

# **Remedies available for aggrieved Tenderers under PPR 2008 : A diagnostic Analysis**

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Md Sharfuddin Khan Jilani

## **Abbreviations and Acronyms**

AO	Approving Authority
BADC	Bangladesh Agricultural Development Corporation
BARI	Bangladesh Agricultural Research Institute
BBS	Bangladesh Bureau of Statistics.
BCIC	Bangladesh Chemical Industries Corporation
BIWTA	Bangladesh Inland Water Transport Authority
BOQ	Bill of Quantity
BPDB	Bangladesh Power Development Board
BR	Bangladesh Railway
BRTA	Bangladesh Road Transport Authority
BSCIC	Bangladesh Small & Cottage Industries Corporation
BTCL	Bangladesh Telephone Company Limited
BTRC	Bangladesh Telecommunication Regulatory Authority
BWDB	Bangladesh Water Development Board
CCGP	Cabinet Committee on Government Purchase
CGFR	A Compilation of General Financial Rules
CPA	Country Procurement Assessment
CPAR	Country Procurement Assessment Report
CPTU	Central Procurement Technical Unit
DGFP	Director General of Family Planning
DGH	Director General of Health
DGLR	Director General of Land Records & Survey
DI&P	Department of Immigration & Passport
DL	Department of Livestock



DO letter	Demi Official letter
ECNEC	Executive Committee of the National Economic Council
E&MRD	Energy & Mineral Resources Division
FBCCI	Federation of Bangladesh Chamber of Commerce & Industries
FD	Finance Division
FS&CD	Fire Service and Civil Defence
GATT	General Agreement on Tariffs and Trade
GATS	General Agreement on Trade in Services
GCC	General Conditions of Contract
GPA	Agreement on Government Procurement
HOPE	Head of the Procuring Entity
IDA	International Development Association.
IMED	Implementation Monitoring and Evaluation Division
JV	Joint Venture
LGD	Local Government Division.
LGED	Department of Local Government Engineering
MD	Managing Director
MoA	Ministry of Agriculture
MoC	Ministry of Commerce
MoCA	Ministry of Cultural Affairs
MoF&L	Ministry of Fisheries & Livestock
MoH	Ministry of Home
MoH&FW	Ministry of Health & Family Welfare
MoH&PW	Ministry of Housing & Public Works
MoI	Ministry of Information
MoP&T	Ministry of Post & Telecommunication

MoR	Ministry of Railway
MoS	Ministry of Shipping
MP	Member of the Parliament
NOA	Notification of Award
PCC	Particular Conditions of Contract
PD	Project Director
PE	Procuring Entity
PEC	Proposal Evaluation Committee
PGCB	Power Grid Company Limited
PPA 2006	The Public Procurement Act 2006
PPR 2003	The Public Procurement Regulations 2003
PPR 2008	The Public Procurement Rules 2008
PWD	Department of Public Works
REB	Rural Electrification Board
RFP	Request for Proposal
RFA	Request for Application
R&HD	Department of Roads & Highways
SB	Sonali Bank Ltd.
SRDI	Soil Resource Development Institute
STD	Standard Tender Document
TEC	Tender Evaluation Committee
TOC	Tender Opening Committee
WTO	World Trade Organisation.

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## **Abstract**

Like any other Public procurement rules/regulation/directives, Public Procurement Rules 2008 (PPR 2008) has also well defined grievance remedy procedures. Under the PPR 2008, there are four stages of complaints lodge procedure. But seeking remedy at the level of the Review Panel is the last stage of getting remedy by a tenderer. Actually, the enforcement of rules of PPR 2008 relies heavily on complaints/appeal petitions brought by aggrieved tenderer for public contracts before the four stages of complaints lodge procedure specifically at Review Panel level.

The study considers the extent to which the existing remedial system, available for aggrieved tenderer under PPR 2008, is an effective mechanism through text-based research, by analyzing the text of related statutes and records of disposed appeal petitions, and validation of the observations/data, found by reviewing the contents of disposed appeal petitions, by conducting interviews with a tiny size of sample.

The findings of the research indicate that with all its weaknesses the existing remedy procedure is best available mechanism for ensuring transparency, efficiency and accountability in the public procurement system of Bangladesh. But for making it effective in true sense immediate intervention is needed from strategic level in the forms of (i) ensuring intensive monitoring of the procurement processes by the supervisory layer, (ii) ensuring proper functioning of three tiers of the administrative remedy procedure, (iii) taking initiative from the government side to formally orient the tenderer about the remedy provision, and (iv) issuing circular explaining the areas, where disagreements are being happening during interpretation, and providing the correct interpretation by the CPTU.

Before this study was undertaken, no study was conducted on remedy procedures available for the tenderer under the PPR 2008. It is hoped that the study would shed light on different related issues and will be of some use to policy makers.

**Key Words** : *remedial system, effective, transparency, efficiency, accountability.*

# ***Chapter One***

## **Introduction**

### **1.1 Introduction**

Among in many other functions the government of a nation is also a purchaser of large quantities of goods. This function of procurement is assuming larger proportions than ever before with the constantly increasing size and scope of governments. This trend has been climaxed with the additional economic activities involved in the conduct of the last world war, the attempts to mitigate an aftermath of virtually worldwide famine, and government's part in encouraging reconstruction and reconversion to peacetime industry<sup>1</sup>. Since Second World War, the effects of public procurement on the national economy have been becoming more visible and now the impact of public procurement on the national economy has become enormous.

There are mainly two purposes of public procurement – (i) for the sake of obtaining the required items to be used/required in public sector, and (ii) for the effect the purchase is apt to have on the economy. More specifically, a government purchase is made for one of the following reasons :<sup>2</sup>

- (A) Because of actual need for the item whether on the part of the agencies of government itself or on the part of others to whom the government intends subsequently to donate or resell the item.
- (B) Because of the effect of the purchase on the market

These functions of government procurement are not limited to any one government; but are uses by every government. The fact is that govt. is not an ordinary purchaser. Government often purchase for other reasons than consumption which distinguishes it from an ordinary purchaser. The possibility of alternative purchases in making a purchase is possible only as a result of the magnitude characteristic of most government purchases, the gargantuan nature of which is such that it

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<sup>1</sup> Baumol W. J., "Notes on the Theory of Government Procurement", *Economica*, New Series, Vol. 14, No. 53(Feb., 1947), p.1.

<sup>2</sup> Ibid p.1

has profound effects on the country's economy. As a result, there is ample scope procurement could make a suitable instrument of control.

## **1.2 Government Procurement in Different Countries**

Traditionally each government has the tendency to place procurement contracts within domestic industry. This tendency has been distorting the natural patterns of international trade and creating inefficiencies in the global economy. Like global, regional and bilateral initiatives for reducing trade barriers such as quantitative restrictions and tariffs, similar initiatives are taken to reduce the remaining barrier for opening that closed government procurement. Government procurement was largely excluded from the original General Agreement on Tariffs and Trade (GATT) and its 1994 successor, and has also been largely omitted from the 1995 General Agreement on Trade in Services (GATS)<sup>3</sup>. However, limited success was achieved to tackle this issue in the form of the separate "GATT" Agreement on Government Procurement concluded at the end of the Tokyo Round. This Agreement sought to remove discrimination in government supplies contracts as well as transparency in contract award procedure. At the end of Uruguay Round, in 1993, a new Agreement on Government Procurement (GPA) was concluded. That agreement became one of the plurilateral (Optional) agreements administered by the World Trade Organisation(WTO). In terms of aims and approach, this agreement is very similar to the old one. But its coverage is wider extending to procurement of services and construction and also to sub-federal government and some state enterprise. This new Agreement has attracted very few participants. Since GPA has not proved attractive, the WTO determined that a new approach is required. Thus at the 1996 Ministerial Conference at Singapore, a Working Group on Transparency in Government Procurement was set up. Its mandate was to conduct a study on transparency in government procurement practices and on the basis of this study, to "develop elements for inclusion in an appropriate agreement".<sup>4</sup>

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<sup>3</sup> Arrowsmith Sue, Towards a Multilateral Agreement on Transparency in Government Procurement, *The International and Comparative Law Quarterly*, Vol. 47, No. 4.(Oct., 1998), P.793

<sup>4</sup> *Ibid*, p.794

### 1.3 Public Procurement Legislation in Bangladesh

The Constitution of the People's Republic of Bangladesh does not have any direct provision bearing the public procurement issues. Despite the absence of direct constitutional provisions, the institutional and legal frameworks for public procurement in Bangladesh, which are of recent origin, can be seen to have derived their legitimacy from the constitution of Bangladesh.<sup>5</sup> Until the enactment of the Public Procurement Act 2006, the legal regime of public procurement in Bangladesh was based on procedures and practices that date back to the British era. Almost all the regulations/procedures on public procurement processing were inherited from British rule and were in use before 1998. Government Purchase Manual was introduced during the World War II which was last amended on 1978. In fact, immediately after independence Bangladesh inherited few customs, procedures and forms introduced by the British colonial govt. and followed by the public sector since then. Forms 2908 and 2911 are, two forms have been using for the purpose of public procurement processing since our independence, said to have been introduced in the month of August 1929 and November 1929 respectively by the then British colonial government. These two forms were subsequently changes slightly to make it update. A Compilation of General Financial Rules (CGFR) outlined broad financial principals of public procurement. However, before introducing PPR' 2003, documents/ procedures like i) the Manual of Office Procedure (purchase) compiled by the Department of Supply and Inspections as the guide for purchasing goods, ii) the Public Works Department's Code as the guide for procuring works; and iii) the Economic Relations Division's Guidelines on procurement for donor assisted development projects were in exist. The CGFR in a way or other also referred to those documents.

In the light of the Paris Declaration, Government of Bangladesh initiated Country Procurement Assessment in the year 1998 in collaboration with the World Bank. Economic Relations Division made Implementation Monitoring and Evaluation Division (IMED) as counterpart agency for that assessment. The assessment was conducted between January and December 1999 and Country Procurement Assessment Report (CPAR) was finalized in September 2000. In 3<sup>rd</sup> October 2000, the National Economic Council took a decision for

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<sup>5</sup> Hoque, Ridwanul, Public Procurement Law in Bangladesh : From Bureaucratisation to Accountability.



assigning the IMED the responsibility of doing public procurement reform in the country. 6<sup>th</sup> February 2001 is a milestone day, when Executive Committee of the National Economic Council (ECNEC) took a decision in its meeting for starting Public Procurement reform activities after reviewing the comments from different ministries/divisions about the CPAR. The committee also decided in that meeting to carry out that reform activity through a Central Procurement Technical Unit (CPTU) under the IMED.<sup>6</sup>

The first “Public Procurement Reform Project” with the assistance of IDA was initiated in 2002 with the objectives to contribute to improved performance in public procurement through introduction of measurement system of making the public procurement system compliant with internationally agreed norms and practices for increasing efficiency, transparency and accountability. Under that reform project, uniform and standard regulation with the title “The Procurement Regulation 2003” was promulgated. It was made effective in September 2003 by replacing all other public procurement guidelines, procedures and practices that were exist at that time. Later, based on the experience gained through the implementation of regulations and valuable inputs from all stakeholders, a draft Public Procurement Act was formulated and it was passed by the National Parliament having the title “Public Procurement Act 2006” (PPA 2006) with the provisions to be followed in procurement of goods, works and services using the public fund.<sup>7</sup> In exercise of the power conferred to the government under section 70 of the PPA 2006, the government has framed “Public Procurement Rules 2008” (PPR 2008) on 24<sup>th</sup> January 2008<sup>8</sup> and made effective both PPA 2006 & PPR 2008 from 31<sup>st</sup> January 2008 through a notification.<sup>9</sup>

#### **1.4 Scope**

Like any other public procurement rules/regulation/directives, PPR 2008 has also well defined grievance remedy procedures. Under the PPR

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<sup>6</sup> Source : Quarterly News Letter of the PPSC (Volume 1, Issue 1, June 2010) jointly published by the Public Private Stakeholders Committee & Institute of Governance Studies (IGS) of the BRAC University.

<sup>7</sup> Act No. 24 of 2006, passed by the National Parliament on 2<sup>nd</sup> July 2006

<sup>8</sup> SRO No. 21-Law/2008, dated : 24/01/2008

<sup>9</sup> SRO No. 20-Law/2008, dated : 24/01/2008

2008, there are four stages of complaints lodge procedures. An aggrieved tenderer has the opportunity to seek remedy one after one starting from seeking remedy from the Procuring Entity (PE)<sup>10</sup>. If he/she is not satisfied with the response of the PE, he/she has to submit his/her complaint to the concern Head of the Procuring Entity (HOPE)<sup>11</sup>. After that, there is provision for lodging complaint to the Secretary of the respective Ministry or Division. Even if the tenderer still not satisfied with the decision of the Secretary, the tenderer has the last resort to lodge the appeal before the Review Panel<sup>12</sup>. So seeking remedy at the level of Review Panel is the last stage of getting remedy by a tenderer under PPR 2008.

This study is mainly concerned with the extent of the legal remedies available for the tenderer under PPR 2008. It seeks to contribute to an understanding of this subject by analyzing the provision of the rules related to remedy, explaining the different tiers earmarked by the rules for lodging complain by a tenderer including the structure of the Review Panel, explaining the power of the authority for constituting the Review Panel and Qualification of the member of the review panel; and the remedies available in PPR 2008 for an aggrieved tender if he/she can proof his/her case. But this study basically concentrates its focus on the effectiveness of remedial system through the text-based research. The Records of appeal petitions lodged before the Review Panel since the inception PPR 2003 would be analyzed under this study. The research was centered on factors that influence tenderers' use of remedies and explores practice in the field.

### **1.5 Problem Identification**

In Bangladesh, public procurement contracts have been a major source of corruption<sup>13</sup> in the executive organ of the state. There was no

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<sup>10</sup> An entity having administrative and financial powers to undertake Procurement of Goods, Works and Services.

<sup>11</sup> HOPE means the Secretary of a Ministry or a Division, the Head of a Government Department or Directorate; or the Chief Executive, by whatever designation called, of a Local Government agency, an autonomous or semi-autonomous body or a corporation, or a corporate body established under the Companies Act.

<sup>12</sup> "Review Panel" means a panel comprised of specialist to review complaints submitted by a tenderer.

<sup>13</sup> Hoque, Ridwanul, Public Procurement Law in Bangladesh : From Bureaucratisation to Accountability.

public procurement act and rules or any uniform regulation in Bangladesh till 2003. The first uniform and standard regulation under the title "The Procurement Regulation 2003" was promulgated in 2003 and made effective it in September of that year by replacing all other public procurement guidelines, procedures and practices that were exist at that time. Subsequently, the National Parliament passed the first public procurement act in 2006. So now the principal legal instruments to deal with public procurement in Bangladesh are the Public Procurement Act 2006 and Public Procurement Rules 2008. Though efforts were to ensure openness and transparency in the public procurement system before the promulgation of PPR 2003; the procurement process was in practice far from satisfactory due to absence of comprehensive legal framework exclusively relevant to public procurement issues. Following factors were prevailing in the public procurement arena during that time : (i) absence of proper planning, (ii) poor advertisement, (ii) short bidding period, (iv) poor specifications, (V) non-disclosure of selection criteria, (Vi) vague evaluation criteria, (Vii) multi-layering of the approval & review process, (viii) negotiations with all bidders, (ix) re-tendering without adequate grounds, (x) protracted award delays, (xi) multiple committees, and (xii) corruption and outside influence<sup>14</sup>.

So it is obvious that the law makers sought to eliminate all those factors from and ensure transparency, accountability and fairness in government procurement by enacting PPA 2006. So the players of the public procurement area have now been regulated by the PPA 2006 and PPR 2008 for the last almost near to four years period. So it is high time to assess whether PPR 2008s' accountability goal has already been achieved satisfactorily. Like any other public procurement rules/regulation/directives, PPR 2008 has also well defined grievance remedy procedures. So the effectiveness of remedy procedures could be one of the mechanisms to assess the achievement of accountability goal. Without an effective remedy procedure, the enforcement of PPR 2008 could be flouted by the technical avoidance of the rules.

## **1.6 Research Questions**

In view of the above discussion, the following research questions are developed :

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<sup>14</sup> Source : Country Procurement Assessment Report, prepared jointly by the Govt. of Bangladesh and the World Bank in 2000.

“What is the main cause of lodging Appeal Petitions in most cases? Is it due to non-compliance of rules by the PEs at processing stage? Is there any grey area within the rules or standard documents which facilitate the disagreement regarding the interpretation of that rule/clause ultimately resulting the lodgment of complaint by the aggrieved tenderer? Is there any other reason behind for lodging complaint by the tenderer?”

### **1.7 Hypothesis**

It is assumed that there are two main reasons for lodging appeal by an aggrieved tenderer at the Review Panel level. First one is the non-compliance of the specific provision of PPR or the clause of tender document by the concern officer of the procuring entity. And the second one is the existence of grey areas in the PPR/STD which is/are being interpreted by the procuring entity (PE) and tenderer both from their own perception resulting the disputes which ultimately coming up to review panel in the form of appeal.

### **1.8 Objective**

To assess the extent to which the existing remedy procedure available for the tenderer under PPR 2008 is effective. Further, to test whether the above hypothesis is correct or not.

### **1.9 Specific Objectives**

Specific objectives of my research would be

- i) to identify the main cause of lodging Appeal Petitions by the aggrieved tenderer in most review cases ;
- ii) to locate the grey areas of the PPR (if any) due to which maximum disputes are being originating based on the own interpretation of the rules both by the tenderer and PE;
- iii) to identify whether there are any other reason responsible for originating the maximum number of review cases;
- iv) to bring the notice of the policy makers about the grey areas of the PPR if at all identified during my research;
- v) to suggest specific actions to the policy makers for ensuring transparency, accountability and fairness in government procurement.

### **1.10 Justification**

It is a fact that no study has yet been conducted on remedy procedures available for the tenderers under the PPR 2008. Neither any study has already been done to assess the effectiveness of the remedies available under the PPR 2008 for ensuring the transparency of the process and accountability of the related people. Prior to this study there were no data on the practical aspect of the use of remedies including number and trend of review petitions lodged since the inception, existence (if any) of fear of retaliation, existence (if any) of alternatives to prescribed remedy procedures.

Since remedy procedure is one of the effective mechanism to assess the compliance of the rules/directives and more specifically is vital to ensure the transparency in the public procurement process, this study hopefully would shed light on those issues and assist the policy makers to fine tune the existing PPR 2008 in achieving the accountability goal satisfactorily as it is dreamed by the lawmakers during passing the PPA 2006 in the National parliament.

### **1.11 Methodology**

This study would be a text-based study for finding out the answer of the selected research questions. To this end, the study first outlines remedy procedures provided in the PPR 2008, composition of the review panel, qualification of the members of the panels and authority of the govt. to constitute the Panel, procedures of submitting petition at different levels including the time limit, and the available remedies for the aggrieved tenderers under PPR 2008. For these, the relevant provisions of the PPA 2006 and the PPR 2008 would be discussed and assessed first. Then the records of the disposed Appeal petitions kept under the jurisdiction of the CPTU would be examined, assessed and analyzed after taking permission of the DG, CPTU.

Since the aim of this research to explore and investigate in depth a phenomenon, behavior or area, the appropriate research method is qualitative. Qualitative research involves the collection and interpretation of data that are not easily reduced to numbers. Qualitative research is suited to exploratory projects, is concerned with individualized experiences<sup>15</sup> and gives priority to depth of investigation.

After finding out the answer of the research questions by reviewing, assessing and analyzing the text of related statutes and records of the disposed review petitions, attempts would be made for triangulation by taking interviews of the small sample of tenderers, PEs,

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<sup>15</sup> Patton, How to Use Qualitative Methods in Evaluation(1987), p.47

HOPEs, Secretaries and independent consultants. The initiative of triangulation would hopefully assist the researcher to verify the findings of the text-based research study by comparing the perception of the interviewees regarding the issues.

### **1.12 Limitations**

One of the very vital limitations is time and resource constraint for conducting this study. After finalizing the Supervisor by the IGS of the BRAC University in the third week of October, there were hardly sufficient times to review the records of disposed appeal petitions and conduct triangulation by taking semi-structured interviews of small size of sample.

For conducting this research, mainly records of the appeal petitions disposed of at the Review Panel level have been reviewed. The reviewing of records of proceedings/actions taken under three other different levels was not attempted even. So the findings of this study might reflect the partial picture about the effectiveness of the remedies system of PPR 2008.

### **1.13 Chapter Outline**

The whole research work is presented in seven different chapters.

The first chapter is the introduction chapter; which gives an outline of the theoretical background of the government procurement and past tendencies of the governments in case of processing government procurement. The history of the public procurement regime in Bangladesh is then narrated in this chapter. The chapter also explains the scope of the research work, the identification of the problem, the research question, the objective of the work including specific objectives, Hypothesis, the methodology to be followed with the probable limitations.

The second chapter is the literature review chapter. The chapter is started with the brief definition of the Procurement and Public Procurement. General Principles adopted in Bangladesh within its Legal framework of Public Procurement are then outlined in that chapter. This chapter also explains the responsibility of compliance of provisions of Act & Rules, available remedies for aggrieved tenderers under PPR, formation of Review Panels, provision of Interim Relief available for the tenderers, procedure of Appeal disposal and finally provision for dispute settlement during contract execution stage.

The third chapter is the research design chapter; which one is started with the brief introduction of different research methods with

the advantage and disadvantage of each. Then argument was given in favour of selecting qualitative method as suitable for this research followed by the methods of data collection. This chapter also explains the brief introduction of triangulation, types of interview, size and collection of sample and how the questions, asked in the interview, have been designed.

The fourth chapter is the data presentation chapter; where data have been presented, collected during data collection period, using the methodology explained already Chapter One. In this chapter, attempts have been made to present data available for presentation after reviewing the records of Appeal petitions disposed of by the Review Panels constituted by the CPTU. During collection of data, 18 types of different information were collected from the reviewed 111 records of the appeal petitions. Based on those collected information, data have been presented in this chapter by using different chart for easy understanding of the readers. All the Tables of data analysis have been put in Annex- A of the dissertation.

In the fifth chapter, analysis of few selected records, disposed of by the Review Panels on different dates either under PPR 2003 or PPR 2008, have been done. The objectives of this analysis are to (i) give an in-depth idea about the nature of the complaints, (ii) give an idea about the main causes of lodging complaints in most cases especially due to difference of interpretation of rules/tender clause, (iii) provide the insight how those appeal petitions are dealt by the Review Panel, (iv) focus light on the matter of the jurisdiction of the Review panels to the readers of this research report. Total 14 records have been analyzed in detail in this chapter categorizing the selective records under four different classes namely (i) Appeal petitions due to Non-compliance, (ii) Appeal Petitions due to differences of interpretations of rules/tender clauses, (iii) Appeal petitions lodged due to actions of PEs during contract management stage, and (iv) Appeal petitions rejected since the contract with the another tenderer has already been signed. But for protecting the privacy & confidentiality of the concern PEs including respective HOPEs & Secretaries of the ministry/division and petitioner Tenderers, the identity of the PEs and Tenderers have not been mentioned during the analysis.

The sixth chapter is mainly devoted for analysis of data and presenting findings. In this chapter, attempts have been made to analyse data, collected from the records of 111 Appeal petitions, and present findings. In this chapter, presented findings are grouped in categories that concern factors influencing tenderers' use of remedies

but also provide more general information on the function and impact of remedies.

The seventh and final chapter is the conclusion and recommendations chapter; which summarizes the results of the study and discusses their policy implications. Policy implications of the results of the study have been highlighted in detail in this chapter along with the recommendation for the policy makers necessary for making the existing remedy procedure under PPR 2008 an effective one. In addition to these, this chapter has also narrated the scope of further study in this field.

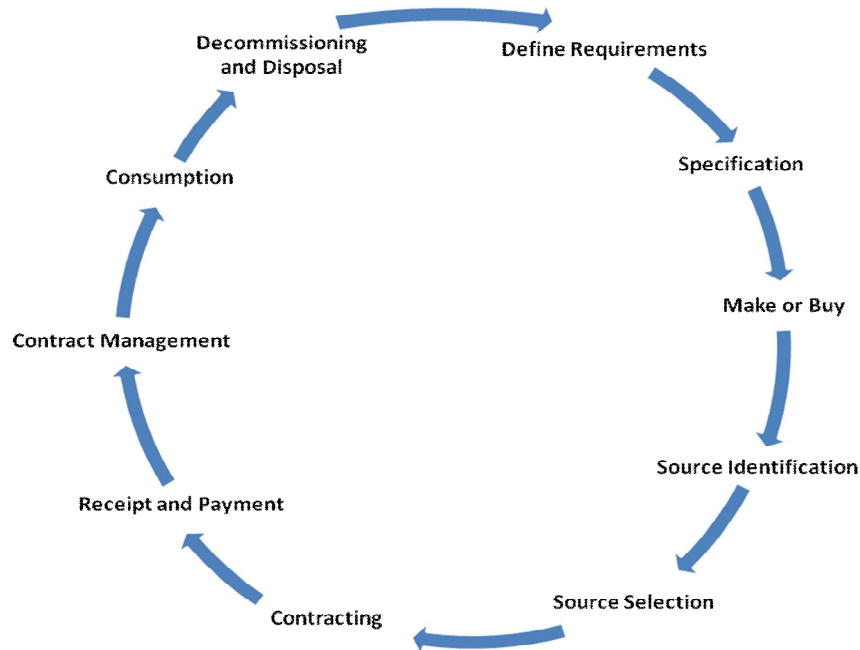


# Chapter Two

## Literature Review

### 2.1 What is Procurement?

Procurement is the obtaining of supplies and services by various means (e.g. loan, transfer, hire, purchase, etc.) with or without consideration<sup>16</sup>. But in PPR, Procurement defines as the purchasing or hiring of Goods or acquisition of Goods through purchasing and hiring, and the execution of Works and performance of services by any contractual means<sup>17</sup>. The Procurement Cycle describes the overall cycle of obtaining supplies from the origin of the need, through the purchasing or other means, e. g. loan etc, to the intake of correct requirements and final consumption and disposal<sup>18</sup>.



**Figure 1 : The Procurement Life Cycle<sup>19</sup>**

<sup>16</sup> The Official Dictionary of Purchasing & Supply, published by the Liverpool Business Publishing, p.122

<sup>17</sup> The Public Procurement Rules 2008, Rule 2(38)

<sup>18</sup> Ibid

<sup>19</sup> Source : Purchasing Context, Second edition, Ian Thompson, The Chartered Institute of Purchasing & Supply, p.119

Procurement is often confused with the term purchasing. But they are not the same. Purchasing is the obtaining of supplies of goods and services by purchase<sup>20</sup>.

