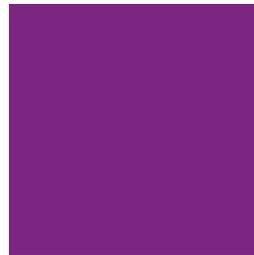


How do you decide if a tender is abnormally low, and what do you do if it is, supported by practical examples of borderline cases?

White Paper Conference, 4 December 2024

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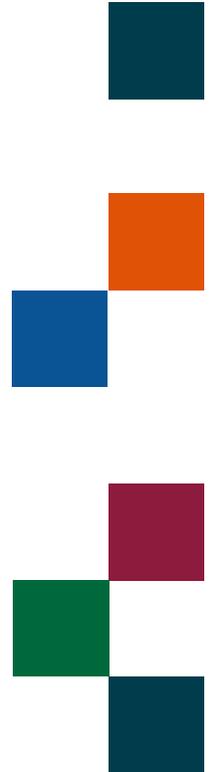
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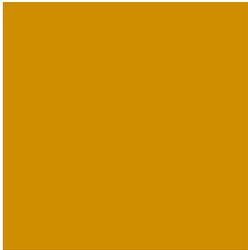
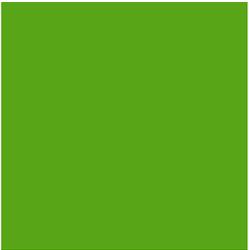
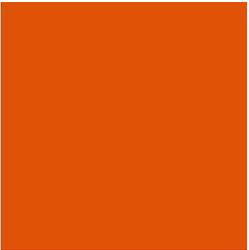
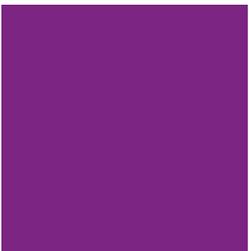
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Agenda

- Introduction
- How do you identify an abnormally low tender?
- What do contracting authorities need to do if a tender appears to be abnormally low?
- Case law
- Key takeaways



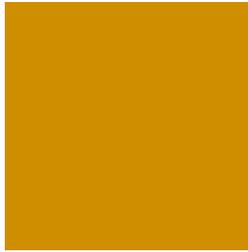
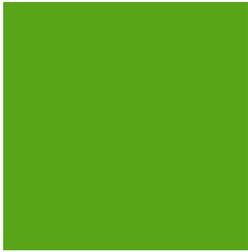
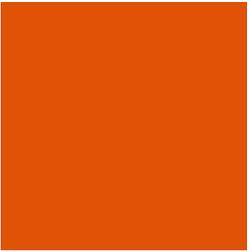
Introduction



Introduction

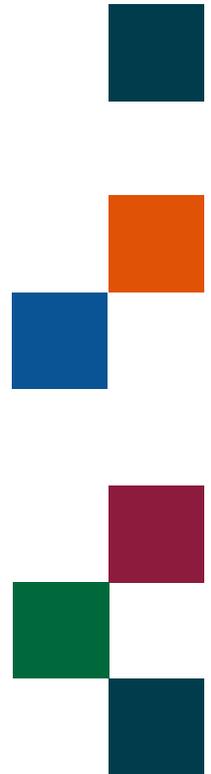
- Recital 103: *Tenders that appear abnormally low...might be based on technically, economically or legally unsound assumptions or practices...*
- Risks for contracting authorities (CA):
 - Non-performance or poor performance of contract
 - Contractual claims to recoup 'lost' consideration which can lead to cost overruns
- Low pricing can be due to a number of factors, eg
 - Lower supply chain costs
 - Economies of scale – other similar projects
 - 'Buying' contract to break into a new market/sector

How do you identify an abnormally low tender?



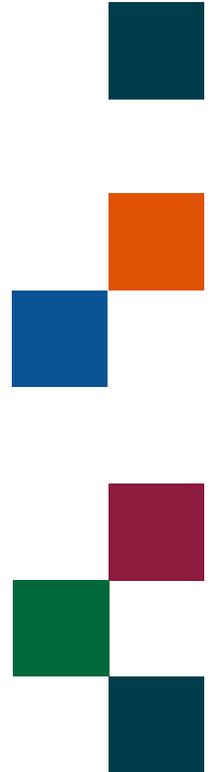
How do you identify ALTs?

