

**In the High Court at Calcutta
Constitutional Writ Jurisdiction
Appellate Side**

The Hon'ble Justice Sabyasachi Bhattacharyya

WPA No.6792 of 2021

**Devsaria Iron & Steel Co. Private Limited and another
Vs.
The State of West Bengal and others**

For the petitioners	:	Ms. Rashmi Chopra, Ms. Tejaswini, Mr. Avishek Das
For the State-respondent	:	Mr. Washim Ahmed, Mr. T. A. Khan
For the respondent no.2	:	Mr. Sujit Sakan Koley
For the respondent no.3	:	Mr. Mainak Bose
For the respondent no.4	:	Mr. Srijib Chakraborty, Mr. Jaydeb Ghorai, Mr. Saugata Banerjee
Hearing concluded on	:	09.03.2021
Judgment on	:	07.04.2021

Sabyasachi Bhattacharyya, J:-

1. The petitioners have challenged an e-auction floated by the respondent-authorities, through respondent no.4, on February 12, 2021 for sale of de-commissioned plant and machinery and items of COGP/DPL and Unit-6, Durgapur Projects Limited. The grievance of the petitioners revolves around alterations in the terms of the original auction catalogue on

February 10, 2021, whereas the last date for submitting pre-bid security of Rs.1.5 crore was February 11, 2021. It is argued by learned counsel for the petitioners that the said alterations, modifying the post-bid conditions and relaxing those, were substantial in nature. Since the petitioners could not participate in the auction sale due to the prohibitive post-bid conditions, such relaxation at the last moment adversely affected the interests of the petitioners. If the alterations were made sufficiently before and/or contained in the original conditions, the petitioners would have participated in the auction.

- 2.** It is submitted that, since there is no separate eligibility criteria in view of the nature of the auction, the post-bid conditions were a major determinant of an informed choice to participate in the tender. Since the petitioners had no option to participate upon having knowledge of the relaxations granted on the day previous to the last date for submitting pre-bid security, the petitioners' right to participate was curtailed, in direct contravention of Article 14 of the Constitution of India.
- 3.** Learned counsel for the petitioner, by placing reliance on the terms of the e-auction, contends that the inspection date, time and query were fixed from January 15, 2021 to February 11, 2021 between 9 a.m. to 12 p.m. and 2 p.m. to 4:30 p.m. on Mondays to Saturdays. However, there was a clear clause in the conditions that such inspection had to be held by the bidder with prior appointment with the concerned person from Mjunction Service Limited, being respondent no.4 herein, two days in advance.

4. In the present case, the material alterations were effected in the conditions on February 10, 2021, which did not leave clear two days to give advance notice to the respondent no.4, since the very next date, that is, February 11, 2021, was the last date for such inspection.
5. That apart, the last date of answering any queries from the bidders was also fixed on February 11, 2021, which opportunity was not available to the petitioner at all in view of the last-moment alterations in the terms.
6. Learned counsel for the petitioners submits that the respondent-authorities violated the principle of fair play, which governs all tender processes, particularly those floated by public authorities.
7. By placing reliance on the relevant CVC guidelines governing such tenders, in particular Clause 11 of the same, learned counsel appearing for the petitioners submits that it was recorded in the said clause that it had been noticed that whenever extension in tender opening is given due to any reason (like change in scope of work or changes in specifications of some of the equipments, etc.), the intimation regarding extension is only to such bidders who had purchased tender documents originally even if the extension is regarding opening of first bid like pre-qualifications in case of a single-bid system and techno-commercial bids in case of two-bid system. By doing so, the competition is restricted to the firms who had purchased tender documents within the original date of tender sale. The corrigendum for such extensions is not being published in newspapers.

- 8.** It was further provided in the said clause that, in order to give an equal opportunity to all the bidders and to maintain the sanctity of tendering system, it is of paramount importance that any change in the tender terms and conditions, specifications and tender opening date, etc., be notified to all the bidders sufficiently in advance of the revised tender opening date. It was further provided that in case the extension is regarding submission of first bid like pre-qualification documents in case of single-bid system and techno-commercial bid in case of two-bid system, the tender sale date should also be extended suitably so as to allow new participants in the bid in order to increase the competition.
- 9.** Learned counsel for the petitioner relies on the judgment of *Meerut Development Authority and Ors. Vs. Association of Management Studies and Ors.*, reported at (2009) 6 SCC 171, for the proposition that, by way of judicial review, courts can examine whether the decision-making process was reasonable, rational, not arbitrary and violative of Article 14 of the Constitution. It was further observed that no bidder is entitled as a matter of right to insist the authority inviting tenders to enter into further negotiations unless the terms and conditions of notice so provided for such negotiations.
- 10.** It is argued that, in the present case, there was no scope for negotiations, which prevented the petitioners from participating in the tender process due to the prohibitive post-bid conditions. Hence, the last-moment

alterations-in-question deprived the petitioners of an equal opportunity with those who participated in the tender.