## **2.2 What is Public Procurement?**

Considerable amounts of taxpayers' money are spent on procuring a wide range of goods and services. Public Procurement means Procurement using public funds<sup>21</sup>. Section 3(2) of the PPA widens the scope of the Act covering the government, semi-government and statutory public bodies, other procuring entities that use public funds<sup>22</sup>, and even companies that procure by using public funds. Any procurement under any loan, grant, or credit agreements with the development partners or with a foreign state or an organization would also come under the purview of this Act provided that if there is anything to the contrary in any such agreement entered into, the provision of that agreement shall prevail. The general principles that have been followed for many years within the public sector can be summarized as follows<sup>23</sup> :

- Purchasing should be based on value for money.
- Competition should be used to acquire goods and services.
- There should be clear definition of the roles and responsibilities of personnel involved in specifying the need, giving financial authority, and making procurement commitments.
- There should be separation of the financial authority and the purchasing authority.
- There should be separation of duties between personnel who make contracts, those who receive the goods or services and those who authorize payments.

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<sup>20</sup> The Official Dictionary of Purchasing & Supply, published by the Liverpool Business Publishing, p.127

<sup>21</sup> The Public Procurement Rules 2008, Rule 2(43)

<sup>22</sup> Public funds means any funds allocated to a Procuring Entity under Government budget, or loan, grants and credits placed at the disposal of a Procuring Entity through the Government by the development partners or foreign states or organizations.

<sup>23</sup> Baily, Peter et al, Procurement Principles and Management, Tenth Edition, FT Prentice Hall, p.86

- Requirements which are above a certain financial threshold are normally required to be advertised in accordance with set regulations on public procurement.

### **2.3 General Principles adopted in Bangladesh within its Legal framework of Public Procurement**

It has been mentioned in first chapter that at present there are two principal legal instruments to deal with public procurement in Bangladesh are the PPA 2006 and PPR 2008. Procurement systems share some common objectives such as value for money, fair treatment, non-discrimination, integrity, and social and industrial development<sup>24</sup>. Generally, competition and transparency are widely regarded as the two principles which are utilized to achieve these objectives<sup>25</sup>. Lawmakers of Bangladesh also set the objectives of the PPA by stating it in its preamble as “to provide for procedures to be followed for ensuring transparency and accountability in the procurement of goods, works or services using public funds, and ensuring equal treatment and free and fair competition among all persons wishing to participate in such procurement including the matters incidental thereto”<sup>26</sup>. The third chapter of PPR 2008 is mainly concerned with the Principles of public procurement. Rule 3 of PPR provides public accessibility to Procurement Act, Rules, and related orders, instructions, guidelines or other documents. It has entrusted the responsibility of ensuring public accessibility of those Act/Rule/Orders/Instructions/Documents/STDs to the CPTU through printing & publishing the Bangla version of the English text, publishing Procurement-related documents needed to facilitate the conduct of Procurement activities, making Documents available to the general public in hard copy and posting these Documents on CPTU website; and finally ensuring that these Documents are properly maintained and updated<sup>27</sup>.

Non-discrimination is one of the main principal of Public procurement regime of Bangladesh. The PE is not allowed to restrain a person from participation in public procurement on ground of race, colour, sex, nationality or any criterion not related to the qualifications

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<sup>24</sup> Arrowsmith, Sue.(2004), “Public Procurement : An Appraisal of the UNCITRAL Model Law as a Global Standard.” *International & Comparative Law Quarterly*, 53

<sup>25</sup> Hoque, Ridwanul, “Public Procurement Law in Bangladesh : From Bureaucratisation to Accountability

<sup>26</sup> See the Preamble of the Public Procurement Act 2006

<sup>27</sup> See Rule 13 of the Public Procurement Rules 2008

as specified in the procurement related document<sup>28</sup>. The PE is, further, obliged to ensure competition in procurement on the basis of impartial and objective terms, provide all necessary information to all prospective applicants, tenderers or consultants required for the preparation of the application, tender quotation or proposal. In addition to that, the criteria for qualifications assessment and evaluation has to be clearly stated in the tender or proposal document and it has to be ensured that the applicant, tenderer or consultant is allowed at least minimum time, in consistent with the procurement method to respond properly<sup>29</sup>. The PE is not generally allowed to split a Project or a Programme components into successive packages of lower value when preparing its procurement plan with the intention of avoiding either a particular Procurement method or the obligations of seeking the approval of a higher authority. PEs are also advised not to usually split a package as approved in the Total Procurement Plan into more than 5 lots in order to make application of cross-discounts simple during evaluation<sup>30</sup>.

It also provides that the tender or proposal validity period should be determined in a way sufficient to complete the evaluation of tenders or proposals, and a comparative assessment, and to obtain all necessary approvals so that the notification of award of contract can be issued within such validity period<sup>31</sup>. The law also assigned to PE the responsibility of providing a correct and complete description of their expected performance levels and the characteristics & required quality in an non-restrictive way in preparing technical specifications and descriptions of the goods and related services, or works and physical services specified to be procured for the purpose of creating impartial and open competition among tenderers. Further, PEs have to be clearly specify the amount of tender security, the specified rate and the prescribed procedure for submission of performance security in the tender document<sup>32</sup>. A PE is bound to maintain the confidentiality of the process from tender opening or proposal opening leading up to an award of contract. Any effort by a person to influence the procurement process would result in the rejection of that person's pre-qualification, tender, proposal or quotation<sup>33</sup>. However, following the signing of a contract with a successful tenderer or consultant, any unsuccessful tenderer or consultant might have the right to get information from the

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<sup>28</sup> See Section 25 of the Public Procurement Act 2006

<sup>29</sup> See Section 13(1 & 2) of the Public Procurement Act 2006

<sup>30</sup> See Rule 17(1 & 2) of the Public Procurement Rules 2008

<sup>31</sup> See Section 14(a) of the Public Procurement Act 2006

<sup>32</sup> See Section 15(1) & 14(b) of the Public Procurement Act 2006

<sup>33</sup> See Section 18 of the Public Procurement Act 2006

PE about its own tender or proposal in the form of its relative situation and the deficiencies of its tender or proposal<sup>34</sup>. The PE has the responsibility to maintain all procurement related records and to administer efficient management of the contract awarded and to conduct Post procurement review within 90 days of the end of each fiscal year<sup>35</sup>.

## **2.4 Compliance of the Provision of Act and Rules**

The prime responsibility of compliance monitoring of the rules and implementation of the Act have been vested upon the Government by the PPA 2006 and government might monitor it either through a Central Procurement Unit or by establishing a separate unit for it<sup>36</sup>. No officer or member of staff engaged in the procurement of goods, works or services under the PPA, is allowed to undertake or attempt to undertake any procurement of goods, works or services in contravention of any provision of PPA & PPR. It is the responsibility of the PEs to ensure that its officers and members of staff do not engage in any corrupt, fraudulent, collusive or coercive practices during the process of procurement and execution of contracts. Any public officer or employee who acts in contravention of the PPA or PPR is liable to be prosecuted under the Government Servants (Discipline and Appeal) Rules 1985 with the charge of either corruption or misconduct. In addition to or an alternative to the departmental proceedings, criminal prosecutions may also be initiated against such officer or employee concerned under the relevant provision of the Prevention of Corruption Act, 1947 or the Penal Code 1860. As the most lenient consequence, HOPE might declare such person ineligible for further participation in the particular procurement proceedings or in any other procurement proceedings in future<sup>37</sup>.

There are also provisions for debarment of tenderer for their corrupt, fraudulent, collusive or coercive practices<sup>38</sup>. A number of tenderers have already been debarred by concerned procuring entities for varying periods from taking part in public procurement processes<sup>39</sup>. Apart from debarment, defaulted suppliers or contractors might be

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<sup>34</sup> See Section 21(2) of the Public Procurement Act 2006

<sup>35</sup> See Section 22 & 23 of the Public Procurement Act 2006

<sup>36</sup> See Section 67 of the Public procurement Act 2006

<sup>37</sup> See Section 64 of the Public Procurement Act 2006

<sup>38</sup> See Section 64 of the Public Procurement Act 2006 r/w the Rule 127 of the Public procurement rules 2008

<sup>39</sup> For a list of debarred companies, pl. visit <<http://www.cptu.gov.bd/DebarmentList.aspx>>

punished by lodging suit for un-liquidated damages and contractual penalties under the contract law.

The Government has also formulated Code of Ethics under the title "The Code of Ethics for Public Procurement" for the public officers and private individuals involved directly or indirectly in any public procurement process as Schedule XII of the Public Procurement Rules 2008<sup>40</sup>. It is considered as basis for best practices of ethical behavior for persons engaged in public procurement in Bangladesh and it aims at enhancing efficiency, competition, transparency and accountability in public procurement.

## **2.5 Remedies for the Tenderers under PPA 2006 & PPR 2008**

The principal qualities of any remedies system that seeks to be effective is to be functional : well designed and clear in text and capable of offering protection in an accessible, uncomplicated, inexpensive and speedy manner in practice<sup>41</sup>. If a person suffers or is likely to suffer loss or damage due to failure of a PE to fulfill its obligation under the PPA, he has the right to complain against that PE to the specified authority. But no complain could be lodged in the following cases : (i) choice of procurement method for goods, works or services, (ii) a refusal to shortlist an applicant, (iii) a decision to reject applications for pre-qualifications, tenders, quotations or proposals, (iv) a decision to award a contract following approval by the Cabinet Committee on Government Purchase(CCGP)<sup>42</sup>. Any aggrieved tenderer can lodge formal complaint to the prescribed authority against any irregularity such as corrupt practices, insufficient time for the tenderer to respond, inadequate documents and so forth done by the PE during or through the several processes of public procurement. There are almost 24 circumstances mentioned in the PPR in which situation an aggrieved tenderer might lodge complaint<sup>43</sup>.

Like any other public procurement rules/regulation/directives, PPR' 2008 has also well defined grievance remedy procedures. The complaint to be lodged under PPA & PPR has to be submitted in writing to the administrative authority in a hierarchical order. Under the PPR 2008, there are four stages of complaints lodge procedures. As per rule 57 of PPR, an aggrieved tenderer initially has to lodge complaint to the

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<sup>40</sup> See the Schedule XII of the Public Procurement Rules 2008

<sup>41</sup> Craig and de Burca, op. cit. footnote 17, p.235.

<sup>42</sup> See Section 29 of the Public Procurement Act 2006

<sup>43</sup> See Rule 56 of the Public Procurement Rules 2008

concern officer of the procuring entity such as Project Director, Line Director, Project manager, Procurement Officer within 7 calendar days of becoming aware of the circumstances giving rise to the complaint. The PE or Officer assigned for procurement shall consider the matter and issue a written decision to the person stating either the reasons for the rejection of the complaint or advising what corrective actions have been or will be taken within 5 working days of receipt of the complaint. If the aggrieved tenderer is not satisfied with the written decision of the PE, and wishes to pursue his/her complaint, he may lodge the same complainant to the HOPE within 3 working days after expiry of the fifth day of submission of complaint. After receiving the complaint from aggrieved tenderer, HOPE would examine whether he/she was a member or Chairperson of the Evaluation Committee of that particular procurement process or not. If he/she was a member or Chairperson of the Evaluation Committee of that particular procurement process, he/she would forward the complaint to the Secretary of the concerned Ministry or Division within 3 working days. If HOPE is in a position to accept the complaint, he/she would issue his/her written decision within 5 working days of receipt of the complaint. If the tenderer is not satisfied with the decision of the HOPE, he/she can lodge the complaint to the Secretary of the concerned Ministry/Division within 7 working days. Secretary of the Ministry/Division should give his/her written decision to the person stating either the reasons for rejection of the complaint or advising on the corrective actions that has been taken within 5 working days of receipt of the complaint. If the applicant fails to receive a written decision within the time period specified at each stage, then the person has the right to directly submit a complaint within 3 working days to the next higher level. If the aggrieved tenderer is not satisfied with the decision of the secretary or have not received any timely decision, the tenderer has the last resort to lodge the appeal to the Review Panel within 7 working days with required registration fee and refundable security deposit. Registration fee varies between Tk. 10,000/- to 25,000/- depending on the amount of the estimated Contract price or Tender price. Depending on the estimated Contract price or Tender price, Security deposit also varies with minimum 50,000/- to maximum Tk. 500,000/-. A person may appeal to a Review Panel only if the aggrieved tenderer has exhausted first three stages of

available options<sup>44</sup>. This is actually last step in the internal complaints mechanism ladder<sup>45</sup>

## **2.6 Formation of Review Panels**

Review Panels are constituted by the CPTU with the approval of the Minister for Planning and it comprised of minimum of 3 members. CPTU constitutes the Panel taking one member from each of the following three groups : (i) well-reputed specialist in legal matters, experienced in Procurement related legal issues, including retired senior officers, (ii) well-reputed specialist having relevant technical expertise & experience in public procurement, (iii) well-reputed experts in procurement and contract management nominated by the FBCCI. Review Panel might request the CPTU to co-opt 2 members on a case-by-case basis out of the list of specialist maintained by the CPTU. It is the responsibility of the CPTU to frame a detailed work procedure governing the functioning of the Review Panel<sup>46</sup>.

## **2.7 Interim Relief**

When a complaint is being considered by the Procuring Entity or the Review Panel, Notification of Award (NOA) shall not be issued until a final decision of the complaint or appeal has been made. However, this embargo would not be applicable if HOPE having obtained the approval of the concerned Secretary or Minister, certifies that public interest considerations require the Procurement process to proceed. But in that case, the basis of considering the inevitability of carrying out the procurement in certification has to be recorded in Procurement proceeding and it shall be conclusive with respect to all levels of complaint except judicial review<sup>47</sup>.

## **2.8 Disposal of Appeal by Review Panels**

Upon receiving a complaint through the CPTU, the first action of the Review Panel would be to advise the PE to continue the suspension of the issuance of NOA until such time as the decisions of the Review Panel have been announced. The Review Panel shall issue its written decision within maximum 12 working days to the aggrieved tenderer

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<sup>44</sup> See Rule 57 of the Public Procurement Rules 2008

<sup>45</sup> As CPTU's website reports, "there are 4 tiers in the complaints submission ladder....." The first three layers are complaints (i) to concerned officer of the Procuring Entity, (ii) to the Head of Procuring Entity, and (iii) to the Secretary of the concerned Ministry. The fourth tier is thus an appeal to the Review Panel.

<sup>46</sup> See Rule 58 of the Public Procurement Rules 2008

<sup>47</sup> See Rule 59 of the Public Procurement Rules 2008



with a copy to the Secretary of the concerned Ministry/Division, the CPTU and the Procuring Entity. Unless it dismisses the complaint as being frivolous, the Panel could dispose of appeal by taking either any or in combination of the following decisions : (i) reject the appeal, stating its reasons and suggest that a PE continue with Procurement proceedings, (ii) state the Rules or principles that govern the subject matter of the appeal and advise the parties to act accordingly for its disposal, (iii) recommend remedial measures if the PE has taken action contrary to its obligations under the Rules, (iv) suggest annulment in whole or in part of a non-compliance action or decision of a PE, other than any action or decision bringing the Procurement contract into force, (v) suggest the payment of compensation by a PE for costs incurred by the Person, such as, cost of preparation of Tender Document and expenses associated with legal fees and other expenses incurred in lodging complaint, (vi) recommend that the Procurement proceedings be completed. Decisions of the Review Panel have to be taken on the basis of the majority opinion. The decision of the Review Panel is final and all concerned parties have to act upon such decision. Any decision by a PE or by the Review Panel and the grounds and circumstances thereof is made part of the record of the procurement proceedings<sup>48</sup>.

## **2.9 Settlement of Disputes during execution of the Contract**

The Procuring Entity or the Contractor and the Consultant may terminate the contract in accordance with the General Conditions of Contract if the other party causes a fundamental breach of the Contract. The PE may terminate the contract due to following grounds : (i) on the grounds of default of the Supplier, Contractor or Consultant in the performance of the Contract, (ii) in the public interest, (iii) pursuant to the force majeure<sup>49</sup>, (iv) for the convenience of the Procuring Entity. Any disputes or claims arising out of the implementation of the Contract shall be dealt with chronologically for settlement by amicable solutions, adjudications and arbitration in accordance with such provisions laid down in the Contract. It is the responsibility of CPTU to outline the

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<sup>48</sup> See Rule 60 of the Public Procurement Rules 2008

<sup>49</sup> Force Majeure means an event or situation beyond the control of the Contractor, a Supplier or Consultant that is not foreseeable, is unavoidable, and its origins not due to negligence or lack of care on the part of the Contractor, such events may include, but not be limited to, acts of the Government in its sovereign capacity, wars or revolutions, fires, floods, epidemics, quarantine restrictions, and freight embargoes.

framework of and procedure for amicable settlement and arbitration by issuing order<sup>50</sup>.

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<sup>50</sup> See Rule 42 of the Public Procurement Rules 2008

# *Chapter Three*

## **Research Design**

### **3.1 Introduction**

Research methods can be classified in various ways. However, one of the most common distinctions is between qualitative and quantitative research methods. Quantitative research methods were originally developed in the natural sciences to study natural phenomena. Example of quantitative methods now well accepted in the social sciences include survey methods, laboratory experiments, formal methods (e.g. econometrics) and numerical methods such as mathematical modeling. Qualitative research methods were developed in the social sciences to enable researchers to study social and cultural phenomena. Examples of qualitative methods are action research, case study research and ethnography. Qualitative data sources include observation and participant observation (fieldwork), interviews and questionnaires, documents and texts, and the researcher's impressions and reactions.

The motivation for doing qualitative research, as opposed to quantitative research, comes from the observation that, if there is one thing which distinguishes humans from the natural world, it is our ability to talk! It is argued that the goal of understanding a phenomenon from the point of view of the participants and its particular social and institutional context is largely lost when textual data are quantified<sup>51</sup>. Although most researchers do either quantitative or qualitative research work, some researchers have suggested combining of one or more research methods in the one study – which can be termed as triangulation. As well as the qualitative/quantitative distinction, there are other distinctions which are commonly made. Research methods have variously been classified as objective versus subjective<sup>52</sup>, as being concerned with the discovery of general laws(nomothetic) versus being concerned with the uniqueness of each particular situation (idiographic), as aimed at prediction and control versus aimed at explanation and understanding, as taking an outsider (etic) versus taking an insider (emic) perspective, and so on.

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<sup>51</sup> Kaplan and Maxwell, 1994

<sup>52</sup> Burrell and Morgan, 1979

### 3.2 Choice of research method

The choice of research method grows out of and is matched to the aims and focus of the research project. If a research project is set to measure a wide range of phenomena, patterns or behavior, the appropriate method is quantitative; while if it is set to explore and investigate in depth a phenomenon, behavior or area, the appropriate research method is qualitative. Qualitative research involves the collection and interpretation of data that are not easily reduced to numbers. Quantitative research on the contrary concerns data that can be reduced to and expressed in numbers. Qualitative research is suited to exploratory projects, is concerned with individualized experiences<sup>53</sup> and gives priority to depth of investigation, while quantitative research is suited to measuring phenomena, is interested in noting frequencies or distribution of patterns<sup>54</sup> and gives priority to breadth of investigation. The choice between methods is thus determined by a discovery versus measurement distinction in the aim of the research projects and a depth versus breadth selection in their priorities, for qualitative and quantitative research respectively.

The aim of this research project is to understand the extent of effectiveness of remedy procedures, have an idea about the level of compliance of the provisions of PPA & PPR, find out the existence of grey area within PPR, discover concerned persons' relevant experience and views and understand is there other reasons for lodging appeal at the Review Panel level. So this research is exploratory. No such research has been conducted before taking the consideration of remedy procedures available for tenderers in PPR 2008. So relevant problems, answers and theory have not been identified and conceptualized yet. So it is obvious that the approach more likely to provide answers to the research questions is one that allows an understanding of the subject, where depth and discovery takes priority over breadth and measurement. Thus qualitative research seems most appropriate method. Indeed, before qualitative research is conducted in this area, establishing some explanations or patterns, there is no space for quantitative work. Because it is not obvious what there is or should be measured. So, having ascertained that this research project lends itself to qualitative research, it remains to choose the most suitable method or technique of data collection.

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<sup>53</sup> Patton, *How to Use Qualitative Methods in Evaluation* (1987), p.47.

<sup>54</sup> Black, "The Boundaries of Legal Sociology" (1972) 81 *Yale Law Journal*, p.1076

### 3.3 Choice of method of data collection

The selection of the technique of data collection is to a great extent dependent on the type of information desired<sup>55</sup>. A technique is chosen on the basis of its capacity to yield maximum access to the information sought and ensure maximum accuracy and relevance of that information to the research project, within the time frame and financial means available<sup>56</sup>. In this study, after finalization of the Supervisor of this research by the IGS, BRAC (on 26<sup>th</sup> September 2011), the time available for the collection and analysis of data and writing the thesis was approximately 3 month. Moreover, there was no fund from the financing project PPRP-II for collecting data. So, as it is mentioned in the chapter one, the process that seems more likely to yield maximum access, relevance and accuracy of information, within the said time and financial frame of the research, is mainly conduct this research based on text-based method.

Content analysis is a useful research method<sup>57</sup>. All available records of Appeals lodged before the Review Panel are selected for reviewing. Since the inception of the remedy procedures in legal framework of Public Procurement in Bangladesh, total 113 appeal petitions have been disposed of by the Review Panel till 15<sup>th</sup> November 2011. Out of those 113 records, 2 records were not available during data collection period. Rest 111 records were reviewed, relevant data were collected during data collection period. Following information are collected from each of those records for analysis and interpretation :

- (i) Serial number<sup>58</sup> of Appeal petition as it is provided by the CPTU (Secretariat of the Review Panel),
- (ii) Date & year of filling petition by the aggrieved tenderer,
- (iii) Gist of the complaint,
- (iv) Identity of the concerned PE and his department/organisation,

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<sup>55</sup> Vago, Law and Society, 1997

<sup>56</sup> Pachnou, Despina, "The effectiveness of bidder remedies for enforcing the EC public procurement rules : a case study of the public works sector in the United Kingdom and Greece".

<sup>57</sup> Thai, Khi V, "Public Procurement Re-examined", Journal of Public Procurement, Volume 1, Issue 1, p.14

<sup>58</sup> CPTU is providing serial number of the petition chronologically since the inception of the lodging 1<sup>st</sup> case in the year 2005; not giving the number year wise.

- (v) Identity of the concerned HOPE,
- (vi) Identity of the concerned administrative Ministry/Division of the PE,
- (vii) Date of giving decision by the Panel,
- (viii) Nature of the decision e.g. whether it is against or infavour of the PE,
- (ix) Extract of the short order of the decision of the Review Panel,
- (x) Is the reason for allowing appeal petition by the Panel due to the reason of non-compliance of the provision of the PPA & PPR by the PE,
- (xi) Is there any Appeal resulting from the dispute between PE & Tenderer aroused due to the difference of interpretation of the rule/provision/clause of the Tender document,
- (xii) Which Review Panel disposed of the petition,
- (xiii) Is this petition rejected by the Panel for not exhausting the previous options of complaints to the administrative authority mentioned in the Rule 57(11)<sup>59</sup>,
- (xiv) Is there any evidence of Fear of retaliation<sup>60</sup> such as withdrawing the petition by the petitioner after filling,
- (xv) Is there any order of compensation/damage in favour of the aggrieved tenderer for malafide non-compliance of the rule/provision by the PE<sup>61</sup>.
- (xvi) Is there any evidence of less occurrence of lodging petition by the tenderer of any agency among the four target agency<sup>62</sup> as sign of existence of dispute avoidance culture,

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<sup>59</sup> As per Rule 57(11) of the Public Procurement Rule an aggrieved tenderer may appeal to the review panel only if that tenderer has exhausted all his/her options of complaints to the administrative authority

<sup>60</sup> In a study conducted by Despina Pachnou reveals that fear of retaliation by authorities is a major reason why firms are unwilling to litigate.

<sup>61</sup> As per Rule 60(3)(f), a Review Panel might order the payment of compensation if a PE is in breach of its obligations under the PPR.

<sup>62</sup> The Government of Bangladesh has earmarked (i) Roads & Highways Department (R&HD), (ii) Local Government Engineering Department(LGED), (iii) Bangladesh Water

(xvii) Is there any tendency among the tenderers of lodging complaint based on the size or nature of the organization<sup>63</sup>.

(xviii) Is there any evidence of alternatives like seeking political and media intervention instead of taking opportunity of remedy procedure by the aggrieved tenderer<sup>64</sup>.

### **3.4 Interpretation and validation : Triangulation**

One may wish to measure the distance from his/her current location to a landmark across the field. He/she measures exactly the distance between two points at his/her current location (this defines the base line of a triangle) and then the angles between that base line and the two other sides of the triangle formed by drawing a line from each side of the base line to the distant landmark. Given the length of the base line and measurement of the two base angles, he/she can compute the distance to the landmark. This is in brief what triangulation is.

In a similar fashion a social scientist may better be able to describe/measure/manipulate/understand a concept if he/she can look at it from two (or more) different perspectives. If he/she reach essentially the same conclusion from a second perspective that he/she did from the first perspective, he/she likely will feel more comfortable with his/her conclusion, as if he/she has validated the first conclusion by checking from a different angle and seeing the same thing again.

One observation does not tell us whether something is true, whereas multiple observations provide grounds for reinterpretation or confirmation<sup>65</sup>. In this study, initiative was taken to validate the observations/data found by reviewing the contents of 111 appeal cases through triangulation. The validation is done by conducting interviews with two groups of people taking a tiny size of sample from each group. Interviewees from 1<sup>st</sup> group(Group A) are those who are either directly involved/ concerned with the remedies such as tenderers, PEs or involved with administrative remedy procedures as remedy provider other than PEs and chairman/member of the Review Panel such as concern HOPE and Secretary. These persons are the only ones

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Development Board(BWDB), and (iii) Rural Electrification Board(REB) as Target agency for providing procurement training since these are utilizing the highest portion of annual development budget of the republic.

<sup>63</sup> It has been seen in a study, conducted by Despina Pachnou, that small firms are some times more willing to litigate than big firms.

<sup>64</sup> In a study, conducted by Despina Pachnou, it is revealed that use of politician and media can sometime be an alternative to litigation.

