

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 10.02.2021

CORAM

THE HONOURABLE MRS. JUSTICE PUSHPA SATHYANARAYANA

W.P.Nos.15156, 15221, 15632 and 16526 of 2020
and W.M.P.Nos.18911, 18914, 19055, 19056, 19482, 19483,
20503 and 20505 of 2020

M/s.Kumbhat Holographics,
Kumbhat Complex,
No.29, Rattan Bazaar,
Chennai-600 003
rep. by its Partnership
Mr.Sanjay Kumbhat ... Petitioner in WP No.15156/2020

M/s.Kantas Track-Pack India Ltd.
B-23, Ground Floor, Sector 65,
Noida-201 300000, Uttar Pradesh,
rep. by its Authorized Signatory
Mr.M.R.Karunakaran ... Petitioner in WP No.15221/2020

M/s.Alpha Lasertek India LLP
(rep.by its Authorized Signatory)
Mr.P.Jegadeesan,
Flat No.609, Building No.89,
Hemkunt Chamber,
Nehru Place,
New Delhi-110 019. ... Petitioner in WP No.15632/2020

M/s.Shriram Veritech Solutions Pvt. Ltd.,
Plot No.39, Ecotech Ext-1,
Greater Noida,
Uttar Pradesh-201 306
rep. by its Authorized Signatory
Mr.Girinder Kumar ... Petitioner in WP No.16526/2020

Vs.

1. The Government of Tamil Nadu
rep. by its Secretary,
Prohibition and Excise Department,
Secretariat, Fort St. George,
Chennai-600 009.

2. The Commissioner of Prohibition and Excise,
Government of Tamil Nadu,
Ezhilagam, Chepauk,
Chennai-600 005.
3. The Tender Scrutiny Committee,
O/o.The Commissioner of Prohibition and Excise,
Ezhilagam, Chepauk,
Chennai-600 005.
4. Uflex Limited,
No.305, 3rd Floor, Bhanot Corner,
Pamposh Enclave, Greater Kailash-I,
New Delhi-110 048.
5. Montage Enterprises Pvt. Ltd.,
C-53, Shashi Garden,
Mayur Vihar Phase-I,
Near Pocket-Vi,
New Delhi-110 091. .. Respondents in WP Nos.15156,
15221 and 16526 of 2020
4. Uflex Limited,
A-1, Sector-60,
Noida 201 301
Uttar Pradesh
5. Montage Enterprises Pvt. Ltd.,
502/503, C-31, G Block,
Naman Centre, Bandras Kurla Complex,
Bandra (East),
Mumbai-400 051. .. Respondents in WP No.15632/2020

* * *

Prayer in W.P.No.15156/2020 : Writ Petitions filed under Article 226 of the Constitution of India praying for a Writ of Certiorari to call for the records in Tender for production and supply of Polyester Based Hologram Excise Labels on Turnkey Basis bearing Tender No.1/2020, issued on 01.10.2020 by the first and second respondents and quash the same.

Prayer in W.P.No.15221/2020 : Writ Petitions filed under Article 226 of the Constitution of India praying for a Writ of Certiorari to call for the records in Tender for production and supply of Polyester Based Hologram Excise Labels on Turnkey Basis bearing Tender No.1/2020, issued on 01.10.2020 by the first and second respondents and quash the same.

Prayer in W.P.No.15632/2020 : Writ Petitions filed under Article 226 of the Constitution of India praying for a Writ of Certiorari to call for the records in Tender No.01/2020, dated 01.10.2020 for Production and Supply of Polyester based Hologram Excise Labels on Turnkey issued by the first and second respondents and quash the same.

Prayer in W.P.No.16526/2020 : Writ Petition filed under Article 226 of the Constitution of India praying for a Writ of Certiorari to call for the records in Tender No.01/2020, dated 01.10.2020 for Production and Supply of Polyester based Hologram Excise Labels on Turnkey issued by the first and second respondents and quash the same.

