Lac) sets of EU Compliant GSP Form-A at the quoted price of Taka 1,93,90,000 (Taka One Crore Ninety-Three Lac and Ninety Thousand only).

The respondent No. 4, in due compliance with their contractual obligations, delivered the aforesaid 4,00,000 (Four Lac) sets of EU Compliant GSP Form –A in favour of the

respondent No. 2-Bureau, which was confirmed vide the Challan dated 28.12.2011.

It is also pertinent to note here that the respondent No. 4 issued a Bill under a Memo dated 28.12.2011, which was received by respondent No. 2-Bureau on 03.01.2010, against the delivery of the said 4,00,000 (Four Lac) sets of EU compliant GSP Form-A and, as such, the applicant performed its duties and responsibilities under the said contract with due diligence and care.

The Review Panel-4 of CPTU has erred in law and fact in coming to its Decision dated 08.12.2011. Review Panel-4 did not consider respondent No, 2-Bureau's response prepared categorically as per the provisions of Act 2006 and Rules 2008. Review Panel-4 of CPTU discussed the three technical issues as followed:

- (a) The petitioner No. 1 supplied the GSP Form-A with Monocolour (blue) instead of the prescribed Monocolour (black) as per technical specification mentioned in tender

notice. The Review Panel-4 had failed to provide any reasoning justifying the incompetency and failure of the petitioner No. 1 to meet the technical requirement. Moreover Review Panel-4 also failed to consider the importance of a specific ink for a security paper in the nature of GSP Form-A. The Review Panel-4 considered a hypothetical ground that had the petitioner No. 1 been allowed more time, they could have met the technical specification. There was a stipulated period 21days period for all the tenders and the requirement was specifically mentioned in the tender schedule.

- (b) The petitioner No. 1 submitted a Work Order of Taka 1,53,00,000/- (Taka One Crore Fifty-Three Lac Only), which is not the same as the prescribed Work Experience Certificate, According to the TEC, a Work Order is not a substitute for a Work Experience Certificate' inasmuch as the former does not guarantee that the work is

executed properly. But the Review Panel-4 dismissed the ground without showing any cogent reason.

- (c) The petitioner No. 1 failed to submit up-to-date Income Tax Clearance Certificate. The Review Panel-4 failed to understand the difference between a TIN (Tax payer's Identification Number) Certificate and an up-to-date Income Tax Clearance Certificate and, hence, found the TIN certificate provided by the Petitioner No. 1 as acceptable. A TIN Certificate certifies a person as a registered assessee holding a ten-digit number under jurisdiction of a Taxes Circle within a Taxes Zone. On the other hand, the up-to-date Income Tax Clearance Certificate certifies that all taxes are paid by the assessee up to the latest assessment year. As on the tender dropping date, i.e., 28.07.2011, the prescribed Income Tax Clearance Certificate required a certificate signifying payment of income tax up to the assessment year of 2010-2011.

Considering the above points, it is clear that the Review Panel-4 of CPTU failed to understand the specific technical requirements as well as other required qualifications related to the tender evaluation. Ignoring the technical grounds, the Review Panel-4 took cognizance of facts/issues, such as hearsay, perception and fictitious claim, although they are not entitled to rely upon the said facts/issues. The Review Panel-4 made an allegation against an officer, namely, DG-2 of respondent No. 2-Bureau, based on petitioner No. 1's complaint although the DG-2 of the respondent No. 2-Bureau was neither part of Evaluation Committee nor present at the office during the time of execution of the Contract since he was under a training programme in BPATC, Savar at the relevant time. The Review Panel-4's Decision dated 08.12.2011 neither asked the respondents to cancel the Work Order/Notification of Award issued in favour of respondent No. 4 nor asked the respondents to stop the tender process/proceeding.



GSP Form-A is a unique and special type of security form to ensure that no person can forge the export/negotiating documents while exporting RMGs from Bangladesh to Europe and, as such, the sample provided for the said tender process had to be an actual GSP Form-A (as approved by EU) which was being used by respondent No. 2-Bureau at the relevant time.

