

A

THDC INDIA LTD.

v.

VOITH HYDRO GMBH CO. AND ANR.

(Civil Appeal No. 2572 of 2011)

B

MARCH 17, 2011

[V.S. SIRPURKAR AND T.S. THAKUR, JJ.]

C

Contract – Tender – Tehri Pump Storage Plant, a project for additional electricity generation – Appellant (THDC), a corporation under the Government of India, handling the project right from August, 2007 – However, tender not finalized due to legal battle between the two bidders, respondent No.1 and respondent No.2 – Respondent no.1 filed writ petition – High Court passed interim order staying the whole tender process – Justifiability – Held: Not justified – Since the whole process was absolutely transparent, there is no scope to stall the whole process by finding fault with the tendering process and insisting that THDC could not invite fresh pricing bids – In inviting the fresh pricing bids, particularly after conveying the deficiencies or non-conformities to both the respondents and making it clear to them, it cannot be said that any change was made in the bidding conditions – There was nothing wrong in THDC treading its course with utmost care – THDC acted in favour of the national interest by trying to prevent the exorbitant prices for the project and further trying to go to the realistic and minimum price – Contractual rights of competing parties like respondent no.1 and respondent no.2 not more important than the national interest – Stay order of High Court set aside – Parties to submit fresh price bids – THDC to accordingly take decision in respect of the grant of contract.

D

E

F

G

The Tehri Pump Storage Plant, a project for additional electricity generation, involved technical issues. The appellant (THDC), a corporation under the Government of India, has been handling the project right from August,

H

THDC INDIA LTD. v. VOITH HYDRO GMBH CO. AND 619
ANR.

2007. However the tender was not finalized due to legal battle between the two bidders, respondent No.1 and respondent No.2. Respondent no.1 filed writ petition. The High Court, by the impugned order, passed an interim order staying the whole tender process. A

Allowing the appeal, the Court B

HELD:1. In an earlier round of litigation, by judgment and order dated 26.3.2010 passed by this Court, this Court had clearly expressed that the contractual rights of the competing parties like Voith GMBH (respondent No. 1) and Alstom (respondent No.2) were not more important than the national interest. If in pursuance of the national interest, which was so explicitly mentioned in this Court's judgment dated 26.3.2010, the THDC by adopting a fair and transparent procedure, provided a level playing field to both the parties to get a proper idea of costs that it would have to pay to the party winning the contract, no complaint could be made of the breach of the contractual rights. [Para 24] [637-A-C] C D

2. Since the whole process was absolutely transparent and since the issues raised by way of the Writ Petition, were not even argued before the Court in the first round, there is no scope to stall the whole process by finding fault with the tendering process and insisting that THDC could not invite the fresh pricing bids. In inviting the fresh pricing bids, particularly after conveying the deficiencies or non-conformities to both the respondents and making it clear to them that they would have to comply with the same as first stage, it cannot be said that any change is being made in the bidding conditions. This Court had left discretion in THDC to take the decision in the light of Panel of Experts' report. The Panel of Experts had gone into the exercise not once but twice. However, the close examination of the second report of the Panel E F G

H

A of Experts would suggest that everything was not alright
even with the bid of Voith GMBH (respondent No.1) and
there were in fact some non-conformities, which were
required to be considered by THDC before a final decision
was taken. There is nothing wrong in that. [Para 23] [636-
B C-F]

3. There is no breach of the contractual rights or the
terms of Instructions to Bidders (ITB). After all, it could
not be said that the rights of the parties were crystallized.
C According to Voith GMBH (respondent No. 1), the
crystallization of the rights was even prior to passing of
the judgment of this Court dated 26.3.2010, as the bid of
Alstom (respondent No.2) was found to be non-
responsive and the only bid which was found to be
responsive was that of Voith GMBH (respondent No. 1).
D Even accepting this, Voith GMBH (respondent No. 1)
could not insist upon the grant of contract in its favour
on that ground alone. In the light of peculiar facts of this
case, it must be stated that even if the bid of Voith GMBH
(respondent No. 1) was found to be responsive, that did
E not end the matter. After all, THDC, which was going to
come out with the huge expenditure running into
thousands of crores of rupees, was bound to safeguard
the national interest. That was the tone of this Court's
judgment dated 26.3.2010 also. Otherwise, this Court
F could have straightaway awarded the contract in favour
of Voith GMBH (respondent No. 1). But that was not
found feasible in national interest. Instead, it was found
proper to give fair opportunities to both the parties and
it was only with that objective that the matters were
G referred to the Panel of Experts. If the facts are viewed
from this angle, then it will be clear that there was nothing
wrong in THDC treading its course with utmost care and
it must be said that the facts show that THDC appears
to have acted in favour of the national interest by trying
H to prevent the exorbitant prices for the project and further

