(2013) 10 SIK CK 0002

Sikkim High Court

Case No: WP (C) No. 27 of 2013

M/s. Uflex Limited		APPELLANT
	Vs	
State of Sikkim and M/s. Holoflex Limited		RESPONDENT

Date of Decision: Oct. 28, 2013

Citation: AIR 2014 Sikk 1 : (2014) 3 BC 224

Hon'ble Judges: S.P. Wangdi, J

Bench: Single Bench

Advocate: Jorgay Namka and Ms. Chenga Doma Bhutia, for the Appellant; J.B. Pradhan, Additional Advocate General, Mr. Karma Thinlay, Senior Government Advocate, Mr. S.K. Chettri, Assistant Government Advocate for Respondent Nos. 1 and 2 and Mr. S.K. Datta and Mr. D.K. Siwakoti, Advocates, for the Respondent

Final Decision: Dismissed

Judgement

S.P. Wangdi, J.

In this Writ Petition the Petitioner seeks to assail the tender process in respect of supply of security holograms to the Excise (Abkari) Department, Government of Sikkim in which the bid of the Respondent No. 3 had been accepted resulting in issuance of letter No. 387(7) Ex/Abk dated 07-08-2013 informing all distilleries in the State that they were to procure their requirements of security holograms from the said Respondent. The Petitioner is a registered Company under the Companies Act, 1956, having its registered Office at 305, 3rd Floor, Bhanot Corner, Pamposh Enclave, GK-I, New Delhi, with its manufacturing unit established at Noida, UP. The Petitioner produces high security holograms and is engaged in the business of sale of security holograms, holographic films, etc., and supply such materials to various State Governments including Uttar Pradesh, Meghalaya, Rajasthan and Sikkim. It is stated that in order to ensure that the Government did not suffer revenue loss by sale of duplicate alcoholic produce, the Respondent No. 1 decided to affix security holograms on bottles and cans containing alcoholic liquor and for the first time floated Notice Inviting Tender (in short the "NIT") in

the year 2010 in which the Petitioner having successfully bided was awarded with the work for supply of the security holograms for the full term of three years except for certain impediment that was faced by the Petitioner at the initial stage of the supply which also involved a round of litigation before this Court in WP(C) No. 33 of 2011. The period of contract was successfully completed by the Petitioner.

(i) For the next term of such supply, NIT was published on 24-05-2013 both in the newspaper and also in the Government website for wide circulation. The tender notice so published set out the terms and conditions in detail and called upon the bidders to submit their sealed tenders before the Respondent No. 2 on or before 3 p.m. of 15-06-2013. The Petitioner who had earlier successfully supplied security holograms to the Respondent No. 1, also submitted its technical as well as price bids in separate sealed envelopes as required under the terms of the NIT. The technical bids of six tenderers including that of the Petitioner was opened by the Respondent No. 2 on 17-06-2013 at about 3 p.m. in their presence who were also informed that physical verification of the factory premises of only those who qualified in the technical bid would be carried out by the Department as per Clause 19 of the NIT in order to ascertain their technical capability.

(ii) It is the case of the Petitioner that a factory visit was a mandatory requirement as would appear on a conjoint reading of Clauses 1 and 19 of the NIT, for the purpose of evaluation of the technical bids in order to decide the eligibility of the bidders and that it was only after such evaluation that the price bids would be opened. The Petitioner alleges that this procedure was not followed and that it was only later that the Company got to know that the Respondent No. 2 had visited the premises of Respondent No. 3 on 26-07-2013 and 27-07-2013. It is alleged that the entire process was a sham carried out with the ulterior motive to grant the work to the Respondent No. 3. It is further alleged that the action of the Respondents No. 1 and 2 demonstrated that the entire process was pre-meditated, pre-determined and carried out only as an eye-wash and tailor-made to favour Respondent No. 3. The tender process was carried out by the Respondents No. 1 and 2 in a surreptitious manner as the list of qualified bidders was neither put up on the Notice Board nor uploaded on the website of the Department nor did the Department notify result of the technical bid before the financial bid was opened.

