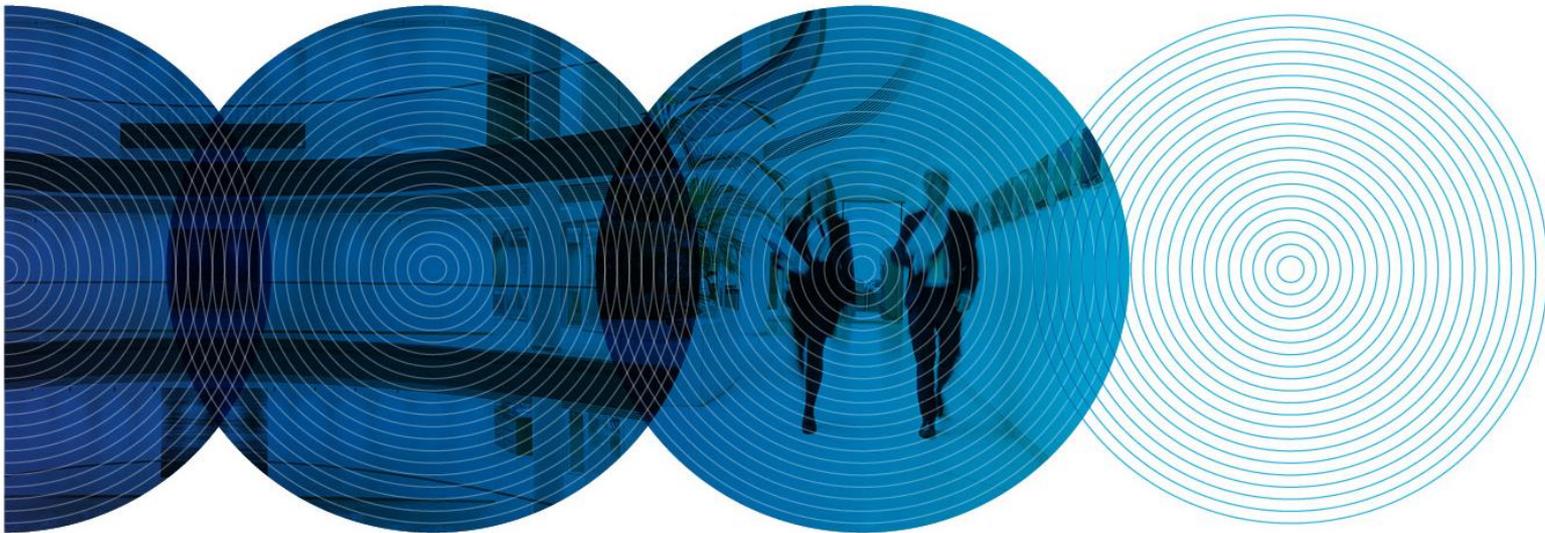


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# Abnormally low tenders

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# The question

- *“How do you decide if a tender is abnormally low, and what do you do if it is, supported by practical examples of borderline cases?”*
- How to identify
- Duty to investigate?
- Duty to reject?
- Abnormally high tenders?
- Unbalanced tenders?
- A word about discretion in a procurement process

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# Abnormally low tenders – the issue

- Bidders may tender a lower than expected price to win the contract
- Risk of non-performance
- Prospect of claims being made to make up the difference

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# What is an abnormally low bid?

- No definition in the Directive or Regulations
- *Clestra Hausermann T-725/17*
  - *The mere fact that a tender is lower than that of another tenderer does not necessarily mean that it was abnormally low*

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# How to identify abnormally low tenders

- Use of formula
- *Impresa Lombardini Spa*, T – 285/99
  - Formula ok to identify ALT in the first instance, but cannot justify automatic exclusion
- Irish private members bill (currently at early stage) in legislative process suggesting a price below 15% of the average of submitted tenders is officially “abnormally low”
- Recent case C-669/20 (*Veridos*) – formula cannot allow Authority to abdicate responsibility
- *Secap Spa*, C-147/06
  - Very limited circumstances in which automatic exclusion could be justified – where there would be a huge number of tenderers (caution advised with this case)
- Standard of review – manifest error

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# What happens if a bid is abnormally low?