**THDC INDIA LTD. v. VOITH HYDRO GMBH CO. AND 621
ANR.**

trying to go to the realistic and minimum price. That was the spirit of this Court's judgment dated 26.3.2010 too. [Para 24] [637-C-H; 638-A-B] A

3. In that view, it cannot be said that the High Court was right in passing the stay order as it did. This was a clear effort on the part of Voith GMBH (respondent No. 1) to put the spoke and to bring to halt the motion of the process which was ordered by this Court in its judgment dated 26.3.2010. [Para 25] [638-C] B

4. It is only to save the precious time that this Court has entertained the instant appeal and cleared the obstacles in the whole tendering process. The order of the High Court granting stay is set aside. The parties will now proceed to submit their price bids. THDC (appellant) shall take the decision in respect of the grant of the contract thereafter. [Paras 26, 27] [638-D-E] C D

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2572 of 2011.

From the Judgment & Order dated 01.02.2011 of the High Court of Uttaranchal at Nainital in WP No. 212 of 2011. E

G.E. Vahanvati, AG, H. Rawal, ASG, Pratap Venugopal, Purushottam Kumar Jha, Namrata Sood and Anuj Sarma (K.J. John & Co.) for the Appellant. F

Ashok Desai, Shyam Divan and A.M. Singhvi, Jai Munim, Anu Bindra, Amit Anand Tiwari, Ashutosh Jha, Prashant Mehta and Abhinav Mukharji for the Respondents.

The Judgment of the Court was delivered by G

V.S. SIRPURKAR, J. 1. Leave granted.

2. This case is a classic example of the whole nation suffering on account of the fight between two multi-national H

A companies in respect of each other's rights. There is no dispute
 that the Tehri Pump Storage Plant project is of utmost
 importance to the State of Uttarakhand particularly, and to the
 nation generally. Substantial electricity generation is the object
 of that project. It is only with that objective that a dam was
 B constructed on river Bhagirathi involving crores of rupees for
 the construction as also for the rehabilitation of the persons who
 were displaced on account of the construction of dam. Tehri
 Pump Storage Plant is a project within the larger picture of Tehri
 Dam and would prove to be a boon for the additional electricity
 C generation. It is a project involving technical issues. The
 appellant which is a corporation under the Government of India
 has been at this project right from August, 2007. Considering
 the tremendous importance of the project, it has yet not been
 able even to finalize the tender. Three and a half years have
 D rolled by and yet no progress has been made, thanks to the
 legal battles in between the two giants called Voith GMBH
 (respondent No.1) and Alstom (respondent No.2).

3. It is not for the first time that this Court has to deal with
 the matter. Even about a year back, this Court was required to
 E deal with the matter extensively and while dealing with the
 matter, the Court, in its order dated 26.3.2010 observed:

F "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 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 4. In spite of these observations, we are extremely sorry
 to note that the matter has not reached its finality as yet and,
 therefore, we are constrained to interfere against an interim
 order passed by the High Court. The issue of national interest
 is our prime concern, the importance of which cannot be
 H undermined.

THDC INDIA LTD. v. VOITH HYDRO GMBH CO. AND 623
ANR. [V.S. SIRPURKAR, J.]