It is further stated that the petitioners misled the Hon'ble Court by suppressing the relevant fact in the Writ Petition that the respondent No. 2 issued Work Order/Notification of Award in favour of the respondent No. 4 on 12.10.2011, entered into a contract with the respondent No. 4 and thereafter, received the GSP Form-A delivered by the respondent No. 4 on 02.01.2012 and, hence, the tender proceedings were completed and, therefore, the instant Writ Petition has become infructuous and beyond any intervention.

The ready-made garments ("RMG") exporters are mandatorily required to furnish the EU Compliant GS Form-A as a negotiating document for the export of RMGs from Bangladesh

to the EU market, as a result of which the RMG exporters enjoy duty-free facility from the EU and, therefore, the export process of the county vis-a-vis RMG sector would be adversely affected since the respondent No. 2-Bureau is on the verge of running out of the EU Compliant GSP Form-A and, hence, the respondent No. 2-Bureau would not be able to supply any GSP Form-A to RMG exporters if the GSP Form-A already supplied to the respondent No. 2-Bureau by the respondent No. 4 are not allowed to be used and, as such, the Rule is liable to be discharged for the ends of justice.

Due to the instant Writ Petition, any export to the European Union would be impeded, thus leading to huge loss of foreign remittance.

It is submitted that the instant Writ Petition is not maintainable in law inasmuch as the decision passed by the Review Panel-4, in respect of the tender for printing/supplying of EU Compliant GSP Forms in Review Petition No. 115 of 2011, has neither rendered the tender process as being an invalid one

nor stayed the operation of the same and, as such, the Rule is liable to be discharged for the ends of justice.

As the Rule was taken up for adjudication, Mr. Awsafur Rahman submitted that the respondents are bound by the decision of the Review Panel 4 and hence they should be directed to revoke the work order, and issue the same in the petitioners favour Mr. Mahmud Mutahar Hussain on the other hand submitted that nowhere has the Review Panel ordered revocation of the work order or to accord the same in the petitioner's favour.

For us the questions to be addressed by us is whether the respondents have in fact complied with the orders the Review Panel passed, and if not whether we should pass any direction to that effect.

Admittedly the Public Procurement Rule provides for inbuilt device for appeal. Admittedly again the petitioner has exercised that right and admittedly, the appellate body has passed a number of orders after adjudicating upon the appeal preferred by the petitioner. The orders are as follows:

- (1) Decision of the Evaluation Committee making tender bid of JBSPPL non-responsive is illegal, unethical and void. The appropriate authority will take necessary action to compensate loss of the government and of the complainant.
- (2) The Ministry of Commerce should investigate in to the matter and take action as per rules and regulations indicated in to findings of the case. The security deposit furnished by the complainant may be refunded by CPTU.

The petitioner's case is that although the Reviewing Panel-4 has passed some orders, the respondents have not complied with them.

It is quite clear that the said Panel has passed no order requiring the respondents to revoke the work order it has issued in favour of the respondent no. 4 or to rescind the contract the respondent no. 2 concluded with the respondent no. 4.

So, while we accept that the respondent no. 2 must abide by the decision passed by the Review Panel-4, that does not follow that the work order is to be revoked or accorded to the petitioner. As the respondent no. 2 is obliged to comply with the Panel's decision they must undertake the following actions;

1. a through investigation into the matter as per the order the Panel passed;
2. return the Security deposit to the petitioner;
3. asses as to whether any loss has been occasioned to the government and, if so, how and by whom the government should be compensated for that loss.

With the above observation the rule is disposed of without any order on costs.

The interlocutory order passed earlier is vacated.

It will not prejudice any contract that may have been concluded between the respondents and any other party, and any work order that may have been accorder by the EPB in favour of any party.

**Jahangir Hossain, J**

I agree