

TEHRI HYDRO DEVELOPMENT CORPORATION

v.

ALSTOM HYDRO FRANCE & ANR.

(Civil Appeal No. 2761 of 2010)

MARCH 26, 2010

**[V.S. SIRPURKAR AND DR. MUKUNDKAM
SHARMA, JJ.]**

Tenders:

Tehri Hydro Development Corporation – Inviting tenders – Acceptance of bid challenged in writ petition before High Court – Direction by High Court for inviting fresh bids – Challenged before Supreme Court – Corporation directed to invite fresh bids and process the matter accordingly – Objections filed – Panel of Experts appointed to examine objections – Objections raised to report submitted by Panel of Experts – HELD: A very important project like the instant one is being held up in a legal battle between two multinational companies – Contractual rights of these companies are not more important than national interest – In the interest of the project, the Panel of Experts shall give a fresh report after giving one more final opportunity of hearing to the parties – The Corporation would then, without loss of time, take the decision regarding the award of contract, considering the report of the Panel of Experts – Once the fresh bids were allowed to be given, the old controversies before the High Court would naturally become extinct and nothing survives in the appeals arising out of its decision – The exercise of bidding before the Supreme Court was ordered with the sole objective of saving time and to give the transparency to the whole exercise – It is not for this Court to award the contracts by accepting or rejecting the tender bids – It is exclusively for the Corporation to do that – Hydro-Electric Projects.

A CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2761 of 2010.

From the Judgment & Order dated 29.6.2009 of the High Court of Uttarakhand at Nainital in W.P. No. 167 of 2009.

B WITH

SLP(C) No.19890 of 2009

T.C. (C) No. 33 of 2009.

C G.E. Vahanvati, AG, F.S. Nariman, A. Sharan, Harish Salve, Dr. A.M. Singhvi, Pratap, Venugopal, Surekha Raman, Dileep Poolakkot, Purushottam Kumar Jha (for K.J. John & Co.) Jai Munim, Gursharan, Anuradha Bindra, J.N. Patel, Amit Anand Tiwari, Abhinav Mukerji, Shiv Prakash Pandey for the
D appearing parties.

The Order of the Court was delivered by

ORDER

E **V.S. SIRPURKAR, J.** 1. Leave granted in SLP (C) Nos.15779 and 19890 of 2009.

F 2. These appeals emanate out of the order passed by the learned Single Judge of Uttaranchal High Court. On 31st August, 2007, the appellant herein invited bids for turn-key execution of the Tehri Pump Storage Plant, Phase-II. After the pre-bid conference and amendments four pre-qualification bids were submitted on 29th December, 2007 by respondent no.1 – Alstom Hydro France, Patel Engineering, Sumitomo Corporation, Japan and Voith Seimens as leaders of their
G respective consortia. Initially respondents 1 and 2 along with Sumitomo Corporation, Japan were qualified, however, subsequently the bid of Sumitomo Corporation was declined as non-responsive. Thus there were two parties in the fray, they being respondents 1 and 2 herein. These two gave two price
H options. However, respondent no.1 filed a Writ Petition being

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W.P. No.167 of 2009 in the Uttarakhand High Court on two grounds, namely, (a) that respondent no.2 was not technically qualified; (b) that respondent no.2 had submitted two price bids which was in contravention of the terms and conditions of the ITB. The High Court by its final judgment came to the conclusion that the respondent no.2 was qualified. It was further held that there was no violation of terms and conditions of ITB. However, the learned Single Judge passed the following order by way of final directions:

“Consequently this Court holds as follows:

The qualifications of respondent no.2 for having done the work of ‘erection’ at Ghangzhou II seems to be in order as this court holds ‘supervision of erection’ as equivalent to that of ‘erection’ and rejects the arguments of petitioner on the eligibility of respondent no.2. Further, under the facts of this case, if two price bids had been invited by the employer – one as an assignee and the other as a partner, then again there is nothing wrong in such an approach and if consequent to it two price bids have been given by respondent no.2- one as an assignee and the other as a partner, it is in order and will not be called as a non-responsive bid. However, since the process of calling two bids is flawed for lack of clarity, the benefit has to be given to the petitioner, for the reasons already stated above. Hence, it is directed that respondent no.1 must ask for fresh bids from the petitioner as well as respondent no.2.”

Being aggrieved the appellant herein filed the present appeals.