5. Before we take up the issue for consideration, a short resume regarding the progress (?) would be worth seeing. The notice inviting tender on the prime turn-key execution was issued on 31.8.2007. Bids were received on 29.12.2007 in all from four companies, the respondents being a part of them. After opening the pre-qualification bids, two of the tendering parties were found to be dis-qualified leaving only the two respondents in the fray. On 15.1.2009, financial bids were opened in respect of the offers made by the two respondents. Obviously, on the basis of the fact that offers of the two respondents were found to be responsive, respondent No.2 approached the Court by way of a writ petition challenging the validity of the two bids submitted by respondent No.1. The High Court of Uttarakhand issued a stay order and ultimately on 29.6.2009 though it held that the objection raised by respondent No.2 against respondent No.1 regarding its lack of experience was not valid, the bidding documents themselves were not clear as to the manner in which the bids were to be made. It, therefore, directed the appellant to invite fresh bids. Special Leave Petition No.15779 of 2009 came to be filed before this Court and the respondent No.1 also filed an intra-court appeal being Appeal No.131 of 2009 before the High Court of Uttarakhand. With the sole objective of giving quietus to the issues and to provide the motion for the project, this Court transferred the said appeal filed by respondent No.1 and tagged it along with the Special Leave Petition. Since the Attorney General had offered to abide by the operative order of the High Court, this Court directed the appellant herein to invite fresh price bids by its order dated 11.09.2009. Thus, bids were examined by the appellant and it was found that the bid filed by Alstom, respondent No.2 was substantially lower. However, there were certain deviations in the fresh bids offered by the respondent. Respondent No.2, therefore, objected to the report dated 8.11.2009 and took exceptions to some of the observations and insisted that there were no deviations in the techno-commercial part of the bid. By their another letter dated 16.1.2010, respondent No.2 again reiterated their objections

A
B
C
D
E
F
G
H

A and insisted upon the grant of contract in their favour. In order to maintain transparency and objectivity, the appellant offered to send the fresh bidding process for consideration by a panel of experts of national repute. They were to examine objections raised by the consortium of respondent No.2. They submitted
B their report on 8.2.2010 and observed that the fresh bid of M/s Alstom was non-responsive. In this backdrop, the Court heard both the parties as also the appellants all over again and ultimately passed an order on 26.03.2010.

C 6. The Court considered the question framed by the panel of experts which was to the following effect:

“whether the examination of report of THDC declaring the bid of the consortium of M/s Alstom is OK or the objections raised by the consortium of M/s Alstom are justified with reference to the terms and 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.”
D

E The Court also noted the conclusion drawn by the panel of experts which was to the following effect:

“based upon the views outlined, POE is of the opinion that fresh price bid of consortium of M/s Alstom is not non-responsive. Their quoted price of partnership basis even though non-responsive is, however, lower by 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 108.7 crores (M/s Voith Rs.22,343,174,985.00 M/s Alstom Rs.21,256,007,413.00). The unconditional offer of the consortium of Alstom to take care of the THDC observations without any extra costs was that the bid becomes responsive and in accordance with the employers' requirements is not acceptable as this is not permissible under bidding document of this tender.”
F
G
H

THDC INDIA LTD. v. VOITH HYDRO GMBH CO. AND 625
ANR. [V.S. SIRPURKAR, J.]

7. During the hearing, respondent No.2 had urged that panel of experts had not given any fair deal to respondent No.2 and it prayed that the matter should be sent to the Government of India. This was obviously opposed by the Attorney General as well as M/s Voith and, therefore, this Court took note of the contentions that the nature of objections to the report was of technical character and the bona fides of panel of experts was not questioned. The Court further took note of the stand taken by the Attorney General that the respondent No.1 could still address the panel of experts and further hearing could be given to M/s Alstom. The Court found the offer given by the Attorney General to be a fair offer and, therefore, one more opportunity was directed to be given to the parties for appearing before the panel of experts and, therefore, a report was directed from the panel of experts. The Court fixed the end of April 2010 for this purpose. It was observed in paragraph 11:

"the appellant herein would then, without loss of time, take decision, considering the report of the panel of experts regarding the award of contract." (emphasis supplied)

In view of this, the Court disposed of all the pending matters including the appeal filed by M/s Voith, respondent No.1 herein. The Court observed:

"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

A herein to do that. Once all this exercise is over, nothing would remain for us to decide in these appeals.”

8. What followed thereafter is more interesting. On 17.4.2010, detailed written submissions file by both the respondents before the panel of experts wherein respondent No.2 pointed out that there were several technical deviations in the bid of M/s Voith which were not considered so far by the appellant. Several technical issues were raised and it was pointed out that the bid of M/s Voith was not in accordance with the technical requirements. It was stated that the bid of M/s Voith, respondent No.1 had more than 40 commercial deviations and more than 90 technical deviations. It was, therefore, requested that panel of experts should look into the above referred matters and to look into all these aspects including the deviations of the bidding on the part of the respondent No.1. This was reiterated by subsequent letter dated 27.4.2010. On 29.4.2010 after going into the details of the contentions raised by both respondent Nos. 1 and 2 the panel of experts went into the details regarding the deviations and non-conformities in M/s Alstom, respondent No.2's fresh bids but did not give any finding regarding the deviations pointed out by it in respect of respondent No.1, M/s Voith. It, however, expressed in the following terms:

F “M/s Alstom during hearing have pointed some specific issues relating to bid of M/s Voith Siemens regarding sourcing and supply of Turbine Shaft and Rotor from Germany/ Italy/ Czech/ Spain/ Korea. In respect of Rotor they have also included Poland (Reference written submissions dated 17.4.2010, Volume-II A).