- Public Sector and Utilities Regs (Reg 69 PS, Reg 93 Utilities): if tender appears to be abnormally low, authority “shall require” explanation
- Bid may not be rejected without giving bidder chance to explain
- Bidder will often have valid explanation...
  - lower supply chain costs
  - sharing overheads with other projects
  - Seeking to enter a new market – willing to take risks

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## Abnormally low bid - duty to Investigate?

- Much discussion in case law (both EU and UK) as to whether **duty** to investigate abnormally low bid
- Two possible readings:
  - *if bid **appears** abnormally low: duty to investigate (see Regulations, Directive, EU case law)*
  - *if bid **appears** abnormally low: duty to investigate **if** the authority is considering rejecting the bid (see UK case law)*

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## Duty to investigate - UK approach (1)

- *Varney –v- Hertfordshire County Council (2010)*
- “[T]he Council was not under a duty generally to investigate so-called “suspect” tenders in circumstances where the Council had no intention of rejecting those tenders”
- Facts did not support the proposition that the Contracting Authority had made a manifest error in
  - not deciding that the tender was abnormally low;
  - and not investigating

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## Duty to investigate - UK approach (2)

- *SRCL v NHSE [2018] EWHC 1985 (TCC)*
- *“I consider that there is no basis for imposing a general duty to investigate such tenders in all cases. If, in any particular competition, the contracting authority considers that a particular tender has the appearance of being abnormally low, and the contracting authority considers that the tender should be rejected for that reason, there is a duty upon the contracting authority to require the tenderer to explain its prices.”*

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## Duty to investigate - EU approach

- *SAG ELV Slovensko* Case C – 599/10
  - *Article 55 of Directive 2004 /18 precludes a contracting authority from taking the view that it is not required to ask a Tenderer to clarify an abnormally low price*
- C-669/20 (*Veridos*) 15 Sept 2022 – if tender appears abnormally low, must investigate
- Public Sector and Utilities Regs (Reg 69 PS, Reg 93 Utilities): if tender appears to be abnormally low, authority “shall require” explanation

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# Duty to reject?

- Appears to be no duty to reject (except for breach of environmental/social/labour law – Reg 69(5) Public Sector Regs, Reg 93(5) Utilities Regs)
- Again tension between EU and UK positions (although this time the Directives/Regulations favour UK approach)
- T-392/15 *European Dynamics* mentions an obligation to reject an abnormally low bid
- *SRCL v NHS Commissioning Board* 2018 EWH C 1985
  - No general duty to reject except in the circumstances explicitly referenced in Regulations
  - Noted Recital 103 of Directive “*the contracting authority should be entitled to reject the tender. Rejection should be mandatory ....[in the specific circumstances referenced in the Regs/Directive]*”
- Better view – discretion to accept/reject except where limited by Directive/Regulations

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# Abnormally low – unbalanced tenders

- Owens v Kildare County Council
  - *some of the bidder's rates were abnormally low, while others were extremely high*
  - *more than 70% of the 620 items were priced abnormally. Of these, 28 were priced abnormally high, and 410 were priced abnormally low – e.g. €10/h labour costs*
  - *Many items 1% of average prices, others 916% of average prices for other tenders*
  - *Kildare did not seem to be too worried about overall sum, just its balancing*
  - *Owens did not provide any explanation for rates*
  - *Kildare took the view that it was entitled to eliminate the tenderer based on this and the Court held that this was not a manifest error.*

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# Abnormally low – observations

- *Amey v Scottish Ministers 2012 CSOH 181*
  - Not obliged to take a risk – even with a big company
- *FP McCann [2016] NICH 12*
  - Decision making – exercising discretion
  - Importance of recorded reason

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# A word about discretion

- Abnormally low tenders – lots of case law – steps that have to be followed
- However, provided authority has followed these steps, ultimately the decision to accept/reject is for authority
- However - no such thing as absolute discretion in a regulated procurement process
  - Discretion always limited by the general principles of equal treatment, proportionality and transparency
  - Decisions have to have a rational basis – *Amey Highways Ltd v West Sussex County Council* [2019] EWHC 1291
- Standard of review – manifest error

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# Making robust decisions

- Check your own process rules and follow them carefully
- Know full picture – investigate and give bidders right of reply
- Be fair, proportionate and consistent
- Record decision carefully – Reg 84 Report

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# Questions?



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