<sup>65</sup> Stake, 1995, p.110

possessing the information sought and thus their input is indispensable. Conducting face to face interviews with them is the most appropriate means to access information (rather than, for example, sending them questionnaires to fill in and return), as it ensures that the research questions are understood by the respondents, eventually through clarifications by the interviewer, and allows them to be explored and examined in depth<sup>66</sup>. Other forms of data collection may share certain of these advantages. None, however, offers such a unique combination of advantages as the interview permits<sup>67</sup>.

Interviewees from 2<sup>nd</sup> group (Group B) are those who were actively involved with drafting the PPA 2006, PPR 2008 & PPR 2003 including implementation of public procurement rules/regulations /directives/orders since the inception of the regulated framework of public procurement in Bangladesh<sup>68</sup>. They were working at that time in the public sector, and it is expected that they have in-depth understanding of true meaning of compliance of PPR 2008 not only in the sense of letter of rules, but the spirit of the rules also. Moreover, they still actively involved in the area of public procurement as individual consultant mostly at the policy level. It is further expected that inclusion of those as interviewees outside the public sector other than tenderers would give an impartial and biasless observation regarding remedy procedures.

### 3.5 Types of Interview

There are 3 basic types of interviews, distinguished by the degree of their structuring or standardisation<sup>69</sup>. First, there is the structured or standard schedule interview where the questions are predetermined, put in the same words and asked in the same order for all respondents. The advantage of structured interviews is that the answers can be pooled and analyzed easily and that similarities and differences between them can easily be detected. However, they refrain the initiative and participation of the respondent. Secondly, there is the semi-structured or non-schedule standardized interview where the investigator has a list of questions to ask and points to raise, but no fixed formulation or order of questions to follow. The style is flexible to suit individual respondents. Such interviews have the advantage that, while they offer structure for the investigator to rely on and for the findings to be relatively comparable, they are sufficiently loose to allow the respondents to present their views in their own words and in the order they prefer to,

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<sup>66</sup> Patton, *How to Use Qualitative Methods in Evaluation* (1987), p.49

<sup>67</sup> Black/Champion, *Methods and Issues in Social Research* (1976), p.371

<sup>68</sup> First structured unified regulatory/legal instrument in Bangladesh is Public Procurement Regulations 2003.

<sup>69</sup> Murphy/Dingwall/Greatbatch/Parker/Watson, *Qualitative Research Methods in Health Technology Assessment : A review of the Literature* (1998), Health Technology Assessment (16), p.113



assess the importance and relevance of the questions asked for them and offer unforeseen responses. However, the analysis of the findings is more burdensome, because neither the order nor the formulation of the questions is exactly the same from one interview to the other, while the unanticipated answers may vary considerably. Thirdly, there is the unstructured or non-standardised interview where the investigator's role is kept to the minimum, no specific questions are asked and the free flow of respondent's narration of his experiences or ideas is encouraged to the full. In these interviews, the technique and use of which is associated with psychotherapy<sup>70</sup>, the respondent is given full initiative but the findings may vary greatly and not lend themselves to comparison<sup>71</sup>.

The choice of the interview structure depends on the research project, the aims of the researcher and the existence of research already conducted in the area. However, qualitative research is usually associated with semi-structured interviews<sup>72</sup>, because its aims and their characteristics often match. Qualitative research aims, as it is mentioned earlier, to gain insight, explore and explain a certain area, practice and phenomenon and semi-structured interviews are suited to that pursuit. They provide respondents with space and scope to elaborate on the questions in their own terms, encourage the narration of individualized experiences, offer the opportunity for factors that were not initially obvious to be drawn out and explored and allow the respondents to challenge the researcher's pre-conceptions and re-define the problem and the related issues. In structured interviews (usually associated with quantitative research<sup>73</sup>) the results of the collection of data are predetermined by the choice of the questions and the exploration of the subject and discovery of explanations is therefore restrained or impeded. There is "a danger that the investigator has structured the interview in such a way that the respondent's views are minimized and the investigator's own biases regarding the problem being studied are inadvertently introduced"<sup>74</sup>. On the other hand, unstructured interviews are not suited to research projects where the investigator wishes to raise certain specific points and is interested in the respondents' narration only as long as it is relevant to the investigated problem. For such projects, there must be some structure

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<sup>70</sup> Robinson, *Real World Research* (1993), p.240

<sup>71</sup> Pachnou, Despina, "The effectiveness of bidder remedies for enforcing the EC public procurement rules : A case study of the public works sector in the United Kingdom and Greece"

<sup>72</sup> Murphy/Dingwall/Greatbatch/Parker/Watson, "Qualitative Research Methods in Health Technology Assessment : A review of the Literature" (1998), Health Technology Assessment (16), p.117

<sup>73</sup> Murphy/Dingwall/Greatbatch/Parker/Watson, "Qualitative Research Methods in Health Technology Assessment : A review of the Literature" (1998), Health Technology Assessment (16), p.115

<sup>74</sup> Black/Champion, *Methods and Issues in Social Research* (1976), p.374

of the exchange between investigator and respondent, to contain the free association of the respondents' ideas and more or less ensure that the scope of the investigation is covered. In this study, semi-structured type of interview is used.

### **3.6 Size and Collection of Sample**

Examination of the all units of the wider population, in which the researcher is interested, is usually impossible, impractical or simply not necessary<sup>75</sup>. A researcher has to select a portion of the total number of subjects and examine only that. At the beginning, a researcher must define the total population under examination and, then, choose the strategy which they will employ to determine the identity and number of subjects of the wider population to be examined. A question related to the selection of subjects is whether the chosen sample will be relevance to cases other than those investigated and allow (eventually under conditions) generalization of the findings to the wider population.

The total examined population in this research is tenderers, PEs, HOPEs and Secretaries in case of Group A. For Group B, independent consultants who were earlier involved with public procurement system in Bangladesh at policy level for long time, but no more in active public service now.

Since time is a real constraint, total 15 numbers of interviewees were selected from Group A. They, in category wise, are :

- (i) Secretary of the Ministry/Division – 2
- (ii) Head of the Procuring Entity (HOPE) – 3
- (iii) Procuring Entity (PE) – 5
- (iv) Tenderer – 5

From Group B, total 2 numbers of interviewees were selected. Care was, also, given during selection of the interviewees from category A to include representative from that organization/Department/Division/Ministry from where maximum numbers of appeal petition have been lodged. Selecting tenderers, preference, also, have given who earlier availed the remedy procedure at least once and are involved in business with the organizations from where maximum numbers of appeal petitions have been lodged. The logic behind this is those who are involved more with available remedy procedure of the PPR either personally or as member of the department/organization or as the player of that sector; would be more suitable for providing his/her

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<sup>75</sup> Murphy/Dingwall/Greatbatch/Parker/Watson, *“Qualitative Research Methods in Health Technology Assessment : A review of the Literature”* (1998), Health Technology Assessment (16), p.93

observation regarding effectiveness of the remedy system than the others.

For the convenient of the researcher during analysis and result presentation stage, following identification were provided : the initials S, H, PE, T and IC mean Secretary of the Division/Ministry, Head of the Procuring Entity, Procuring Entity, Tenderer and Independent Consultant respectively. They are numbered, in each category, according to the order in which they are interviewed, starting with the number 1. So S#2 would identify the second respondent from Secretaries category, T#4 means the 4<sup>th</sup> respondent from tenderer category, IC#1 is the 1<sup>st</sup> respondent from Independent Consultant category.

### **3.7 Design of the Interview questions**

Three types of questions are used in research interviews<sup>76</sup> : closed or fixed choice questions (yes/no or questions asking the respondent to choose from two or more fixed alternatives), open-ended questions (providing no restrictions on the content or manner of the reply) and scale questions (asking the respondent to measure his view or experience on a scale). Open-ended questions were preferred here, for the same reasons that qualitative research was chosen over quantitative and semi-structured interviews over structured ones. Open-ended questions are best suited at exploring an area, discovering phenomena and their explanations. Fixed choice and scale questions would be inappropriate, as it is meaningless to produce measurements or qualifications of phenomena whose dynamics are not yet understood<sup>77</sup>.

Research always begins with a set of issues. The aim in the pre-investigation phase and in the early stages of data collection is to turn the foreshadowed problems into a set of questions to which an answer can be given<sup>78</sup>. The premises on which this interview was built were explored during reviewing of records of Appeal petitions. A number of potentially important issues were identified and some potentially useful analytic ideas were developed after reviewing records of Appeal petitions. The purpose of interviewing selected samples is to validate or dismiss these or uncover further factors, offering synergistic or contradictory explanations<sup>79</sup>. Based on that, an Interview Guide is developed for conducting the interview of selected samples. The questions of the interview guide are not identical for all categories. The formulation, coverage and number of questions actually asked are

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<sup>76</sup> Robinson, *Real World Research* (1993), p.233

<sup>77</sup> Voysey, *A Constant Burden : the Reconstruction of Family Life* (1975)

<sup>78</sup> Denscombe, M., *The Good Research Guide*, Buckingham, Philadelphia (Open University Press) 1998

<sup>79</sup> Schooner, "Fear of Oversight : The Fundamental Failure of Businesslike Government", *American University Law Review*, Vol. 50 : 627, 2001, p.627 at p.649.

different for different categories. A copy of the interview guide is enclosed as Annex – B.

# ***Chapter Four***

## ***Data Presentation***

### **4.1 Introduction**

The history of the public procurement regime in Bangladesh is briefly narrated in the first chapter. General Principles adopted in Bangladesh within its Legal framework of Public Procurement are then outlined in second chapter. This chapter also explains the responsibility of compliance of provisions of Public Procurement Act 2006 & Public Procurement Rules 2008, available remedies for aggrieved tenderers under PPR, formation of review Panels, provision of Interim Relief available for the tenderers, procedure of Appeal disposal and finally provision for dispute settlement during contract execution stage. In this chapter, attempts would be made to present data available for presentation after reviewing the records of Appeal petitions disposed of by the Review Panels constituted by the CPTU.

### **4.2 Brief Summary of the Records analyzed during data collection**

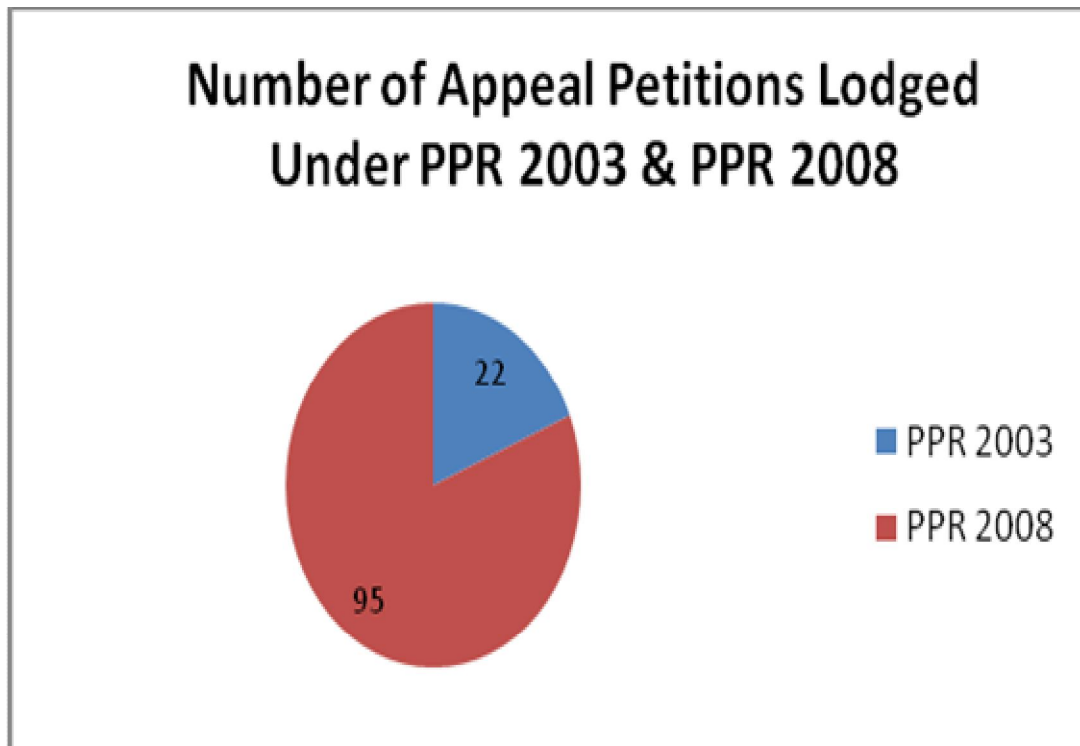
It has been mentioned beginning of writings that this research is done to investigate the effectiveness of the remedy procedures available for tenderers through reviewing the records of Appeal petitions disposed of by the Review panels since its inception. Further, it might be useful to mention here that 'structured and unified' remedy procedure available for aggrieved tenderer was first introduced in Bangladesh with the promulgation of Public Procurement Regulations 2003. Accordingly, CPTU constituted the first Review Panel on 27/08/2005<sup>80</sup> under the Regulation # 52 of Public Procurement Regulation 2003. Subsequently, three more panels were constituted by the CPTU on 05/04/2006<sup>81</sup>. The first Appeal petition was lodged by an aggrieved tenderer on 29/09/2005 under PPR 2003 for seeking remedy. This petition was heard by the Review Panel # 1 under the chairmanship of Mr. Md. Asaduzzaman and the Panel gave its decision on 18/10/2005 allowing the appeal. Since then, total 22 review petitions were lodged by different aggrieved tenderers under Public procurement Regulations 2003 and disposed of by different Panels. In the meantime, Public

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<sup>80</sup> Notification # IMED/CPTU/PPRP-0202D/373; dated : 27/08/2005

<sup>81</sup> Notification # IMED/CPTU/PPRP-0202D(Part-1)/126; dated : 05/04/2006

Procurement Act 2006 was enacted by the National parliament and later the Govt. has made the Public Procurement Rules 2008 in-exercising the power conferred to it under the section 70 of that Act<sup>82</sup>. Then, govt. has made the PPA effective from 31<sup>st</sup> January 2008 without any delay<sup>83</sup>. Accordingly, the tenderers have to start lodging complaint with four tiers of the designated remedy structure following rule 57 of the PPR 2008. Since then, another 95 appeal petitions have been lodged before Review Panel following the Rule 57(12) of the PPR 2008 up to 15<sup>th</sup> November 2011. Table 4.1<sup>84</sup> and Figure 2 show the number of appeal petitions lodged under PPR 2003 and PPR 2008 separately.



**Figure 2 : Number of Appeal Petitions lodged under PPR 2003 & PPR 2008**

Out of these 95 appeal petitions lodged under PPR 2008, 91 appeal petitions were disposed of by the review Panel till 15<sup>th</sup> November 2011. So during my review stage of the records of appeal petitions, I reviewed

<sup>82</sup> SRO # 21-Law/2008; dated : 24/01/2008

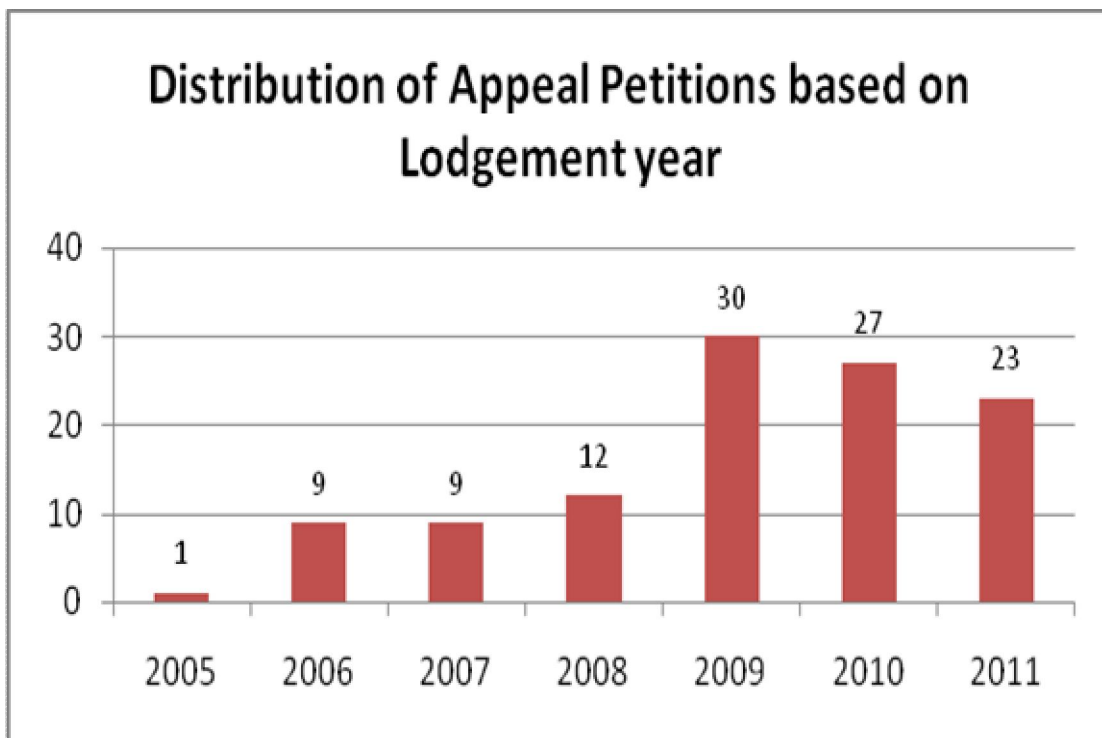
<sup>83</sup> SRO # 20-Law/2008; dated : 31/01/2008

<sup>84</sup> All the Tables of Data presentation have been put in Annex-A of the dissertation.

all the records of 113 disposed petitions except 2 (Appeal Petition # 7 & 79) with the aim of searching the answer of my research questions. Two records could not be reviewed since they were not available for review during review stage.

#### 4.3 Lodgment year of disposed Appeal Petitions

It has been mentioned in previous Para that the first appeal petition was lodged on 29/09/2005. It was the lone appeal petition lodged during the year 2005. During 2006 and 2007 the number of lodging petitions has been increased with the number of 9 for each year. The trend is remained at increasing till 2009 when the number of petition lodged reached the number of 30. Then, the following year, it decreased slightly with the total number of lodgment of petitions of 27. In 2011, total 27 numbers of petitions have been lodged till 15<sup>th</sup> November and till that time 23 out of these 27 are disposed by the panels. Table 4.2 and Figure 3 show the number of appeal petitions lodged during different years since 2005 up to November 2011.



**Figure 3 : Distribution of Appeal Petitions based on Lodgment year**

From the figure it is seemed that the trend of lodgment of Appeal petitions is increasing. More numbers of appeal petitions are being

lodged by the aggrieved tenderer in comparison to previous year since inception of formal remedy procedures till November 2011 with the only exception of 2010.

#### 4.4 Department/Organisation wise number of lodged Appeal Petitions

In Bangladesh, there is no centralized public procurement agency for procuring goods, works or services. Public procurements are done by different PEs functioning under the administrative control of different projects/agencies/organizations/departments/divisions/ministries as a programme unit or logistic unit as per the mandate of that. Since PEs are innumerable, instead of comparing the number of appeal petitions originated from different PEs; attempt is taken to compare number of appeal petitions originated from procurement proceedings of PEs functioning under different departments/organizations. Table 4.3 and Figure 4 show Department/ Organisation wise number of Appeal petitions lodged by the aggrieved tenderers during the period from inception to November 2011.

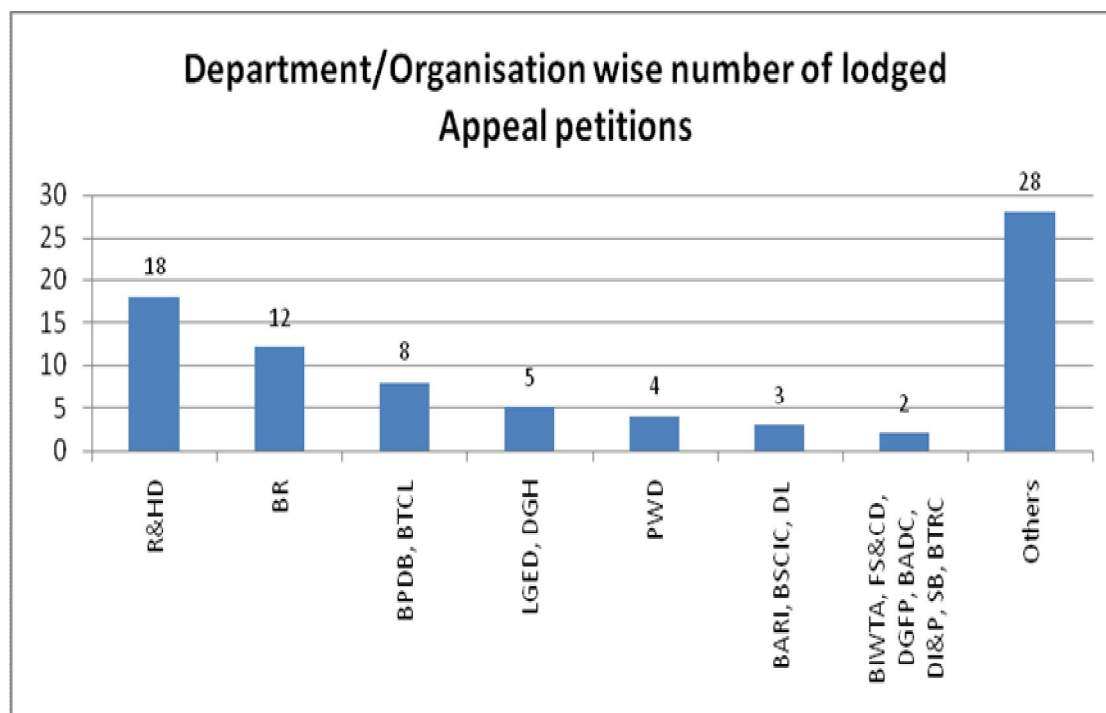


Figure 4 : Department/Organisation wise number of Lodged Appeal Petitions



It appears that highest number of Appeal petitions was originated from the procurement proceedings of R&HD. Bangladesh Railway is in the second position. BPDB and BTCL both are in the third position with the number of 8 originated from each of two organisation's procurement proceedings. LGED and DGH are both in the fourth position with the number of 5 originated from each of the organization. PWD is in fifth position having 4 appeal petitions related to its procurement proceedings. There are 28 department/organization including BWDB from which procurement proceedings 1 appeal petition each has been originated. Interesting fact is, being target agency<sup>85</sup> of the govt. in relation to procurement; R&HD is on the top of the list. Another target agency LGED is on the fourth position. Bangladesh Water Development Board is in the bottom of the list with 27 other department /organizations. Surprisingly no appeal petition has been lodged till the data collection period of this study from the procurement proceedings of REB.

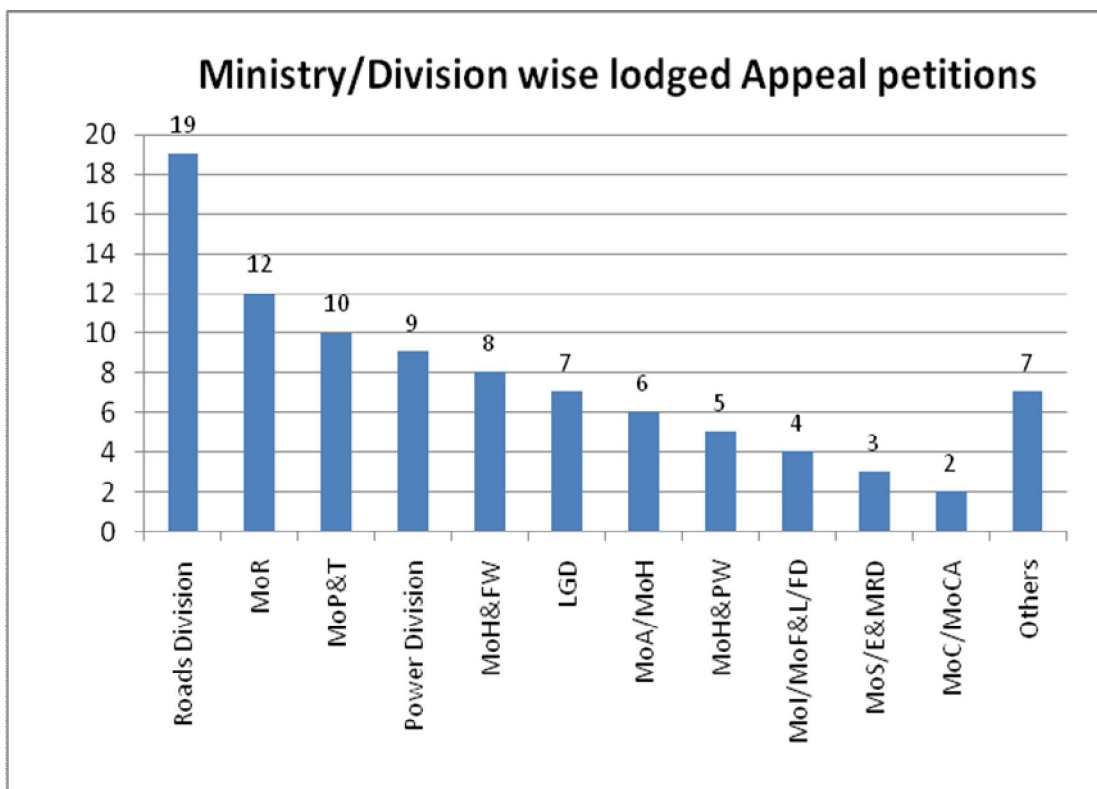
#### **4.5 Ministry/Division wise number of lodged Appeal Petitions**

Secretary of the concerned Ministry or Division is responsible for disposing of the review petitions lodged by the aggrieved tenderers at a third tier of the formal remedy procedure available for the tenderers<sup>86</sup>. So they are at the last tier of administrative review system before submitting appeal petition by an aggrieved tenderer to an independent Review panel. So effectiveness of the remedy system at its third tier is also crucial for ensuring the transparency in public procurement process. Numbers of Appeal petitions originated from different departments/organizations based on its administrative ministry/division have been sorted out to find out the ministry/division which deserve more attention in relation to its third tier of remedy procedure. Table 4.4 and Figure 5 show Ministry/Division wise number of Appeal petitions lodged by the aggrieved tenderers during the period between since inception to November 2011.

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<sup>85</sup> Govt. of Bangladesh has earmarked four department/ organizations e. g. R&HD, LGED, BWDB and REB as target agency based on their share of procurement expenditure in comparison with national annual procurement related expenditure.

