30.11.2022
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Sl. No. 07
Ct. No. 05

WPA 25786 of 2022

Twenty First Century Iron & Steel Ltd & Anr.
-Versus-
Damodar Valley Corporation & Ors.

Mr. Ratnanko Banerji
Mr. Rishad Mishra
Mr. Meghajit Mukherjee
Mr. Kanishk Kejriwal
Mr. Ramendu Agarwal
Ms. Vidya Bhushan
..... for the petitioners
Mr. Anirban Ray
Mr. Swarajit Dey
Mr. Subhadeep Basak
Ms. Ridhi Jain
....for the respondent No. 1

The petitioners seek a restraint on the respondent Damodar Valley Corporation in the matter of proceeding with a tender pursuant to an e-auction Notice dated 19th September, 2022. The e-auction Notice was followed by an auction conducted on 28th October, 2022. The petitioners say, through learned counsel, that the e- auction should be set aside and the offer of the petitioners should be accepted by Damodar Valley Corporation(DVC). The ground for seeking the relief as stated above is that the petitioners were not able to participate in the e-auction held on 28th October, 2022. Learned counsel seeks to supplement the ground by making an offer which is about 50 crores in excess of the bidder who emerged successful in the e-auction. Counsel submits that the petitioners are now ready to make an offer of 261 crores as opposed to 211 crores which was the last bid amount put in by the successful bidder who is a party respondent to the writ petition. Counsel submits that as a public body, the respondent No. 1 has an obligation to ensure that the sale fetches the highest price. Counsel also relies on correspondence to show that the petitioners were egged on to participate in the e-auction at the relevant point of time after the petitioners put in the EMD on 27th October, 2022.

Learned counsel appearing for the respondent No.1 points to various Clauses in the e-auction documents including an "Inspection Closing Date" of 12th October, 2022 as also the fact that the petitioners did not comply with a mandatory requirement of the e-auction with regard to uploading of a Chartered Accountant Certificate before the e-auction was to take place on 28th October, 2022.

The e-auction for sale of de-commissioned Plant and Machinery at Chandrapura Thermal Power Plant was conducted on the basis of an e-auction Catalogue which contained certain mandatory requirements which a bidder was required to fulfil before the inspection closing date which was 12th October, 2022. Among the mandatory requirements for participation in the online e-auction, detailed documents in support of financial qualifying requirement was to be uploaded by the bidders on or before the inspection closing date.

Although, the relevant pleading in paragraph 17 of the writ petition states that the petitioner No. 1 was unable to participate in the bidding process (presumably due to technical reasons), the said statement is preceded by an averment that the petitioner did not upload the CA certificate as required in the Catalogue. The relevant paragraph states that the petitioner physically submitted the CA certificate to the respondent No. 1. This fact is reiterated in the grounds taken in support of the relief.

The respondent No. 2, MSTC limited, was the facilitator of the e-auction. The alleged difficulty faced by the petitioner on the date of e-auction is not borne out with any particulars. The pleadings are more on the requirement of uploading of the CA certificate on the portal which the petitioner No. 1 was unable to do within the stipulated time. The inability of the petitioners to do the needful assumes significance in light of the relevant dates which follow.

The inspection closing date was 12th October, 2022, the e-auction was held on 28th October, 2022 and the sale was confirmed by respondent No. 1, DVC in favour of the H1 bidder on 9th November, 2022. The petitioners wrote to DVC on 26th October, 2022, i.e., two days before the e-auction, pointing out to the mistake in failing to upload the financial certificate on the MSTC portal. The next letter of the petitioners is of 3rd November, 2022, post-auction, where the petitioner No. 1 reiterated that it had submitted the EMD of 11 crores and was interested in purchasing the Plant by submitting an offer of Rs. 261 crores. The petitioner also reiterated that it had made a mistake in physically submitting the financial certificate to DVC instead of uploading the certificate on the portal.

The correspondence on record shows that the inability of the petitioner No. 1 to participate in the e-auction was due to the failure to comply with the mandatory requirement of uploading the financial certificate on the portal. The inability had nothing to do with any suggested technical glitch faced by the petitioner on the day of the e-auction. Even if the technical glitch contention is to be believed, the petitioners should have approached the facilitator being the respondent No. 2/MSTC. Instead of having done so, the petitioner sought to better the offer of the highest bidder.

The purpose of an e–auction or a tender is not only transparency and accountability but also certainty. The certainty comes from declaring the successful bidder within the time-window of the tender. The time-window in an e-auction becomes even more significant since the bidders are invisible to one another. Hence, the successful bidder must be declared within the closing time of the e-auction and to the knowledge of all the other participating bidders. The certainty of an e-auction would be unsettled and that to for a indefinite period of time if third parties or even a participating bidder is permitted to improve on the offer of the successful bidder after the closing time of the bid. This would be akin to holding the auction all over again.

The argument that the respondent No. 1 is under an obligation to accept highest offer loses significance when compared to the importance of certainty, transparency and closure. The fact that the petitioners have come before the Court after a month from the e-auction and after confirmation of sale on 9th November, 2022 tilts the balance of convenience against the petitioners.

Food Corporation of India vs. M/s Kamdhenu Cattle Feed Industries;(1993)1 SCC 71 and *Haryana State Agricultural Marketing Board & Ors. vs. Sadhu Ram; (2008)16 SCC 405* have been cited in support of the contention that the Government must try its best to get the best price in a tender. These decisions however were not concerned with the proprieties of an e-auction where the process involves transparency and finality. The petitioners may have had a case had the e-auction been conducted in an arbitrary manner or the conditions been tailor-made to favour a particular bidder to the exclusion of the others. That not being the case, this Court finds no reason to interfere with the e-auction.

However, since the petitioners approached the respondent No. 1 both before and after the e-auction admitting to its mistake together with the fact that the petitioners had put in the EMD before the relevant date, this Court deems it fit to direct the respondent No. 2 to refund the EMD to the petitioners within two weeks from date. The relevant Clause casting an obligation on MSTC/respondent No. 2 to do so is part of the Catalogue. The petitioners shall comply with any formalities in that regard within seven days from date.

WPA 25786 of 2022 is disposed of in terms of the above.

(Moushumi Bhattacharya, J.)