- No definition of ALT in Directive or Regulations
- OECD Report: *generally recognised as referring to the situation where the price offered by an economic operator raises doubts as to whether the offer **is economically sustainable and can be performed properly***
- No requirement to carry out detailed analysis in every case but **CA must carry out a prima facie assessment of whether the tender is or arouses suspicion of being abnormally low** (C-101/22 *Sopra Steria*; *White Mountain*)
- That is the case, *in particular*, where the price proposed in a tender is **considerably lower than that of the other tenders or the normal market price** (*Sopra Steria*)
- Must consider whether tenders appear suspect in light of all the features of the **subject matter of the tender**

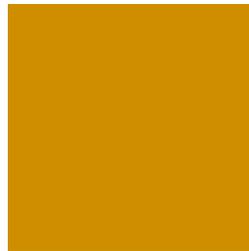
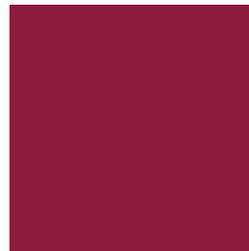


Can you use a formula to identify ALT?

- CA are permitted to fix a formula for identifying ALTs (*Veridos; T-640/22 Westpole Belgium*)
- Formula must be objective and non-discriminatory, eg mathematical calculation
- Tenderers must be given opportunity to provide explanations – **there cannot be an automatic exclusion** of tender (*Veridos; T-285/99 Impresa Lombardini*)



What do contracting authorities need to do if a tender appears to be abnormally low?



Duty to investigate tenders suspected to be abnormally low (Art/Reg 69 inquiry)

- Art/Reg 69 (Art 93 - Utilities): *Contracting authorities shall require economic operators to explain the price or costs proposed in the tender where tenders appear to be abnormally low in relation to the works, supplies or services*
- If tender appears abnormally low, duty to investigate, even if CA not considering rejecting the tender (*Veridos; Killaree v Mayo CC; White Mountain*)
- Investigation has a dual purpose:
 1. Establish whether tender is reliable (i.e. sufficiently **genuine and serious**)
 2. Allow tenderer to explain the apparently suspect pricing

Duty to investigate tenders suspected to be abnormally low (Art/Reg 69 inquiry)

- CA cannot reject tender without giving tenderer a chance to explain, even if tender price is €0.00 (C-367/19 *Tax Fin Lex*)
- CA not required to check each price in each tender, but *it must examine the **reliability and seriousness of the tenders** which it considers to be generally suspect, which necessarily means that it must ask, if appropriate, for details of the individual prices which seem suspect to it* (T4/01 *Renco SpA*)

What are the obligations on CAs if a tender is abnormally low?

- If above steps are followed, CA can **accept or reject** ALT
- No general duty to reject ALT but CA **must reject** where tender violates applicable laws, eg environmental / social / labour law
- Discretion must be exercised in accordance with **EU principles** of equal treatment, proportionality, transparency and sound administration and must have a rational basis
- Court only intervenes if **manifest error** has occurred

What records must the CA keep?

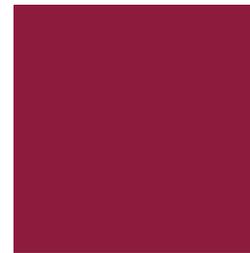
Prima facie assessment

- No general obligation to adopt or express a reasoned decision
- If unsuccessful tenderer requests reasons, CA is required to explain why tender was not considered to be ALT (*Sopra Steria; White Mountain*)
- In practice, CA should record outcome of prima facie analysis

Art 69 inquiry

- CA must formally adopt a reasoned decision admitting or rejecting tender (*White Mountain*)

Case law



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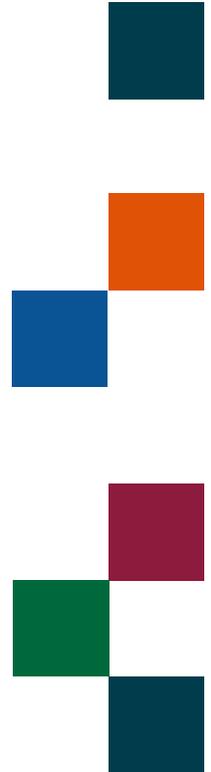
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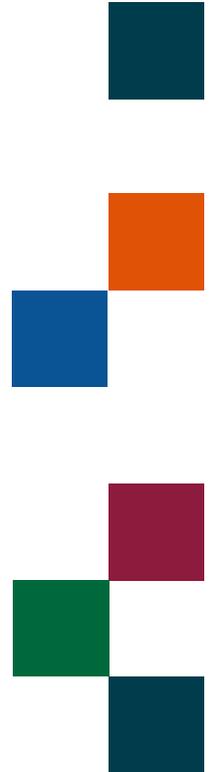
Owens v Kildare County Council [2020]

- Tender document required rates to be priced in a 'fair and balanced' manner
- More than 70% of the items were priced abnormally, the majority abnormally low (eg 1% of average prices) but some abnormally high (916% of average prices)
- Owens did not provide any explanation for rates and failed to submit revised pricing document when requested by CA
- Simple statement that it would stand over its low rates
- Council eliminated the tenderer
- Court held that this was not a manifest error