G they also pointed out regarding supply of Spherical Valve from Voith, USA. M/s Alstom Consortium in their rejoinder (15.4.2010) under “overall conclusions” (page 46) they also requested to enquire that both bids have been evaluated at par and cross checked in details that Voith's bid is not containing hidden deviations as was the case for MIV.

H

THDC INDIA LTD. v. VOITH HYDRO GMBH CO. AND 627
ANR. [V.S. SIRPURKAR, J.]

THDC will have to look into these issues along with all other issues particularly with regard to clause 9.4.4 of employer's requirements (amendment No.9 at Annexure 17) before taking a decision if M/s Voith's bid is responsive or non-responsive. (emphasis supplied)

9. Again respondent No.2, M/s Alstom filed letters dated 12.7.2010 and 23.7.2010 to the appellant and to the Ministry of Power. The matter was then taken up on the basis of the report of the panel of experts by tender committee. Tender committed again went into the exercise and submitted its report on 2.8.2010 wherein it was observed that the fresh price bids of consortium of M/s Alstom both as the partner and as the assignee were not responsive. It recommended further that negotiations would have to be undertaken with the respondent No.1, M/s Voith for considering the downward trend in prices and to much with the quoted prices of respondent No.2. It was also observed that the deviations of bids of respondent No.1 should be discussed with it. The matter then went the higher level of Executive Director, Contracts. He observed in his note dated 8.9.2010 "*if a minute scrutiny is carried out in respect of the bids of both the bidders, both the bids cannot be said to be fully responsive to the tender conditions*". It was observed that even the bid of respondent No.1, M/s Voith could not be said to be fully complying and it was observed:

If an impartial and independent scrutiny of tender is carried out, it may appear that THDC has been too stringent on M/s Alstom and quite lenient in case of M/s Voith Siemens. In a true stricter sense, it appears that there have been some non-conformities in the bid of M/s Voith Siemens also."

It was then suggested in the note that *the tender committee should identify the non-conformities in respect of both the bidders and bidders should be asked to submit their fresh price bids after fully complying with the tender conditions without deviations. (emphasis supplied)*

A 10. The competent authority, therefore, took a decision on
1.10.2010 to call for the fresh bids after due identification of
the non-conformities. Both the bids were, therefore, scrutinized
in great details. Even the deliberations were held between
2.11.2010 and 14.12.2010 and ultimately a report was
B submitted by the tender committee on 14.12.2010 in relation
to the non-conformities of both the bidders. The report
contained two annexures being annexures 1A and 1B detailing
the non-conformities in respect of respondent No.2 and
respondent No.1, respectively. Therefore, a communication
C dated 21.12.2010 was sent to both the respondents that it is
only after the unqualified and unconditional compliance to the
employer's requirements in respect to the non-conformities
pointed out in annexures 1A and 1B and on the respondents
agreeing to comply with the objections raised as regards the
D non-conformities that the respondents would submit fresh price
bids.

11. In this letter all the earlier correspondence and the
techno-commercial bids including all earlier letters sent by both
the respondents were referred to. The report of the panel of
E experts was also referred to. It was stated that the techno-
commercial offers of both the bidders were reviewed at length
and it was decided to invite fresh price bids from both the
bidders. The letter went on to clarify that these bids were invited
in two stages. In the first stage both the bidders were required
F to convey their unqualified and unconditional compliance with
the employer's requirements with respect to the shortcomings
observed in their respective bids, so as to resolve all the
inconsistencies and thereby ensuring compliance with the
tender conditions (In terms of the annexure 1A for consortium
G of M/s Alstom and annexure 1B for the consortium of M/s Voith).
It was clarified that subsequent to such unqualified and
unconditional confirmation by the respective bidders, the
bidders were to put their fresh price bids in the second stage.
Seven pre-conditions were then put and it was clarified that the
H stage of price bidding i.e. regarding the un-conditional