(iii) By referring to a letter dated 03-06-2013 written by a prospective bidder, M/s. Montage Enterprises Private Limited, Malanpur, Bhind, MP, addressed to the Department, it is stated that objections concerning the tender process had been raised with the Respondents No. 1 and 2 bringing to their notice the mala fides of the tender process and the unreasonableness and conflicting provisions contained in Clauses 13 and 14 of the NIT. The Petitioner further goes on to allege that the 10 years'' experience stipulated for supply of polyester based holograms was deliberately stipulated to curtail competition with the collateral purpose of favouring the Respondent No. 3. It is alleged that when the result of the technical bid was not announced, the Petitioner by letter dated 12-08-2013 addressed to the Respondent No. 2, duly received by them on 13-08-2013, enquired on the outcome of the technical bid submitted by the Petitioner. When there was

no response to this, the Petitioner opted for the RTI route by an application dated 14-08-2013 under that Act followed by letter dated 16-08-2013 addressed to the Respondent No. 2 seeking for the information. Ultimately, on 24-08-2013 the Petitioner received a letter by fax from the Respondent No. 2 informing that as the agreement dated 05-07-2010 entered between the Respondent No. 1 and the Petitioner had expired, the Petitioner should wind up its business. It is alleged that the Respondent No. 3 neither had the experience nor possessed the mastering systems as stipulated in the NIT but despite this the work was awarded to the Respondent No. 3 ignoring the other bidders including the Petitioner. It is thus submitted that the entire tender process is tainted with arbitrariness, illegality, an abuse of the process of law and violative of the principles of natural justice and, therefore, liable to be quashed.

2. The State-Respondents and the Respondent No. 3 have contested the case by filing separate counter-affidavits.

3. The principle ground of objections raised on behalf of these Respondents in their counter-affidavits is that the Petitioner did not possess the requisite eligibility criteria stipulated for the technical bid. It is stated on behalf of the State-Respondents that in response to the NIT six Companies had bided including the Petitioner and on 17-06-2013 when the technical bids were opened, representatives of all the bidding Companies were present before the Tender Committee. After that the bids were signed by the Members of the Tender Committee and the representatives of all the tenderers. The representatives were informed that only those bidders who satisfied the terms and conditions of the technical bids would be informed about their being qualified for the financial bid and that the premises of only the successful bidders would be inspected for verification as per Clause 19 of the NIT. That on the scrutiny of the technical bid submitted by the Petitioner-Company it was found that it did not fulfil the criteria stipulated under Clause 14 of the NIT. This fact was apparent from the very documents submitted by the Petitioner along with the technical bid. Of the six bids received in response to the NIT, only that of the Respondent No. 3, namely, M/s. Holoflex Limited, was found valid as it fulfilled all the terms and conditions of the NIT and, therefore, qualified for the next round of the financial bid. Although Clause 9.6 of the General Conditions of Contract provided in the Sikkim Public Works Manual, 1999, prescribed that at least three valid participants or tenderers in each tender was required to be considered but that very Clause also vests the Head of the Department with the discretion to accept or reject the tenders in the event of there being less than three tenderers. The Tender Committee forwarded the case of the Respondent No. 3 under this Clause with recommendations for its acceptance and the Government after due consideration accepted the recommendation and awarded the work to the said Respondent. As per the State-Respondents the tender process was fair, reasonable and transparent and that the technical bid of the Petitioner was rejected as a natural course for failing to meet the eligibility criteria prescribed under the NIT.

4. The Respondent No. 3, apart from reiterating the preliminary objections raised on behalf of the State-Respondents that the Petitioner was not qualified having failed to meet

the eligibility criteria, has averred that after its bid was accepted under the terms and conditions contained in the letter dated 01-08-2013 issued by the State-Respondents, substantial investments have been made by the Company and the manufacturing process of the security holograms has reached an advanced stage. We may reproduce below the relevant portion of the affidavit filed on behalf of the Respondent No. 3:-

p) The Department of Excise, Government of Sikkim had then entered into a contract with the respondent no. 3 on 01-08-2013 for supply of holograms at the rate of Rs. 0.295 per hologram for the next three (3) years with effect from 07-08-2013.