<sup>86</sup> See Rule 57(7) of the Public Procurement Rules 2008



**Figure 5 : Ministry/Division wise number of Lodged Appeal Petitions**

It seems that highest number of Appeal petitions was originated from the procurement proceedings of departments/organizations under the administrative control of the Roads Division with the number of 18. R&HD is the main contributor for this number. Ministry of Railway is in the second position with the number of 12. Ministry of Post & Telecommunication is in the third position with 10 number of lodged appeal petitions. The number of lodged appeal petitions originated from procurement proceedings of organization/company under the administrative control of Power Division is 9; just one less than Ministry of Post & Telecommunications taking fourth position in the list. Ministry of Health & Family Welfare is in the fifth position among ministries /divisions in respect of the number of lodged appeal petitions.

#### **4.6 Nature of the Decisions of the Panels**

The principal quality of any remedies system that seeks to be effective is to be functional : well designed and clear in text and capable of offering protection in an accessible, uncomplicated, inexpensive and

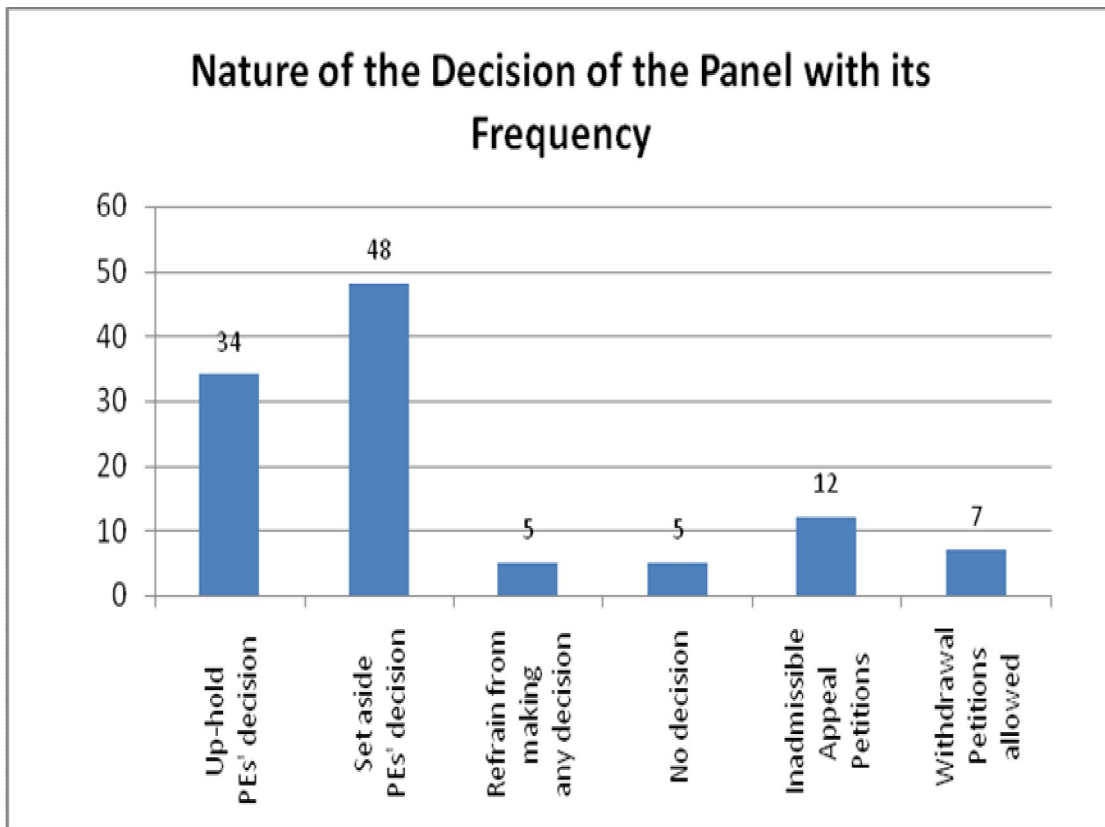
speedy manner in practice<sup>87</sup>. It can be safely assumed that tenderers are in better placed than anyone else to know when a non-compliance of the rules of PPR 2008 or clauses of the tender document, by the PEs, has occurred. So, the analyses of the decisions given by the Review panels upon the lodged Appeal petitions of the aggrieved tenderers deserve importance under this study. For the convenience of the analysis, decisions of disposed 111 appeal petitions have been categorized under 6 categories. They are (i) Up-hold PEs' decision, (ii) Set aside PEs' decision, (iii) Refrain from making any decision, (iv) No Decision, (v) Inadmissible Appeal petitions, and (vi) Withdrawal Petition allowed.

In which case, the Panel has upheld the decision of PE in respect to a particular procurement process by not allowing the Appeal petition of aggrieved tenderer, the nature of that type of decision is termed here as 'Up-hold PEs' decision'. On the other hand, when the Appeal petition of an aggrieved tenderer is allowed and the decision of PE in respect to that particular process is declared null & void by a Review Panel, that type of decision is marked as 'Set aside PEs' decision'. In case of total 5 appeal petitions, the concerned Review Panel has refrained itself from making any decision. The reasons, as it is cited by the Panel in its written order in three different appeal petitions, are either (i) CCGP has already accorded its approval regarding that particular procurement process, or (ii) that particular procurement process does not come under the purview of PPR 2008 as per its Rule 3. In another petition, the Panel refrained from making any decision after failing to co-opt a member having mechanical engineering expertise even sending request to CPTU for co-option. In fifth case, the Panel refrained itself from making any decision since the matter was already brought to and pending before a High court Division for its judicial review. All these 5 appeal petitions have been termed for analysis purpose as 'Refrain from making any decision'. In five instances, the Panel did not give any decision after taking full hearing in presence of both parties with the written observation that either the evaluation process has not yet been completed or the procurement process is under re-evaluation as per

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<sup>87</sup> Craig P. and De Burca, G., EU Law. Texts, Cases and Materials, 2<sup>nd</sup> Edition, Oxford (Oxford University Press) 1998

decision of the approving authority<sup>88</sup>. These decisions are categorized in this study as 'No decision'. In couple of appeal petitions, the Panel declared the petition as 'Inadmissible' citing the ground that the aggrieved tenderer did not exhaust all options of complaints to the administrative authority before lodging complaint to Review Panel as per provision of Rule 57(11) of the PPR 2008. In case of few appeal petitions, the petitioner had submitted withdrawal petition either during hearing stages or after completion of hearing but before pronouncing the decision of the Panel. In these cases, the Panel allowed the withdrawal petition as it was prayed by the petitioner. For the analysis purpose, those decisions have been termed as 'Withdrawal petition allowed'. Table 4.5 and Figure 6 show category of the nature of the decisions including number of disposed appeal petitions fall under that category.



**Figure 6 : Nature of the Decision of the Panel with its Frequency**

<sup>88</sup> Approving Authority means the authority which, in accordance with the Delegation of Financial Powers, approves the award of contract for the Procurement of Goods, Works or Services.

From the above Figure it is clear that more number of appeal petitions have been allowed with a order of set aside the PE's decision than the numbers of disallowing the appeal petitions with a order of uphold the PE's decision by the different Review Panels on the basis of the merit of fact & law in respect to the disputed procurement process. Though if the number of appeal petitions disposed of under the category of 'Inadmissible Appeal petitions' and 'Withdrawal Petitions allowed' add up with the number mentioned under 'Up-hold PEs' decision' category; the total number of disallowed appeal petitions would go up the figure of appeal petitions allowed by the Review Panels. But it should keep in our mind that both "Inadmissible Appeal petitions' and 'Withdrawal Petitions allowed' category were disposed of by the Panels either for not exhausting all options of complaints to the administrative authority before lodging complaint to Review Panel as per provision of Rule 57(11) of the PPR 2008 or due to application of the petitioner to withdraw the petition; not considering the merit of the petition.

#### **4.7 Causes of disputes in Appeal petitions**

In chapter one, the research questions has been stated under Research Question Para. In fact, to find out the main cause of lodging Appeal petitions at Review panel level is one of the main objectives of this study. Is the main cause of lodging appeal petitions is the non-compliance of rules of PPR or the clause of the tender document? Is there any grey area within the rules or standard tender documents which facilitate the disagreement regarding the interpretation of that rule/clause ultimately resulting the lodgment of petition by the aggrieved tenderer? These are the research questions of this study.

The literal meaning of 'Compliance' is the certification or confirmation that the doer of an action meets the requirements of accepted practices, rules, regulations, specified standards or the terms of a contract. Non-compliance means 'disregard of rules or conditions'. Wrong implementation can also be called non-compliance. Hoque argued that the procurement rules in Bangladesh are somewhat defected both by bureaucratization and technical avoidance of the rules<sup>89</sup>. But it is really hard to classify an action of a PE as non-compliance simply by reviewing the content of lodged Appeal petition.

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<sup>89</sup> Hoque, Ridwanul, Public Procurement Law in Bangladesh : From Bureaucratization to Accountability, p.1

Not also easy by reviewing the written decision<sup>90</sup> of the Review panel in case of a full contested Appeal petition even. In procurement, authorities, first, often have a margin of discretion and, secondly, take highly technical decisions. In such circumstances, strict review of factual issues by the court is technically difficult and probably inappropriate, since it would fetter the authority's discretion, probably reduce the efficiency of its decisions and lead to substituting the authority's appreciation of how the award should be conducted for that of the courts. This would usurp the primary decision-maker's prerogatives and arguably go beyond judicial authority<sup>91</sup>. But Rule 56 of the PPR 2008 state total 24 number of circumstances under which a formal complaint might be lodged by an aggrieved tenderer against a Procuring entity.

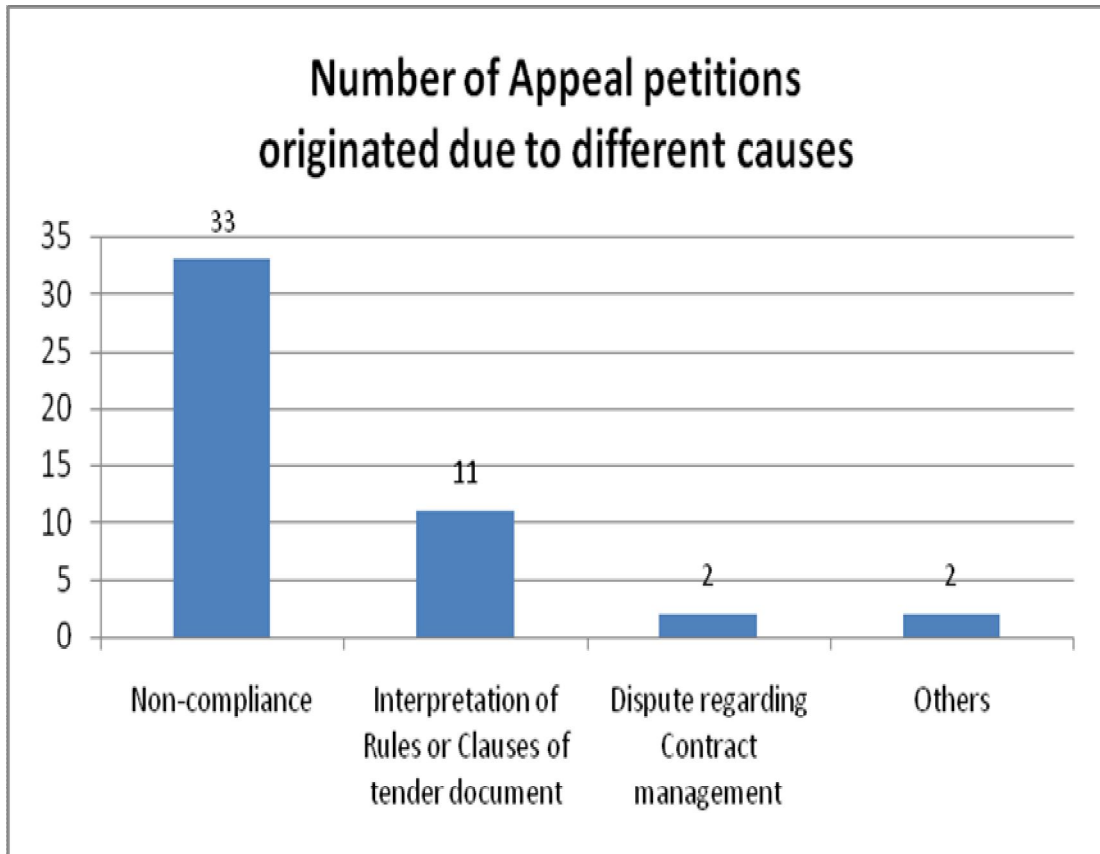
Taking those circumstances into consideration, the copies of the written decisions in which cases the PEs decisions have been set aside by the Review panels, are only reviewed in this study to find out the instances of the non-compliance of the rules/clauses by the PEs or the existence of grey area within rules/clauses (of tender document) which facilitate the disagreement regarding the interpretation. So out of 111 records of appeal petitions, only the records of Appeal petitions termed in Para 4.6 as 'Set aside PEs' decision' have only been analyzed to find out that. The records of Appeal petitions fall under five other categories mentioned in Para 4.6 have not taken into consideration since (i) either nothing wrong or error have been found in respect of those procurement proceedings by the Review panel; nor (ii) any fact of those procurement proceedings have been analyzed in their written decisions by the Panels due to not exhausting all administrative options before coming to Panel or withdrawal of the Appeal petitions by the Petitioner before pronouncing its decision. Moreover, in few cases the Panel did not give any decisions either (i) due to signing of the Contract by the PE with another bidder before lodging appeal petition by the aggrieved tenderer, or (ii) due to approval of PEs proposal by the CCGP before pronouncing Panel its decision. So only 45 records of Appeal petitions fall under 'Set aside PEs' decision' category only considered to find out the main causes of lodging complainant by the aggrieved tenderer in

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<sup>90</sup> What the Review panels deliver after hearing both sides of the procurement dispute is termed by Rule 60(2) of the PPR 2008 as 'Written decision'.

<sup>91</sup> Bailey, S.H., "The Relationship between Judicial Review and the Public Services Contracts Regulations; R. v. London Borough of Tower Hamlets, ex p. Luck; judgment of October 30, 1998, Richards J.", (1999) 8 Public Procurement Law Review, p. CS 77

most cases. Table 4.6 and Figure 7 show the number of Appeal petitions originated due to different causes.



**Figure 7 : Number of Appeal petitions originated due to different causes**

From the above figure, it would be seemed that more number of allowed Appeal petitions have been originated due to non-compliance of either Rules of PPR 2008 or the Clauses of the tender document. Less Appeal petitions have been originated due to difference in interpretation of either Rules of PPR or the Clauses of the tender document. Interesting point is, in case of two Appeal petitions, the dispute has been originated from the action of PEs during contract management stage.

#### **4.8 Size and Market position of the Tenderer**

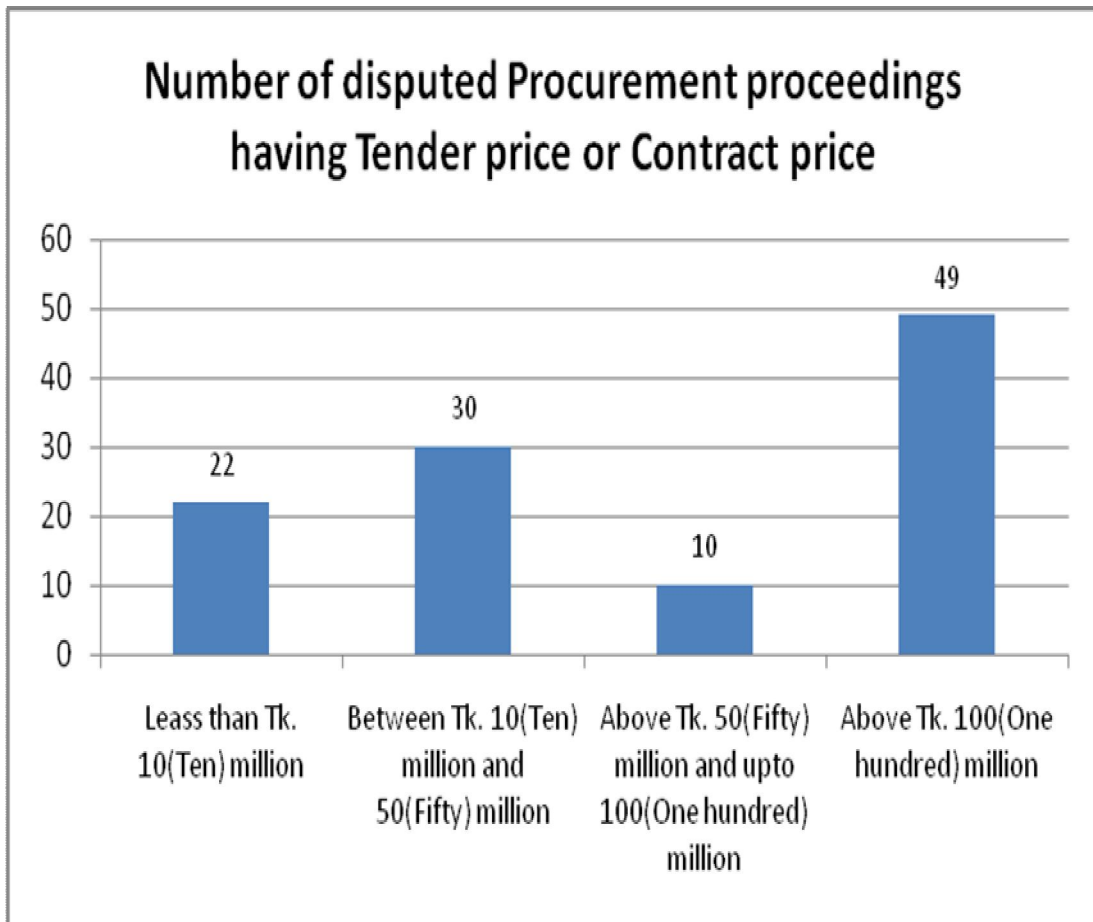
The size and market position of the firm (in the sense of its presence in the market, which refers to the duration of its existence,

experience and network) are relevant to its decision to start litigation<sup>92</sup>. Size of the tenderer's firm and its position in the market could influence the tenderer's decision to lodge a complaint before the Review panel. In many studies, the impact of the size of tenderer's firm and its market position was recognized. Since this study is basically based on text analysis of the records of the lodged Appeal petitions, it was not possible to categorize the aggrieved tenderers as small or big tenderer based on their paid up capital due to absence of that information in the reviewed records. It has been discussed in Chapter Two that an aggrieved tenderer has to deposit non-refundable Registration fee, which varies between Tk. 10,000/- to 25,000/-, and refundable Security deposit, which varies with minimum 50,000/- to maximum Tk. 500,000/- during filing its Appeal petition depending on the amount of the estimated Contract price or Tender price. In Schedule II of the PPR 2008, there are four different thresholds for assessing and realizing the non-refundable Registration fee and refundable Security deposits from the aggrieved tenderer during submission of Appeal petition at Review panel level in case of after opening tender. The amount of Registration fee paid by the aggrieved tenderer during submission of Appeal is very much available with CPTU. So by taking the estimated contract price or tender price of disputed procurement process as proxy, and with the assumption that relatively big tenderer generally participate in procurement process having bigger tender price, it is possible to get an idea about the size of the tenderer's firm. Table 4.7 and Figure 8 show the number of Appeal petitions originated from Procurement proceedings having four different thresholds of Tender price or Contract price.

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<sup>92</sup> Pachnou, Despina, *"The effectiveness of bidder remedies for enforcing the EC public procurement rules : A case study of the public works sector in the United Kingdom and Greece"*.

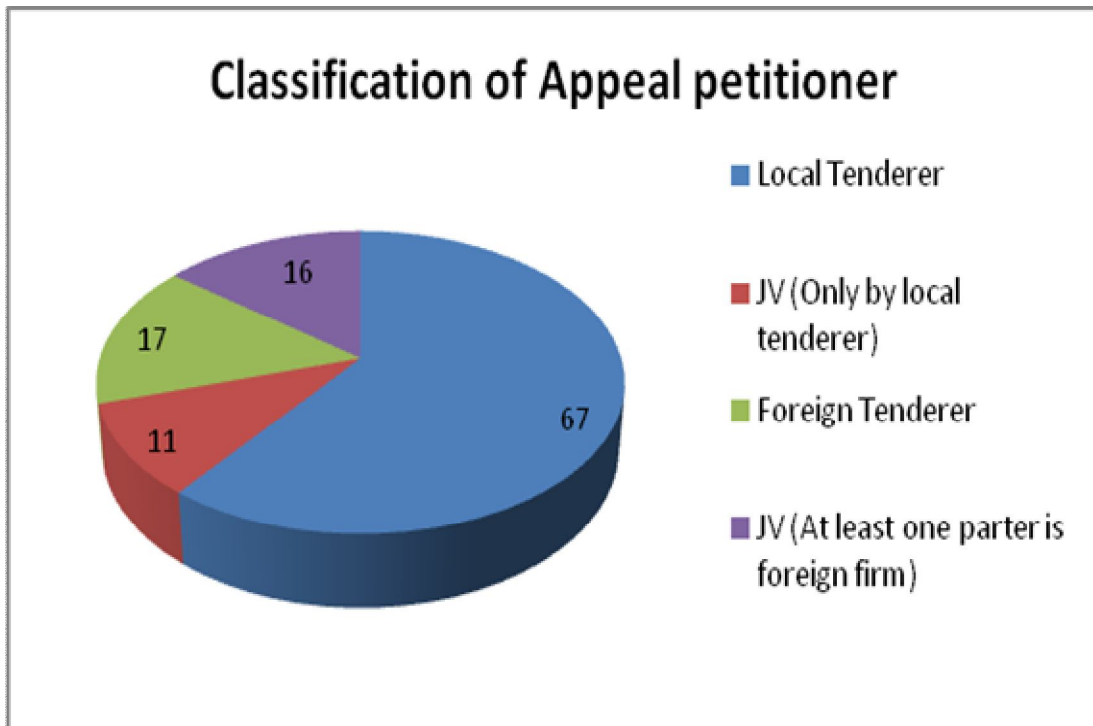




**Figure 8 : Number of disputed Procurement proceedings having Tender price or Contract price.**

Figure 8 illustrate that maximum number of Appeal petitions have been originated from the procurement proceedings having tender price above Tk. 100 million.

During study, attempt was made to see whether factors like the origin of the tenderer such as local tenderer, foreign tenderer or JV have any influence on its decision for taking remedial actions when it becomes aggrieved. Further, there was interest also to see whether there are any differences in case of their trend of lodging complaint between the established tenderer and new tenderer. Table 4.8 and Figure 9 show the classification of appeal petitioners based on their Nature like local tenderer, foreign tenderer, JV etc.



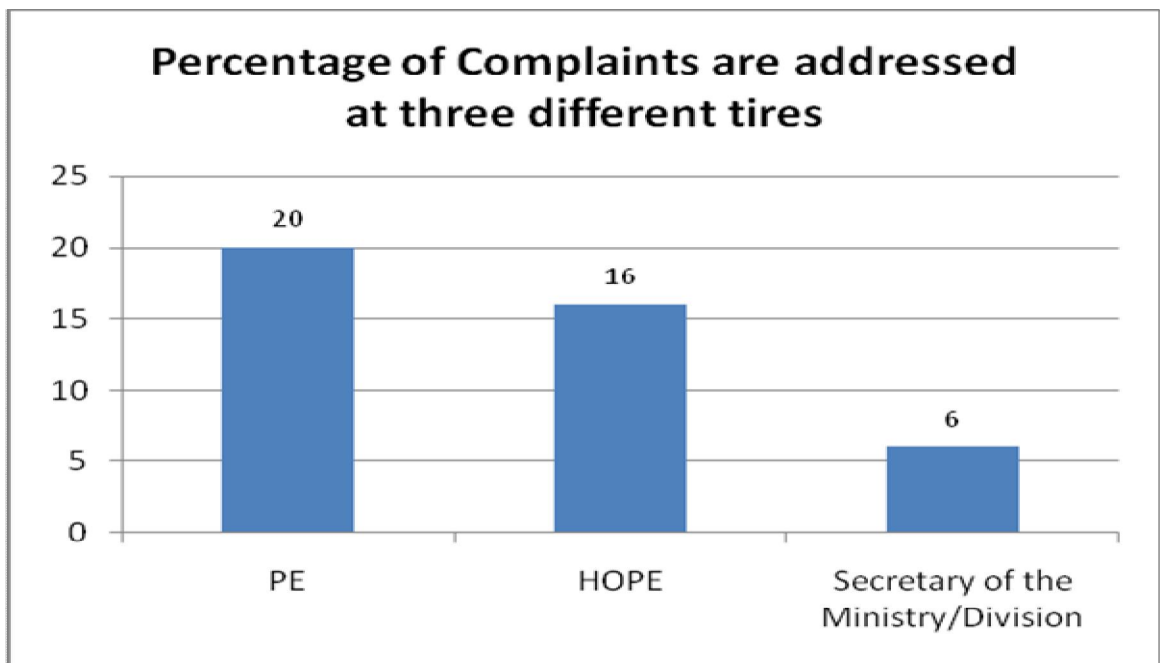
**Figure 9 : Classification of Appeal petitioners based on their Nature.**

From the above figure, it is found that most of the Appeal Petitioners at Review panel level are local tenderer with the percentage of 60% of the total petitioners. Foreign tenderers are in the second position in case of lodging appeal petition with number of 17 instances.

#### **4.9 Effectiveness of first 3 tiers of Remedy procedures and its uses**

The details of steps & procedures of lodging complaint at different tiers of the administrative review systems available for the aggrieved tenderers under PPR 2008 have been discussed in Chapter Two. In brief, according to rule 57 of the PPR, an aggrieved tenderer of an public procurement process may challenge the action of the concerned PE by way of an appeal to the administrative authorities in a hierarchical order; starting from the Procuring Entity to the Head of the Procuring Entity and to the Secretary of the concerned ministry/division. Having remained dissatisfied with the reply or absence of any reply within stipulated time from first three tiers, the complainant may only then bring the complaint to the 'Review Panel', an independent expert body

consisted of legal and technical experts in public procurement. This is actually the last and the fourth step in the complaints mechanism ladder prescribed in the PPR 2008. Though under this study, only the records of the Appeal petitions disposed of by the Review panels are reviewed during text/content analysis; but there should not be any disagreement to ignore the importance of assessing the effectiveness of remedy procedures at first three tiers. Since to assess the effectiveness of first three tiers are not possible in detail under this study due to its limited scope, but it is possible to look into the matter of how officers responsible to work at first three tiers dealing with the received complaints especially whether they were responding within stipulated time upon received of the complaints. Since there are innumerable number of Procuring Entity in Bangladesh Public procurement sector, and since the number of HOPE and Secretary are also many; it is really impossible to evaluate how the first three tiers are dealing with the complaints through collecting data from those three tiers. But taking these 111 disputed procurement process related with the reviewed 111 Appeal petitions as sample of the overall scenario, one can find idea how the first three tiers are dealing lodged complaints. Table 4.9 and Figure 10 show the percentage of complaints are addressed at three different tiers by responding within stipulated time.



