

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 02.05.2007

CORAM

THE HONOURABLE MR. JUSTICE K. MOHAN RAM

W.P.No.6027 of 2007 and
M.P.Nos.1 and 4 of 2007

M/s. Process Color
Rep. By its General Manager, Mr. N. Selvaraj
Opp. To Town Hall, Banerji Road
Cochin, Kerala - 682 018 ... Petitioner

-Vs.-

1. The Secretary for Home
Government of Tamil Nadu
Secretariat, Fort St. George, Chennai
2. The Commissioner
Department of Excise and Prohibition
Government of Tamil Nadu
3. Dr. A.K. Agarwal
4. M/s. Holostic India Private Limited
W-51 Sector - II, Noida District,
Goutham Budh Nagar, U.P. 201 301 .. Respondents

PRAYER:-Petition under Article 226 of The Constitution of India praying for the issuance of a writ of declaration to declare the award of the contract to manufacture for master origination, manufacture and supply of Polyester Hologram Excise Labels to the Government of Tamil Nadu pursuant to the Tender Notification in Ref.No.DIPR/3379/Tenders/06, dated 01.12.2006 made in favour of the fourth respondent without opening and considering the price bid of the petitioner is unconstitutional and illegal. (Amended prayer as per order dated 28.03.2007 passed by this Court in M.P.No.3 of 2007 in W.P.No.6027 of 2007).

For Petitioner : Mr. R. Muthukumarasamy, S.C., for
Mr. A. Jenasan
For Respondents : Mr. M. Dhandapani, A.G.P., for R-1 & R-2.
Mr. Ayyadurai, for R-3.
Mr. Vijay Narayan, S.C., for
Mr. R. Parthiban, for R-4.

O R D E R

The short facts that are necessary for the disposal of the above writ petition are as follows:-
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On 01.12.2006, the second respondent issued a tender notification inviting tender from licensed and reputed manufacturers for master origination, manufacture and supply of polyester hologram excise labels as per the specifications described in the tender notice. As per the tender notification, the last date for submission of tender was 05.01.2007 and the technical bids were to be opened at 3.30 pm on the same day. As per the tender conditions only those tenderers who qualify in the technical evaluation will be considered for price bid opening and the tenderers who did not qualify in the technical bid will not be considered in the price bid opening. The tenderers who qualify in the technical bid will be invited to the opening of the price bid. The said tender consists of five sections, which are as follows:

- Section 1 : Tender notice
- Section 2 : Instructions to tenderers
- Section 3 : Technical specifications and product specifications.
- Section 4 : General terms and conditions.
- Section 5 : Tender form and price schedule.

Section 2 contains the instructions to tenderers, while section 3 deals with the technical and product specifications. Section 4 of the tender contains general terms and conditions, while Section 5 deals with the tender form and price schedule.

2. According to the petitioner, the petitioner submitted their tender by complying with all the conditions and specifications within the time prescribed. The petitioner submitted a representation on 04.01.2007 to the first respondent setting out the facts relating to Dr. Agarwal, the third respondent herein, along with a request to see that Dr. Agarwal does not participate in the Expert Committee to evaluate the Technical Bids and bias and mala fides have been attributed against the third respondent. The said representation was followed by another representation dated 11.01.2007. Though the first respondent assured to look into the matter, the third respondent continued to be a member of the committee. According to the petitioner, out of seven tenders, the tender submitted by M/s. Flex Industries Limited is incomplete and consequently it is the tender of the petitioner and the fourth respondent, M/s. Holostic India Private Limited, which would qualify at the technical bid stage and be eligible for the opening of the price bids. The petitioner, on coming to know that the Committee is visiting the units of the tenderers, by their representation dated 25.01.2007 sought for inspection of the petitioner's unit. Pursuant thereto the Committee visited the petitioner's unit at Cochin alone although they fully knew that the full-fledged unit of the petitioner is situated at Coimbatore. According to the petitioner, the officers of the petitioner's unit had brought to the notice of the Committee that another unit of the petitioner, which is under a single roof is situated in Coimbatore which should also be visited by them, but the committee did not visit the petitioner's unit at Coimbatore. According to the petitioner, the petitioner came to know that the Committee headed by the third respondent, had disqualified the petitioner's tender besides four other tenderers also and had certified only the tender of the fourth respondent and M/s. Alfa Laser Tech Private Limited as being technically qualified.

