

WP(C) 4139/2009

BEFORE

THE HON'BLE MR. JUSTICE A.POTSANGBAM

Heard Mrs. N.S. Thakuria, learned counsel appearing for the petitioner and Mr. D .C. Chakraborty, learned CGSC representing the respondents.

2. The short question involved in this case is whether the highest bidder, in an auction sale for Road Rollers, could be rejected by the respondent No.3 on the ground of being non-competitive and what would be the basis of determining a bid as non-competitive.

3. The brief facts of the case may be noticed as hereunder -

3(i) On 6.8.2009, the Executive Engineer Electrical Division, GED -1, Central Public Works Department, Bamunimoidum, Guwahati - 21, on behalf of the Government of India, issued an auction notice in the local daily, whereby inviting bids from the intending bidders for auction of four number of Road Rollers, old and used, on the following terms and conditions. The date for auction was fixed on 19.8.2009.

Terms and Conditions :

1. The interested bidders are required to deposit an amount of Rs.,1,00,000/- (Rupees One lac only) with Assistant Engineer(E), ECSD, CPWD, Guwahati - 21 by demand draft/bankers cheque only in favour of Executive Engineer (E), GED-1, CPWD, Guwahati - 2) on the date of auction well before commencement of auction to become entitled to participate in the auction. The earnest money will be refunded to the un-successful bidders after the auction is over.

2. The highest bidder has to deposit 25% of highest bid on the spot after fall of hammer failing which the offer will stand rejected & EMD shall be forfeited.

3. The above road rollers are available for inspection at GC, CRPF, Khanapara & CPWD Colony, Japorigog, Guwahati.

4. Before handing over the road rollers to the highest bidder, he will have to give an affidavit that, he will get ownership of the Road Rollers transferred in his name and will not bring the Road Roller (or any of its part/parts) to use for any purpose to prevent any misuse of the Road Rollers/ its parts till it is in the ownership of Union of India.

5. The balance amount of bid shall be deposited within three days from the date of receiving information of its acceptance failing which EMD shall be forfeited.

6. The undersigned reserves the right to reject any or all offers of bid without assigning any reason.

7. The bid offered by the bidders shall be on as is where is basis.

8. The Road Rollers will be delivered to the highest bidder after deposit of full amount of the bid.

9. The successful bidder will have to remove the Road Rollers at his own arrangement/expenditure within the stipulated time.

3(ii) The Assistant Engineer (Elect) ECSD, CPWD, conducted the auction on 19.8.2009. A total number of 121 bidders including the petitioner submitted their offers by depositing earnest money of Rs.1,00,000/- each, to the respondent in accordance with the terms and conditions of the auction notice. However, out of 121 bidders, only 19 bidders participated in the said public auction held on 19.8.2009 and the petitioner's offer for an amount of Rs.6,01,000/- for all the four Road Rollers, was found to be highest bid from among the offers submitted by the 19 bidders. There is no dispute that the tender containing the offers of the bidders were opened in presence of the bidders or their representatives.

3(iii) The auction notice stipulates, in its terms and condition No.2, that the

highest bidder has to deposit 25% of highest bid amount on the spot after fall of hammer, failing which the offer will stand rejected and the earnest money shall be forfeited. Thus, the petitioner being the highest bidder, submitted a Draft under No.008003 dated 19.8.2009 of Central Bank of India, Lokhra Chariali Branch, for a sum of Rs.1,00,000/- (as balance of Rs.25% of the highest bid amount) to the authority. Another draft being No.431527 dated 18.8.2009 of SBI, Vinobanagar Branch for a sum of Rs.1,00,000/- was already submitted as earnest money and the amount covered by these two drafts constituted more than 25% of the highest bid amount. Receipt of 25% of the bid amount, by way of the aforesaid two drafts, was acknowledged by the Assistant Engineer (Elect), Electrical Construction Sub Division, CPWD, Guwahati, who conducted the auction sale and, thereafter, the petitioner was directed to contact with the office of the Executive Engineer (Elect) GED-1 CPWD, Mamunimaikum, Guwahati, for further order, vide communication No.65(6)AE (E)/CPWD/2009-10/1134 dated 20.9.2009 (Annexure-P/2) to the writ petition.