THDC INDIA LTD. v. VOITH HYDRO GMBH CO. AND 629
ANR. [V.S. SIRPURKAR, J.]

compliance the bidders were to submit the documents latest by 7.1.2011, 4 p.m. IST. The validity of the bid was limited to 180 days from the date of submission of the fresh price bid. A

12. This letter dated 21.12.2010 was challenged by the respondent No.1 by way of a writ petition No.212 of 2011. But before that respondent No.1 had addressed a letter to the compliance dated 24.12.2010 that inviting fresh price bids was not in accordance with the bidding documents and was contrary to the legal position. In that letter it was stated that it reserved the right to challenge the decision to invite fresh price bids and therein also sought time on any day after 18.01.2011 to seek certain clarifications in respect to the THDC's letter dated 21.12.2010. It also sought for extension of the compliance of first stage of price bidding. This request of extension was acceded to by the appellant THDC and it fixed a meeting on 19.1.2011. In the letter sent by THDC dated 4.1.2011 THDC refuted the contention raised by respondent No.1 regarding the invitation of fresh price bids. Yet another objection was raised by a letter on 15.1.2011 on behalf of respondent No.1. for inviting the fresh price bids. In addition to this notice, fresh report of the panel of experts dated 29.4.2010 and further recommendations/reports of the tender committee were also sought for. The meeting took place on 19.1.2011 when in addition to the appellant THDC officials, representatives of respondent Nos.1 and 2 were present wherein the same stand was allegedly reiterated by respondent No.1. A further letter dated 20.1.2011 was sent by the respondent No.1 calling upon THDC: B
C
D
E
F

"(1) to respond to the points raised in the letter dated 15.1.2011; G

(2) requesting for a copy of the fresh report of the panel of experts dated 21.4.10;

(3) requesting for the copy of the subsequent report/ recommendations of the tender committee." H

A 13. This letter was responded to by THDC wherein it reiterated its stand dated 21.12.2010 and further conveyed that it was not obliged to provide fresh reports of the panel of experts or reports of the tender committee.

B 14. On this basis, respondent No.1 proceeded to file a Writ Petition in the High Court of Uttarakhand challenging the letter dated 21.12.2010. This Writ Petition seems to have been filed on 27.1.2011 and was placed before the Learned Vacation Judge of the High Court of Uttarakhand. The High Court then passed the following order:

C "After hearing rival contentions of learned counsel for the parties, this Court is of the view that the opinion/recommendation made by panel of experts should be placed on record along with the objections raised by the parties and the report of the tender committee and recommendations of the Executive Director.

D Mr. Rawal learned Additional Solicitor General of India stated at Bar that the petitioner must also comply with the letter of respondent No.1 though annexure P-1. to which learned counsel for the petitioner stated that without prejudice to the rights of the petitioner, he shall comply with the same within a week if the date of compliance is so extended as the date has expired on 31.1.2011.

E Mr. Rawal learned counsel for respondent No.1 prays for and is granted time to file counter affidavit. The counter affidavit may be filed by 8th February, 2011. Respondent No.2 may also file counter affidavit, if any, within the same period. Copy of the counter affidavit be supplied to the petitioner well before the fixed, who shall also file his reply to this Court on or before 11th February, 2011.

Adjourned to 17.2.2011.

H In the meanwhile, no further proceedings shall be undertaken by respondent No.1."

THDC INDIA LTD. v. VOITH HYDRO GMBH CO. AND 631
ANR. [V.S. SIRPURKAR, J.]

15. It seems that by their letter dated 12.2.2011, A
respondent No.1 have sent their compliance to annexure 1B
of the letter dated 21.12.2010. It has been stated in that letter
at the outset, and as recorded in the aforesaid order dated
1.2.2011, we have to state and emphasize that compliance by
the Voith Hydro Consortium with the order dated 1.2.2011 B
passed by the High Court is strictly without prejudice to the
rights and contentions of the Voith Hydro Consortium as well
as without prejudice to the contentions and grounds raised in
Writ Petition No.212 of 2011. Added to this is annexure
signifying compliance with the question raised by the THDC as C
regards to the non-conformities.