According to the petitioner, M/s.Holostic India Private Limited and M/s. Alfa Laser Tech Private Limited have formed a cartel along with few others which has also been brought to the notice of the respondents. It is alleged by the petitioner that the action of the respondents in seeking to disqualify the tender of the petitioner at the stage of technical bid is vitiated by bias in fact, bias in law besides being arbitrary and unreasonable violative of Article 14 of the Constitution of India only for the purpose of selecting and continuing the fourth respondent to be the manufacturer and supplier of the Hologram labels for collateral considerations.

3. A detailed counter affidavit has been filed by Respondents 1 and 2. In the counter affidavit, the various allegations levelled against Respondents 1 to 3 by the petitioner have been denied. In paragraph 9 of the counter affidavit, the reasons for disqualifying the tender of the petitioner in the technical bid stage is stated, which reads as follows:-

"9. All the facility viz. Art work creation, Master Origination, glass negative preparation, Developing of glass master, Nickelling process, Metal master preparation, embossing lamination, Die-cutting, coating and other intermediary processes involved in the manufacture of hologram excise label is not located in the same premises under one roof (as per Condition No.6 of Part-4 of Tender Document, 2006). On Inspection it was found that embossing, lamination, die-cutting, coating and re-combination machineries were not available in the factory premises. In addition, the Dot Matrix origination facility is less than three years. The samples supplied by the tender do not conform to the prescribed specifications such as the recombination of holographic masters made from both 2D/3D conventional and DOTMATRIX Digital Origination System, four channel effect, multilevel animation effect, pearl effect with hidden micro text, concealed animated image and multiple LASER viewable animated covert image" required as per the technical specifications in part-3 of Tender document".

4. It is further stated in the counter affidavit that as per the recommendations of the Tender Scrutiny Committee the price bid for procurement of Polyester Hologram Excise Labels was opened on 12.02.2007 at 11.00 am in the presence of authorised representatives of two technically qualified tenderers. The fourth respondent had quoted the lowest price of Rs.0.1661 per hologram label and after negotiations the fourth respondent agreed for substantial reduction in price which was accepted by the Department and finally orders have been placed with the fourth respondent for supply of Polyester Hologram Excise Labels at Rs.0.14375/- per label in the Commissioner of Prohibition and Excise letter No.P&E10(3)20120/2006 dated 14.02.2007. It is further alleged in the counter affidavit that the petitioner was giving false complaints against the Department based on unfounded assumptions even before the notification for invitation of tender was published in the newspapers. It is stated in the counter affidavit that when the petitioner failed in their attempts to influence the tender process in any way, they started giving false complaints to impeach the credibility of the tender process as well as of the Officials who are assigned the job of assisting the Government in finalising the tender for procurement of Hologram labels and the same were examined and found to be

not worthy of consideration. According to these respondents, there are six persons to evaluate the tenders for opening the price bid and Dr. Anil K. Agarwal is one of the members of the Committee and the Tender Scrutiny Committee is not headed by Dr. Anil K. Agarwal and no material is available or placed by the petitioner or anybody to prove that Dr. Anil K. Agarwal is biased in any manner and he has links with any of the tenderers who participated in the tender. It is stated in the counter affidavit that the Tender Scrutiny Committee inspected the factory premises of the tenderers and gave its report in which the tenderers who are not technically qualified were not recommended for opening of price bid including that of M/s. Flex Industries Limited, M/s. Everest Hologram and M/s. Gopson Private Limited in addition to the price bid of the petitioner. It is stated in the counter affidavit that Condition No.6 of Part-4 of the tender document makes it very clear that the tenderer should have all the facilities of Master origination and other production in the same premises under one roof. The tenderer who does not have all the facilities in the same premises will be ineligible to participate in the tender and the tender will be summarily rejected. To ensure that the tenderer has all the facilities under one roof, the condition number 7 of Part-4 of tender document requires the participating tenderer to submit an affidavit to this effect. The petitioner does not have all the facilities under one roof in Cochin which was inspected by the Tender Scrutiny Committee as per the request of the petitioner. As the petitioner do not have all the facilities under one roof, its tender is to be rejected summarily as per Condition number 6 of Part-4 of tender document. The Technical bid of the petitioner has been disqualified because the petitioner do not have all the facilities under one roof as required under Condition No.6 of Part-4 of tender document and the specimen samples submitted by the petitioner do not conform to the technical specifications prescribed in the tender document. It is also stated in the counter affidavit that the petitioner seems to have business rivalry with the fourth respondent due to which he is harbouring illwill against the fourth respondent and no tenderer has been given any privilege or any unfair treatment. The entire process of finalisation of tender for procurement of Hologram labels has been done strictly as per the Tamil Nadu Transparency in Tenders Act, 1998 and the Tamil Nadu Transparency in Tender Rules, 2000. On the above said averments and allegations, Respondents 1 and 2 seek dismissal of the above writ petition.

