ABNORMALLY LOW TENDERS

Strabag/Hauserman

Change to existing thinking on clients' investigatory obligations?

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OVERVIEW

- ALTs – duty to investigate:
  (a) SRCL Ltd v. NHS England [2019] PTSR 383: 27 July 2018 per Fraser J; appeal dismissed 20 June 2019 (unreported)
  (b) Clestra Hauserman v. European Parliament EU General Court (2nd Chamber): 26 March 2019
  (c) Strabag Belgium v. European Parliament EU General Court (9th Chamber): 13 June 2019

- "Move along – nothing to see" OR "Help – I need somebody, help"©

- PS Brexin/Brexout

ALT – EU DIRECTIVES

- Directive 2004/18/EC

  Article 55(1): "*If, for a given contract, tenders appear to be abnormally low in relation to goods, supplies or services, the contracting authority shall, before it rejects those tenders, request in writing details of the constituent elements of the tender which it considers relevant."* [emphasis added]

- Directive 2014/24/EU

  Article 69(1): "*Contracting authorities shall require economic operators to explain the price or costs proposed in a tender where tenders appear to be abnormally low in relation to the works, supplies or services.*" [emphasis added]

ALT – EU REGULATIONS RE EU INSTITUTIONS PROCUREMENT

- Regulation 2342/2002:
- Article 139(1): "*If, for a given contract, tenders appear to be abnormally low, the contracting authority shall, before rejecting such tenders on that ground alone, request in writing details of the constituent elements of the tender which it considers relevant and shall verify those constituent elements, after due hearing of the parties, taking account of the explanations received. These details may relate in particular to compliance with the provisions relating to employment protection and working conditions in force at the place where the work, service or supply is to be performed."* [emphasis added]
- Article 146(1): "*All requests to participate and tenders declared as satisfying the requirements shall be evaluated and ranked by an evaluation committee set up for each of the two stages on the basis of the pre- announced exclusion and selection criteria and the award criteria respectively."*
- Delegated Regulation 1268/2012

  Article 151(1): "*If, for a given contract, the price or cost proposed in a tender appears to be abnormally low, the contracting authority shall request in writing details of the constituent elements of the price or cost which it considers relevant and shall give the tenderer the opportunity to present its observations.*" [emphasis added]

ALT – UK LEGISLATION

- Public Contracts Regulations 2006

  Regulation 30(6): "*If an offer for a public contract is abnormally low, the contracting authority may reject that offer but only if it has requested in writing an explanation of the offer or those parts of the offer which it considers contribute to the offer being abnormally low …*" [emphasis added]

- Public Contracts Regulations 2015

  Reg 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.*" [emphasis added]

ALT – EU CASE LAW ON EU DIRECTIVES

- Interpretation of Article 55(1) of 2004 Directive: SAG ELV Slovensko [2013] PTSR 1: ECJ (4th Chamber) 29 March 2012:

  [27] "*It must be borne in mind that, under Article 55 of Directive 2004/18, if, for a given contract, tenders appear to be abnormally low in relation to the goods, works or services, the contracting authority must, before it may reject those tenders, request in writing details of the constituent elements of the tender which it considers relevant.*"

  [28] "*It follows clearly from those provisions, which are stated in a mandatory manner, that the European Union legislature intended to require the awarding authority to examine the details of tenders which are abnormally low, and for that purpose obliges it to request the tenderer to furnish the necessary explanations to prove that those tenders are genuine."*

- Interpretation of Article 69(1) of 2014 Directive: None

ALT – EU CASE LAW ON 2002 EU REGULATION

- Interpretation of Articles 139(1) and 146(1) of 2002 Regulation: TQ3 Travel Solutions Belgium [2007] 1 CMLR 38: EU General Court (2nd Chamber) 6 July 2005
- [49] "*Moreover, under Art.139 of the detailed implementing rules, the contracting authority is obliged to allow the tenderer to clarify, or even explain, the characteristics of its tender before rejecting it, if it considers that a tender is abnormally low. The obligation to check the seriousness of a tender also arises where there are doubts beforehand as to its reliability, also bearing in mind that the main purpose of that article is 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.*"
- [50] "*The application of Art.146 of the detailed implementing rules is therefore inherently connected with that of Art.139 of those rules, since only when a tender is considered abnormally low, within the meaning of the latter article, is the evaluation committee required to request details of the constituent elements of the tender which it considers relevant before, where appropriate, rejecting it. Moreover, contrary to what the applicant claims, where a tender does not appear to be abnormally low for the purposes of Art.139 of the detailed implementing rules, Art.146 of those rules is not relevant. Consequently, given that the evaluation committee had no intention, in this case, of rejecting WT's tender, since that tender did not appear to it to be abnormally low, Art.139 of the detailed implementing rules proves to be irrelevant.*"

ALT – EU CASE LAW ON 2012 EU REGULATION (1)

- Interpretation of Article 151(1) of 2012 Regulation:
  (a) Clestra Hauserman EU General Court (2nd Chamber): 26 March 2019 (not yet reported)

  [56] copy out of paragraph 49 TQ3 Solutions (via 2016 intermediate case of European Dynamics, paragraph 59)

  (b) Strabag Belgium EU General Court (9th Chamber): 13 June 2019 (not yet reported)

  [61-63] copy out of paragraphs 87-90 European Dynamics v. EU Agency for Railways EU General Court (3rd Chamber): 4 July 2017 ECLI:EU:T:2017: 462

  PTO

ALT – EU CASE LAW ON 2012 EU REGULATION (2)