**Figure 10 : Percentage of Complaints are addressed at three different tiers.**

Figure 10 shows that PEs have either did not respond within stipulated time or respond at all regarding received complaints in case of 80% cases. The situation is worst at HOPE and Secretary level both. HOPEs have only responded 16% cases within stipulated time. In 84% cases, HOPEs either not at all responded or did not respond within stipulated time. At Secretaries level, only 6% cases the complaints are addressed by providing a reply within stipulated time mentioned in the PPR 2008.

## ***Chapter Five***

### **Analysis of Few Records**

#### **5.1 Introduction**

Few selective records of Appeal petitions, disposed of by the Review Panels on different dates, either under PPR 2003 or PPR 2008, would be analyzed in this chapter. The objectives of this are to (i) give an in-depth idea about the nature of the complaints, (ii) give an idea about the main causes of lodging complaints in most cases especially due to difference of interpretation of rules/tender clause, (iii) provide the insight how those appeal petitions are dealt by the Review Panel, (iv) focus light on the matter of the jurisdiction of the Review panels to the readers of this research report. Analysis would be done categorizing the selective records under four different classes namely (i) Appeal petitions due to Non-compliance, (ii) Appeal Petitions due to differences of interpretations of rules/tender clauses, (iii) Appeal petitions lodged due to actions of PEs during contract management stage, and (iv) Appeal petitions rejected since the contract with the another tenderer has already been signed. But for protecting the privacy & confidentiality of the concerned PEs including respective HOPEs & Secretaries of the ministry/division and petitioner Tenderers, the identity of the PEs and Tenderers would not be mentioned during analysis.

#### **5.2 Appeal petitions due to Non-compliance**

##### **5.2.1 Appeal petition # 1**

Preamble: Under the provisions of Regulation 53 of the PPR 2003, a formal complaint dated 29/09/2005, addressed to the Chairman of the Review Panel was lodged by a foreign firm as an aggrieved tenderer for alleged illegal practices adopted by the PE during bid evaluation. In its first meeting, held on 04/10/2005, the Review Panel decided to ask both the concerned aggrieved and accused parties to nominate representative for hearing on the issue. Accordingly, the hearings were held on 09/10/2005 and 10/10/2005 in presence of the two representative from petitioner side and four representatives including Chairman of the TEC & Project Director of the concerned project from procuring organization's side.

*Gist of the Complaint*: In this disputed procurement process, out of the 1<sup>st</sup> stage proposal of 5 tenderers, only 3 including the petitioner were selected for the 2<sup>nd</sup> stage bidding after technical scrutiny. Detailed technical discussions were then held by the PE with these 3 tenderers in succession, and draft “Minutes of Tender Adjustments” were drawn up. A revised tender document was also issued for the 2<sup>nd</sup> stage tender, as stipulated in the Regulation 39 of the PPR 2003. On 28/06/2005 three proposals were received from these selected bidders. Out of the 3 received proposals, the petitioner and one other tenderer submitted their tender in proper format, as specified. On the contrary, no Revised Technical Offer in specified format was submitted by the remaining tenderer which was selected during first stage bidding with 2 others. For the convenient of our analysis, let renamed this tenderer firm as ‘C’. The allegation of the petitioner is that the 2<sup>nd</sup> stage bid from ‘C’ was seriously flawed on the context of the absence of Revised Technical offer. The tenderer ‘C’s offer simply included a letter referring to their earlier Technical Proposal submitted during the 1<sup>st</sup> stage, which in effect, went void after issuance of the Revised Tender Document. Despite the gross violation in submission of essential tender documentation comprising the Revised Technical Offer, ‘C’s offer was accepted by the Procuring entity instead of disqualifying it, and considered for further evaluation by the TEC. It is argued by the petitioner in its complaint that this irregular action neither conforms to the PPR 2003, nor PE’s own regulation and practice. It is further alleged by the petitioner that after a few days of the last submission date of 2<sup>nd</sup> stage proposal, a letter was issued by the Project Director on 09/07/2005 requesting tenderer ‘C’ for “submission of detail of specifications including scope of supply, service and work as per Tender document” in the pretext of obtaining ‘clarifications’. The petitioner further alleged that 2 irregularities were committed by doing that. First, as per Regulation 31(5), such letter must be signed by the Chairman of TEC, not the Project Director. The second and most grave irregular step was the tenderer ‘C’ was given the opportunity to improve its 2<sup>nd</sup> stage tender, by submitting the missing technical documentation they skipped or erred, while submitting the 2<sup>nd</sup> stage tender.

*Salient Observations of the Review Panel* :

- (i) The evaluation reports submitted by the TEC and a Sub-committee formed to assist the process, are based on wrong

interpretation of rules and regulations, deliberately biased, and therefore unacceptable.

- (ii) The tenderer 'C's offer was not lawfully supported by the mandatory Technical Proposal to be submitted during 2<sup>nd</sup> stage of tendering. Price related to an irregular and phantom technical proposal or offer, do not deserve any merit in tender evaluation.
- (iii) A bidder may submit its complaint to executing agency in accordance to a prescribed format and given time delay in between. This was observed by the Petitioner in filing complaints successively to the PD, HOPE and the concerned Secretary. It is unfortunate that despite clear stipulation in the PPR, none of the concerned officials responded. This is taken as a violation committed by all three officials of not only the PPR Regulation 51, but also lack of professionalism and normal courtesy displayed in conducting international business correspondence.

*Recommendations and Decisions of the Review Panel :*

(i) The recommendation of the TEC and its Sub-committee, being far from transparent as well as lacking direction, professionalism and respect for law, are hereby rejected.

(ii) The award of contract for this procurement process should be decided between the remaining two technically compliant and commercially valid offers currently available with PE.

(iii) PE to pay the Petitioner under 6(e) of Regulation 53 of PPR 2003, a consolidated sum of Tk. 3 lacs as expenses which is considered to be a prudent sum in the available facts and circumstances, as against their claim of Tk. 7 lacs.

(iv) Procuring Organisation should immediately dissolve the current Tender Evaluation committee for misleading the Organisation and higher authorities, with erroneous report concerning a major infrastructure project. A new committee, with better leadership, should be commissioned to carry on its assigned tasks.

### **5.2.2 Appeal petition # 15**

Preamble : A limited company having its office at Dhaka preferred this complaint under the provision of Regulations 50(3) and 53 of the Public Procurement Regulations 2003 on the ground that the respondent PE has illegally rejected their valid tender malafidely on unsustainable ground of non-responsiveness. The complainant dated 24/06/2007 was received by the Review Panel on 28/06/2007 in sealed cover. On the same date, a meeting of the Panel held to determine the working procedure to be followed and called the complainant party as well as the concerned officials of PE to appear in hearing on 02/07/2007. On the fixed date, the MD of the complainant limited company & others on behalf of the Petitioner and 2 officers including PD on behalf of the PE were present during hearing.

Gist of the Complaint : Brief case of the complainant is that in pursuance of the Invitation of sealed tender by the PE for construction of training dormitory in package W-1 on 10/04/2007, the complainant submitted tender along with 5 others. As per readout figure the lowest tenderer, for the sake of convenient say 'B', did not submit tender security along with the tender. The TOC accepted their security at the time of opening of the tender which is after three hours of the schedule time. On the following day the complainant filled a written application to the PE drawing his attention regarding violation of tender document instructions. The matter having been disclosed TEC cancelled the tender of 'B'. As per readout figure complainant was the second lowest and was entitled to get the award of contract. But the TEC being enraged at the application containing complaint against 'B's acceptance of security money recommended 4<sup>th</sup> lowest instead of complainant (2<sup>nd</sup> lowest) for award of contract. Thereupon the complainant submitted an application to HOPE demanding justice on 03/06/2007. Upon received of the application, the organization issued NOA in favour of 4<sup>th</sup> lowest tenderer on the same day and by letter dated. 11/06/2007 (received on 14/06/2007) advised the complainant to approach the Review Panel direct in case the complainant is aggrieved by that decision. The HOPE further stated in his letter that complainants tender has been made non-responsive on the ground that (i) it sought 10% advance though there is no provision for payment of advance in GOB project and withdrawn the claim after opening of the tender which is barred by clause 36.3 of the tender document; (ii) the price offered by the tenderer is significantly below the official estimate which shows that the



tenderer is inexperienced and cannot price its tender properly; (iii) the complainant wanted to influence the PE by making a complaint against tenderer 'B' during evaluation of the tender which is within the mischief of Regulation 32(3) of PPR 2003.

*Salient Findings and Observations of the Review Panel :*

(i) It is admitted also from the report of the TEC that tenderer 'B' did not submit tender security along with tender but submitted an application along with a pay order at the time of opening tender which has been noted on the tender opening sheet.

(ii) It appears from record that the factum of filing application urging the authority to reject the tender of 'B' for violating ITT clause 31.3 was treated by the TEC as an effort to influence PE in its decision concerning tender evaluation and basing on Regulation 32(3) of PPR TEC found it one of the ground for rejecting the tender.

(iii) The authority has totally misinterpreted Regulation 32(3) and as it appears from the conduct that they did it so purposely to reject the tender of the complainant.

(iv) It appears clear that the PE was at fault for publishing faulty or confusing Tender document which mislead the complainant. So the complainant cannot be penalized for the fault of the PE.

(v) There is nothing on record to show that in view of Regulation 31(16) the TEC made any investigation to find out real reasons behind the alleged low price nor there is anything to show that the TEC gave any opportunity to the complainant to explain their position by asking them to submit a rate analysis.

(vi) It appears clear that the grounds put forward for making the tender of the complainant non-responsive are not at all sustainable in facts as well as in law. Further it is obvious that the PE made the tender of the complainant non-responsive with malafied intention apparently to defeat its right of getting the award of contract as lowest responsive tenderer.

(vii) The decision of the PE is apparently liable to be annulled but since the procurement contract has already been entered into, the complainant is entitled to get compensation in view of Regulation 53(6)(e) payable by PE as well as approving authority HOPE.

Decision of the Review Panel :

The Procuring Entity including Head of the Procuring Entity is directed to pay a sum of taka two lacs as compensation to the complainant towards the cost incurred by him in preparing tender document up to hearing before review panel within 30 days.

**5.2.3 Appeal petition # 24**

Preamble : An individual, for the sake of convenience say Eng. 'X', lodged this written complaint to the Chairman of the Review Panel praying for justice against the selection of Experts under one target agency. Before lodging this complaint, he initially lodged a complaint to the PD on 03/03/2008. As he did not get any reply from the PD, he then lodged complaint to the HOPE on 06/03/2008 from whom also he did not receive any reply. Then he submitted complaint to the Secretary of the respective division on 13/03/2008. As he did not get any reply from the secretary also, he lodged this complaint to the Review Panel. Hearing was held before the Review panel on 10<sup>th</sup>, 13<sup>th</sup> and 16<sup>th</sup> April, 2008. On first day of the hearing, none from the PE was present despite the notice was served. But both parties were present during hearing of the remaining two days.

Gist of the Complaint : The complainant stated that in response to the newspaper advertisement, he submitted application duly filled by him with relevant certificates to the PD. He stated that according to regulation 45(2) of PPR 2003, the PE is supposed to make a short list of eligible candidates and shall inform all the applicants whether they have been short listed or not. The complainant further alleged that according to the provision in the Instruction to Applicants(Clause 4.5, 21.1, 21.2, 22.1 of RFA), short listing and ranking of the candidates should be done on evaluation and after taking interview final selection has to be made. But the PE neither informed him about his status in the short list nor took his interview. He further alleged that in spite of the non-eligibility for a former employee of the client immediately before the submission of this proposal as per provision of the RFA document (Page 14, 15), the PE has appointed two former employees of his department as experts.

Salient Findings and Observations of the Review Panel :

(i) The definition of the client given in the RFA is considered to be defective. The client should have been the Department.

(ii) According to Instruction to Applicants Clause No. 21.1 of RFA, there is no provision for making a short list of applicants or informing all the applicants whether short listed or not. It provides making a selection list of ten applicants.

(iii) Although according to Instructions to applicants Clause No. 21.2, taking interview of the selection list applicants is mandatory and the newspaper advertisement also mentioned taking of interview of short listed applicants, no such interview of Petitioner was taken for the two posts. This is a clear violation of RFA provision. The submission of the PE representative that taking of interview of Petitioner was not considered important is not acceptable.

Decisions of the Review Panel :

(i) Although the Petitioner was ranked 3<sup>rd</sup> and 4<sup>th</sup> in the selection list of applicants for two posts, but his interview was not taken which is a violation of RFP/RFA provision. So the appointment of two applicants is not lawful. As such their appointments shall be cancelled immediately.

(ii) Fresh recruitment process can be taken up with correction of the definition of client in consultation with concern ministry.

**5.2.4 Appeal petition # 70**

Preamble : A proprietor of a Firm having its office at Shahid Syed Nazrul Islam Swarani has filed this complaint against Invitation of Tender for goods without complying with the mandatory provision of the PPR 2008. The complaint dated 18/04/2010 was received by the Review Panel on 25/04/2010 in sealed cover. The Panel in its meeting held on the same date determined the working procedure to be followed and asked the complainant as well as the PE and concerned officials of the department & ministry to appear in hearing on 29/04/2010. The proprietor of the complainant firm himself with two of other appeared on behalf of the petitioner while the PE appeared for the opposite party.

Gist of the Complaint: The brief case of the complainant is that the PE invited sealed Tender for supply of Equipment and Instrument in a single package for 169 different items. The petitioner participated in the pre-bid meeting held from 27/02/2010 to 01/03/2010 and proposed following amendments :

(i) ITT 20.3 & 42 (Page-29) : Tender has been invited for 169 items of different nature which is violation of Rule 15 of PPR 2008. Bidders proposed to amend it item wise.

(ii) ITT 27.1 (Page 30) : Tender security has been fixed at 5 lac taka which is violation of Rule 22 of PPR 2008. Bidder proposed to amend it as per rule.

(iii) ITT 13.1(a)[Page 28] : Bidder required to submit qualification experience of supplying similar goods under a single contract with value of taka 6 crore. Bidder requested to reduce it to 1-2 crore.

(iv) ITT 13.1(b)[Page 28] : Required liquid asset is 15 crore. Bidder proposed to amend the tender item wise or 80% of the quoted value.

(v) Amendment of Technical Specification of the Items required : Specific brand name was mentioned against item no. 24(Classic velp), 43(Homoeid HF 32), 60(Gene Analyzer), 106, 107, 108 (Reagents for specific instruments).

It is further alleged that though the PE agreed in the pre-bid meeting to make amendments of the tender items to bring it in conformity with PPR rules, but surprisingly the PE did neither make any amendment nor publish any pre-bid minutes though as per rule the PE is bound to issue such minutes within one week of such meeting. Further the PE received the tender on 09/03/2010 without extending the time though in view of Rule 95(6) time should be increased by at least 3 days when one-third time is left after pre-bid meeting. Finally the complainant apprehends that the PE has done all these illegality in order to provide the work to particular tenderer of their choice. The complainant has preferred the complaint first to the PE on 09/03/2010, then to HOPE on 18/03/2010, and then the Secretary of the concerned ministry on 24/03/2010 seeking redress under the provision of PPR. But none of those complaints were followed by any reply.

Salient Findings and Observations of the Review Panel :

(i) It is admitted by the PE that they did not publish any pre-bid minutes nor supplied copy to participants. It is, therefore, apparent that the PE has admittedly failed to comply with the mandatory provision of the Rule 18(1)(C) of the PPR 2008.

(ii) In the present tender the number of item is 169 and its estimated cost is approximately 20 crore. So apparently the amount of security as expressed in fixed amount appears to be without any basis and clearly against the principle of Rule 22(3) of PPR 2008 and therefore not sustainable.

(iii) The contention of the complainant is that full specification of item no. 41 "electrolyte and blood gas analyzer" and item no.45 "electrolyte analyzer" has been replaced by another specification mentioned in the last page of the tender document and item no. 105 dropped without any amendment. After publication of Tender notice any change without formal amendment is not legal.

(iv) It appears that the PE has in some cases prepared technical specifications with reference to particular trade mark/name, brand name, patent design or type and though the country of origin was not mentioned, it is implied from the description. It is clear that some of the technical specifications given in the tender document are in violation of Rule 29(3) of the PPR 2008.

(v) It clearly appears that the whole tender process has been vitiated due to violation of some mandatory provisions of PPR 2008 viz violation of Rule 29(3),22(3) & 18(1)(C) and as such the tender is liable to be annulled.

Decisions of the Review Panel :

The appeal is allowed. The PE is advised to make appropriate amendments to the tender document in the light of the observations made above and invite tender afresh.

**5.2.5 Appeal petition # 90**

Preamble : On behalf of the Local agent of a Foreign firm, its Chairman & CEO submitted this appeal petition on 19/01/2011 and that was sent

to the Chairman of the Review Panel on 25/01/2011 for disposal. The petitioner's firm is one of the seven short listed firms done by the PE based on their submitted EOI. A notice was served to the parties fixing 01/02/2011 for hearing. Both party attended the hearing on fixed date.

*Gist of the Complaint:* In his appeal petition, the petitioner alleged that they have come to learn that two bidders are being considered as responsive leading to the opening of their financial offers; though those two firms apparently could not meet the terms and conditions laid down in the tender document.

The allegations against first firm, say its name 'X (Bangladesh) International', are as follows:

(i) As per letter of invitation, among others 'X (Bangladesh) International' has been short listed and RFP was issued in its name. But in response to RFP, the firm submitted bid security in the name of 'X Inc.' having its registered office outside the Bangladesh.

(ii)The petitioner alleged that 'X Inc.' is a different company than that of 'X (Bangladesh) International' which was basically short listed.

(iii)They also kept an option to provide SERCELL-428 if requested by client. This amounts to option/alternative offer which as per page-13 of RFP, Clause ITC 18.2 is illegal.

(iv)The petitioner further alleged that the independent auditor's reports of 'X Inc.' for the year 2007, 2008, and 2009 have been submitted with the Proposal instead of 'X (Bangladesh) International's.

(v)Many irrelevant CVs have been submitted with the proposal which do not conform to the categories of post and degrees not mentioned – the petitioner further alleged.

The allegations against second firm, say its name 'Y International', are as follows:

(i) 'Y International' received Enterprise Business License on 19<sup>th</sup> December 2003. Since a firm has to have an experience of minimum 10 years to be considered in this procurement process, it is argued by the petitioner that 'Y International' is not an eligible bidder under Clause 7, Page 103 of the RFP.

(ii) Though, 'Y International' has submitted the experience of two other firms, yet did not submit any document about Joint venture.

(iii) According to Page 33 of RFP, Clause 1.0, Technical, Sub-clause 3, mobilization time is 90 days maximum. But, it is alleged by the petitioner that 'Y International' has proposed 180 days as mobilization time.

Salient Findings and Observations of the Review Panel :

(i) The Managing Director of the concern public sector company - which was procuring the said service - argued before the panel that since 'X Inc.' has a good reputation & acting with 'X (Bangladesh) International', they allowed 'X (Bangladesh) International' to submit their proposal in the name of 'X Inc.' But the MD has failed to explain or to show how these two firms are incorporated each other with what relation or link to based on. So the panel observed that though 'X Inc.' was not shortlisted yet it has submitted RFP which is not at all maintainable according to clause-2 of the terms and conditions of RFP.

(ii) It is also admitted that no Proposal was filed in the name of 'X (Bangladesh) International'. So the panel has taken the conclusion that 'X (Bangladesh) International' is not responsive as per PPR – 2008. As it found that the 'X (Bangladesh) International' is non-responsive so the allegations about bid security, auditors reports, submission of other under a cover letter of 'X Inc.' and about the irrelevant CVs yet need not be discussed.

(iii) The 'Y International' was established on December' 26, 2003. So there is no question of gathering 10 years of experience by this firm. So basic requirement of experience as stated in the RFP fails to fulfill. As 'Y International' doesn't fulfill the basic criteria of 10 years experience so as per RFP the firm is not eligible to be considered for this procurement process.

(iv) From the provisional time table proposed by the 'Y International' it is clear that it has proposed mobilization time exceeding the 90 days as it is stated in the RFP by the PE. Hence the 'Y International' has also failed to fulfill the condition of RFP.

Decisions of the Review Panel :

(i) The review petition is allowed.

(ii) Both the companies i.e. (a) 'X (Bangladesh) International', (b) 'Y International' are hereby declared non-responsive according to PPR – 2008.

### **5.3 Appeal petitions due to differences of interpretations of rules/tender clauses**

#### **5.3.1 Appeal petition # 9**

Preamble: A Bangladeshi limited company having its office at Sector 4 of the Uttara model Town has preferred this complaint under the provision of Regulation # 53(3) of Public Procurement Regulations 2003 on the ground that the respondent PE has illegally rejected their responsive lowest bid with a malafide intention to award the contract to 2<sup>nd</sup> lowest tenderer. The complaint dated 01/10/2006 was received by the Review Panel on 02/10/2006 in sealed cover. The Panel in its first meeting determined the working procedure to be followed and in pursuance thereto asked the complainant as well as the PE and concerned officials of the department & ministry to appear in hearing on 11/10/2006. The MD of the complainant company along with an officer of his company appeared on behalf of the petitioner while the PE along with 2 other officers of his department appeared for the opposite party.

Gist of the Complaint: The case of the complainant in short is that they participated in the tender for construction of 697.75 m long R.C. Girder Bridge over a river during the year 2005-06 against the tender # D2-06/2005-06 and became lowest bidder with quoted price of Tk. 475,524,639.56. The TEC in its meeting dated 24/05/2006 recommended complainant company as the lowest responsive bidder and forwarded the same to the HOPE for further action. Meanwhile the 2<sup>nd</sup> lowest bidder lodged complaint to the HOPE stating that the work completion certificate issued by one PE in favour of complainant company for 303.25m long Mollarhat bridge does not meet the criteria set forth by PPR 2003 and/or Article 15.1 of GCC of this tender document defining the procedure for assigning sub-contract. Pursuant to that the HOPE returned the tender document to review the recommendation in the light of the complaint submitted by the 2<sup>nd</sup> lowest bidder. There after the TEC held meeting again on 18/07/2006 and decided complainant company as non-responsive on the ground that it could not produce any paper/document from the employer



permitting the complainant company to work as sub-contractor as per clause 21 of Form 2911 and accordingly the TEC evaluated the initial 2<sup>nd</sup> lowest bidder as the 1st lowest responsive bidder. Being aggrieved by the said decision of the TEC the complainant first submitted its complaint to the PE and then to the HOPE. Being not received any reply within stipulated time from neither PE nor HOPE; the complainant submitted its complaint to the concern Secretary as per Regulation # 51(6). But being failed again to receive any reply from the Secretary within stipulated time, the complainant has preferred this complaint to the Review panel under the provision of Regulation 53 of PPR 2003.

*Salient Findings and Observations of the Review Panel :*

(i) To meet the tender data sheet ITT 12.3(b) experience requirement, the complainant company submitted two of its works as sub-contractor. Of them one is construction of 303.25m long pre-stressed concrete girder bridge at Mollarhat and another is construction of 450m long Arial Khan Bridge. In the first work prime contractor was M/S Tower Enterprise Ltd. While Hanil Construction Company Ltd. Was prime contractor in the second. The complainant company completed both works as sub-contractor.

(ii) Regarding construction of 303.25m long pre stressed concrete girder bridge at mollarhat, the complainant submitted a work completion certificate issued by the concern PE. It appears from the certificate that the complainant completed part work of 303.25m long two lane multispans pre-stressed concrete girder Bridge as sub-contractor of M/S Tower Enterprise Ltd. The scope of work for the complainant comprised construction of 1m and 1.2m diam bored cast-in-site RCC piles and fabrication, casting stressing and including of 42.69m long pre-stressed concrete Girders.

(iii) The contention of the PE for construction of this bridge (303.25m long pre-stressed concrete bridge) is that experience shown by the complainant was not valid as per the then contract agreement following Bangladesh form no. 2911 Clause 21 which says that 'the contract shall not be assigned or sublet without specific order from the government in respect of a specified sub-contractor'. But the contention of the complainant is that the work in question was completed within 16/06/2000 before enactment of PPR 2003 by using form 2911. According to that form the President was employer of the work and on behalf of the President the contract was executed

by the concerned Executive Engineer of the govt. and the President was represented by the concerned Executive Engineer. In the bottom of page 2 the words "the above tender is hereby accepted by----- on behalf of the President" have been inserted. From this it appears clear that President/Govt. did not accept any tender himself and all those were done by the concern Executive/Divisional Engineer on behalf of the President. So when the Executive Engineer under whose supervision the work was performed himself certifies that the complainant as sub-contractor of M/S Tower Enterprise Ltd. Completed 303.25m long pre-stressed girder bridge, there is no scope to hold anything otherwise than that the sub-contracting was with due approval of the employer govt./or its representative. The Review Panel opined that there cannot be any document greater than that was issued by the concerned Executive engineer himself since he worked as representative of the employer at the relevant time.

(iv) Regarding construction of 450m long Arial Khan Bridge, the complainant claimed to had done the work as sub-contractor of the Hanil Construction Company Ltd., Korea. The complainant submitted papers in support of his claim. On perusal of those papers it appears that by letter dated 02/08/2001 the Hanil Construction Company Ltd. sought approval from the Engineers Representative to appoint the complainant company as the nominated sub-contractor. On the basis of aforesaid letter, the Engineers Representative and the Team leader informed the no objection to the proposal and also recommended the complainant company by the letter dated 20/05/2002 and 23/05/2002. As per requirement of clause 4.1 of the general conditions part -1, the Engineer having been consented with the Project Director, wrote to the Chief Engineer (the employer) by its memo # SRNDP 1044/01(2), dated : 11/06/2002 for approval of the subletting. There appears no paper showing formal approval of the Chief Engineer (the employer); but there are several letters showing that the complainant attended in different meeting during different phases of construction. The complainant further claims that during construction work he as subcontractor met on several occasion with Employer, Engineer representative and other department officials. The complainant further claimed that having been satisfied with his work the department never raised any objection either about quality of the work or the complainant company's appointment as sub-contractor and the department made payment for the work through the principal contractor.