* * *

For Petitioner in W.P. : Mr.AR.L.Sundaresan,
Senior Counsel
Nos.15156/2020 and M/s.R.Sandeep Bagmar
16526/2020

For Petitioner in W.P. :Mr.M.S.Krishnan, Senior Counsel
No.15221/2020 for M/s.AR.Ramanathan

For Petitioner in W.P. :Mr.P.S.Raman,
No.15632/2020 for M/s.Dwarakesh Prabhakaran

For Respondents 1-3 :Mr.P.H.Arvinth Pandian,
in all these WPs Additional Advocate General
assisted by Mr.V.Shanmugasundar,
Special Government Pleader

For Respondent 4 : Mr.P.Wilson, Senior Counsel
for M/s.A.Sam Arul Praasath

For Respondent 5 : Mr.V.Prakash, Senior Counsel
M/s.Abitha Banu

COMMON ORDER

Since all the writ petitions arising out of one and the same tender notification, they are taken up together for hearing and disposed of by this common order, with the consent of the learned counsel on either side.

2. The petitioners are either Limited Company, Partnership firm or Limited Liability Partnership firm (LLP) and are engaged in production of security holograms in India. The first respondent, by G.O.Ms.No.23, Home, Prohibition and Excise (VII)

Department, dated 24.08.2020, in order to call for fresh tender for procurement and supply of Polyesterised Holograms Excise Labels, as required under Rule 7 of the Tender Transparency Rules, 2000 (hereinafter referred to as "the 2000 Rules) appointed the Commissioner of Prohibition and Excise as "Tender Accepting Authority" (in short, "TAA") in terms of Rule 24 of the said Rules and also appointed a Technical Specification Committee (for the sake of brevity "TSC") and a Tender Scrutiny and Finalization Committee comprising of the experts.

2.1. The second respondent, by its letter dated 27.08.2020, invited suggestions from various suppliers, including the petitioners, which was promptly responded to by the petitioners putting forth their suggestions for the holograms label features and security standards, which can be provided by the prospective bidders.

2.2. The first of the meeting of TSC was conducted on 09.09.2020. The TSC was given the suggestions by the petitioners regarding printing of hologram on polarized excise labels and other technical inputs to enhance the quality, durability and security features of the existing polarized hologram excise labels. Accordingly, the technical specifications, which are generic in nature and ensure wider participation by incorporating those features that are available with at least not less than three bidders were suggested by the TSC.

2.3. The second meeting was held on 18.09.2020 to discuss technical specifications of excise hologram, that are to be incorporated in the tender document. In the second meeting, the Technical Experts were requested to suggest technical specifications with latest features from the literature submitted by the prospective bidders, which should be in line with the guidelines given in the Government Order in G.O.Ms.No.23, dated 24.08.2020. The TSC had agreed to have High Security Master made at a Resolution upto 1,20,000 DPI under the Holographic features. The non-holographic features were also discussed, which included Hidden Text on Colour Change Background, which has got three features : (i) a stripe of design transferred, but not laminated, on the top of the hologram with visual holographic designs on top layer ; (ii) hidden texts/images encrypted on second layer on different colour background ; and (iii) the hidden colour should change at every 45° (45 degree) angle. This hidden text "Tamil Nadu Excise" shall be visible only through a special Polaroid Identifier.

2.4. There was a third meeting held on 23.09.2020, in which, the TSC wanted to introduce certain eligibility criteria in the commercial bid, in addition to the existing criteria, so as to enhance the security features, better participation and to restrict fly-by-night operators and decided to recommend only

those suppliers having adequate experience in the production and supply only to Excise Departments, i.e., the supplier should have been continuously doing business activities in the same field for the past 8 to 10 years. Therefore, the TSC included the clause "that the bidder should possess experience in each and every Holographic and non-holographic feature which are to be part of technical specification and product specification."

2.5. The fourth meeting was held on 24.09.2020, in which, the draft tender document prepared based on the inputs given by the TSC on technical specification, product specification, eligibility criteria and general terms and conditions was approved. The petitioners contend that the said minutes of the meeting of the TSC were not in the public domain and they were not privy to the deliberations of the said Committee.