3. As it appears from the appeal filed by Tehri Hydro Development Corporation, the appellant assails the direction of the learned Single Judge to issue fresh bids as it was bound to further delay the project which was already delayed for six months only because of the pending proceedings. A contention was also raised that the fresh bidding was directed without

- A offering any protection to the appellant herein against cartelization. It was, therefore, apprehended that the two multinational corporations, they being respondents 1 and 2 in the appeal filed by Tehri Hydro, as leaders of the Consortia could possibly get together and submit revised reduced bids
- B which would not be in the public interest. The criticism by the learned Single Judge in the impugned judgment to the effect that there was no clarity on the issue whether two price bids could be submitted was also assailed on various grounds. It was pointed out that the price options of the respondent no.1
- C were at Rs.2520.60 crores while after discount it was at Rs.2483.80 crores. The price options of the respondent no.2 was at Rs.2327.50 crores as assignee and under Clause 9.4.4(v)(e) as a partner it was Rs.2261.60 crores and thus the respondent no.2 was the lowest bidder. According to the
- D appellant this fact was completely lost sight of by the High Court.

4. Notice was ordered to be issued on 11.9.2009. At that stage itself all the interested parties were being represented through counsel. It was, however, expressed by the learned Attorney General for India that in the national interest of
- E completing the project early, the appellant was not averse to inviting the fresh bids in light of the judgment of the High Court. Accepting that plea, the following order came to be passed:

“Issue Notice.

- F The affidavits shall be exchanged within three weeks from today. Tehri Hydro Development Corporation shall invite fresh bids in the light of the judgment of the High Court. Both Alstom Hydro France and Voith Siemens Hydro
- G Germany shall be entitled to put in their bids. These bids shall be examined by the Tehri Hydro Development Corporation and report shall be submitted to this Court in a sealed cover. Needless to mention, all this shall be done without prejudice to their rights and contentions. All
- H contentions shall be open. We are passing this order deliberately as we are told that a very important project is

held up.

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Put up after six weeks.”

Accordingly fresh bids were invited and the respondents 1 and 2 submitted the same. As ordered in the earlier order two bids were submitted to the Registry of this Court in the sealed covers. Learned Attorney General also offered that the sealed covers could be opened in the office of the Registrar. Accordingly, the bids were directed to be opened on 26.10.2009 at 4.30 p.m. in the office of Registrar (Judicial-I) and copies thereof were directed to be given to the representatives of the respective parties. A Report was submitted thereafter in the sealed covers and vide order dated 4.12.2009, the appellant was directed to process the matter further on the basis of the fresh bids. The appellant, at this stage, also offered to give hearing, if any, to the parties in respect of their objections to the fresh bids.

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5. Before that since it was found that respondent no.2 had impugned the order of the learned Single Judge dated 29.12.2009 by way of an appeal before the Division Bench of the Uttaranchal High Court being Special Appeal No.131 of 2009. That appeal got transferred to this Court.

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6. On 3.12.2009 the respondent no.1 submitted a representation against the exercise of scrutiny by the appellant. It was suggested that the respondent no.1 had no opportunity to review the contents of the Report. Some other objections were also raised insisting that ultimately the Tender should be awarded in favour of the respondent no.1 alone. It seems that all these objections raised by the respondent no.1 were referred to a Panel of Experts on 29.1.2010. A letter to that effect was written to both the respondents by the appellant. It was stated in this letter that the examination report on fresh bids was opened in the Court on 4.12.2009 and since the court had directed the appellant herein to give hearing to the objections raised by the parties, if any, before the final decision and since

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A the copies of the examination report were already supplied and the appellant had received a representation raising objections, in order to maintain the transparency the appellant had constituted a Panel of three experts of national repute and impeccable integrity to examine the objections raised by the Consortium of respondents. This panel of experts comprises of following experts:

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- (i) Shri Ramesh Chandra (Ex-Chairman, CWC)
- (ii) Shri D.V. Khera (Ex-Chairman, CEA)
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- (iii) Shri A.K. Shangle (Ex-Member, CWC)

The objections raised by the first respondent were inquired into by the Panel of Experts. The Panel of Experts framed the following question:

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“Whether the examination report of THDC declaring the bid of the Consortium of M/s.Alstom as non-responsive is OK or the objections raised by the Consortium of M/s.Alstom are justified with reference to the Terms & Conditions of the Tender, Techno-commercial bid submitted in October 2008 and fresh price bid submitted in October, 2009 and their bid can be considered as responsive.”