(v) 450m long Arial Khan Bridge is one of the expensive prime projects of the government and it is difficult to believe that a governmental authority has left the construction of such heavy installation uncared or allowed a foreign contractor to get the work done by an unauthorized sub-contractor. On query during hearing the complainant informed the Panel that he was not prevented by man of the government in performing his work as sub-contractor nor challenged by anybody during the course of work. So it is clear that the complainant worked in that bridge construction project with consent and permission of the department.

(vi) From the papers on record and oral submission the Review Panel is quite satisfied that the complainant company completed 450m long Arial Khan Bridge under main contractor Hanil Construction Company Ltd, Korea as sub-contractor with the consent and approval of the concern department though no formal letter of approval was issued.

Decisions of the Review Panel :

(i) The second evaluation and recommendation of the TEC for awarding the bid infavour of the 2<sup>nd</sup> lowest being absolutely malafide and repugnant to provisions of law, Rule & Practice and far from transparent is rejected.

(ii) The PE is directed to process and take all further steps on the basis of offer of the complainant company pursuant to TEC meeting for contracts evaluation of Tender no. D2/TRD/AGDNT/BR/2005-2006 held on 24/05/2006.

**5.3.2 Appeal petition # 12**

Preamble : A proprietor of a Firm having its office at 183, Trunk Road, Feni has filed this complaint against Invitation of Tender for works. The complaint dated 04/01/2007 was received by the Review Panel in sealed cover. The Panel in its first meeting determined the working procedure to be followed and asked the complainant as well as the PE and concerned officials of the department & ministry to appear in hearing on subsequent day. The proprietor of the complainant firm himself with one employee of his firm appeared on behalf of the petitioner while the PE appeared with two more officers for the opposite party.

*Gist of the Complaint* : The case of the complainant in short is that his firm participated in the tender for construction of 42.68m long P.C. Girder Bridge during the year 2005-06 with other interested bidders. As per clause 21(b) of the tender notice, clause 5(b) of the Corrigendum notice, and clause 13.1(a) of the TDS, interested bidder has to have minimum average annual construction turnover having the amount of Tk. 525 lacs during last three years. But by completely deviating the terms 7 conditions of the tender document, TEC has recommended a firm to award contract which does not have construction experience even an amount of Tk. 100 lac per annum. The complainant has preferred the complaint first to the PE on 03/12/2006, then to HOPE on 11/12/2006, and then the Secretary of the concerned ministry on 18/12/2006 seeking redress under the provision of PPR - 2003. But none of those complaints were followed by any reply.

*Salient Findings and Observations of the Review Panel* :

(i) During hearing the PE informed the Panel that they have evaluated the tender on the basis of bank turnover statement of all the bidders. On that basis they are processing to award the work to a bidder as a lowest and responsive bidder other than the complainant bidder. In respect of their yearly turnover they also fulfill the condition of the tender accordingly as shown in the cash flow statement of all the different banks.

(ii) The representative of the complainant reiterated their complaint quoting tender clause no. 13A and by restating that the turnover means construction turnover of Tk. 1575 lac in 3 consecutive years and every year at least Tk. 525 lac which the TEC recommended firm does not have as such his bid is non-responsive. The representative of the complainant further claimed that since the TEC recommended firm did not submit the required construction turnover certificates they should be non-responsive.

(iii) The Review Panel examined the tender documents and found that according to tender clause no. 13.1(a), evaluation of all the tenders should have been done on the basis of construction turnover. But the TEC has made the evaluation on the basis of bank turnover statements.

*Decisions of the Review Panel* :

(i) The complaint of the complainant is found to be correct.

(ii) Only two bidders including the complainant are found responsive.

(iii) The tender to be awarded to the lowest responsive bidder.

### **5.3.3 Appeal petition # 45**

Preamble : On behalf of a JV, an authorized signatory having its office at 6 Motijheel C/A submitted this appeal petition on 18/06/2009 and that was sent to the Chairman of the Review Panel for disposal in sealed cover. The Panel in its first meeting determined the working procedure to be followed and asked the complainant as well as the PE and concerned officials of the department & ministry to appear in hearing on subsequent day.

Gist of the Complaint : The case of the complainant in short is that their JV firm participated in the tender for 'Permanent Riverbank Slope Protection by dumping of sand filled Geo-textile bags and Wave protection above low water level by CC Blocks of a river during the years 2008-09 & 2009-10' with three other interested bidders. As per condition of the tender the interested bidder must have completed similar nature of work worth Tk. 8.65 crore during the preceding five years in construction of Regulators/Sluice/ barrage/River closure/Bank revetment/ Spur. But the selected lowest tenderer – which one also a JV- submitted certificate of completion of work of Tk. 8.54 crore in which the participating associate member had only 30% share equal to Tk. 2.56 crore. From this angle of consideration the work certificate of Tk. 8.54 crore can't be considered entirely in favour of the opponent being the first lowest tenderer as only one of his associates partner had 30% share worth Tk. 2.56 crore as has already mentioned. The complainant before coming to the Review Panel exhausted all the administrative forum and finding no remedy has appealed before this Review Panel.

#### Salient Findings and Observations of the Review Panel :

(i) The argument of PE is that since one of the associating partner participated in the work of Tk. 8.54 crore (though with 30% share), and since the experience of work of 8.54 crore can't be divided/separated; as such the PE has attributed the credit of completion of entire work of Tk. 8.54 crore in favour of the lowest.

(ii) It is observed by the panel that they don't find very sound reason or logic in the above mentioned argument of the PE. The lead partner of the TEC's recommended JV has no specific experience in the similar nature of work though its partner had 30% share in work of 8.54 crore having similar nature.

Decisions of the Review Panel :

(i) The complainant succeeds in this appeal.

(ii) The PE is directed to re-evaluate on the basis of existing terms and conditions of the Tender document and to proceed accordingly as per relevant rule of PPR-2008.

#### **5.3.4 Appeal petition # 59**

Preamble : A proprietor of a Firm having its office at 19, East Manipuripara, Parliament Avenue, Dhaka-1215 has filed this complaint against Invitation of Tender for works. The complaint dated 18/11/2009 was received by the Review Panel in sealed cover. The Panel in its first meeting determined the working procedure to be followed and asked the complainant as well as the PE and concerned officials of the department & ministry to appear in hearing on subsequent day. The proprietor of the complainant firm himself appeared on behalf of the petitioner while the PE appeared with two more officers for the opposite party.

Gist of the Complaint : The case in short is that turnover of the complainant who filed certificate of turnover which totally amount of Tk. 13.163 crore per year according to evaluation of the TEC as against the requisite annual turnover of 13.5 crore per year which amount to 02.50 crore less than the required amount and for this the complainant was declared non-responsive by the TEC. On this point the complainant raised objection as during the process one of his completion certificate was allegedly found to have been interpolated; though this certificate was otherwise properly granted by an Executive Engineer of a district. The complainant vehemently submitted that this certificate has been forged and was not the same filled by him to the PE and he does not know how it got inducted in the Tender Document. It is further alleged by the complainant that the so-called successful bidder was debarred by another agency for having resorted to collusive illegal practices. By

ignoring this fact with malafide intention, the TEC has still made that firm as responsive though the debarment status of the firm was available from the web page of the CPTU. The complainant moved all the administrative authorities as prescribed in PPR 2008 thus exhausted the entire prescribed administrative forum. Finding no reply and no remedy, the complainant lodged this complain to the Review panel.

*Salient Findings and Observations of the Review Panel :*

(i) The certificate which is a real and original one as it appears to the Panel (containing original signature of the issuing authority) has not been considered by the TEC. Though the complainant contended to have earlier filed copy of this real one.

(ii) According to STD PW 3 ITT clause 14.1(a) it is the required position in this respect is that the date should be counted from to the date of publication of tender notice. Therefore the statutory position shall have to be followed in this case in absence of any specified date of commencement of five years in this respect.

(iii) It well appears that the disputed and debarred successful tenderer has come within the mischief of Rule 47(Ga) & (Gha) of PPR 2008 and is liable to be impacted accordingly as per this rule which does not provide for any exception.

(iv) There is enough lack of transparency in the evaluation process, especially on point of turnover.

*Decisions of the Review Panel :*

(i) The NOA and work order are liable to be set aside and it is nearly so set aside.

(ii) The TEC be hereby recommended to re-evaluate the tender a fresh in the light of the observation in the judgment and as per law.

**5.3.5 Appeal petition # 60**

*Preamble :* A proprietor of a Firm having its office at House # 35, Road # 1, Niketan, Gulshan-1, Dhaka-1212 has filed this complaint. The complaint dated 24/11/2009 was received by the Review Panel on 06/12/2009 in sealed cover. The Panel in its first meeting determined the working procedure to be followed and asked the complainant as well

as the PE and concerned officials of the department & ministry to appear in hearing on 13/12/2009. The proprietor of the complainant firm himself appeared on behalf of the petitioner while the PE appeared with seven other officers for the opposite party. A written reply on the petition of complaint was also submitted by the PE by his memo no 3147, dated : 10/12/2009.

*Gist of the Complaint :* The case in short is that the PE invited a tender having 2 lots on 23/02/2009 and the complainant accordingly participated for 2 lots under that tender. One of the conditions for participation in the tender was that the required average annual turnover over the last five years will be (i) Tk. 370.66 lac for lot no. 1, and (ii) Tk. 244.31 lac for lot no. 2. On the opening date of the tender the complainant was found lowest bidder in both the lots; but subsequently on 30/06/2009 NOA was issued in favour of the complainant for the lot no. 1; not for the lot no. 2. Then after query they came to know that the TEC recommended other lot to the 2<sup>nd</sup> lowest tenderer on the ground that the complainant's average annual turnover does not cover the turnover for the two lots. So they lodged complaint first to the PE, then the HOPE and thirdly to the Secretary with the argument that if their average annual turnover covered the required amount of Tk. 370.66 for lot no. 1, then it also covered other lot no. 2 which requires a lower average turnover of Tk. 244.31. But got no remedy. Hence the complainant approached the Review Panel for review.

*Salient Findings and Observations of the Review Panel :*

(i) During hearing the complainant claimed that he has fulfilled all requirements of the package tender, particularly ITT 13.1(a) requiring the average annual turnover for the last five years. He further claimed that nowhere in the tender document was written that the average annual turnovers for each lot will be added in case of success in more than one lot. The PE also admitted this fact during the hearing.

(ii) On query from the Review Panel it was also admitted that never before were the average annual turnovers added for being successful in more than one lot.



(iii) It is observed by the Review Panel that the petitioner has fulfilled all the conditions of the package tender including the required average annual turnover and that he is responsive for both the lots.

Decisions of the Review Panel :

(i) The appeal is allowed with advice to the PE to complete the process for issuing NOA in favour of the complainant firm for the other lot also.

#### **5.4 Appeal petitions lodged due to actions of PEs during contract implementation stage**

##### **5.4.1 Appeal petition # 103**

Preamble : A proprietor of a firm having its office at 128 Patanpara, Boalia, Rajshahi has filed this complaint regarding disagreement with the PE during execution of a works procurement contract. The complaint dated 08/05/2011 was received by the Review Panel on 10/05/2011 in sealed cover. The Panel in its first meeting determined the working procedure to be followed and asked the complainant as well as the PE and concerned officials of the department & ministry to appear in hearing on 18/05/2011. Both parties were present during hearing. During hearing the PE expressed its intention to submit written argument. Accordingly the Panel allowed both parties to submit written argument by 22/05/2011.

Gist of the Complaint : The case in short is that the PE invited a tender for procuring works and the petitioner participated in the bidding. After evaluation, the authority selected his firm and subsequently the contract was signed with the contract amount of Tk. 78,60,090/-. The PE issued work order on 11/02/2010 and the petitioner's firm have already completed 90% of work. At this stage, the verification committee has recommended for paying Tk. 17,25,139.50 in favour of the petitioner as price of 23,768.80 kg rod at the rate of Tk. 72.58/kg as it is quoted in the tender schedule under serial no. 13. But the PE has decided to make payment for the item of rod taking the unit price Tk. 0.7258/kg ignoring the recommendation of the verification committee. Due to that the petitioner will be going to get less amounting Tk. 17,07,888.10 than the amount recommended by the verification committee under this item. Being aggrieved by the decision of the PE, the petitioner (Contractor of

this work) first lodged complaint to the PE, then HOPE and finally to the Secretary of the concern ministry. But being get no remedy, the petitioner (contractor of this work) lodged this petition before the Review panel.

*Salient Findings and Observations of the Review Panel :*

(i) During hearing it is argued by the PE that though the petitioner mentioned Tk. 17,49,142.00 as total price for the item of rod in tender, he mentioned 100kg as unit of this item with the quoted unit price Tk. 72.58. So the quoted price for 1kg rod comes down to Tk. 0.7258 and total price for this item comes down to Tk. 17,251.40. The PE further argued that as per Rule 98(12) of the PPR 2008 'the item quantified in the BOQ for which no rates or prices have been quoted shall be deemed covered by the amounts of other rates and prices in the contract and it shall not be a reason to change the tender price'. The PE also referred the clause 38(a) of ITT of the STD which states that "if there is a discrepancy between the unit price and the line item total that is obtained by multiplying the unit price and quantity, the unit price shall prevail and the total price shall be corrected". The PE conclude his argument by saying that since he calculated the total payable price for the item of rod by taking consideration of the contractor's quoted unit price, he did not commit any injustice towards the contractor as per rule and conditions of the tender document.

(ii) It is observed by the Panel that in case of 'rod' item the petitioner has mentioned 100kg as one unit in his tender and quoted Tk. 72.58 as unit price. At the same time he mentioned in his tender total amount of rod is 24099.50 kg and total price for that amount is Tk. 17,49,142/-.

(iii) It is evident from comparative statement prepared by the TEC that considering the total quoted price TEC considered the petitioner firm as lowest responsive bidder. It is further evident that authority has corrected the Part-A of the BOQ replacing 24099.50 kg by 23768.80kg and total Tk. 17,49,141.71 by Tk. 17,25,139.50 under the item no. 13. So the total price of 23768.80kg rod at the rate of Tk. 72.58/kg become Tk. 17,25,139.50. So it is clear that though the bidder mentioned 100kg in the unit column, the TEC evaluated the tender taking into the consideration total quoted price for the item of rod amounting Tk. 17,25,139.50 at the rate of Tk. 72.58/kg.

(iv) It is opined by the Panel that mentioning 100kg by the petitioner in the Unit column of the BOQ was simply a clerical mistake, before detecting by the PE which was not noticed by any officer of the procuring entity including the members of the TEC.

Decisions of the Review Panel :

(i) The review petition is allowed. The PE is directed to make payment to the petitioner (contractor of this work) total Tk. 17,25,139.50 for the price of 23768.80kg rod at the rate of Tk. 72.58/kg.

#### **5.4.2 Appeal petition # 107**

Preamble : An authorized representative of a JV, having its office at House # B-104, Road # 8, New DOHS, Mohakhali, Dhaka has filed this complaint regarding disagreement with the PE during execution of a works procurement contract. The complaint dated 23/06/2011 was received by the Review Panel in sealed cover. The Panel in its first meeting determined the working procedure to be followed and asked the complainant as well as the PE and concerned officials of the department & ministry to appear in hearing on 05/07/2011. Only the petitioner and the PE attended during the time of hearing. No representative neither from the HOPE or the Secretary was present during the hearing.

Gist of the Complaint : The case in short is that the PE invited a tender for procuring works and the petitioner participated in the bidding. After evaluation the authority selected his firm and subsequently the contract was signed with the PE. Maintaining all formalities, the petitioner's firm started to work. During execution of the work, four Interim Payment Certificates (IPC) were submitted and payments were made including price adjustment. There after PE hold up further payment. To make the payment petitioner requested in writing first to the PE, then HOPE and finally to the concern Secretary of the division. But none responded in time. After much delay a committee was formed at the instruction of HOPE. The committee held its meeting on 30/05/2011 and decided that as per submitted letter of bid no escalation is payable. Then the petitioner lodged this petition before the Review Panel seeking remedy in this matter. In brief the disagreement between the petitioner (contractor) and the PE is 'whether the petitioner's (contractor) JV firm is entitled for price adjustment due to escalation'.

*Salient Findings and Observations of the Review Panel :*

(i) It is opined by the Review Panel that 'any dispute about public procurement falls under the provision of Public procurement Rules. As it is a dispute between contractor and the authority on payment, so the review petition is well maintainable'.

(ii) TEC calculated the total contract value with provision of price adjustment as price contingency. Contract was signed. During execution of the work Interim Payment Certificate (IPC) were submitted and paid accordingly including price adjustment. Four IPC were submitted and paid along with price adjustment to the petitioner. After that payment were held up showing the cause that the petitioner had forgone the right of price adjustment in his letter of bid.

(iii) In clause (f) of letter of bid the petitioner had noted that no price adjustment provisions are applicable to the contract. This clause (f) is about the provisions as stated in clause 47 of G.C.C. clause. Clause 47 of G.C.C. tells about bonus of the work, which was initially excluded. So if the petitioner forgoes the clause (f) of G.C.C., he will be excluded from any sort of bonus only. But in the present case the authority has excluded the petitioner from price adjustment of the whole project.

(iv) The provision of price adjustment is stated in the clause of 44 of G.C.C. where it is stated that price shall be adjusted for fluctuations in the cost of inputs only if provided in the P.C.C. It is also found in the clause ITB 14.5 of bid data sheet that price adjustment will apply as detailed in sub-clause 44 of the condition of contract (G.C.C. and P.C.C.). So it is clear that the provision of price adjustment was well present in the contract.

*Decisions of the Review Panel :*

(i) The review petition is allowed. The petitioner is entitled for price adjustment due to escalation.

## **5.5 Appeal petitions rejected since the contract with the another tenderer has already been signed**

### **5.5.1 Appeal petition # 32**

Preamble : : The CEO of a firm having its office at 33 Topkhana road, Dhaka-1000 has filed this complaint against Invitation of Tender for goods. The complaint dated 07/01/2009 was received by the Review Panel on 12/01/2009 in sealed cover. The Panel in its first meeting held on 14/01/2009 determined the working procedure to be followed and asked the complainant as well as the PE and concerned officials of the department & ministry to appear in hearing on subsequent day. The CEO and another appeared for the complainant party while the PE with some other officers appeared for the respondent party.

Gist of the Complaint : The case of the complainant in short is that the PE invited sealed tender for supplying 218 physical unit of goods. The complainant participated in the tender along with three others. Since the complainants bid fulfilled all the tender criteria and its financial offer become lowest, the complainant's firm was expecting NOA. But the PE in its letter dated 01/07/2008 informed with reference to the Complainant's firm letter that NOA was issued in favour of the highest bidder and the complainant's firm was found non-responsive by technical evaluation sub-committee on three grounds. Upon receipt of the letter the complainant lodged first formal complaint to PE, then to the HOPE and finally to the Secretary of the concern ministry. But no reply was received by the complaint from any of three tiers within stipulated time. Thus the complainant has been constrained to file this appeal to Review Panel.

#### Salient Findings and Observations of the Review Panel :

(i) The Technical Evaluation sub-committee made the bid non-responsive on the following grounds : (i) "detachable portable hand held for patient transport not found in the catalogue", (ii) "perfusion index not available in the offered model", and (iii) "operated by adapter instead of 220 VAC power supply".

(ii) From the datasheet and physical display we are clearly of the opinion that the pulse oxy-meter is detachable, portable hand held for patient transport and it fulfills the tender criteria.

(iii) In the catalogue submitted by the complainant AC power requirement has been mentioned to be "100 to 240V AC 50 to 60 H2.1.2A". So apparently the quantum of power mentioned in the catalogue fully covers the tender specification.

(iv) The PE has filed papers to show that contract with the highest bidder has been signed and L/C has been opened in pursuance thereof.

Decisions of the Review Panel :

(i) The complaint is hence rejected.

### **5.5.2 Appeal petition # 58**

Preamble : : The General Manager(Enterprise Business Group) of a limited company having its office at 30 Gulshan Avenue(North), Gulshan Circle-2, Dhaka-1212 has filed this complaint. The complaint dated 18/11/2009 was received by the Review Panel on 22/11/2009 in sealed cover. The Panel in its first meeting held on 22/11/2009 determined the working procedure to be followed and asked the complainant as well as the PE and concerned officials of the organisation & ministry to appear in hearing on 24/11/2009 and 01/12/2009. Representatives of the both parties appeared and participated in the hearing.

Gist of the Complaint : The case of the complainant in short is that they along with some other bidders submitted tender in response to the PE's invitation to tender for supply, customization, installation and commissioning of centralized real time online system. Their bid offer was treated technically non-responsive which was arbitrary illegal and unlawful although they were 1<sup>st</sup> lowest bidder. They initially submitted complaint to the PE under Rule 57(2) of PPR-2008 against the said decision. As they were not convinced with the reply from PE, they submitted their complaint to the HOPE and received a stereo typed reply. Thereafter, the complainant company submitted complaint to the Secretary of the concern ministry under Rule 57(7) of the PPR-2008. But received no response from him. Therefore, they submitted this appeal to the Review Panel under the provision of Rule 57(12) of the PPR-2008.

*Salient Findings and Observations of the Review Panel :*

(i) It transpires that on 21/10/2009 the lowest responsive bidder (Recommended by the TEC) executed performance security and the PE accepted the same. Subsequently on 22/10/2009, contract of Award was signed between the said lowest responsive bidder and the PE. The complaint dated 18/11/2009 was received by the Review Panel on 22/11/2009.

(ii) The Ld legal Adviser for the complainant company stated that the Review Panel may suggest annulment in whole or in part of a non-compliant action or decision of a Procuring Entity.

(iii) In our view as PE has already completed the entire bid process, prior to lodging of complaint by the complainant company; so there is no scope for any interference by the Review panel at this stage.

*Decisions of the Review Panel :*

(i) The complaint of the complainant company be rejected. Written submissions of both the parties are made part of the record.

## ***Chapter Six***

### ***Data Analysis and Findings***

#### **6.1 Introduction**

It has been stated in preceding chapters that the aim of this research project is to understand the extent of effectiveness of remedy procedures, have an idea about the level of compliance of the provisions of PPA & PPR, discover concerned persons' relevant experience & views and understand other reasons (if any) for lodging appeal at the Review Panel level. For that following research questions were developed : "What is the main cause of lodging Review Petitions in most cases? Is it due to non-compliance of rules by the PEs at processing stage? Is there any grey area within the rules or standard documents which facilitate the disagreement regarding the interpretation of that rule/clause ultimately resulting the lodgment of petition by the aggrieved tenderer? Is there any other reason behind for lodging complaint by the tenderer?"

For finding out the answer of these research questions, research based on text-based method is selected and justification of that has already been narrated in Chapter Three. In total records of 111 Appeal petitions were reviewed and relevant data were collected during data collection period. As many as 18 types of information were collected from each of those records for analysis and interpretation purpose. Collected data are presented in Chapter Four. In this chapter, attempts would be made to analyse data, collected from the records of 111 Appeal petitions, and present findings. It might be mentioned here that findings are grouped in categories that concern factors influencing tenderers' use of remedies but also provide more general information on the function and impact of remedies.

#### **6.2 Validation of the Observations/data**

It has already been stated in Chapter Three that observations/data found by reviewing the contents of 111 Appeal cases would be validated through triangulation. Validation is done by conducting interviews with a tiny sample size having 17 units. Samples are selected from the populations consisting of different groups who are directly involved either remedy seeker or remedy providers other than 2 units who were actively involved with drafting the PPA 2006, PPR 2003



& PPR 2008 including implementation of public procurement rules/regulations/directives/orders for long time. Following are the identity of the interviewees in category wise with their number and respective identification initials used for each category during result presentation :

**Table 6.1 : Categories of Interviewees**

<b>Sl. No.</b>	<b>Category of Interviewees</b>	<b>Number of Interviewees</b>	<b>Identification initials used during result presentation</b>
<b>(i)</b>	Secretary of the Ministry/Division	2	S
<b>(ii)</b>	HOPE	3	H
<b>(iii)</b>	PE	5	PE
<b>(iv)</b>	Tenderer	5	T
<b>(v)</b>	Independent Consultant	2	IC

Open-ended questions are used in case of interviewing the 17 interviewees. An Interview guide is developed for conducting the interview of selected samples. The questions of the interview guide are not identical for all categories. The formulation, coverage and number of questions actually asked are different for different categories. The interview Guide is prepared based on the important issues and analytic ideas developed after reviewing records of Appeal petitions. During data analysis and presentation of findings, primary focus was to analyse data found by reviewing the contents of 111 Appeal cases and findings have been drawn based on that. Then interviewees' views/observations /experiences – recorded during interviewing 17 units of sample through semi-structured interview – are used to validate or dismiss these findings or uncover further factors, offering synergistic or contradictory explanations.

### **6.3 Findings of the Research**

#### **6.3.1 Trend of lodgment of Appeal petitions**

From data presented in figure 3 of the Chapter Four, it is seemed that the trend of lodgment of appeal petitions is increasing. More numbers of appeal petitions are being lodged by the aggrieved tenderer in comparison to previous year since inception of formal remedy procedures with the only exception of 2010. For validation of this apparent trend, all five category of interviewees were asked whether

they consider that introduction of formal remedy procedure has increased (the interest in) lodging complaint among tenderers. All five interviewees under 'T' category replied that it is increased. Among 'PEs' the responses are mixed. Out of five PEs, 1 replied Yes, 2 replied no and rest 2 thought that it is in fact decreased. IC#1 answered differently by saying that 'since the provision was not there before, so there were no scope for lodging formal complaint before introducing PPR 2003 & PPR 2008. But the trend would actually depend how the PEs will be handling the procurement process in future'. Two probable interpretations could be of that increasing trend. First one could be that the tenderers have been becoming more aware gradually about the effectiveness of existing remedy procedures available for them under PPR. So effectiveness of the remedy procedures has been encouraging the increased number of tenderers to take opportunity of that. The other interpretation might be that the degree of compliance level during execution of procurement process is not improving at a satisfactory rate though the tenderers have been becoming more acquainted with the different compliance provisions of PPR 2008 specially the remedies available to them.

