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Burness Paul

White Paper Conference

RUTH MCNAUGHT

Hello

The One with the Abnormally Low Tender:

“What are you to do - lawfully and proportionately - when a tender is abnormally low, and how far can you go in asking the tenderer to reassure you otherwise, supported by practical examples?”

Regulation 69(1)

“A contracting authority **must** require a tenderer to explain the price or costs proposed in the tender **where the tender appears to be abnormally low** in relation to the works, supplies or services.”

SRCL Ltd v NHS England [2018] EWHC 1985 (TCC)

- CCS Framework Mini-Competition
- Contract for delivery of clinical waste disposal services – North East of England

- “Reverse Auction”

Healthcare Environmental Services	£310,000
Sharpsmart	£313,000
SRCL	£479,999

- NHSE said **no obligation** to investigate

SRCL Ltd v NHS England [2018] EWHC 1985 (TCC)

Two fundamental points from the judgement:



No obligation* to investigate whether a tender has appearance of being abnormally low (*but failure to appreciate appearance of being abnormally low may be a manifest error)



Duty to investigate only kicks in where the authority might **reject it on basis of ALT** (ie. when it's the frontrunner)

Regulation 69(4)

“The contracting authority **may only reject** the tender where the explanations given and any evidence supplied do not satisfactorily account for the low level of price or costs proposed, taking into account the elements referred to in paragraph (2).”

Regulation 69(5)

“The contracting authority **must reject** the tender where the authority has established that the tender is abnormally low because it does not comply with applicable obligations referred to in regulation 57(2) (general principles).”

“What are you to do - lawfully and proportionately - when a tender is abnormally low...”

REGULATION 69(2) AND (3)

- (2) The explanations given in accordance with paragraph (1) may, in particular, relate to—
- the economics of the manufacturing process, of the services provided / construction method;
 - the technical solutions / any exceptionally favourable conditions available to the tenderer;
 - the originality of the works, supplies or services proposed by the tenderer;
 - compliance with obligations referred to in regulation 57(2) (general principles);
 - compliance with obligations referred to in regulation 71 (subcontracting)
 - whether the price or costs take into account the grant of subsidies.
- (3) The contracting authority must assess the information provided by consulting the tenderer.

Commercial strategy – interesting territory

- A low price **can** simply reflect a bidder making a conscious commercial decision
- Regulation 69 doesn't preclude slim or uncertain margins
- **But** watch out for:



Falling foul of the requirements of the ITT



Failing to include certain mandatory costs



Inconsistency with proposed approach to delivery of specification

"...how far can you go in asking the tenderer to reassure you otherwise...?"

Regulation 69(4)

“The contracting authority **may only reject** the tender where the explanations given and any evidence supplied do not satisfactorily account for the low level of price or costs proposed....”



It's not **just** about reassurance



It's about doing enough to understand price before taking the exceptional step of rejecting the tender

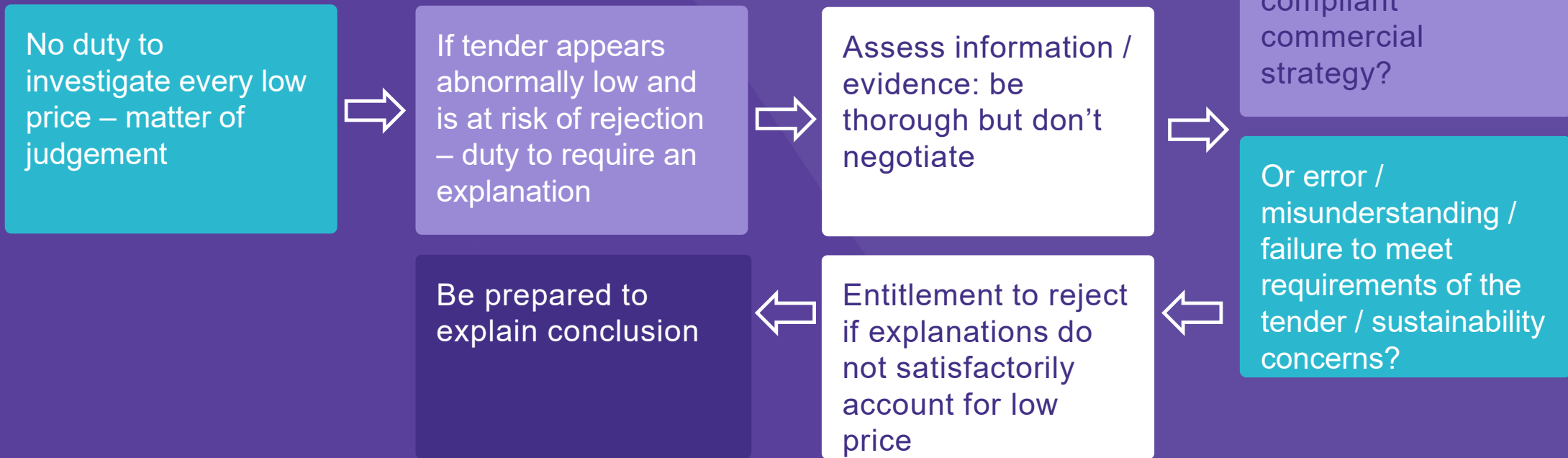
Amey LG Ltd v Scottish Ministers [2012] CSOH 181

- Trunk road maintenance services contract – under previous Regulations
- Amey's tender rejected by Transport Scotland for being abnormally low
- Judgement at interim stage: grounds of challenge were *prima facie* weak
- Sustained engagement to understand basis of price:



Word of caution: **don't** permit changes or corrections

Episode Summary



Q&A



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