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The Panel of experts have drawn a conclusion in their report to the following effect:

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“Based upon the views outlined above, POE is of the opinion that fresh price bid of consortium of M/s.Alstom is non-responsive. Their quoted price on partnership basis even though non-responsive is however lower by Rs.84.5 crores (M/s.Voith Rs.21,551,245,304.00 – M/s.Alstom Rs.20,705,840,090.00). Similarly, the quoted price on assignee basis though non-responsive is lower by Rs.108.7 cores (M/s.Voith Rs.22,343,174,985.00 – M/s.Alstom Rs.21,256,007,413.00). The unconditional offer of consortium of M/s.Alstom to take care of THDC

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observation without any extra cost so that bid becomes responsive and in accordance with employers' requirement is not acceptable as this is not permissible under Bidding Document of this Tender." A

7. Ultimately when the matter was heard on 15.2.2010, a copy of the report of the Panel of Experts was handed over to the parties. B

8. When the matter came up on 19.3.2010 Shri Harish Salve, Senior Advocate and Dr.A.M. Singhvi, Senior Advocate appearing for the respondent no.1 urged that the Panel of Experts had not given a fair opportunity to it and that it had merely reiterated what was already done by the appellant. The respondent no.1, however, in order to give quietus to the matter urged as under:- C

"it is agreeable if the Government of India sends for the files and considers all the objections raised by it and Voith and issues appropriate directions to the appellant. Such a power is available with the Government in relation to PSUs in any event. If such an 'administrative review', is conducted, the petitioner (respondent no.1 in the appeal filed by Tehri Hydro) states that it shall not challenge any decision that may be taken in the matter by the Government of India and the matter shall, as far as the petitioner (respondent no.1 in the appeal filed by Tehri Hydro) is concerned, be given a quietus". D
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In short the respondent no.1 whose bid has been found to be non-responsive by the appellant as well as Panel of Experts was prepared to have a final decision from the Government of India. G

9. Learned Attorney General as well as Shri F.S. Nariman, Senior Advocate appearing on behalf of the respondent no.2, however, opposed this plea. It was pointed out by the learned Attorney General that at no point of time the integrity, competence or capability of the members of the Panel of H

A Experts was ever challenged by anybody including the
respondent no.1. The nature of objections raised to the report
is of technical character. Even in its objections the respondent
no.1 has not challenged the bonafides of the Panel of Expert
though during the arguments the possibility of bias was
B expressed though haltingly. Learned Attorney General pointed
out that in case the respondent no.1 has any grievance of not
being heard by the Panel of Experts, the respondent no.1 could
still address the Panel of Experts which could be requested to
give a hearing to the respondent no.1. The Attorney General
C Pointed out that all the grievances, technical or otherwise could
well be raised before the Panel of Experts and for that purpose
a hearing could be given to all the concerned parties on the
basis of the objections raised by them which would atleast put
an end to the controversy.

D 10. The offer given by the Attorney General is undoubtedly
a fair offer. The respondent no.1 has no problem about the
matter being referred to the Government of India. We do not
think that in absence of any allegations/ charges made and
substantiated against the Panel of Experts, it would be proper
E to change the Panel of Experts and to appoint a new Panel of
Experts through the Government of India or some other panel.
There has to a finality somewhere. We are pained to note that
a very important project like the present one is being held up
in a legal battle between the two multinational companies. Till
F today, even the contract has not been finalized. All this would
invariably cause loss to the nation. After all, contractual rights
of these companies are not more important than the national
interest.

G 11. Under the circumstances we order that the Panel of
Experts shall give one more final opportunity to the parties to
be heard and more particularly the respondent no.1 on the
objections that it has raised on the earlier report of Panel of
Experts and give a fresh report in the nature of
recommendations. This exercise should be completed by the
H end of April, 2010. The appellant herein would then, without loss

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of time, take the decision, considering the report of the Panel of Experts regarding the award of contract. A

12. This course would leave nothing to be decided in the pending appeals. Firstly, when the Attorney General for India agreed to invite fresh bids as per the directions of the High Court, there remained nothing in that appeal as the invitation for new bids would straightaway put the clock back and the parties would be back to square one. Secondly, when all the parties agreed to give their fresh bids in pursuance of the offer made by Attorney General for India, there remained nothing in the original controversies. The challenge to the judgment by respondent no.1 in the appeal arising out of SLP 19890 of 2009 would also not survive once both the contesting respondents accepted the proposal to put bids again. Therefore, at this juncture, it is futile to go into the earlier controversies. Even the challenge by respondent no.2 would be of no consequence once the respondent no.2 was given a fresh opportunity for bidding. The exercise of bidding before this Court was ordered with the sole objective of saving time and to give the transparency to the whole exercise. Once the fresh bids were allowed to be given the old controversies before the High Court would naturally become extinct. In our opinion it would be in the interest of the project which has already been dragged by more than a year that the Panel of Experts should be allowed to consider the objections and express their opinion. That opinion shall then be considered by the appellant which would take the final decision on that basis. We must reiterate here that it is not for this Court to award the contracts by accepting or rejecting the tender bids. It is exclusively for the appellant herein to do that. Once all this exercise is over, nothing would remain for us to decide in these appeals. B
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13. In view of the directions passed above both the appeals as well as the Transfer Case No.33/2009 are disposed of.

R.P.

Matters disposed of. H