5. The third respondent has filed a separate counter affidavit denying all the allegations of mala fides levelled against him by the petitioner. As the learned senior counsel for the petitioner fairly submitted that the petitioner is not pressing the grounds relating to mala fides levelled against the third respondent, the entire averments contained in the counter affidavit filed by the third respondent is not being reproduced.

6. The fourth respondent has filed a detailed counter affidavit which contains the following averments:-

In the counter affidavit filed by the fourth respondent, the fourth respondent has highlighted the necessity to fulfil strictly all the requirements of the tender conditions. The fourth respondent has pointed out in the counter affidavit that in paragraph-2 of the affidavit filed in support of the above writ petition the petitioner has admitted that many of

his facilities are in Coimbatore but that is in the name of another company known as Igetta Holographic Private Limited which was not one of the tenderers. Therefore, the facilities of Igetta Holographic Private Limited cannot be considered to be the facility of the petitioner. According to the fourth respondent, the petitioner is a firm whereas Igetta Holographic Private Limited is a Company and therefore it is not clear how a statement has been made in paragraph 2 of the affidavit that Igetta Holographic Private Limited is a sister concern of the petitioner. According to the fourth respondent on this ground alone the writ petition is liable to be dismissed. The allegations of bias, mala fides and the alleged relationship of the third respondent with the fourth respondent have been denied. According to the fourth respondent, the experience claimed by the petitioner is not for production of similar samples as required by the Government of Tamil Nadu, since in Kerala, the exercise label is a paper label on which a small Hologram is struck whereas in Tamil Nadu the exercise label is completely Polyester Hologram Excise Label and therefore the petitioner does not have the experience of manufacturing of the similar product. The allegations of forming of a cartel by the fourth respondent with M/s.Alpha Laser Technology has been denied. According to the fourth respondent M/s.Igetta Holographic Private Limited is not one of the tenderers and the Coimbatore Unit does not belong to the petitioner herein which fact will show that the petitioner is not having all the facilities under one roof. On the above said averments, the fourth respondent seeks for the dismissal of the above writ petition.

7. In the reply affidavit filed by the petitioner it is stated that the Committee which inspected the petitioner's unit at Cochin did not include the Financial Controller of the Commissioner of Prohibition and Excise nor Thiru.Venkataraman, Joint Director, Indian Institute of Packaging and out of six members three members were non-technical persons. Though M/s.Alpha Laser Technology which is closely associated with the fourth respondent did not have the facilities of dot-matrix origination facility with 4000 DPI graphic resolution, it has been deliberately chosen with a view to ultimately award the contract to the fourth respondent. According to the petitioner, they have all the facilities under one roof in their unit at Coimbatore besides major parts of the requirements in their unit at Cochin. The petitioner had requested the Committee to inspect their units at Coimbatore and Cochin, but the Coimbatore unit has been purposely not inspected. The reason given in paragraph 9 of the counter affidavit that the sample supplied by the tenderer did not confirm to the prescribed specification is misconceived incorrect and denied. The awarding of the contract to the fourth respondent at the price which is much higher is not only illegal for the various reasons stated in the writ petition, but also against public interest and public exchequer. An independent Committee should be directed to visit the petitioner's unit at Coimbatore as also the unit of M/s.Alpha Laser Technology to examine their respective capabilities so as to ascertain whether their productions meet the specifications. The petitioner made a request to inspect the units at Coimbatore and Cochin, but purposely the Coimbatore unit which had all the facilities under one roof was not inspected.