3(iv) The further case of the petitioner is that instead of finalizing the auction sale in terms of his bid, as discussed above, the respondent No.3, the Executive Engineer (Electrical), informed the petitioner by communication dated 22.8.2009 that his highest bid had been rejected and both the banker cheques referred to above, were released. The aforesaid impugned order dated 22.8.2009 is quoted below -

Shri Sukhvinder Sing,
S.J. Road, Chabipool,
Guwahati - 781008.

Sub: Auction of Road Roller held on 19.8.2009

Ref: This office auction letter No.54(210)/GED-I/09-10/770 dated 05.08.2009.

Dear Sir(S),

Your highest bid for Rs.6,01,000/- for the Road Rollers has been rejected by the competent authority for & on behalf of the President of India. Both the Bankers Cheque bearing No.431527 dated 18.8.2009 and No.008003 dated 19.8.2009 amounting to Rs. 1 Lac each deposited by you on account of earnest money & 25% amount are hereby released.

For & on behalf of the President of India
Sd/- Executive Engineer(Elect)

4. By another communication dated 24.8.2009, the aforesaid two cheques were released and returned to the petitioner. On the same day, the petitioner submitted a representation requesting the respondent No.3 to re-call or withdraw the order of rejection. It is stated by the learned counsel appearing for the petitioner that the reasons for rejection are not given in any of the two communications dated 20.8.2009 and 24.8.2009, issued by the respondent No.3 and the petitioner was kept in dark about the reasons for rejection of his highest bid. Having failed to evoke any positive response from the respondent, the petitioner has filed this writ petition with a prayer for quashing the communication dated 22.8.2009 (Annexure-P/3 to the writ petition), with a further prayer for directing the respondents to finalise the auction in favour of the petitioner, the highest bidder, in terms of the auction sale held on 19.8.2009.

5. The respondents filed an affidavit-in-opposition opposing/ disputing the contentions of the writ petitioner. The respondents submit that they are guided in the process of auction sale by the provision of - Disposal of Surplus Stores, CPWD Manual, 2007 and the Appendix thereto. One of the provisions relied upon by the respondents is para 5 of Appendix-38 under the heading Acceptance of Bid. Para 5(b) lays down that it is not incumbent on officers of CPWD to outright

t accept the highest bid which can be rejected without any assigning any reason to the bidder concerned but he must record in writing his reasons for not accepting the same. It is thus, contended by the respondents that the highest bid of the petitioner was rejected by invoking the aforesaid para-5(b) of the Appendix-38 as referred to above. However, it is noticed in para-6 of the same appendix, under the heading "Power To Accept The Bid", that bids should be accepted by the Executive Engineer concerned. In case of bids below the reserve price, the bids will be accepted by the next higher authority. The aforesaid para 6 leaves no doubt that, in case of auction sale, reserve price is contemplated and such reserve price is required to be indicated in order to inform to all the intending bidders that unless their bids are above the reserve price, the consideration of acceptance will depend on the discretion of the higher authority. What is more important is that reserve price is the determining factor either for rejection or acceptance of bid offered by the bidders.

6. It is further contended by the respondents that in one of the auction sales held on 7.7.2009 by the department, the highest bid offer for two Road Rollers, was for an amount of Rs.10,31,000/-. However, the highest bidder failed to deposit Rs.25% of the amount within the stipulated period and as a result, the said auction had been cancelled by the respondents. This is cited as one of the reasons for branding the highest bid of the petitioner as non-competitive. It must be clearly understood that the amount quoted above, by the highest bidder in the auction sale dated 7.7.2009, cannot be the basis for determining a bid as competitive or not, for the simple reason that the aforesaid bid amount was neither deposited by the bidder nor was the auction sale with the aforesaid amount ever finalized. It is one of the cancelled auction sales and the legal effect of which is that the aforesaid auction sale, already cancelled, shall be deemed as non est in law. The learned CGSC for the respondents was asked by the Court as to what was the reserve price of the Rollers under auction, in terms of para 6 of Appendix 38, as the same was not indicated in any of the documents including the auction sale documents available on record. Mr. Chakraborty, learned CGSC, has fairly submitted before the Court that he was verbally informed by the authority that the reserve price for the aforesaid four Rollers under auction, was Rs.4,50,000/- only.