Killaree Lighting Services Ltd v Mayo CC [2024]

- Council required tenderers to submit balanced tender prices
- Killaree submitted prices of €0.01 for approximately 66% of the tendered rates
- Council took the view that these prices were not balanced and were abnormally low, prompting it to investigate
- Council rejected tender on grounds that it was ALT and low pricing was not satisfactorily explained
- Court found decision to be justified
- Note: Tender documents contained discretion to seek explanations in respect of ALT – court held that this discretion was overridden by the statutory obligation to investigate



White Mountain Quarries v Mayo CC [2024]

- Very low employment rates (many below sectoral employment orders)
- Difference in price between tenders was, according to Council, *massive*
- Tender was accepted by Council without conducting formal Reg 69 inquiry
- Court noted that preferred bidder's prices were considerably lower than that of other tenderers, ie suspiciously low, and there should have been Reg 69 inquiry
- Circumstances in which a suspicion should be raised:
 - Price is ***below the range of anything which might legitimately be considered to be normal...***
 - Contract can only be performed at a loss which is not nominal/marginal
 - Rates proposed are below statutory or industry standard rates

White Mountain Quarries v Mayo CC [2024]

Methods to identify suspect tenders

Analysis of the price or cost proposed in comparison with the subject of the procurement

Comparison of tender price with the pre-tender estimated value and assessment of deviation

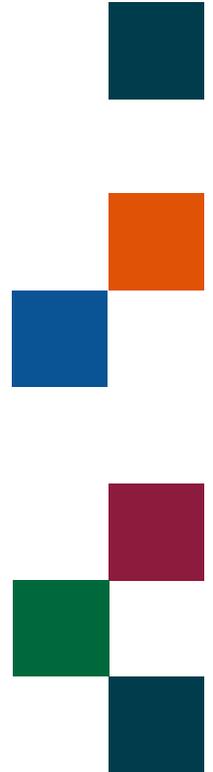
Comparison of tender price with prices proposed in all other **compliant** tenders and assessment of deviation from mean price and/or the extent of the difference between tenders

White Mountain Quarries v Mayo CC [2024]

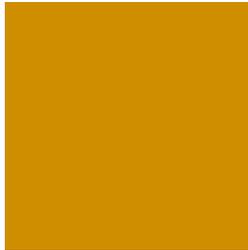
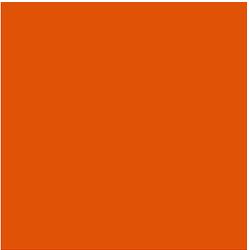
- A tender which does not comply with applicable obligations, eg labour law, must be treated as ALT - not cured by
 - **'blended rates'** (ie sufficient 'fat' to enable bidder to perform contract)
 - **contract clause (Z6) requiring that rates of pay and conditions of employment comply with applicable law**
- Strategic pricing (at cost/loss) not itself problematic but there must be robust interrogation of responses to establish if pricing genuine
- Council accepted **bare and formulaic assurances** without critical analysis
- Court emphasised lack of minutes of evaluation meetings or other evidence; evaluation report did not address several issues relied on in court

T-640/22 *Westpole Belgium v European Parliament*

- Tender for IT services, divided into 10 lots
- Mathematic formula for identifying ALTs
- Tenderer requested to clarify prices
- Detailed explanation of prices provided, including available resources, calculation of margin, compliance with minimum wages, calculation methodology, details relating to costs, submission strategy, risk sharing
- Court held
 - CA was entitled to accept tender
 - Costs of different economic operators may vary considerably
 - ALT assessment separate for each lot
 - Impact of inflation on amount of margins due to passage of time was the same from one tender to another – did not necessarily impact ALT analysis



Key takeaways



Summary of obligations on authorities

Duty to identify
suspect tenders
(*prima facie*
assessment)

Duty to investigate
tenders suspected
to be abnormally low
(*Art/Reg 69 inquiry*)

Duty to afford
tenderers an
opportunity to
explain by asking
them to provide
details

Duty to assess the merits of
the information provided to
determine whether it
satisfactorily accounts for the
low level of price or costs
proposed

Duty to reject ALT where
breach of applicable
legislation (in all other
cases discretion to admit or
reject ALT)

Key takeaways



Tenderers should engage with CA during investigation



CA should critically analyse responses from tenderers



Ensure compliance with EU principles during investigations and when deciding whether to accept or reject tenders



Record process and reasons for decision to accept / reject ALT and incorporate into evaluation report

Thank you



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