2.6. The impugned Notice Inviting Tender (in short, "NIT") was issued on 01.10.2020 with various technical specifications and eligibility criteria. There was a pre-bid meeting on 08.10.2020, wherein, the petitioners conveyed their objections and concerns highlighting the wider participation, as mandated by G.O.Ms.No.23, dated 24.08.2020 and also the arbitrary conditions in the tender notice. Though it was stated that the objections will be considered, the second respondent did not provide any specific reply to the objections.

2.7. According to the petitioners, there were numerous deviations in the impugned tender, which have been introduced for the first time only to ensure that the competitive bidders as that of the petitioners herein are prevented from participating in the tender process.

2.8. On the above broad grounds, the said NIT dated 01.10.2020 is challenged by the petitioners. In fact, the primary concern of certain bidders is that unless they are Companies registered under the Companies Act, 1956/2013, they may not be eligible to participate in the tender, as it specifically prohibited partnership firms and others from taking part in the tender.

3. When a similar question came up for consideration in W.A.Nos.509 of 2016, etc. batch, wherein, the petitioner in W.P.No.15156 of 2020 was a party, a Division Bench of this Court, in the judgment dated 01.12.2016, held thus,

"24. As regards the condition that the bidder should be a company, the second respondent after analysing various advantages and disadvantages of the firm and the company, and in view of the fact that the company could not be closed all of a sudden and that element of uncertainty exists in the case of a firm,

decided that the bidder should be a company, instead of firm. Even in the State of Maharashtra, the condition that bidder should be a company registered under the Companies Act was imposed in the tender floated in 2016."

4. The next ground was that there should have been eight years of experience of the bidders in the field of manufacture of security holograms and they should have supplied, at least, Rs.20 Crores full polyester based security hologram labels to any State Excise Departments during any one of the last three Financial Years and the bidders also should submit a satisfactory performance certificate from competent authority or the end-user. It is contended by the petitioners that thus, the specific supply only to the Excise Department would enable only the fourth and fifth respondents to get qualified. It is pointed out that as per Clause 4.6 in Part 4 of the impugned tender notification it is not that the bidder should have supplied the holograms with same technical features with all the requirements to any Department, but only to any of the State Excise Departments previously will be eligible to submit the technical bid. The tender document has borrowed the technical specifications from the tender floated in Madhya Pradesh, Jammu and Kashmir, Chhattisgarh and Uttarakhand and hence, only successful awardees in those States would be eligible under the impugned tender notification, which would indicate only, the fourth and fifth respondents alone can participate in the impugned tender. In the States above-mentioned only this particular group of companies had won the tenders. Therefore, the petitioners had requested the authorities to cross-check the said aspect.

5. The petitioners also had sought for clarification on the technical aspect of the "holograms". The clarification was issued on 08.10.2020 in this regard, which reads as follows :

"..... From the documents received from the prospective bidders, this department felt that many of the prospective bidders won't be having all the three master origination facilities. Also, it is important to note by not restricting the mastering technique to any feature there will be improvement in the quality of hologram. Keeping this in mind and to give scope for maximum inclusion of the participants, this department accepted the holographic specification to have a hologram prepared by using mastering features and non-mastering features that could not be counterfeited.

It is also clarified that enough care has been taken to ensure the security of the hologram and the techniques involved in manufacture of such hologram

keeping in mind the larger consequences of Government revenue and the public interest at large."

6. A further clarification was also sought for by the bidders on the feature "Hidden Text on Colour Change Background", which is polarized covert image applied on a reflecting layer. It was specifically pointed out that this 'Unigram' is based on the patented technology of creation of polarized latent images. In the clarification issued by the respondents, it is stated that the same feature was insisted by the Excise Departments in many States as well as Public Sector Undertakings and that quite a few companies have supplied security labels with the inclusion of this feature to State Excise Departments as well as Public Sector Undertakings such as IRCTC, etc.,.

7. However, Mr.P.S.Raman, learned Senior Counsel for the petitioners, contended that in those tenders, which have been pointed out by the official respondents, the fourth and fifth respondents were the qualified bidders. Besides fourth and fifth respondents, Prizm Holography and Security Films Private Limited, Shriram Veritech Solutions Private Limited and Holostik India Limited had supplied holograms only for IRCTC and not to Excise Department. It is alleged that the official respondents also did not want to step into the patent infringement issue, as it is within the domain of the supplier and clarified that in the event of any claim regards infringement of patent rights, it shall be the responsibility of the successful bidder to resolve the same, failing which, he would be blacklisted.