8. I have heard Mr. R.Muthukumarasamy learned Senior counsel for Mr.A.Jenasenan learned counsel for the petitioner and Mr. M.Dhandapani learned Additional Government Pleader for Respondents 1 and 2 and Mr.

V.Ayyadurai learned counsel for Respondent 3 and Mr. Vijay Narayan learned senior counsel for Mr. R.Parthiban learned counsel for Respondent 4.

9. Mr. R.Muthukumarasamy learned senior counsel for the petitioner submitted that if the petitioner is able to prima facie show that they had requested for inspection of their unit at Coimbatore which according to the petitioner has got all the facilities under one roof as contemplated in Condition No.6 of Part-4 of Tender Document, 2006, the failure of the Committee to inspect the Coimbatore unit will vitiate the entire decision making process and on that ground itself the writ petition has to be allowed.

10. Therefore, this Court is of the considered view that the above aspect has to be considered first before taking up the other contentions. In the affidavit dated 04.01.2007 filed by the petitioner in twenty rupees non-judicial stamp paper it is averred as follows:-

"I, T.M.Rajan, Managing Director, Ignetta Holographic Pvt. Ltd. And Proprietor, Process Color, hereby state that I am in possession of all the relevant and capable machines in house and I will not sublet or sub contract any work or a portion of work, in connection with the security hologram printing for Prohibition and Excise, Chennai, to an outside agency. I also confirm that all the above machines are in my possession and ownership and none of these facilities partially or fully will be sub contracted. All the machines are installed in my premises under a secured environment.

Sd/-...
T.M.Rajan

Dated this on the 4th of January 2007"

In the letter dated 05.01.2007 by the petitioner to the Commissioner, Prohibition and Excise, Ezhilagam, Chepauk, Chennai - 600 005, it is stated as follows:-

"LIST OF FAC. LOCATION

Holography

We have started production of Hologram in the year 2001. We have holographic production in three locations. The addresses of the 3 locations are printed on the bottom of this letter. One in Trivandrum where we make excise labels and other Security Holograms for Kerala Government and the other units in Coimbatore in the name of M/s. Ignetta Holographic Pvt. Ltd. We make Security Holograms for other commercial activities for Southern Region and Cochin we have mastering facilities conventional and Dot matrix and other related Electro forming equipments to cater our both units Trivandrum and Coimbatore. For Tamilnad excise purpose we will be making master in Cochin unit.

We will be providing brand new Holographic equipments for Tamilnad Excise as per clause (16) of Part-4 of the Tender. We have already placed the order and the machineries are ready for dispatch to Chennai. Copies of the dispatch details are also enclosed.

We are providing the photographs of Cochin and Coimbatore unit's machineries. The Trivandrum unit is almost like Tamilnadu excise label printing unit. It is classified as a high security area by State Government. So it is illegal to photograph the premises and machineries. So we are not enclosing the photographs of Trivandrum unit."

...

"Ighetta Holographic Pvt. Ltd. An ISO 9001 : 2000 Company & Process Color

Ighetta Holographic Pvt. Ltd. and our sister concern Process Color both is registered under SSI and Sales Tax in Tamilnadu and Kerala. We, Ighetta Holographic Pvt. Ltd. And Process Color promoted by T.M.Rajan will be collaborating in the Tamilnad Tender. In this regard a Board Resolution is also attached"