16. In the Writ Petition, amongst the other prayers, a
direction was sought against the appellant to award the contract
in respect of Tehri Pump Storage Plant. The main attack in the
Writ Petition was on the letter dated 21.12.2010 on the ground D
that the decision therein was ex-facie illegal, unreasonable,
arbitrary, unfair and biased and that the said decision was
taken with a sole and ulterior motive of benefiting Alstom
(respondent No.2) and giving Alstom (respondent No.2) yet E
another opportunity to rectify or supplement its admittedly non-
responsive fresh price bids. It was further urged in the Writ
Petition that such action on the part of the appellant was
contradictory to the tender conditions, more particularly, Clause
25.3 of the Instructions to Bidders (ITB), which prohibited a non- F
responsive bid from being made responsive at the instance of
the bidder by introducing corrections or withdrawing the non-
conforming deviation or reservation. It was also urged that in
inviting the fresh pricing bids, the provisions of the bidding
documents were selectively changed and had resulted in
reopening techno commercial bids after the price bids of both G
the respondents had been opened and evaluated. It was further
urged that after passing of the judgment dated 26.3.2010 by
this Court, the scope of the Panel of Experts was restricted, in
the sense that it could only examine the price bid by Alstom
(respondent No.2) and could not go into the merits of the bid H

A given by Voith GMBH (respondent No. 1). On that basis, it was
urged in the Writ Petition that once the techno commercial bid
of Voith GMBH (respondent No. 1) was finally accepted, there
was no question of introducing the subject of deviations and
then insisting upon the compliance with those deviations and
B thereafter, inviting fresh price bids. Strong words like 'bias',
'discrimination', 'nepotism' and 'fairness' have also been used
in the Writ Petition. In short, the actions on the part of the
appellant have been interpreted to be with the sole objective
to confer benefit to Alstom (respondent No.2) to the detriment
C of Voith GMBH (respondent No. 1). It was further urged in the
Writ Petition that once Envelope Nos. 3 and 4 were opened
and evaluated, there was no provision in any of the bidding
documents permitting the appellant to revisit or reopen or
reconsider the technical bid contained in Envelope No. 3.
D Referring to the earlier correspondence and various letters by
the appellant, as also the contents of various documents, it was
contended that the appellant was stopped from contending to
the contrary. It was suggested that after the judgment dated
26.3.2010 passed by this Court, the only course left open to
THDC (appellant herein) was to proceed further and award
E contract to Voith GMBH (respondent No. 1 herein) in view of
Clause 28.1 of ITB. It was urged that THDC (appellant) ought
to have abided by the observations made by the Panel of
Experts in their first report dated 8.2.2010. Contentions were
also raised about the bidding process as also ITB.

F

17. It is obvious that the High Court, on the basis of this
plea, as also the plea of non-supply of the necessary
documents, chose to stay the whole process after hearing both
the sides.

G

18. We have intentionally chartered the whole course of this
tender, which began in August, 2007. When the matter came
for the first time after the final judgment of the High Court was
passed, requiring the appellant THDC to invite fresh price bids,
it was felt by this Court that the legal battle between these two

H

THDC INDIA LTD. v. VOITH HYDRO GMBH CO. AND 633
ANR. [V.S. SIRPURKAR, J.]

multi-national companies was resulting in delaying of the whole process. The importance of the project as also the tremendous financial implications, were realized. The project undoubtedly was going to cause very heavy expenditure on the part of THDC (appellant). It was in that spirit that this Court proceeded to pass the judgment and order dated 26.3.2010, and it was, therefore, that the price bids were directed to be given before the officer of this Court. The monetary implications were tremendous and, therefore, this Court felt the need for transparency on the part of THDC (appellant) as also the objectivity. It was, therefore, directed that the price bids should be got examined by the Panel of Experts. This was done not only once but twice to ensure that both the sides should get equal opportunities and treatment of fairness.

19. What strikes us initially is that all the arguments and the insistence for award of contract in favour of Voith GMBH (respondent No. 1) could have been argued before us in that very first round. That was not done and even if that was haltingly done, it was not found feasible to straightaway award a contract in favour of Voith GMBH (respondent No. 1). Considering the national interest, the matter was referred to the Panel of Experts. Again, it was made very clear that the report of the Panel of Experts was not going to be all and end all of the matter. In the last paragraph of the judgment, it was made very clear that the ultimate decision regarding awarding of the contract would have to be given by THDC (appellant) and not by this Court. Therefore, there was enough discretion and play left in THDC (appellant) to act on the report of the Panel of Experts and as such THDC could have adhered to its own procedure and decide upon the award of contract.