A copy of the contract dated 01-08-2013 is annexed hereto and marked as Annexure "R-3".

q) By the letter No. 387(7) Ex/Abk dated 07-08-2013 issued by the Department of Excise, Government of Sikkim, impugned in the said petition, the liquor manufacturers in the State of Sikkim were informed of the contract awarded to the respondent no. 3 herein. The liquor manufacturers in the State of Sikkim were requested to procure their requirement of security hologram from the respondent no. 3 on and from 07-08-2013.

A copy of the said letter dated 07-08-2013 is annexed hereto and marked as Annexure "R-4".

r) Acting upon the contract so awarded on 01-08-2013, the respondent no. 3 vide Challan No. HL/1301/2013-14 dated 30-08-2013 supplied 10,00,000 pieces of holograms to M/s. Overall Traders which received the same on 02-09-2013. By another Challan No. HL/1335/2013-14 dated 04-09-2013, 5,00,000 pieces of holograms were supplied by the respondent no. 3 to M/s. Kanchenjangha Distilleries & Liquors which had received the consignment on 11-09-2013. The contract awarded on 01-08-2013 was acted upon by the Excise Department, Govt. of Sikkim since its nominated manufacturers had accepted the consignments supplied by the respondent No. 3. The office order dated 07-08-2013 was acted upon by the respondent no. 3, by supplying the holograms to M/s. Overall Traders and M/s. Kanchenjangha Distilleries & Liquors, being the manufacturers who have procured the same from the respondent no. 3 entitling the Government of Sikkim to realize the administrative charge of 0.10 paise per hologram.

Copies of the challans dated 30-08-2013 and 04-09-2013 are annexed hereto and marked as Annexure "R-5" collectively.

s) The writ petition was filed on 30-08-2013.

5. Before entering into the merits of the case, it is relevant to note that when the matter was taken up for the first time on 04-09-2013 this Court upon consideration of the submission made on behalf of the Petitioner, had directed that the parties should maintain status quo as on that date until 03-10-2013 when the matter would be taken up. On 03-10-2013, the Respondents urged that the question of stay should be taken up and

heard on that very day. While the State-Respondents had filed its counter-affidavit along with an application for vacation of the Order dated 04-09-2013, nothing had come on record on behalf of the Respondent No. 3. Considering the urgency expressed by the parties, the case was listed on 07-10-2013 for hearing on the stay application granting liberty to the Respondent No. 3 to file an application, if so advised. On 07-10-2013, the Respondent No. 3 filed a reply to the stay application. However, since the question involved in the case was quite limited and that necessary pleadings were complete, it was agreed by all that the Writ Petition could be heard finally on that day. The parties were accordingly heard on the merits of the case for its final disposal.

6. Mr. Jorgay Namka, Learned Counsel, appearing for the Petitioner, most strenuously argued to impress upon this Court on the illegality of the tender conditions, the tender process and the mala fide on the part of the State-Respondents in rejecting the Petitioner''s bid. He would argue that the terms and conditions of the NIT was unreasonable and was tailor-made to suit the Respondent No. 3. Letter dated 03-06-2013 submitted by M/s. Montage Enterprises Private Limited, Malanpur, Bhind, MP, was placed before this Court as Annexure P3 to indicate the unreasonableness of the tender conditions. He then submitted that the Petitioner had fulfilled all the requisite criteria as prescribed under the NIT, a fact which would be evident from him being awarded the very work for the earlier term. It was submitted that after the technical bid was opened the names of the successful bidders were not published in spite of repeated requests made both orally and writing and it was only later that he got to learn that the Respondent No. 3 had been awarded the work. The mala fide on the part of the State-Respondents was traced to the earlier contract of supply in terms of the agreement dated 05-07-2010 with the State-Respondents which was said to have been terminated arbitrarily leading the Petitioner to file WP(C) No. 33 of 2011. The supply order was restored in favour of the Petitioner only after this Court had allowed the Writ Petition by Order dated 28-07-2011. It is submitted that a conjoint reading of Clauses 1 and 19 of the NIT required mandatory visit of the factory premises of all the bidders for proper evaluation of the technical bids so as to enable the Tender Committee to decide on the eligibility of the bidders. This mandatory condition was violated by the Respondent No. 2 who chose to visit only the factory premises of the Respondent No. 3 on 26-07-2013 and 27-07-2013 rendering the entire technical evaluation process a sham and, therefore, liable to be quashed as prayed for in the Writ Petition.