11. In the affidavit submitted by the petitioner in stamp paper he has not stated that the petitioner is having all the facilities under one roof at Coimbatore or for that matter in any other place. A reading of the letter dated 05.01.2007 also indicates that the petitioner is not having all the facilities as contemplated in Condition No.6 of Part-4 of Tender Document, 2006 at single place under one roof. Admittedly, the unit at Coimbatore is in the name of M/s.Ighetta Holographic Private Limited, whereas the tender has been submitted by the petitioner which is a proprietary concern. Simply because Mr.T.M.Rajan happens to be the Managing Director of M/s.Ighetta Holographic Private Limited and Proprietor of Process Color, the facilities belonging to M/s.Ighetta Holographic Private Limited can not be considered to be that of the petitioner. The materials available in the original files produced by Respondents 1 and 2 clearly show that the petitioner has not requested the Committee to inspect its unit at Coimbatore. Further, the unit at Coimbatore does not belong to the petitioner who is the tenderer. As rightly contended by Mr.Vijaya Narayan learned senior counsel for the fourth respondent when M/s.Ighetta Holographic Private Limited is not one of the tenderers, the facilities belonging to a Private Limited Company cannot be considered to be belonging to the petitioner, which is a proprietary concern, though Mr.T.M.Rajan, proprietor of M/s. Process Color happens to be the Managing Director of M/s.Ighetta Holographic Private Limited. Mr.Vijaya Narayan learned senior counsel for the fourth respondent and Mr. M.Dhandapani learned Additional Government Pleader for first and second respondents submitted that a perusal of the original files does not indicate that there was any request by the petitioner to inspect the unit at Coimbatore. It is true that it is averred in the affidavit that a request was made by the petitioner to the Inspection committee to make an inspection of its Coimbatore Unit and such an averment had not been denied in the counter affidavit but the materials available in the files indicate that no request was made by the petitioner in writing. When admittedly there is no averment in the affidavit of the petitioner filed in the non-judicial stamp paper which was enclosed with the tender documents and no written request of the petitioner is available in the files and when admittedly it is not the case of the petitioner that a written request was made to the inspection committee to visit the petitioner's unit at Coimbatore, no duty is cast on the inspection committee to visit the Coimbatore Unit. The materials available on record clearly show that the petitioner is not having all the facilities under one roof as prescribed by Tender Conditions.

12. It is pertinent to point out that in the letter dated 05.01.2007 it is categorically stated as follows:-

" For Tamilnad excise purpose we will be making master in Cochin unit" Further, the invoices and bills for purchase of machinery stand in the name of M/s.Ignetta Holographic Private Limited which admittedly is not the tenderer. In the letter dated 05.01.2007 the petitioner has stated that they are providing photographs of Cochin and Coimbatore units' machineries and that itself shows that all the facilities are not available under one roof. In paragraph 2 of the affidavit filed in support of the above writ petition, the petitioner has admitted that many of its facilities are in Coimbatore but, as pointed out above, the Coimbatore unit is in the name of a Private Limited Company known as M/s.Ignetta Holographic Private Limited, which admittedly is not one of the tenderers. Therefore, this Court is of the considered view that the rejection of the petitioner's tender for not fulfilling the terms of the tender conditions at the stage of evaluation of the technical bid cannot be said to be erroneous. Further, the alleged failure on the part of the Committee to inspect the Coimbatore unit has not vitiated the decision making process and the award of contract in favour of the fourth respondent. The learned senior counsel for the fourth respondent relied upon the following decisions:-

(i) 2005 (4) S.C.C. 435 (Global Energy Ltd. And another Vs. Adani Exports Ltd. And others).

(ii) 2005 (6) S.C.C. 138 (Master Marine Services (P) Ltd. Vs. Metcalfe & Hodgkinson (P) Ltd.

In 2005 (4) S.C.C. 435 (referred to supra) in paragraphs 10 and 12 it is observed as follows:-

"10. The principle is, therefore, well settled that the terms of the invitation to tender are not open to judicial scrutiny and the Courts cannot whittle down the terms of the tender as they are in the realm of contract unless they are wholly arbitrary, discriminatory or actuated by malice.