20. It was argued before us by the Shri Vahanvati, learned Attorney General that there are hierarchies in the working of THDC. The report of the Panel of Experts had to be first analyzed by the Tender Committee and even the decision of the Tender Committee was not final and the same was subject

A to the decisions of the Executive Director and ultimately the competent authority. It was pointed out by the learned Attorney General that after the final report of the Panel of Experts came, it was heavily deliberated by the Tender Committee. The Tender Committee made a few comments in terms of the report. The Panel of Experts had already, in para 8 of its report, expressed what we have reproduced in para 8 of this judgment. Therefore, even if the bid of Alstom (respondent No.2) was found to be non-responsive by the Panel of Experts, it was clear that the ultimate decision was to be taken by THDC after looking into number of issues. When the matter was considered further by the Tender Committee, the Tender Committee came to the conclusion which is to be found in para 12 of the recommendations. This report of the Tender Committee is dated 2.8.2010. The Tender Committee, under the working pattern of THDC (appellant), could not have finalized the grant of award. It could only make the recommendations. It held that the fresh price bids of Alstom (respondent No.2) were non-responsive. However, it is clear from the record that the report of the Tender Committee was to be considered at various higher levels in the hierarchical structure of the decision making of the appellant. In this report, as pointed out by the learned Attorney General, the Tender Committee had pointed out certain deviations/non-conformities in respect of the bid of Voith GMBH (respondent No. 1) also and, therefore, it had suggested discussion for resolving certain deviations and price negotiations and had also recommended the award of contract to Alstom (respondent No.2). All these aspects were bound to be considered and were actually considered at the higher levels and thereafter the report of the Executive Director came. We have already made a reference to the decision of the Executive Director, who found, by his note dated 8.9.2010, that the bid of Voith GMBH (respondent No. 1) was also not fully complied with. It was found that on an impartial and independent scrutiny, the attitude of THDC (appellant) was found to be too stringent to Alstom (respondent No.2) and quite lenient to Voith GMBH (respondent No. 1). The Executive

THDC INDIA LTD. v. VOITH HYDRO GMBH CO. AND 635
ANR. [V.S. SIRPURKAR, J.]

Director had also noted the non-conformities of the bids. The actual observations have been pointed out and mentioned in para 9 of this judgment. It was in view of this that the decision was taken on 1.10.2010 by the competent authority to call for fresh bids. The matter was again examined by the Tender Committee and by its report dated 14.12.2010, the Tender Committee fixed the deviations which were reported in Annexure 1 A and Annexure 1 B to its report. It is these non-conformities which were mentioned in the letter dated 21.12.2010. Now, it was clear that these deviations or non-conformities, as the case may be, were located and both the respondents were asked to comply with these deviations/non-conformities with the sole objective of bringing them on the same level playing field, so that thereafter there would be only one task to decide as to whose price bid was lower and as such acceptable by THDC (appellant).

21. We do not find anything amiss in this whole exercise. Shri Desai, learned senior counsel appearing on behalf of Voith GMBH (respondent No. 1), invited our attention to the allegations of bias, discrimination etc. It cannot be forgotten that at a point of time, the Executive Director felt that in fact, THDC (appellant) was showing a tilt in favour of Voith GMBH (respondent No. 1). When the documents and the correspondences are examined, we do not find any tilt in favour of either party and in our opinion, there is no scope to accept the allegation that THDC wanted to favour Alstom (respondent No.2) and had, therefore, changed the rules of the game. That contention is clearly without any merits. The allegations of mala fides and bias are directed towards THDC as a whole without naming any individual person. Such allegations are easy to be made but very difficult to justify. Precisely that has happened here also. The extremely general nature of allegations would desist us from accepting the same. Particularly, when there is hardly any material justifying the same.

22. It has already been pointed out that it is only when all

A the exercise was taken in pursuance of this Court's judgment
dated 26.3.2010 that the respondent No. 1 chose to raise the
issue about the non-responsive bid of Alstom (respondent
No.2). It went on with the whole exercise including the
arguments before the Panel of Experts not once but twice and
B thereafter, also took part in the negotiations. But its stance
changed only after the final decision was taken by the
competent authority on 1.10.2010 and more particularly, after
the Tender Committee had finalized the report on 14.12.2010.