7(i). Mr. J.B. Pradhan, Learned Additional Advocate General, on the other hand, as a preliminary objection, submitted that the Writ Petition was not maintainable at the behest of a person who did not qualify to participate in the tender process. As per him Clause 14 of the NIT stipulates that at least five years'' experience was required in three technologies involved in the hologram manufacture, namely, (i) shooting a multiple technology combination master comprising high security Dot Matrix Origination of at least 6000 DPI or more, (ii) 2D/3D origination system and (iii) Lithographic origination head capable of shooting images of a resolution of up to 120000 DPI. The Petitioner did not

fulfil these criteria as was apparent from the very documents filed by it. From the commercial invoices submitted by the Petitioner it was apparent that Dot Matrix lab was purchased by the Petitioner on 26-09-2003, another lab was purchased in the year 2004, comprehensive mastering system was purchased on 20-12-2010 and the supply of 2D/3D master lab was made only on 10-08-2010. These documents filed as Annexures R1 to R5 to the counter-affidavit on behalf of the Respondents No. 1 and 2, clearly indicated that the Petitioner-Company did not fulfil the criteria stipulated in Clause 14 of NIT. This, therefore, led to the Petitioner''s bid being rejected by the Tender Committee.

(ii) The Bid of the Respondent No. 3 was found to be the only one which was valid and was, therefore, forwarded to the Government with the recommendation for its acceptance as per Clause 9.6 of the General Conditions of Contract as contained in the Sikkim Public Works Manual, 2009. It was submitted that pursuant to the approval of the Government the work was allotted to the Respondent No. 3 under the terms and conditions as contained in letter dated 01-08-2013. The Respondent No. 3 has thereafter acted upon the letter and has commenced with the work of supplying security holograms to the Respondents No. 1 and 2 for its use.

(iii) On the question of non-fulfilment of Clause 19 which prescribed physical verification to be carried out of the manufacturing premises as alleged by the Petitioner, it was submitted that the provision was not mandatory which was apparent from the very term "may" appearing in that Clause. In any case, as per Mr. Pradhan, verification of the premises of only those tenderers who were successful in the technical bid would be carried out. This fact had been brought to the notice of the bidders at the time when technical bids were being opened.

8. Mr. S.K. Datta, Learned Advocate, appearing for the Respondent No. 3, in his submission has reiterated the stand of the State Government and further has placed before us the extent of investments made and the progress made in the works in terms of the agreement dated 01-08-2013.

9(i). Upon consideration of the pleadings and the submissions made on behalf of the parties, I find that the question for determination in this case is very short. The Writ Petition can be disposed of on the sole question as to whether the Petitioner was at all eligible for the financial bid. For this purpose relevant Clauses of NIT to be considered are as follows:-

12. The Tenderer must have at least ten years of experience of manufacturing and supply of polyester based security Holograms.

13. EXPERIENCE - The Tenderer should have three origination systems:

a. Dot Matrix origination system of 6000 DPI or more

b. 2D/3D origination system

c. Lithographic origination head capable of shooting images of a resolution of upto 1,20,000 DPI

14. The tenderer must have atleast five years of experience in shooting a multiple technology combination master comprising high security Dot Matrix Origination of atleast 6000 DPI or more and 2D/3D origination. In order to maximize the security of the hologram all the three Origination Technology - Dot Matrix origination system of 6000 DPI or more, 2D/3D origination system and Lithographic origination head capable of shooting images of a resolution of upto 120000 DPI - must be used in creation of the hologram master.

19. The Department may carry out physical verification of the manufacturing premises to ascertain technical capability of the tenderer, facilities available and manufacturing capacity as part of technical evaluation to decide the eligibility of tenderer. During such visits all the machines, processes and other inter-mediatory process must be in working and running conditions.