7. It is not a case of the respondents that the process for auction sale and bid offered by the petitioner, have suffered from any irregularity or illegality thereby warranting rejection or cancellation of the auction sale held on 19.8.2007. The reasons recorded by the respondent No.3 simply indicate that the bid amount of the petitioner, though highest among the 19 bidders, is not competitive and this conclusion was arrived at by referring to the bid of 10,31,000/- of the auction sale dated 7.7.2008 which was already cancelled by the respondents themselves as the bidder therein failed to deposit 25% amount. Perhaps, the bid amount was unrealistic.

8. The case of the petitioner is that reserve price in terms of para 6 Appendix 38, was neither disclosed in the auction sale nor indicated in any of the communications. That apart, the range of bid amount so as to come within the expression of being competitive is not at all disclosed by the respondents in the entire process for auction sale. Therefore, the amount offered by the petitioner which was found to be the highest bid among the 19 bidders, cannot be rejected arbitrarily on the whims and fancy of the authority and there is no acceptable reason why the highest bid amount of the petitioner should be rejected. In support of the contention of the petitioner, the learned counsel has relied upon the case of Dutta Associates Pvt. Ltd. Vs. Indo Merchandiles Pvt. Ltd and Others reported in (1997) 1 SCC 53, wherein the Apex Court held that decision making process should be transparent, fair and open. It was further held that whatever procedure, the government proposes to follow, in accepting the tender must be clearly stated in the tender notice so that all the tenderers/bidders are informed of the

e basis for consideration of the tender and non-disclosure of the basis/procedure in the NIT/auction sale, would vitiate the entire tender process. Following the aforesaid principle laid down by the Apex Court, this Court in the case of Sargous Tours and Travels and another Vs. Union of India and Others reported in 2003 (3) GLT 202 held that the law laid down by the Datta Associates Pvt. Ltd. (Supra) is to be followed in all tender process. In the aforesaid case, the tender of the petitioner was rejected on the ground that the tender was below 20% of the reasonable rate and such standard/procedure having not made known to the intending tenders, the acceptance of the tender on behalf of the private respondents therein was set aside by this Court. In the instant case, the auction sale dated Annexure-P/1, did not mention nor indicate the range of amount for being competitive nor was any reserve price for the Rollers, under auction, disclosed and as such the petitioner and other bidders had never been informed of the procedure/standard to be followed by the respondents.

9. The case of the petitioner is squarely governed by the law laid down in Datta Associates Pvt. Ltd. (Supra). Mr. Chakraborty, learned CGSC, appearing for the respondents submits that the case in hand has to be decided on the basis of the decision rendered by the Apex Court in (2009) 6 SCC 171 (Meerut Development Authority Vs. Association of Management Studies and Another). Mr. Chakraborty has drawn the attention of the Court to various paras of the aforesaid case. This Court has no quarrel with any of the general principles and perceptions as laid down in the aforesaid case but the case is clearly distinguishable from the instant case which is rather governed by the decision of Datta Associates Pvt. Ltd. (Supra)

10. In view of what has been discussed above, this Court is of the opinion that the decision of the respondent No.3 to reject the highest bid of the petitioner in connection with the auction sale held on 19.8.2009, for four Road Rollers, is not sustainable in law and accordingly, the communication dated 22.8.2009 (Annexure-P/3) is quashed. The respondent No.3 is further directed to settle the auction sale with the petitioner who is the highest bidder in terms of the result of the auction sale held on 19.8.2009, as indicated in communication dated 22.8.2009, within a period of two (2) months from the date of receipt of a certified copy of this order.

11. The writ petition stands allowed. No order as to cost.