

Avoiding widely differing bids and determining abnormally low tenders

Michael Rainey

The question

- ▶ What is a tangible methodology for avoiding widely differing bids and determining abnormally low bids?
- ▶ Should you determine and record in advance a price level which you consider to be abnormally low?

Abnormally low tenders

- ▶ What are they?
- ▶ What do you do with them?
- ▶ What can you do when they are not satisfactorily explained?
- ▶ How do you discourage the submission of abnormally low tenders in the first place?
- ▶ What about abnormally high tenders?

The context – why ALTs matter

- ▶ 2014 Directives have shifted the focus
- ▶ Now a statutory duty to investigate ALTs
- ▶ That means ALTs need to be identified
- ▶ No longer just about protecting tenderers from rejection
- ▶ In certain circumstances there is a duty to reject
- ▶ Commonly challenged

A snapshot of the shift in focus

- ▶ In 2005, main purpose: *“to enable a tenderer not to be excluded from the procedure without having had an opportunity to explain the terms of its tender which appears abnormally low”* (*TQ3 Travel Solutions*)
- ▶ In 2014: *“to fight social dumping and ensure that workers' rights are respected, stricter rules are introduced regarding abnormally low bids”* (*EU Parliament Press Release on New Directive*)

What is an abnormally low tender?

- ▶ Not defined in EU legislation
- ▶ No consistent definition in case law – “*the tenders which it considers to be generally suspect*” (*Renco*)
- ▶ Not defined in UK legislation
- ▶ Can apply an arithmetic / mathematical threshold to identify ALT (*Lombardini and Mantovani*)

The Northern Ireland approach

- ▶ PGN 03/13 (reissued on 13 June 2016)
- ▶ Any tender price that:
 - ▶ is more than 15% lower than the adjusted average price; and
 - ▶ exceeds the proximity margin, that is, is more than 1% lower than the lowest qualifying price.
- ▶ Where:
 - ▶ adjusted average price excludes the highest tender price
 - ▶ proximity margin limited to minimum of £1,000 and maximum of £100,000
 - ▶ at least 4 tenders

The Commission proposal for New Directive

- ▶ Where all of the following conditions are fulfilled:
 - ▶ the price or cost charged is more than 50% lower than the average price or costs of the remaining tenders;
 - ▶ the price or cost charged is more than 20% lower than the price or costs of the second lowest tender; and
 - ▶ at least five tenders have been submitted.
- ▶ Tweaked then removed during legislative process

What do you do with an ALT?

- ▶ Public Contracts Regulations 2015 – regulation 69(1):
“Contracting authorities shall require tenderers 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.”
- ▶ See also Utilities Contracts Regulations 2016 – regulation 84(1)
- ▶ Note that no explicit provision in Concession Contracts Regulations 2016 – but consider EU Treaty principles (SECAP)
- ▶ What is the tenderer required to explain?

What is the tenderer required to explain?

- ▶ “*reliability and seriousness*” (*Renco*)
- ▶ “*genuine*” (*Fratelli Costanzo*)
- ▶ “*viable*” and “*soundness*” (*SECAP*)
- ▶ “*complied with the national legislation*” and “*included all the costs arising from the technical aspects of the selected tender*” (*European Dynamics*, Feb 2017)
- ▶ “*In my view the various expressions, although different, are all directed towards the same broad end, namely that of judging whether the bid is one that is likely to provide the contracting authority with the services which it seeks.*” (*Amey v Scottish Ministers*, Lord Hodge)

The explanation process

- ▶ Must be an *inter partes* procedure (*Lombardini and Mantovani*)
- ▶ Importance of spelling out precise concerns for tenderer to respond to (*F P McCann v Department for Regional Development*)
- ▶ Legislation provides list of possible explanations (e.g. PCR regulation 69(2)) – list is “*not exhaustive*” but “*also not purely indicative*” (*SAG ELV Slovensko*)

Regulation 69(2) list

- ▶ Economics of the manufacturing process, services provided or construction method
- ▶ Technical solutions chosen or any exceptionally favourable conditions available to the tenderer
- ▶ Originality of the work, supplies or services proposed by the tenderer
- ▶ Compliance with applicable obligations in regulation 56(2) (in the fields of environmental, social and labour law)
- ▶ Compliance with obligations referred to in regulation 71 (subcontracting)
- ▶ The possibility of the tenderer obtaining State aid

What can you do when an ALT is not satisfactorily explained?

- ▶ PCR regulation 69(4) to (6) (UCR regulation 84(4) to (6))
- ▶ May only reject where evidence does not satisfactorily explain the low price or costs
- ▶ Must reject where tender is abnormally low due to breach of applicable obligations in the fields of environmental, social and labour law
- ▶ Consider impact of state aid / public subsidy (*Azienda Ospedaliero-Universitaria di Careggi-Firenze*)
- ▶ Notification and reporting requirements

How do you discourage the submission of ALTs in the first place?

- ▶ Look at the price: quality ratio
- ▶ Consider mandatory technical requirements requiring explicit demonstration
- ▶ Would a fixed price competition work?
- ▶ Avoid overly complex price scoring that encourages “gaming”
- ▶ But if scoring price, the lowest (satisfactorily explained) price must get the highest score (Commission v Italy)

What about abnormally high tenders?

- ▶ Can you exclude tenders that are too expensive?
- ▶ Designing quality scoring to discourage gold plating
- ▶ Designing price scoring to reflect available budget / stakeholder expectations

Conclusion

- ▶ Identifying ALTs now a feature of regulated procurement processes
- ▶ Particular circumstances will determine what is abnormally low
- ▶ There is a margin of appreciation
- ▶ Importance of record keeping and audit trail: “*None of the tenders was considered to be abnormally low because...*”

Questions?

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