11. Learned counsel next relies on a Single Bench judgment of this Court in *Aroni Tubes Private Limited Vs. West Bengal Agro Industries Corporation Limited and Ors.* reported at *MANU/WB/0103/2021*, in support of the proposition that the terms of a tender can be open to judicial scrutiny if it is established that the terms of the tender were so tailor-made as to suit the conveyance of any particular person with a view to eliminate all others from participating in the bidding process.

12. It is, thus, submitted that the impugned tender ought to be set aside.

13. Learned counsel for respondent no.3 submits that only the participants in the tender process could have been affected by an alteration in the post-bid conditions.

14. The respondents contend that there is no question of the eligibility to participate being affected by the alterations-in-question. As such, nothing prevented the petitioner from participating in the tender and taking an inspection of the concerned site.

15. It is further argued by the respondents that the alterations only pertained to specifications being provided regarding the structures on the location of the plant which was to be de-commissioned and within the purview of the original terms of the auction. Hence, there was no material alteration which could affect the interest of the petitioners, who did not participate in the tender at all.

- 16.** Upon hearing learned counsel for the contesting parties, what stares at the face is the non-participation of the petitioners in the tender process. The petitioners could have taken an inspection with sufficient notice as contemplated in the auction conditions, and could have sought for pre-bid clarifications at any point of time, irrespective of the alterations brought in on February 10, 2021.
- 17.** Since the petitioners did not participate in the tender process at all, relaxation of the post-bid conditions could not have affected the petitioners in any manner. In the absence of any challenge to the alterations by any of the several other participants apart from the successful bidder, it cannot be said that the petitioners could benefit even indirectly from the alterations.
- 18.** The tender process was not tainted by patent *mala fides* and/or arbitrariness or tailor-made to suit the needs of a particular person or persons. It is only the successful bidder who could have got the benefit of relaxation regarding payments.
- 19.** As regards the insertion of specifications of the structures lying at the location of the de-commissioning, only further details were provide in the alterations, which would have been evident to the petitioners in the event the petitioners participated and had an inspection. The time for inspection was given from January 15, 2021 to February 11, 2021, thereby providing sufficient opportunity to the participants to have an inspection and decide on their prospects in the tender. Such an

inspection would also furnish an opportunity to the petitioners, even as per the auction conditions, to make any query regarding the sale or bidding process before February 10, 2021. In the absence of such participation, the petitioners can only be labelled as fence-sitters seeking to take advantage of the belated alterations, despite having chosen not to participate in the tender at all.

20. As far as the CVC guidelines relied on by the petitioners are concerned, those are of a directory nature. That apart, the illustrations given in the alterations contemplated in Clause 11 of the guidelines clearly indicate that the same pertains to tenders requiring some work to be done by the participants and/or any pre-qualification eligibility being affected by such alteration. In the present case, however, there was no question of any pre-qualification eligibility criteria, since the auction was floated only for the purpose of sale of the plant and machinery items of the Durgapur Projects Limited on an “as is where” and “no complaint and complete clearing of site” basis with sufficient prior opportunity for taking inspection and making queries by the participants. Hence, the guidelines relied on by the petitioners cannot have a direct bearing on the impugned e-auction, due to its very nature.

21. There arose no question of any pre-eligibility criterion being satisfied prior to participation in the bid. Only participants in the tender could invoke Article 14 of the Constitution of India against successful bidders, if at all, since the other participants in the tender process were on a similar

footing as the successful bidder, to whom the post-bid relaxation applied. Since the petitioners did not participate at all, the mere technical objection that they could have so participated in the event the petitioners had prior knowledge of the relaxations, is a flimsy ground to set aside the e-auction as a whole.

22. That apart, the relaxation of post-bid conditions is well within the discretion of the tender-issuing authority. Thus, in the absence of any arbitrariness, *mala fides* or violation of Article 14 of the Constitution of India and/or any *prima facie* material to show that the tender terms were altered in a tailor-made manner to suit the convenience of any particular person, even adhering to the principles laid down in the judgments cited by the petitioners, there is no scope for judicial interference in the impugned e-auction.

23. Although it was laid down in *Meerut Development* (supra) that the methods to be adopted for disposal of public property must be fair and transparent, providing an opportunity to all the interested persons to participate in the process, in the present case there was no lack of transparency in the methods in view of sufficient opportunity of inspection and prior queries having been provided. The petitioners willingly chose not to participate in the tender. The determinant standards for all who participated were the same, as per the conditions as those stood prior to the impugned alterations. The material alterations, if any, merely

pertained to relaxation of post-bid terms for the successful bidder and did not touch the eligibility to participate in the tender at all.

24. As far as the other alteration was concerned, the same only specified the structures which fell within the scope of the sale-in-question. At best, such specific enumerations of the structures could benefit the participants who, in any event, have had the opportunity to inspect the property.

25. Thus, the ratio laid down in the judgments cited by the petitioners is not applicable to the present case at all.

26. In view of the above observations, there is no occasion for judicial interference under Article 226 of the Constitution of India to interdict and/or set aside the tender impugned in the present writ petition.

27. Accordingly, WPA No.6792 of 2021 is dismissed on contest, without any order as to costs.

28. Urgent certified copies, if applied for, be supplied to the parties upon due compliance of all requisite formalities.

(Sabyasachi Bhattacharyya, J.)