### **6.3.2 Department/Organisation wise number of lodged Appeal Petitions**

From data presented in figure 4 of the Chapter Four, it is evident that highest number of appeal petitions has been originated from the procurement proceedings of R&HD. BR is in the second position. BPDB and BTCL are both in the third position. Fourth highest number of appeal petitions has been originated from the procurement proceedings of two organizations namely LGED and DGH. PWD is in fifth position. Interesting fact is, among the target agencies of the government, R&HD and LGED are in first and fourth position respectively. Among two other target agencies, BWDB is in the bottom of the list with 27 other department/organization. Surprisingly no appeal petition has been lodged from the procurement proceedings of REB. To find out the reason of that, a question -'why less appeal petitions are originated from the procurement proceedings of BWDB and even no appeal petition originated from the procurement proceeding of REB' - was asked to all 17 units of the sample during interviewing period. Among PEs, 3 PEs declined to make any comment on that. PE#2 commented that 'one reason might be less number/frequency of tender proceedings of these 2 organisations'. PE#4 answered that 'since limited number of tenderer were doing business in these 2 organisations, that's why the situation

like this'. Among tenderers, 4 interviewees declined to answer this question. But T#5 commented that 'unholy alliances are there within these 2 organisations between PEs and tenderers. That's why less complaint or no complaint is being lodged in relation to the procurement proceedings of these 2 organisations'. IC#1 said, in this respect, that 'goods procurement is more than works in REB. In case of goods procurement they have tendency to divide the package into small lots or packages. Since tenderers are also limited in REB, so they are all happy & comfortable with innumerable number of lots or packages which discourage them to come forward for availing the opportunity provided in remedy procedures. Collusive practices might also be there in REB. Collusive practices might also be in BWDB in addition to fear of punishment for lodging complaint'. IC#2 considered following as reasons for that : '(i) competition might be limited within a group of tenderers, (ii) existence of culture not challenging the decision of PEs, and (iii) fear of punishment'. Among HOPEs, a HOPE declined to give any reply on that. HOPE#2 observed that 'where there is competition, there would be possibility of lodging complaint'. HOPE#1, who worked for long 3 years one of these 2 organisations as HOPE, said that he used to take very seriously every complaint lodged before him in his tenure. He further claimed that after lodging complaint he used to take hearing in presence of both sides (PE and aggrieved Tenderer) after receiving a complaint without any delay. During hearing stage, if he is not convinced with the reply/argument /explanation of concern PE; he never hesitated to overrule the decision in respect of that particular procurement proceeding. If he is satisfied with the reply/argument /explanation of PE; he always tried in these cases to pacify the aggrieved tenderer explaining the justification of PE/AO's decision before formally providing his decision regarding that particular complaint.

So among the interviewees, there are no consensus regarding the cause(s) of less appeal petitions originated from BWDB or no appeal petition originated from REB. It was not possible to go further under this study to find out the reason(s) of that. It would be an area where interested researcher could come forward to explore the reason(s) why no appeal petition not yet been lodged in respect to procurement proceedings of REB or why less appeal petitions are originated from the BWDB's procurement processes.

### **6.3.3 Ministry/Division wise number of lodged Appeal Petitions**

It might be useful to be mentioned here that Secretary of the concerned Ministry/Division is responsible for disposing of the review petitions at a third tier of the formal remedy procedure available for the tenderers. In fact they are at the last tier of administrative review system before submitting appeal petition by an aggrieved tenderer to an independent Review panel. General assumption is that the effectiveness of the administrative review system especially at its last tier would not only eliminate number of lodging Appeal petitions from that ministry/division; but also would play a key role in ensuring compliance of rules and transparency in the procurement processes. Understandably this third tier of administrative review system is very crucial for ensuring the transparency in public procurement process. So Policy makers might be interested to know which ministry/division should have more attentions in case of disposing review petitions under the third tier of the remedy procedures available under PPR 2008.

From data presented in figure 5 of the Chapter Four, it is evident that the highest number of Appeal petitions was originated from the procurement proceedings of departments/organizations under the administrative control of the Roads Division. R&HD is the main contributor for this number. Ministry of Railway is in the second position. Ministry of Post & Telecommunication and Power Division is in the third and fourth position respectively. Ministry of Health & Family Welfare is in the fifth position among ministries/divisions in respect of the number of lodged appeal petitions. From the above fact, Policy makers could make up its mind in respect of which ministry/division deserve more effort/attention in case of disposing review petitions under administrative review system especially at its last tier. Existence of efficient and effective administrative review system in those ministries/divisions not only ensure the compliance of rules and transparency of public procurement processes; but also would assist to enhance the reputational image of those ministries/divisions as well as their sub-ordinate departments/organizations.

### **6.3.4 Nature of the Decisions of the Panels**

It can be safely assumed that tenderers are in better placed than anyone else to know when a non-compliance of the rules of PPR 2008 or clauses of the tender document, by the PEs, has occurred. So, the

analyses of the decisions given by the Review panels upon the lodged Appeal petitions of the aggrieved tenderers deserve importance under this study. For the convenience of the analysis, decisions of disposed 111 appeal petitions have been categorized in Chapter Four under following 6 categories : (i) Up-hold PEs' decision, (ii) Set aside PEs' decision, (iii) Refrain from making any decision, (iv) No Decision, (v) Inadmissible Appeal petitions, and (vi) Withdrawal Petition allowed. From data presented in figure 6 of the Chapter Four, it is crystal clear that more number of appeal petitions have been allowed with a order of set aside the PE's decision than the numbers of disallowing the appeal petitions with a order of up-hold the PE's decision by the different Review Panels on the basis of the merit of fact & law in respect to the disputed procurement process. Though if the number of appeal petitions disposed of under the category of 'Inadmissible Appeal petitions' and 'Withdrawal Petitions allowed' add up with the number mentioned under 'Up-hold PEs' decision' category; the total number of disallowed appeal petitions would go up the figure of appeal petitions allowed by the Review Panels. But it should keep in our mind that both "Inadmissible Appeal petitions" and 'Withdrawal Petitions allowed' category were disposed of by the Panels either for not exhausting all options of complaints to the administrative authority before lodging complaint to Review Panel as per provision of Rule 57(11) of the PPR 2008 or due to application of the petitioner to withdraw the petition; not considering the merit of the petition. So, it can be inferred from that figure that a significant number of Appeal petitions have been - lodged by the tenderers – originated from the disputed procurement proceedings where action of the PEs were either malafide or contrary to the rules.

### **6.3.5 Causes of disputes in Appeal petitions**

It might be useful to mention here again that the literal meaning of 'Compliance' is the certification or confirmation that the doer of an action meets the requirements of accepted practices, rules, regulations, specified standards or the terms of a contract. Non-compliance means 'disregard of rules or conditions'. Wrong implementation can also be called non-compliance. Rule 56 of the PPR 2008 has stated total 24 number of circumstances under which a formal complaint might be lodged by an aggrieved tenderer against a Procuring entity. Taking those circumstances into consideration, the copies of the written decisions in which cases the PEs decisions have been set aside by the Review panels, are only reviewed in this study to find out the instances

of the non-compliance of the rules/clauses by the PEs or the existence of grey area within rules/clauses (of tender document) which facilitate the disagreement regarding the interpretation. So out of 111 records of appeal petitions, only the records of Appeal petitions termed in Para 4.6 of the *Chapter Four* as 'Set aside PEs' decision' have only been analyzed to find out that. The reasons for not taking into consideration the records of Appeal petitions fall under five other categories mentioned in Para 4.6 of the Chapter Four have already been narrated in that chapter. So only 45 records of Appeal petitions fall under 'Set aside PEs' decision' category only considered under this study to find out the main causes of lodging complainant by the aggrieved tenderer in most cases.

From data presented in figure 7 of the Chapter Four, it is evident that more number of allowed Appeal petitions have been originated due to non-compliance of either Rules of PPR 2008 or the Clauses of the tender document than the number of Appeal petitions that have been originated due to difference in interpretation of either Rules of PPR or the Clauses of the tender document. So we can safely infer that 'non-compliance of rules/clauses of the tender document by the PEs at processing stage' is the main cause of lodging Appeal Petitions in most cases. To validate this fact, I asked a question -'what is the main cause of lodging Appeal petitions in most cases' - to all 17 units of the sample during interviewing period. Among tenderers, all tenderers except one replied that 'non-compliance is the main cause'. Only T#1 declined to answer this question. Among PEs, PE#1 declined to give any answer of that question. PE#2 considered 'ill motive of the few tenderers' is the main reason of lodging Appeal petitions. According to PE#3, 'less carefully prepared tender document' is the main reason for lodging Appeal petitions in most cases. PE#4 identified 'non-compliance' as the main reason for that. PE#5 replied that 'perception of the aggrieved tenderer – that the 1<sup>st</sup> lowest responsive tenderer does not have required qualification or his/her submitted paper is not genuine – instigate the tenderer to lodge complaint at different tier of the formal remedy procedures available for the tenderers'. Among HOPEs, H#2 cited 'non-compliance' as the main reason of lodging appeal petitions. Other 2 declined to answer this question. Among Secretaries, both of them opted not to respond this question. Both interviewees interviewed under 'Independent Consultant' category opined that 'non-compliance' is the main cause of lodging appeal petitions. IC#1 further commented that 'when PE prepare tender document deviating the spirit of the rules then the dispute arises'. So we see that among the interviewees,

maximum number of interviewees - who answered this question - considered 'non-compliance' is the main reason for lodging Appeal petitions in most cases.

### **6.3.6 Size and Market position of the Tenderer**

Size of the tenderer's firm and its position in the market could influence the tenderer's decision to lodge a complainant before the Review panel. In many studies, the impact of the size of tenderer's firm and its market position was recognized. Attempt has also been made under this study to see whether size of the tenderers firm and its position in the market has any influence on the tenderers decision to lodge an appeal under the PPR 2008. Since this study is basically based on text analysis of the records of the lodged Appeal petitions, it was not possible to categorize the aggrieved tenderers as small or big tenderer based on their paid up capital due to absence of that information in the reviewed records. But by taking the estimated contract price or tender price of disputed procurement process as proxy, and with the assumption that relatively big tenderer generally participate in procurement process having bigger tender price, attempt has been made to get an idea about the size of the tenderer's firm. From data presented in figure 8 of the Chapter Four, it is evident that maximum number of Appeal petitions has been originated from the procurement proceedings having tender price above Tk. 100 million. So based on our stated assumption, we can conclude that big tenderers are more prone to challenge awards than small tenderers under the remedy procedures of PPR 2008. During study, attempt was also made to see whether factors like the origin of the tenderer such as local tenderer, foreign tenderer or JV have any influence on its decision for taking remedial actions when it becomes aggrieved. From data presented in figure 9 of the Chapter Four, it is evident that most of the Appeal Petitioners at Review panel level are local tenderer with the percentage of 60% of the total petitioners. Foreign tenderers are in the second position in case of lodging appeal petition with number of 17 instances.

To test the veracity of this finding, a question – which types of tenderer are more likely to lodge petition under remedies procedures? – was asked to interviewees during interview. Among tenderers, 3 tenderers considered 'big tenderer' are more likely to lodge petition under remedies procedures. T#2 did not provide any answer of this question. T#5 opined that 'big tenderer and foreign tenderer are more likely to lodge Appeal petition since they have the manpower having

sound knowledge about contract management, rules and legal affairs'. Among PEs, 3 PEs answered that 'big tenderer are more likely to lodge appeal petition'. PE#1 expressed his inability to answer this question. PE#3 considered 'local firm' are more likely to lodge Appeal petition. Among HOPEs, H#2 opined that 'small tenderer' are more likely to lodge Appeal petition. Rest 2 HOPEs did not recognise any impact of the size of tenderer's firm and its market position on its decision for lodging Appeal petition. Among Secretaries, S#1 considered 'big tenderer' are more likely to lodge Appeal petition. But S#2 opined that 'big tenderers do not generally go for lodging complaint'. Both interviewees under Independent Consultant category answered that 'local big tenderer, foreign tenderer and JV tenderer' are more likely to lodge Appeal petitions under the existing remedy procedures. We see that maximum interviewees also considered 'big tenderers' are more likely to lodge Appeal petitions under existing remedy procedures.

### **6.3.7 Effectiveness of first 3 tiers of Remedy procedures and its uses**

According to rule 57 of the PPR, an aggrieved tenderer of an public procurement process may challenge the action of the concerned PE by way of an appeal to the administrative authorities in a hierarchical order; starting from the Procuring Entity to the Head of the Procuring Entity and to the Secretary of the concerned ministry/division. Having remained dissatisfied with the reply or absence of any reply within stipulated time from first three tiers, the complainant may only then bring the complaint to the 'Review Panel', an independent expert body consisted of legal and technical experts in public procurement. Though to assess the effectiveness of first three tiers are not possible in detail under this study due to its limited scope, but it is possible to look into the matter of how officers responsible to work at first three tiers dealing with the received complaints especially whether they are responding within stipulated time upon received of the complaints by taking studied 111 Appeal petitions as sample of the overall scenario.

From data presented in figure 10 of the Chapter Four, it is evident that in 80% cases PEs have either did not respond within stipulated time or respond at all regarding received complaints. The situation is worst at both HOPE and Secretary level. HOPEs have only responded 16% cases within stipulated time. In 84% cases, HOPEs either did not at all respond or did not respond within stipulated time. At Secretaries



level, only 6% cases the complaints are addressed by providing a reply within stipulated time mentioned in the PPR 2008.

To validate the findings of this, a question - "How does first three tier of remedy procedures deal with complaints?" - was asked only to tenderers and independent consultants during interview. T#1 commented that had I got satisfactory relief from first three tiers of the remedy procedures, I would never went to the Review Panel with the Appeal petition. T#2 replied that both Secretary and HOPE have the tendency to defend PE's decision. T#3 & T#4 answered that first three tiers are not actually effective. T#3 further went by saying that complaints are not disposed of by them within stipulated time. T#5 opined that first three tier are very reluctant to respond especially at Secretary level. He further opined that though PE and HOPE give reply, they basically try to defend PE's initial decision dogmatically. IC#1 commented that PEs generally do not take cognizance of the complaint. Even if they take, they generally give a stereo type reply. He further commented that in 75% cases, HOPEs generally do not give any reply. Even if they give, the reply is prepared by the respective PE without taking any formal hearing of both parties. Regarding the secretary level, IC#1 opined that this level is also not effective. IC#2 replied that in all three tiers, they have the tendency to sit on the complaints. So we can conclude that the first three tiers of the remedy procedures are not functioning effectively as it should be.

### **6.3.8 Fear of Retaliation**

PEs might try to retaliate against a tenderer that has taken initiative for lodging appeal before the Review panel. Almost all interviewees mentioned that fear of retaliation by authorities is a major reason why firms are unwilling to litigate<sup>93</sup>. So, initiative was taken under this study to find out whether any fear factor influences the tenderer's approach of lodging appeal petitions before the Review panel. But in a study based on review and analysis of the records of appeal petitions, it is not an easy task to find out that. From data presented in figure 6 of the Chapter Four, it is evident that in case of 7 cases out of 111, the petitioners had submitted withdrawal petitions either during hearing stages or after completion of hearing but before pronouncing

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<sup>93</sup> Pachnou, Despina, *"The effectiveness of bidder remedies for enforcing the EC public procurement rules : A case study of the public works sector in the United Kingdom and Greece"*.

the decision of the panel. In case of all those 7 appeal petitions, the Panel allowed to withdraw the petitions as it was prayed by the petitioner. In fact, these 7 Appeal petitions were disposed of by the Panels by allowing the petitioners to withdraw these without considering the merit of the petitions. It can be assumed that the apprehension of excluding the petitioner tenderer from its awards in the future by the aggrieved PE might moved the petitioner to submit withdrawal petition during hearing stages. In all those withdrawal petitions, one common ground were being mentioned by the petitioner is 'for the sake of maintaining good relationship in future with the PE'. So, if we take this trend of withdraw by the petitioner as an indication of 'fear of retaliation', we see that amongst 111 disputed procurement proceedings almost in 6.3% cases fear of retaliation had influenced the complainant's subsequent decision to continue the persuasion of his/her appeal petition before the Review panel.

To test the veracity of this finding, two related questions were asked to only tenderers and independent consultants during interviewing them. These two questions are : (i) When tenderer decide to lodge complaint, do they consider the possibility of losing future business? If yes, to what extent does this possibility affect their decision to proceed?, and (ii) Do PEs punish a tenderer if that tenderer has challenged their procedures in the past (for example, try to exclude tenderer from its awards in the future or be exaggeratedly strict during performance)? Regarding the first question, all tenderers except T#2 replied that they considered the possibility of losing future business when deciding lodging appeal petitions/complaint. But T#2 replied that he did not consider it. Regarding second question, again T#2 replied negative. But T#1,3 & 4 did not overrule the possibility of both types of punishment by the PE. T#5 replied that he did not observe it in his case. He further commented that it is not unnatural due to human behavior. Among independent consultants, both of them replied affirmative regarding first question by saying that tenderer generally consider the possibility of losing future business when deciding lodging complaints. Regarding second question, IC#1 commented that theoretically it is not possible. But IC#2 did not overrule the possibility of this and further commented that it might have negative impact on the effectiveness of the remedy procedures.

### **6.3.9 The amount of cost has to be incurred by the tenderer for availing remedy procedures**

The impact of cost – required for availing the remedy procedure - might be crucial to the decision to avail the procedure by an aggrieved tenderer if it becomes significant. A significant amount of cost might likely to prevent a tenderer from availing the remedy procedures. So for assessing the effectiveness of the remedy procedure available for the aggrieved tenderer under PPR 2008, attempt was made to assess the impact of the cost under this study. It has been mentioned in para 2.5 of the Chapter Two that an aggrieved tenderer might lodge complaint in writing to first three tiers without any registration fees and security deposits. So, if the aggrieved tenderer do not employ any lawyer for conducting his complaint petition, he does not have to bear actually any cost in terms of financial resources. But for lodging appeal petition at Review panel level, they have to incur registration fee and refundable security deposit in addition to lawyer fees if a lawyer is employed by the tenderer. It has also been mentioned in Chapter Two that registration fee and security deposit varies respectively between Tk. 10,000/- to 25,000/- and Tk. 50,000/- to Tk. 500,000/- depending on the amount of the estimated contract price or tender price. Other than this (registration fee & security deposit) and the lawyer cost (if employed by the tenderer), no cost have to be incurred by an aggrieved tenderer in an idle situation.

By only reviewing the records of Appeal petitions during first part of the study period, very little information was found regarding the amount of cost involved for availing the remedy procedure. Only information is found from the written decision of the Panel whether the tenderer had engaged any lawyer or not to plead his case before the review panel. For finding out more information about the cost, following question was asked to all tenderers during interview : How much average cost a tenderer has to bear for taking opportunity of remedy by filling review/appeal petition for a single procurement process? In response of this question, all other tenderers except T#2 replied that they did not employ any lawyer for pleading on behalf of them during hearing of their complaint/appeal petitions. So only registration fee and cost of refundable security were total cost they had to incur for availing remedy procedure. But T#2 replied that his firm had to pay Tk. 10,000/- per hearing as lawyer fee in addition to registration fee and cost of refundable security. Due to limitation of the scope of this study,

no further information regarding amount of cost – required for availing remedy procedure - could be revealed under this study.

### **6.3.10 Acquaintance with the Remedy procedure available for the tenderers under the PPR 2008**

The main objectives of the PPR 2008 are to ensure transparency, efficiency and accountability in the area of public procurement in Bangladesh. One of the important tools for ensuring these is the existence of effective remedy procedure. For making available remedy procedure an effective one, tenderers' acquaintance with the remedy procedure is an important precondition. In fact, an important yardstick of effective remedy procedure is existence of sufficient level of tenderers' acquaintance with the remedy procedure. By reviewing the records of the Appeal petitions, no explicit information regarding tenderers' acquaintance is found straight way during the study. But from data presented in figure 6 of the Chapter Four, it is evident that the Panel declared total 12 Appeal petitions out of 111 petitions as 'Inadmissible' citing the ground that the aggrieved tenderer did not exhaust all options of complaints to the administrative authority before lodging complaint to Review Panel as per provision of Rule 57(11) of the PPR 2008. So if we assume that due to ignorance of the procedural aspect of remedy procedure the tenderer did not exhaust all options in those 12 cases before lodging petition before the review panel and take this figure as proxy to explain the level of tenderers' acquaintance with the remedy procedure, we can conclude that in case of 10.81% disputed procurement processes respective aggrieved tenderer was not fully aware regarding detail procedural aspect of the remedy procedure of the PPR 2008.

To test the veracity of this finding, following questions was asked to all respondents during the interview : Are tenderer acquainted with PPR 2008? Are tenderer aware of the remedies available to them? The common answer of the tenderer in respect of this question was 'not very acquainted with PPR 2008'. T#1 further added that 'when they face difficulty/problem, they become aware of the procedural aspect of the remedy procedure'. T#3 replied that 'some tenderer are aware, but not all tenderer'. T#5 answered the question little bit differently by saying that 'tenderer are not willing even to acquainted with procedural aspect. Rather they try to overcome the situation somehow'. Among PEs, all except PE#1 opined that tenderer are not well acquainted with the PPR 2008. But PE#1 replied that tenderer are well acquainted. PE#2 added

further by saying that 'small & medium tenderer are not very much acquainted, but big are'. All respondents under the HOPE and Secretary category replied that 'tenderer are not fully acquainted with the provision of the remedy procedure of the PPR 2008'. HOPE#3 further added that 'tenderer were not acquainted with the provision of the PPR 2008 initially. But the situation is improving now gradually'. IC#2 opined that tenderers have become acquainted by their self reviewing. No outside effort was there to make them aware. So we may conclude that tenderers' acquaintance with the remedy procedure is not at a satisfactory level.

### **6.3.11 Political and media intervention as an alternative of remedy procedure**

During review of the records of 111 Appeal petitions, it was found that in two instance Political and media influence played a role in shaping the final decision of the AO. In one case, when the Review panel invited the PE & HOPE in a hearing after receiving Appeal petition from the aggrieved tenderer, the HOPE informed the panel that the TEC has been asked to reevaluates the received tenders taking consideration of the recent published couple of reports in national daily newspaper regarding this procurement process. In another instance, during hearing stage the AO and PD of the concerned project has informed the panel that he has already sent back the tender evaluation report to respective TEC since a DO letter - from concern honorable MP – has already been received by him mentioning couple of irregularities regarding process and evaluation. In both cases, the panel disposed the petitions without giving any decision with the plea that the respective procuring organization has not yet taken any decision regarding the award of this particular procurement process.

From these facts, the question came whether Politician and media can play any positive role as an alternative of grievance remedy procedure of the PPR 2008. Further, do political and media intervention have any positive influence over the processes for ensuring transparency and accountability in public procurement arena. In search of the answer of these, following question was asked to all respondents during interview : "Are there alternatives of remedy procedure available for tenderer (for example, politician, media)?" Among tenderer all except T#1 & T#3 opined that 'no alternatives are available'. But T#1 replied that 'we do not prefer to go directly to media; but political intervention sometimes works'. 'Media could be an alternative of

existing remedy procedure', replied T#3. Among PEs, 3 out of 5 rejected straightway the idea that there should have any alternative of the existing remedy procedure like politician & media. But PE#3 opined that 'media sometimes work'. PE#4 disclosed an interesting fact by saying that 'practice (political and media intervention) is there, but it is not a good practice'. Among HOPEs, 2 except HOPE#1 also rejected the idea that there should have any alternative of the existing remedy procedure. But HOPE#1 opined that 'media can play a positive role in ensuring transparency and accountability as an alternative of the remedy procedure'. Among Secretaries, S#1 disagreed with the idea of any alternative of the existing remedy procedure. But S#2 opined that 'media could play a great role in ensuring transparency and accountability as an alternative of the existing remedy procedure'. The idea of political and media intervention, as an alternative, was not fully supported by the Independent consultants even. IC#1 replied that 'media could play to some extent; but political influences should not be recognised'. IC#2 answered this question very cautiously by saying that 'the idea should examine further by conducting a study'. So, we might conclude that the idea of political intervention as an alternative of the existing remedy procedure is not acceptable among the different vital group of stakeholders. Though few respondents supported the idea of media intervention, but there was absence of strong consensus among the stakeholders regarding the idea.

### **6.3.12 Areas/Rules/Provisions/Clauses where disagreement are being happening during interpretation**

In para 5.3 of the Chapter Five, total 5 Appeal petitions have been analysed. Those 5 Appeal petitions have been originated mainly due to differences of interpretations of rules/tender clauses between PEs and tenderers. Following are the key areas where differences of interpretation are being exposed :

- (i) Experience certificate submitted by tenderer, which the tenderer has earned working as sub-contractor, are being openly challenged by the opponent tenderer with the plea that he was not approved by the employer as sub-contractor during execution of that specific contract through a formal letter. So that experience could not be counted in favour of claimant tenderer. Often there are incidence that the matter, related to which certificate would be considered in counting the required experience, is being interpreted by both PEs and tenderers in their own way.

- (ii) It has been observed that many TEC is considering the bank turnover statement of the respective tenderer for calculating the required construction experience in terms of monetary amount. But others are calculating the construction experience based on the certificate issued clearly mentioning the construction turnover during the specific period.
- (iii) For calculating the past technical experience of a tenderer, gained by working as an associate member of a JV, a difference of opinion always arise among various TECs regarding what amount of experience would be counted in favour of that specific tenderer. Few TEC consider full experience entirely in terms of monetary value in favour of the specific associate member of JV with the plea that the experience of a JV can't be divided/separated among its associate members. But others only consider that equal percentage of total contract amount which percentage of share the associate member had in that JV.
- (iv) It has been observed that during evaluation many TEC make a tenderer non-responsive if that tenderer has been debarred by any procuring organization. But others only make non-responsive if that tenderer has been debarred by their own procuring organization; not by other organization.
- (v) When a tenderer has won two or more lots in case of lot-by-lot basis procurement process, but is post-qualified only for one lot considering its average annual turnover; many TEC still recommend that tenderer for all lots he become lowest. But others do not do that. They only recommend up to that number of lots which can be qualified by the tenderer's average annual turnover.