C 23. In our opinion, since the whole process was absolutely
transparent and since these issues, which were raised by way
of the Writ Petition, were not even argued before the Court in
the first round, there is no scope to stall the whole process by
finding fault with the tendering process and insisting that THDC
D could not invite the fresh pricing bids. In our opinion, in inviting
the fresh pricing bids, particularly after conveying the
deficiencies or non-conformities to both the respondents and
making it clear to them that they would have to comply with the
same as first stage, we do not think that any change is being
made in the bidding conditions. We must note, at this juncture,
E that this Court had left discretion in THDC to take the decision
in the light of Panel of Experts' report. The Panel of Experts
had gone into the exercise not once but twice. However, the
close examination of the second report of the Panel of Experts
F would suggest that everything was not alright even with the bid
of Voith GMBH (respondent No. 1) and there were in fact some
non-conformities, which were required to be considered by
THDC before a final decision was taken. We do not find
anything wrong in that. It was earnestly urged by Shri Desai,
learned senior counsel that the unfairness was clear enough
G from the fact that even the documents were not supplied by
THDC to Voith GMBH (respondent No. 1) though they were
insisted upon from time to time. While the debate was going
on before us, all the documents were supplied. But, even
otherwise, we do not think that any serious prejudice would have

H

THDC INDIA LTD. v. VOITH HYDRO GMBH CO. AND 637
ANR. [V.S. SIRPURKAR, J.]

been caused to Voith GMBH (respondent No. 1) on that account.

24. We may reiterate at the cost of repetition that by judgment and order dated 26.3.2010 passed by this Court, this Court had clearly expressed that the contractual rights of the competing parties like Voith GMBH (respondent No. 1) and Alstom (respondent No.2) were not more important than the national interest. If we find that in pursuance of the national interest, which was so explicitly mentioned in this Court's judgment dated 26.3.2010, the THDC by adopting a fair and transparent procedure, provided a level playing field to both the parties to get a proper idea of costs that it would have to pay to the party winning the contract, no complaint could be made of the breach of the contractual rights. In our opinion, firstly, there is no breach of the contractual rights or the terms of ITB. After all, it could not be said that the rights of the parties were crystallized. According to Shri Desai, learned senior counsel arguing on behalf of Voith GMBH (respondent No. 1), the crystallization of the rights was even prior to passing of the judgment of this Court dated 26.3.2010, as the bid of Alstom (respondent No.2) was found to be non-responsive and the only bid which was found to be responsive was that of Voith GMBH (respondent No. 1). Even accepting this, Voith GMBH (respondent No. 1) could not insist upon the grant of contract in its favour on that ground alone. In the light of peculiar facts of this case, it must be stated that even if the bid of Voith GMBH (respondent No. 1) was found to be responsive, that did not end the matter. After all, THDC, which was going to come out with the huge expenditure running into thousands of crores of rupees, was bound to safeguard the national interest. That was the tone of this Court's judgment dated 26.3.2010 also. Otherwise, this Court could have straightaway awarded the contract in favour of Voith GMBH (respondent No. 1). But that was not found feasible in national interest. Instead, it was found proper to give fair opportunities to both the parties and it was only with that objective that the matters were referred to the Panel of Experts.

A

B

C

D

E

F

G

H

- A If the facts are viewed from this angle, then it will be clear that there was nothing wrong in THDC treading its course with utmost care and it must be said that the facts show that THDC appears to have acted in favour of the national interest by trying to prevent the exorbitant prices for the project and further trying
- B to go to the realistic and minimum price. That was the spirit of this Court's judgment dated 26.3.2010 too.

C 25. In that view, we do not think that the High Court was right in passing the stay order as it did. This was a clear effort on the part of Voith GMBH (respondent No. 1) to put the spoke and to bring to halt the motion of the process which was ordered by this Court in its judgment dated 26.3.2010.

D 26. Even at the beginning of this judgment, we had pointed out as to why this Court is interfering against the interim order passed by the High Court. It is only to save the precious time that we have entertained this appeal and cleared the obstacles in the whole tendering process.

E 27. The appeal succeeds. The order of the Uttarakhand High Court granting stay is set aside. The parties will now proceed to submit their price bids in the light of the observations made by us. The said price bids shall be submitted within three weeks from the date of this judgment. THDC (appellant) shall take the decision in respect of the grant of the contract within three weeks thereafter. With these

F observations, the appeal is disposed of. No costs.

B.B.B.

Appeal allowed.