8. From the foregoing facts, the grievance of the petitioners in common is that the hidden texts, technical feature in Part 3 along with new requirement under Clause 4.6(c) in Part 4 have been introduced for the first time in Tamil Nadu and were not the subject matter of the previous litigation in 2015. As mentioned supra, as per G.O.Ms.No.23, there should be a wider participation by the bidders, but the technical specifications and the features required in the tender document are patented one, which are available only with the fourth and fifth respondents, who would alone become eligible to submit the technical bids. Despite the fact that prospective bidders raised objections by bringing to the knowledge of the Tendering Authority, the Authorities have not changed their approach leaving only two eligible bidders, who can qualify. The petitioners also attempted to demonstrate that the fourth and fifth respondents are more or less same entity, as the fourth respondent had subscribed and purchased 95.98% of paid up share capital of the fifth respondent and invested about Rs.152.5 Crores in the Financial Year 2019-2020, as Preferential Share

Capital, as per the Annual Returns filed by the fourth respondent.

9. It is further pointed out by the learned counsel for the petitioner that in August, 2020, a tender was floated in the State of Assam for the supply of hologram excise labels with the exact same hidden text feature, wherein the 4th and 5th respondents herein alone had emerged as qualified bidders and serious objections were raised by the prospective bidders in that tender as well. Despite the said fact had been brought to the notice of the second respondent during the pre-bid meeting on 08.10.2020 and also in the subsequent meetings, the purpose of participation had been lost sight of by the respondents.

10. It was mainly contended that the technical specifications of hidden text on colour change background as found in the impugned tender being a patented technology, the usage of the same by the petitioners, would amount to infringement. Hence the tender has crippled the participation of the petitioners. It is pointedly argued by the learned senior counsel that only the 4th and 5th respondents had secured the contracts in the list of eight instances pointed out by the second respondent where the said technical features were required. In short, according to the petitioner, no prospective bidder can satisfy the eligibility criteria in the tender, as the technical requirements can be satisfied only by the 4th and 5th respondents.

11. Mr.A.R.L.Sundaresan, learned senior counsel appearing on behalf of Mr.Sandeep Bagmar, counsel on record for the petitioner in W.P. Nos.15156 and 16526 of 2020 submitted that the impugned tender prejudiced the public interest, as the technical specifications disqualified all the prospective bidders except the 4th and 5th respondents in the supply of secured hologram labels for affixing on the liquor bottles. It was further submitted that the objective for wider participation is eliminated by the respondents by their pre-meditated, biased and tailor-made participation. The learned senior counsel also placed his reliance on Michigan Rubber (India) Limited vs. State of Karnataka and others reported in 2012 (8) SCC 216.

12. In response to the various submissions made by the counsels for the petitioners, the learned Additional Advocate General Mr.Arvinth Pandian, pointed out there were several meetings held between the petitioners and the respondents in the tender process. The deliberations, the queries received on the tender conditions from prospective bidders seeking clarification, were under consideration by the third respondent. Before they could be clarified, the petitioners have approached this court challenging the technical specifications and the

general conditions in the tender document on mere apprehension and without awaiting the decision of the third respondent to clarify. It is stated that on 27.10.2020, a clarification note was uploaded in the website of the department and also sent to all the prospective bidders. The third respondent is also said to have issued a Corrigendum to the tender document inter-alia extending last date for the receipt of the tender document to 10.11.2020. The learned Additional Advocate General pointed out that the petitioner in W.P. No.15156 of 2020 had also approached this court in W.P.No.1211 of 2015 challenging the earlier tender process floated for the year 2015-2016 on similar grounds, which was dismissed by this court upholding the tender technical specifications, as not arbitrary or discriminatory. The said order was also confirmed in writ appeal. Therefore, the act of the petitioners is like re-litigating the same issues.