12. The fact that M/s. Global Energy Ltd. has a licence of Category 'A' and that the said licence is subsisting in its favour on the basis of an interim order passed by the High Court is not in dispute. Under the Regulations of the Central Electricity Regulatory Commission, a holder of Category 'F' licence is entitled to trade in over 1000 million units of power in a year. The total power intended to be traded by the Electricity Board is 1471 million units for which Appellant 1 does not possess the requisite licence. Having regard to these facts, we are clearly of the opinion that no ground has been made out by the appellants, which may warrant interference by this Court with the decision taken by the West Bengal State Electricity Board in not awarding the contract to Appellant 1 as price offered cannot be the sole criterion in the matter of trading of power where holding of relevant licence is mandatory under the Regulations of the Central Electricity Regulatory Commission".

In 2005 (6) S.C.C. 138 (referred to supra) in paragraphs 12 and 15 it is observed as follows:-
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"12. After an exhaustive consideration of a large number of decisions and standard books on administrative law, the Court enunciated the principle that the modern trend points to judicial restraint in administrative action. The Court does not sit as a Court of appeal but merely reviews the manner in which the decision was made. The Court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise, which itself may be falliable. The Government must have freedom of contract. In other words, fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principles of reasonableness but also must be free from arbitrariness not affected by bias or actuated by mala fides. It was also pointed out that quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure.

15. The law relating to award of contract by the State and public sector corporations was reviewed in *Air India Ltd. Vs. Cochin International Airport Limited* (2000 (2) S.C.C. 617) and it was held that the award of a contract, whether by a private party or by a State, is essentially a commercial transaction. It can choose its own method to arrive at a decision and it is free to grant any relaxation for bona fide reasons, if the tender conditions permit such a relaxation. It was further held that the State, its corporations, instrumentalities and agencies have the public duty to be fair to all concerned. Even when some defect is found in the decision-making process, the Court must exercise its discretionary powers under Article 226 with great caution and should exercise it only in furtherance of public interest and not merely on the making out of a legal point. The Court should always keep the larger public interest in mind in order to decide whether its intervention is called for or not. Only when it comes to a conclusion that overwhelming public interest requires interference, the Court should interfere."

13. Basing reliance on the above said two decisions Mr. Vijay Narayan learned senior counsel for the fourth respondent submitted that the Court cannot whittle down the terms of the tender as they are in the realm of the tender unless they are wholly arbitrary, discriminatory or actuated by malice and he further submitted that the power under Article 226 of the Constitution of India should be exercised only in furtherance of public interest and not merely on the making out of a legal point. Learned senior counsel further submitted that the price offered by the petitioner cannot be the sole criterion in the matter of awarding the contract when the petitioner is not having all the facilities as required by Condition No.6 of Part-4 of Tender Document, 2006 under one roof. In the light of the law laid down by the Apex Court in the decisions reported in 2005 (4) S.C.C. 435 (referred to supra) and 2005 (6) S.C.C. 138 (referred to supra) the

above said contentions of Mr. Vijay Narayan learned senior counsel for the fourth respondent merits acceptance.

14. In this case, the petitioner has not even made out a legal point to interfere with the award of contract in favour of the fourth respondent. The tender of the petitioner has been rejected not only on the ground that the petitioner is not having all the facilities under one roof but also on the ground that the specimen samples submitted by the petitioner do not conform to the technical specifications prescribed in the tender document. Though the said ground is being contested by the petitioner, this Court cannot sit as a Court of appeal and review the administrative decision as this Court do not have the required expertise to correct the administrative decision. This Court is not having the technical expertise to decide as to whether the decision of the tender scrutiny committee that the specimen samples submitted by the petitioner do not conform to the technical specifications prescribed in the tender document is correct or not.

15. For the above said reasons, this Court is of the considered view that the petitioner has not made out a case requiring interference of this Court. In the light of the view taken as above, the other contentions put forth by the petitioner does not require any consideration. Accordingly, the above writ petition fails and the same is dismissed. However, there will be no order as to costs. Consequently, the connected MPs are closed.

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

srk

To

1. The Secretary for Home
Government of Tamil Nadu
Secretariat, Fort St. George, Chennai
2. The Commissioner
Department of Excise and Prohibition
Government of Tamil Nadu

- 1 cc To Mr.R.Parthiban, Advocate, SR.30106.
1 cc To Mr.A.Jenasenan, Advocate, SR.30181.
1 cc To The Government Pleader, SR.30255.

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