(ii) On a perusal of the certificates issued by the various State Governments placed before this Court during the course of the arguments, Clause 12 of the NIT appears to have been satisfied by the Petitioner-Company as it does not stipulate the requirements as contained in the subsequent Clauses of the NIT. However, Clauses 13 and 14 that follow, in my view, stand out as causing serious impediments for the Petitioner. While Clause 13 obviously requires that the tenderer should have the three origination systems as indicated in the Sub-Clauses (a), (b) and (c) thereunder, Clause 14 stipulates that the tenderers should have at least five years" experience in those three systems. On examination of the documents Annexures R1 to R5 submitted by the Petitioner along with tender documents it is found that although different equipments were purchased on different dates, namely, 26-09-2003, 2004, 20-12-2010 and 10-08-2010, indicating that the systems stipulated in Sub-Clauses (a), (b) and (c) under Clause 13 were in place with the Petitioner, it certainly did not have the five years" experience in the use of those origination systems since the last two equipments were put in place only on 20-12-2010 and 10-08-2010 as revealed from the commercial invoices Annexures R4 and R5. It is, therefore, clear that the Petitioner failed to fulfil the eligibility criteria under Clause 14 of the NIT. For this very reason, therefore, the Petitioner could not have made a grievance out of his bid being rejected.

(iii) There is another aspect of the matter which requires consideration which, in my view, is quite vital for the purpose of disposal of this Writ Petition. The Petitioner has obviously suppressed documents Annexures R1 to R5 having withheld those from the Writ Petition. Had those been filed, the Order dated 04-09-2013 directing the parties to maintain status quo may not have been passed notwithstanding the fact that different consideration may also have been applied in the Petitioner"s favour under such circumstance. But the Petitioner rather chose to be grossly unfair and dishonest in his approach by withholding those and, therefore, undeserving of the discretionary relief. The Writ Petition, therefore,

deserves to be dismissed on this account also.

(iv) The matter gets worse confounded for the Petitioner when it chose to bid for the tender even when it was fully aware that it was not eligible. It is an admitted position that the Petitioner was aware of the terms and conditions of the NIT having been published in the newspaper and also uploaded in the Government website. This would be apparent from paragraphs 9 and 10 of the Writ Petition which we may reproduce below for convenience:

9. That the Respondent No. 1 on 24.05.2013 issued Notice inviting Tender bearing No. 162 Ex (Abk), which specifically stated that "Sealed Tenders are invited from qualified reputed manufacturer of Security hologram for supply of security hologram to the Excise (Abk) Department, Government of Sikkim. For details and subsequent communication please log on to www.sikkim.gov.in".

A copy of the Notice inviting Tender dated 24.05.2013 bearing No. 162 Ex (Abk) along with detailed the terms and conditions is annexed hereto and marked as Annexure-P2.

10. That the above said Tender Notice signed by which contained detailed terms and conditions called upon the bidders to submit sealed tenders/bids before Respondent No. 2 on or before 3:00 PM on 15.06.2013.

(v) Despite this the Petitioner chose to bid in the tender. Even after that on the day when the technical bid was opened all the tenderers including the Petitioner had been informed that the financial bids would be opened only of those tenderers who were successful in the technical bid and that the verification of the factory premises of only the successful bidders would be carried out in terms of Clause 19 of the NIT. This position stands admitted on the part of the Petitioner even during the course of arguments and, therefore, the plea to the contrary taken by him, in my view, is an afterthought and made only for the purpose of the Writ Petition.

(vi) In so far as the question of unreasonableness of the tender conditions raised by the Petitioner is concerned this Court is of the view that after having participated in the tender process it is not permissible for it to raise such objections. The principles of waiver and acquiescence would certainly get attracted which prohibits the Petitioner from raising such plea. Moreover, as held in Tata Cellular Vs. Union of India, "the terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract".

(vii) The allegation of mala fide also does not appear to hold any water as the rigors of the burden of proof of such allegation do not appear to have been satisfactorily discharged. Vague allegations of mala fide cannot be held against the Respondents. This is a settled position of law.

10. For all these reasons, the Petitioner is not entitled to any of the reliefs sought for in the Writ Petition.

11. In the result, the Writ Petition is dismissed. No order as to costs.