## ***Chapter Seven***

### ***Conclusion and Recommendations***

#### **7.1 Introduction**

To become a middle income group country within a decade, Bangladesh has no other alternative to good governance. An important yardstick of good governance is a system of transparent, efficient and accountable public procurement. It is more pertinent for a country like Bangladesh, more than 80% of which development budget is spent for public procurement purpose. Remedy procedure is one of the vital instrument for ensuring the transparency, efficiency and accountability in public procurement system. Under this study, initiative was taken to assess the effectiveness of the remedies available for tenderer under PPR 2008 for ensuring the transparency of the process and accountability of the related people. For assessing the effectiveness of the remedy procedures available under PPR 2008, this text-based study has been done. Since the aim of this research is to explore and investigate in depth a phenomenon, behavior or area, the qualitative research method has been adopted. Since the introduction of remedy procedures in legal framework of Public Procurement in Bangladesh, total 113 appeal petitions have been lodged before the Review panel till November 2011. Out of those 113 records, 2 records were not available during data collection period. Under the study, rest 111 records of Appeal petitions have been reviewed and 18 types of information have been collected from those records for analysis and interpretation purpose. Then, the observations/data found by reviewing the contents of 111 appeal cases have been validated through triangulation. In brief, this validation has been done by conducting interviews with a tiny size of sample having 17 units. Collected data have been presented in Chapter Four. Then those collected data have been analysed and findings have been presented based on that analysis in Chapter Six. In this chapter, the results of the study would be summarized and discussed their policy implications.



## **7.2 Results of the Study**

### **7.2.1 Trend of lodgment of Appeal petitions**

The trend of lodgment of appeal petitions under the remedy procedures available for the tenderers is increasing. In fact more numbers of appeal petitions are being lodged by the aggrieved tenderer in comparison to previous year since inception of formal remedy procedures with the only exception of 2010. One probable interpretation could be that the tenderers have been becoming more aware gradually about the effectiveness of existing remedy procedures available for them under PPR 2008. So effectiveness of the remedy procedures has been encouraging the increased number of tenderers to take opportunity of that.

### **7.2.2 Department/Organisation wise number of lodged Appeal Petitions**

Among the target agencies of the government, R&HD and LGED are in first and fourth position respectively in terms of appeal petitions have been originated from the procurement proceedings of those two organisations. Among two other target agencies, BWDB is in the bottom of the list with 27 other department/organization. Surprisingly no appeal petition has been lodged from the procurement proceedings of REB. During interviewing the respondents for triangulation purpose, attempt was made to find out the cause of that. But among the interviewees, there were no consensus regarding the cause(s) of less appeal petitions originated from BWDB or no appeal petition originated from REB. It was not possible to go further under this study to find out the reason(s) of that. It would be an area where interested researcher could come forward to explore the reason(s) why no appeal petition not yet been lodged in respect to procurement proceedings of REB or why less appeal petitions are originated from the BWDB's procurement processes.

### **7.2.3 Nature of the Decisions of the Panels**

More number of appeal petitions has been allowed with an order of set aside the PE's decision than the numbers of disallowing the appeal petitions with an order of up-holding the PE's decision by the different Review Panels on the basis of the merit of fact & law in respect to the disputed procurement process.

#### **7.2.4 Causes of disputes in Appeal petitions**

More number of allowed Appeal petitions has been originated due to non-compliance of either Rules of PPR 2008 or the Clauses of the tender document than the number of Appeal petitions that have been originated due to difference in interpretation of either Rules of PPR or the Clauses of the tender document. So we can safely infer that 'non-compliance of rules by the PEs at processing stage' is the main cause of lodging Appeal Petitions in most cases. The veracity of that finding has been tested by asking questions to the interviewees during triangulation. Among the interviewees, maximum number of interviewees considered 'non-compliance' is the main reason for lodging Appeal petitions in most cases.

#### **7.2.5 Size and Market position of the Tenderer**

Maximum number of Appeal petitions has been originated from the procurement proceedings having tender price above Tk. 100 million. So by taking the estimated contract price or tender price of disputed procurement process as proxy, and with the assumption that relatively big tenderer generally participate in procurement process having bigger tender price, it can be concluded that big tenderers are more prone to challenge awards than small tenderers under the remedy procedures of PPR 2008. Further it has been observed that most of the Appeal Petitioners at Review panel level are local tenderer with the percentage of 60% of the total petitioners. Foreign tenderers are in the second position in case of lodging appeal petition with the number of 17 instances.

#### **7.2.6 Effectiveness of first 3 tiers of Remedy procedures and its uses**

In 80% cases, PEs have either did not respond within stipulated time or respond at all regarding received complaints. The situation is worst at both HOPE and Secretary level. HOPEs have only responded 16% cases within stipulated time. In 84% cases, HOPEs either did not at all respond or did not respond within stipulated time. At Secretaries level, only 6% cases the complaints are addressed by providing a reply within stipulated time mentioned in the PPR 2008. So it can be concluded by saying that the first three tiers of the remedy procedures are not functioning effectively as it should be.

### **7.2.7 Fear of Retaliation**

Initiative was taken under this study to find out whether any fear factor influences the tenderers' approach of lodging appeal petitions before the Review panel. It has been observed that amongst 111 disputed procurement proceedings almost in 6.3% cases fear of retaliation had influenced the complainant's subsequent decision to continue the persuasion of his/her appeal petition before the Review panel.

### **7.2.8 The amount of cost has to be incurred by the tenderer for availing remedy procedures**

For assessing the effectiveness of the remedy procedure available for the aggrieved tenderer under PPR 2008, attempt was made to assess the impact of the cost under this study. By only reviewing the records of Appeal petitions during first part of the study period, very little information was found regarding the amount of cost involved for availing the remedy procedure. Even, by interviewing the respondents, very little information was found about the amount of cost involved for availing remedy procedure by the tenderer. Due to limitation of the scope of this study, no further information regarding amount of cost – required for availing remedy procedure - could be revealed under this study.

### **7.2.9 Acquaintance with the Remedy procedure**

By reviewing the records of the Appeal petitions, no explicit information regarding tenderers' acquaintance is found straight way during the study. But during text analysis of the records it is observed that the Panel declared total 12 Appeal petitions out of 111 petitions as 'Inadmissible' citing the ground that the aggrieved tenderer did not exhaust all options of complaints to the administrative authority before lodging complaint to Review Panel as per provision of Rule 57(11) of the PPR 2008. So if we assume that due to ignorance of the procedural aspect of remedy procedure the tenderer did not exhaust all options in those 12 cases before lodging petition before the review panel, and take this figure as proxy to explain the level of tenderers' acquaintance with the remedy procedure; we can conclude that in case of 10.81% disputed procurement processes respective aggrieved tenderer was not fully aware regarding detail procedural aspect of the remedy procedure of the PPR 2008. During triangulation, the veracity of this finding has

also been tested asking question to all interviewees. Maximum respondents agreed with this finding.

#### **7.2.10 Political and media intervention as an alternative of remedy procedure**

Attempt was made, under this study, to find out the answer whether Politician and media can play any positive role as an alternative of grievance remedy procedure of the PPR 2008. Further, do political and media intervention have any positive influence over the processes for ensuring transparency and accountability in public procurement arena. But the idea of political intervention as an alternative of the existing remedy procedure is not acceptable among the different vital group of stakeholders. Though few respondents supported the idea of media intervention, but there was absence of strong consensus among the stakeholders regarding the idea.

#### **7.2.11 Areas/Rules/Provisions/Clauses where disagreement are being happening during interpretation**

In para 5.3 of the Chapter Five, total 5 Appeal petitions have been analysed. By analyzing those 5 Appeal petitions, 5 key areas have been identified where disagreement are being happening during interpretation. Those five areas have been narrated in brief in para 6.3.11 of the Chapter Six.

### **7.3 Empirical findings and the emergence of a theory on the use and effectiveness of remedies**

In this research, it has been tried to discover, build and test theoretical conclusions concerning tenderers' approach to remedy procedure and the power of remedy procedure to ensure transparency, efficiency and accountability in the Public procurement arena. Sufficient convergent data were found during text analysis of 111 records of appeal petitions and subsequent interview with the 17 units of tiny size sample to support an emerging theory on use and effectiveness of tenderer remedy.

First of all, the theory regarding the approach of tenderers to remedies is that effectiveness of the remedy procedure would encourage the tenderers to use more the existing remedy procedure.

Secondly, big tenderers are more prone to challenge awards than small tenderers under the remedy procedures of PPR 2008.

Thirdly, fear of retaliation is exist in public procurement processes and the complainant's subsequent decision to continue the persuasion of his/her appeal petition before the Review panel are influenced to some extent by it.

Fourthly, tenderers' ignorance about of detail procedural steps, to be followed under the existing remedy provision, might deprive the aggrieved tenderer to get expected remedy provided under the PPR 2008.

Finally, the effective use of existing remedy procedure is being considered the best way to ensure transparency, efficiency and accountability in the Public procurement processes in Bangladesh. No other alternative is being considered as effective by the key stakeholders.

## **7.4 Policy implications of the results of the study**

### **7.4.1 Issue of Non-compliance**

From the result of the study it is clear that non-compliance is still a big concern. Significant number of allowed Appeal petitions has been originated due to non-compliance of either Rules of PPR 2008 or the Clauses of the tender document. 'Non-compliance of rules or clause(s) by the PEs at processing stage' is the main cause of lodging Appeal Petitions in most cases. The situation deserves intensive monitoring of the procurement processes by the supervisory layer at different level. Strong political commitment of the government and higher degree of professionalism among procurement practitioners would facilitate a situation where non-compliance would be a rare instance.

### **7.4.2 Effectiveness of first three tiers**

It has been observed that the first three tiers of the remedy procedures are not functioning effectively as it should be. Effectiveness of the remedy procedure, available for the tenderer under the PPR 2008, is mainly depend upon the proper function of all four tiers of the remedy procedure; not only on the fourth tier i. e. the Review panel. Immediate intervention from strategic level is needed for ensuring proper functioning of three tiers of the administrative remedy procedure not only following the letter of the rules but also the spirit of the rules. Otherwise, ensure transparency, efficiency and accountability in public procurement would remain a distant goal yet.

### **7.4.3 Acquaintance with the Remedy procedure**

An important yardstick of effective remedy procedure is existence of sufficient level of tenderers' acquaintance with the remedy procedure. But in this research it is found that in case of more than 10% disputed procurement processes, respective aggrieved tenderer was not fully aware regarding detail procedural aspect of the remedy procedure of the PPR 2008. Due to that there appeal petitions were not admitted by the panel. There petitions were rejected summarily without considering the merit of the complaint. At present, there is no initiative to orient the tenderer about the different aspect of PPR specifically the remedy provision of the PPR 2008. Initiative might be taken from the government side to formally orient the tenderer about the remedy provision of the PPR 2008.

### **7.4.4 Areas where disagreement are being happening during interpretation**

At least five areas have been identified where disagreement are being happening during interpretation. CPTU might issue circular explaining the area & providing the correct interpretation and might ask all concern to follow the unique interpretation in these types of cases.

### **7.4.5 Appeal petitions lodged due to Actions of PEs during contract implementation stage**

In para 5.4 of the Chapter Five, records of two Appeal petitions have been analysed. These two appeal petitions have been lodged by the successful tenderer after awarding the contract in favour of them. More specifically, these two petitions have been lodged during contract implementation stage. During the execution period of the contract, any dispute between the parties should be resolved following the dispute resolution provision of the concern contract; not by the remedy procedure of the PPR 2008<sup>94</sup>. But surprisingly that was happened in the said two appeal petitions. It might be mentioned here that the PPR 2008 has entrusted the CPTU the responsibility of issuing a detailed work procedure governing the functioning of the Review Panel<sup>95</sup>. Policy intervention might be needed to outline the jurisdiction of the Review panel visibly and it might be done by issuing detailed work procedure governing the functioning of the Review Panel in the form of Manual.

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<sup>94</sup> See the rule 42(4) of the PPR 2008.

<sup>95</sup> See the rule 58(5) of the PPR 2008.

## **7.5 Scope of future studies**

This study sought to contribute to an understanding of the legal remedies, available for the tenderer under the PPR 2008, by analyzing the provision of the rules related to remedy, explaining the different tiers earmarked by the rules for lodging complaint by a tenderer including the structure of the Review panel, explaining the power of the authority for constituting the Panel and qualification of the member of the Panel; and the remedies available in PPR 2008 for an aggrieved tenderer if he/she can prove his/her case. This is the first initiative undertaken, by any researcher in Bangladesh, for conducting this type of research. Though studies of this nature have been conducted abroad; but surely not on the remedy procedure of the PPR 2008. As a result, this study has created many scopes of further future studies to fine tune the findings of this research as well as open new areas of study.

### **7.5.1 Further research on effectiveness of remedy procedures at REB and BWDB**

Interesting fact is, among the target agencies of the government, surprisingly no appeal petition has been lodged from the procurement proceedings of REB since the inception of PPR 2003. Further, only one appeal petition has been lodged from other target agency BWDB since the inception of PPR 2003. To find out the reason of that, a question - 'why less appeal petitions are originated from the procurement proceedings of BWDB and even no appeal petition originated from the procurement proceeding of REB' - was asked to all 17 units of the sample during interviewing period. But among the interviewees, there were no consensus regarding the cause(s) of less appeal petitions originated from BWDB or no appeal petition originated from REB. It was not possible to go further under this study to find out the reason(s) of that. It would be an area where interested researcher could come forward to explore the reason(s) why no appeal petition not yet been lodged in respect to procurement proceedings of REB or why less appeal petitions are originated from the BWDB's procurement processes.

### **7.5.2 Amount of cost has to be incurred by the tenderer for availing remedy procedures**

The cost – required for availing the remedy procedure – always influence the decision of an aggrieved tenderer to avail the procedure if it becomes significant. A significant amount of cost might likely to

prevent a tenderer from availing the remedy procedures. So for assessing the effectiveness of the remedy procedure available for the aggrieved tenderer under PPR 2008, attempt was made to assess the impact of the cost under this study. By only reviewing the records of Appeal petitions very little information was found regarding the amount of cost involved for availing the remedy procedure. Even during triangulation stage, no further significant information regarding amount of cost – required for availing remedy procedure - could be revealed by asking question to the respondent tenderers under this study. So, here is the scope for researchers to undertake future study to find out the actual cost required by an aggrieved tenderer to avail remedy procedure and whether this cost has any significant influence on the decision of the tenderer interested to avail the procedure.

## **7.6 Final Words**

The objective of this research was to assess whether the existing remedy procedure, available for an aggrieved tenderer under PPR 2008, is an effective and appropriate mechanism for ensuring transparency, efficiency and accountability in public procurement system of Bangladesh. Though it was a first initiative for conducting this type of research in Bangladesh, with all its limitations, mentioned in Chapter One, the study could go long for exploring the level of effectiveness of the existing remedy procedure. During interview, all respondents including tenderer group were asked whether there are any alternatives of existing remedy procedure available for tenderers. No other alternative of existing remedy procedure are being considered by the respondents. Moreover, the idea of political intervention as an alternative of the existing remedy procedure was not acceptable among the different vital group of stakeholders during interview. Though few respondents supported the idea of media intervention, but there was absence of strong consensus among the stakeholders regarding that idea also. So, we can conclude that with all its weaknesses the existing remedy procedure, available for the tenderer under PPR 2008, is being considered, by stakeholders including tenderers, best available mechanism for ensuring transparency, efficiency and accountability in the public procurement system of Bangladesh.



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## ***Tables related to Data presentation***

*[Tables listed in this Annexure were not shown in the text but the contents herein have been used in data analysis.]*

**Table 4.1 : Number of Appeal Petitions lodged under PPR 2003 and PPR 2008**

Regulations/Rules	Number of Appeal Petitions lodged
PPR 2003	22
PPR 2008	95

**Table 4.2 : Distribution of Appeal petitions based on Lodgment year**

Year	Number of Appeal Petitions lodged
2005	1
2006	9
2007	9
2008	12
2009	30
2010	27
2011 <sup>1</sup>	23

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<sup>1</sup> The number provided for the year 2011 is the number of Appeal petitions lodged up to 15<sup>th</sup> November 2011 only.

**Table 4.3 : Department/Organisation wise number of lodged Appeal petitions**

Department/Organisation	Number of lodged Appeal petitions
R&HD	18
BR	12
BPDB, BTCL	8 each
LGED, DGH	5 each
PWD	4
BARI, BSCIC, Department of Livestock	3 each
BIWTA, Fire Service & Civil Defence, DGFP, BADC, Department of Immigration & Passport, Sonali Bank, BTRC	2 each
Others <sup>2</sup>	28

<sup>2</sup> There are 28 department/organization including BWDB recorded under 'Others' category from which procurement proceedings 1 appeal petition each has been originated.

**Table 4.4 : Ministry/Division wise number of lodged Appeal petitions**

Ministry/Division	Number of lodged Appeal Petitions
Roads Division	19
Ministry of Railway	12
Ministry of Post & Telecommunication	10
Power Division	9
Ministry of Health & Family Welfare	8
Local Government Division	7
Ministry of Agriculture, Ministry of Home	6 each
Ministry of Housing & Public Works	5
Ministry of Industries, Ministry of Fisheries & Livestock, Finance Division	4 each
Ministry of Shipping, Energy & Mineral Resources Division	3 each
Ministry of Commerce, Ministry of Cultural Affairs	2 each
Other Ministries/Divisions <sup>3</sup>	7

<sup>3</sup> There are 7 ministries/divisions, such as Ministry of Information, Land, Commerce, Water Resources, Religious Affairs, cultural Affairs, Primary & Mass Education, Bridges Division and Election Commission Secretariat are recorded under Others category , from which procurement proceedings 1 appeal petition each has been originated.

**Table 4.5 : Nature of the Decision of the Panel with its Frequency**

Nature of the Decision	Provided in Appeal Petitions (In Numbers)
Up-hold PEs' decision	34
Set aside PEs' decision	48
Refrain from making any decision	5
No decision	5
Inadmissible Appeal petitions	12
Withdrawal petition allowed	7

**Table 4.6 : Number of Appeal petitions originated due to different causes**

Nature of the Causes	Number of Appeal Petitions Originated
Non-compliance	33
Interpretation of Rules or Clauses of the tender document	11
Dispute regarding Contract management	2
Others <sup>4</sup>	2

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<sup>4</sup> Those which does not classify clearly under 3 other categories have been recorded under "Others" category including Appeal petition for directing the PE to allow the petitioner to rectify the clerical mistake in submitted 'JV Agreement'.

**Table 4.7 : Number of disputed Procurement proceedings having Tender price or Contract price**

Amount of Tender price or Contract price	Number of Appeal petitions Originated
Less than Tk. 10(ten) million	22
Between Tk. 10(ten) million and 50 (fifty) million	30
Above Tk. 50 (fifty) million and up to 100 (one hundred) million	10
Above Tk. 100 (one hundred) million	49

**Table 4.8 : Classification of Appeal Petitioner based on their Nature**

Nature of the Tenderer	Number of Appeal Petitioner
Local Tenderer	67
JV (By only local tenderer)	11
Foreign Tenderer	17
JV(At least one partner is foreign firm)	16

**Table 4.9 : Percentage of Complaints are addressed at three different tiers.**

Name of the Tier	Complaints are addressed (In %)
Procuring Entity	20
Head of the Procuring Entity	16
Secretary of the ministry/division	6



## ***Annex - B***

### **Interview Guide for Secretaries**

1. What is your experience in public procurement specifically as an officer responsible for providing remedies to aggrieved tenderers at a third tier of administrative review system?
2. How do you deal with complaints?
3. Are tenderer acquainted with PPR 2008? Are tenderer aware of the remedies available to them?
4. Why are less appeal petitions originated from the procurement proceeding of some target agencies like Bangladesh Water Development Board and even no appeal petition originated from the procurement proceeding of one target agency like Rural Electrification Board at Review Panel level?
5. What is the main cause of lodging Appeal Petitions in most cases? Is it due to non-compliance of rules or clauses of the tender document by the PEs at processing stage?
6. Is there any grey area within the rules or standard tender documents which facilitate the disagreement regarding the interpretation of that rule/clause ultimately resulting the lodgment of petition by the aggrieved tenderer?
7. Is there any other reason behind for lodging complaint by the tenderer?
8. Which types of tenderer are more likely to lodge petition under remedies procedure (for example, Small tenderer, big tenderer, local tenderer, foreign tenderer, JV firm, established firm, new firm)?
9. Are there alternatives of remedy procedure available for tenderer(for example, politician, media)?

10. Do you consider that the review system is effective? What do you think are its major strengths and weaknesses?
11. Has the introduction of remedies increased (the interest in) litigation?
12. If remedies were designed/applied differently (and how), would tenderer be more interested in them?

## Interview Guide for HOPEs

1. What is your experience in public procurement specifically as an officer responsible for providing remedies to aggrieved tenderers at a second tier of administrative review system?
2. How do you deal with complaints?
3. Are tenderer acquainted with PPR 2008? Are tenderer aware of the remedies available to them?
4. Why are less appeal petition originated from the procurement proceeding of some target agencies like Bangladesh Water Development Board and even no appeal petition originated from the procurement proceeding of one target agency like Rural Electrification Board at Review Panel level?
5. What is the main cause of lodging Appeal Petitions in most cases? Is it due to non-compliance of rules or clauses of the tender document by the PEs at processing stage?
6. Is there any grey area within the rules or standard tender documents which facilitate the disagreement regarding the interpretation of that rule/clause ultimately resulting the lodgment of petition by the aggrieved tenderer?
7. Is there any other reason behind for lodging complaint by the tenderer?
8. Which types of tenderer are more likely to lodge petition under remedies procedure (for example, Small tenderer, big tenderer, local tenderer, foreign tenderer, JV firm, established firm, new firm)?
9. Are there alternatives of remedy procedure available for tenderer(for example, politician, media)?
10. Do you consider that the review system is effective? What do you think are its major strengths and weaknesses?

11. Has the introduction of remedies increased (the interest in) litigation?
12. If remedies were designed/applied differently (and how), would tenderer be more interested in them?

## Interview Guide for PEs

1. What is your experience in public procurement specifically as a Procuring Entity?
2. How do you deal with complaints?
3. Are tenderer acquainted with PPR 2008? Are tenderer aware of the remedies available to them?
4. Why are less appeal petition originated from the procurement proceeding of some target agencies like Bangladesh Water Development Board and even no appeal petition originated from the procurement proceeding of one target agency like Rural Electrification Board at Review Panel level?
5. What is the main cause of lodging Appeal Petitions in most cases? Is it due to non-compliance of rules or clauses of the tender document by the PEs at processing stage?
6. Is there any grey area within the rules or standard tender documents which facilitate the disagreement regarding the interpretation of that rule/clause ultimately resulting the lodgment of petition by the aggrieved tenderer?
7. Is there any other reason behind for lodging complaint by the tenderer?
8. Which types of tenderer are more likely to lodge petition under remedies procedure (for example, Small tenderer, big tenderer, local tenderer, foreign tenderer, JV firm, established firm, new firm)?
9. Are there alternatives of remedy procedure available for tenderer(for example, politician, media)?
10. Do you consider that the review system is effective? What do you think are its major strengths and weaknesses?
11. Has the introduction of remedies increased (the interest in) litigation?

12. If remedies were designed/applied differently (and how), would tenderer be more interested in them?

## Interview Guide for Tenderer

1. What is your experience in public procurement specifically as a Tenderer?
2. Are tenderer acquainted with PPR 2008? Are tenderer aware of the remedies available to them?
3. Have you ever used remedies available under PPR 2008? If yes how many times? Is your use of remedies recent?
4. How much average cost a tenderer has to bear for taking opportunity of remedy by filling review/appeal petition for a single procurement process?
5. Why are less appeal petition originated from the procurement proceeding of some target agencies like Bangladesh Water Development Board and even no appeal petition originated from the procurement proceeding of one target agency like Rural Electrification Board at Review Panel level?
6. Do PEs have tenderer they award contract regularly? Why?
7. What is the main cause of lodging Appeal Petitions in most cases? Is it due to non-compliance of rules or clauses of the tender document by the PEs at processing stage?
8. Is there any grey area within the rules or standard tender documents which facilitate the disagreement regarding the interpretation of that rule/clause ultimately resulting the lodgment of petition by the aggrieved tenderer?
9. Is there any other reason behind for lodging complaint by the tenderer?
10. How does first three tier of remedy procedures deal with complaints?

11. Which types of tenderer are more likely to lodge petition under remedies procedure (for example, Small tenderer, big tenderer, local tenderer, foreign tenderer, JV firm, established tenderer, new tenderer)?
12. When firms decide whether to lodge complaint, do they consider the possibility of losing future business? If yes, to what extent does this possibility affect their decision to proceed?
13. Do PEs punish a tenderer if that tenderer has challenged their procedures in the past(for example, try to exclude tenderer from its awards in the future or be exaggeratedly strict during performance)?
14. Are there alternatives of remedy procedure available for tenderer(for example, politician, media)?
15. Do you consider that the review system is effective? What do you think are its major strengths and weaknesses?
16. Has the introduction of remedies increased (the interest in) litigation?
17. If remedies were designed/applied differently (and how), would tenderer be more interested in them?



## Interview Guide for Independent Consultant

1. What is your experience in public procurement?
2. Are tenderer acquainted with PPR 2008? Are tenderer aware of the remedies available to them?
3. Why are less appeal petitions originated from the procurement proceeding of some target agencies like Bangladesh Water Development Board and even no appeal petition originated from the procurement proceeding of one target agency like Rural Electrification Board at Review Panel level?
4. Do PEs have tenderer they award contract regularly? Why?
5. What is the main cause of lodging Review Petitions in most cases? Is it due to non-compliance of rules or clauses of the tender document by the PEs at processing stage?
6. Is there any grey area within the rules or standard tender documents which facilitate the disagreement regarding the interpretation of that rule/clause ultimately resulting the lodgment of petition by the aggrieved tenderer?
7. Is there any other reason behind for lodging complaint by the tenderer?
8. How does first three tier of remedy procedures deal with complaints?
9. Which types of tenderer are more likely to lodge petition under remedies procedure (for example, Small tenderer, big tenderer, local tenderer, foreign tenderer, JV firm, established tenderer, new tenderer)?
10. When tenderer decide to lodge complaint, do they consider the possibility of losing future business? If yes, to what extent does this possibility affect their decision to proceed?
11. Do PEs punish a tenderer if that tenderer has challenged their procedures in the past (for example, try to exclude tenderer

from its awards in the future or be exaggeratedly strict during performance)?

12. Are there alternatives of remedy procedure available for tenderer (for example, politician, media)?
13. Do you consider that the review system is effective? What do you think are its major strengths and weaknesses?
14. Has the introduction of remedies increased (the interest in) litigation?
15. If remedies were designed/applied differently (and how), would tenderer be more interested in them?