13. According to the learned Additional Advocate General appearing on behalf of the official respondents, the petitioners who have challenged the tender document, do not possess the required qualification, however, they have approached this court with unclean hands. In the absence of any public interest, the tender document is being challenged as a dispute purely inter se between the private parties. It was further submitted by the learned Additional Advocate General that in the meeting of the third respondent held on 02.11.2020 to revisit the technical specifications in the light of the challenges made before this court, it was decided to retain the non-holographic feature of hidden text on colour change background viewable with Polaroid identifier and to include hidden text on colour change background viewable with the film also for wider participation in the tender.

14. The third respondent has further decided to consider permitting the Limited Liability Partnership registered under Limited Liability Partnership Act, 2008. After the above arguments were advanced, the learned Additional Advocate General pointed out that the petitioners had not even participated in the tender by making bids and they have rushed to the court on mere apprehension and therefore sought permission to proceed with the tender and open the bids.

15. The arguments in these writ petitions were completed on 17.12.2020, however, with the consent of the learned counsel for the petitioners, this Court permitted the respondents to accept the bids from the prospective bidders, process the same and to submit a report on the details of the bidders who qualify the technical specifications of the tender. Pursuant to the said directions, it was stated that bids were accepted till 2.30 p.m on 24.12.2020 as mentioned in the Corrigendum 5, which was issued on 10.12.2020 and there were only three bidders, namely

Montage Enterprises Pvt. Ltd. (Respondent No.5), Hololive Corporation Industries and Uflex Limited (Respondent No.4). The bids were opened at 3.30 p.m on the same day and the technical specifications and the product specifications of the sample of each of the bidders was evaluated by the Technical Scrutiny and Finalization Committee. During the evaluation, the samples were compared by the Committee with the art work already submitted by the bidders. The Committee's observations were recorded in the checklist, which was prepared for evaluation, containing all the specifications as required in the tender document.

16. After the above exercise was completed, the Committee had concluded that the three bidders participated in the tender satisfies all the technical and product specifications mentioned in part 3 of the tender document. The learned Additional Advocate General submitted a report of the second respondent dated 24.12.2020 in Lr No.P&E 10(3)/3088/2020 in this regard.

17. The uniform argument of all the petitioners was that the very first meeting of the TSC (Technical Specification Committee) held on 09.09.2020, suggestions were received from 12 prospective bidders and it was decided that the committee would re-convene on 16.09.2020 to study the suggestions and prepare technical specifications that are generic in nature and available with at least not less than three bidders. Admittedly, there are three bidders qualified in the technical bids.

18. As held supra, the bidders have rushed to this court even without submitted their bids, fearing non-qualification, challenged the tender document. However, the report filed by the second respondent dated 24.12.2020 shows that three bidders had qualified the technical and product specifications. No doubt, as apprehended by the petitioners, the 4th and 5th respondents are successful, however, there is one more bidder, who had also emerged successful satisfying the specifications and the guidelines of the Committee, to have not less than three bidders having the technical qualification.

19. In the light of the above report filed by the second respondent, without harping on the above submissions, it is to be stated that the petitioners, who have not even submitted their bids for the tender, cannot sustain their objections and the writ petitions have to be dismissed.

20. Accordingly, the above writ petitions are dismissed. However, there shall be no order as to cost. Consequently, the connected writ miscellaneous petitions are closed.

-s/d-
Assistant Registrar

True Copy

Sub-Assistant Registrar

gg/asr
To

1. The Secretary,
Prohibition and Excise Department,
Government of Tamil Nadu
Secretariat, Fort St. George,
Chennai-600 009.
2. The Commissioner of Prohibition and Excise,
Government of Tamil Nadu,
Ezhilagam, Chepauk,
Chennai-600 005.
3. The Tender Scrutiny Committee,
O/o.The Commissioner of Prohibition and Excise,
Ezhilagam, Chepauk,
Chennai-600 005.

+1 cc to M/s.A.R.Ramanathan Advocate sr7627
+3 ccs to M/s.A.Sam Arul Prasath Advocate sr8322
+2 ccs to M/s.Sandeep Bagmar Advocate sr7626,7628
+1 ccs to M/s.Dwarakesh Prabhakaran Advocate sr7625

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