European Dynamics v. EU Agency for Railways

[87] "*It is clear from the foregoing that the assessment by the contracting authority of the existence of abnormally low tenders is made in two stages.*"

[88] "*In the first stage, the contracting authority must determine whether the tenders submitted 'appear' to be abnormally low (see Article 151(1) of the Implementing Regulation). The use of the verb 'appear' in the Implementing Regulation requires the contracting authority to carry out a prima facie assessment of the abnormally low character of the tender. Therefore, the Implementing Regulation does not require the contracting authority to carry out, on its own initiative, a detailed analysis of the composition of each tender in order to establish that it is not an abnormally low tender. Thus, in the first stage, the contracting authority need only determine whether the tenders submitted contain evidence likely to arouse suspicion that they might be abnormally low. That is the case in particular, where the price proposed in a tender submitted is considerably less than that of the other tenders submitted or the normal market price. If the tenders submitted do not contain such evidence and therefore, do not appear to be abnormally low, the contracting authority may continue the evaluation of that tender and the award procedure for the contract.*"

ALT – EU CASE LAW ON 2012 EU REGULATION (3)

European Dynamics v. EU Agency for Railways (cont)

[89] "*However, if there is evidence which arouses suspicion that a tender may be abnormally low, the contracting authority must, in the second stage, check the composition of the tender in order to ensure that it is not abnormally low. Where it carries out that check, the contracting authority must give the tenderer which submitted that bid the opportunity to set out the reasons why it considers its tender is not abnormally low. The contracting authority must then assess the explanations provided and determine whether the tender concerned is abnormally low, in which case it must be rejected.*"

[90] "*As the requirement to state reasons must be determined, inter alia, in the light of the applicable legal rules, the existence of that examination in two stages influences the scope of the contracting authority's duty to state reasons.*"

ALT – UK CASE LAW ON 2006 UK REGULATIONS (1)

- Interpretation of Regulation 30(6) of 2006 Regulations - general:

  (a) Morrison Facilities Services v. Norwich City Council [2010] EWHC 487 (Ch): 22 February 2010:

  [12]: Investigatory obligation on contracting authorities is arguably as set out in the Directive, not the Regulations - "shall/may"

  [17]: Seriously arguable that contracting authorities comes under the investigatory obligation, when they suspect that there has been an ALT, to investigate that tender – that is a duty owed to both the low bidder and to the competing tenderers.

  (b) J. Varney & Sons v. Hertfortdshire Country Council [2010] EWHC 1404 (QB): 16 June 2010

  [158] "*It follows that, on the correct interpretation of both the Directive and the Regulation… the 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. …*

  [159] "*Although Regulation 30(6) talks in the abstract of an offer which is abnormally low, the Directive refers to tenders which "appear to be abnormally low" which only makes sense as a reference to what "appears" to the relevant authority.*"

ALT – UK CASE LAW ON 2006 UK REGULATIONS (2)

- Interpretation of Regulation 30(6) of 2006 Regulations – subjective/objective knowledge:

  Varney & Sons:

  [160] "*Mr Coppel contended in his cross-examination of Mr Shaw and Mr King and in his submissions that the Council ought to have known or suspected that the other tenders were abnormally low. He submitted that it was a manifest error to have accepted tenders which the Council should have recognised as unsustainable. Alternatively, he submitted that there was a duty to reject such tenders. In terms of what is the correct test in law, I am firmly of the view that the duty for which Varney contends (even if, contrary to the decision I have already indicated, such a duty could arise) cannot arise save in the case where the relevant authority actually knows or suspects that a tender is abnormally low. What it is contended an authority ought to have known or suspected, but did not know or suspect, is not sufficient to impose the duty for which Varney contends. Were it otherwise, an authority would have to investigate all tenders in detail to satisfy itself of the economic viability of each tender, an unrealistic and onerous burden.*"

ALT – UK CASE LAW ON 2006 UK REGULATIONS (3)

(c) NATS (Services) Ltd. v. Gatwick Airport Ltd. [2014] EWHC 3728 (TCC): 12 November 2014:

[19] "*It is beyond doubt that Regulation 30 does not expressly impose any wide-ranging or indeed any obligation on the utility or contracting authority (in other more utilised Regulations) to reject an abnormally low tender whatever the term means. The context must be that, as the "economically advantageous" and "lowest price" bases of tender are the main bases of tendering legislated for and because price plays a key part in such tendering, the utility under these Regulations in effect has a right to reject an "abnormally low" tender but, if it is considering that it might reject the tender because it considers that the price is suspect, it has to give the tenderer in question the opportunity to explain why it has priced as it has.*"

ALT – UK CASE LAW ON 2006 UK REGULATIONS (4)

- NATS (cont):

  [20] "*One needs to understand that the legislation and Directives encourage competition and competitiveness. A key aspect of this is price and tenderers who are keen to secure a project will want to pitch their prices at a level which will be the lowest. They might be keen to break into a market or establish their market share. There is nothing wrong with that for them or for the utilities or contracting authorities, who are (almost) always keen to place contracts at the lowest price and, preferably, at lower than they have budgeted. One needs to consider how, commercially, a tenderer, which is not the incumbent provider or not the market leader, will ever get a contract unless it puts in attractively low prices. Provided that the lowest tenderer is sufficiently` robust enough in financial/economic terms to provide the services which have been tendered for (or put another way will not become bankrupt part way through the contract), most utilities/contracting authorities will foreseeably be delighted to place the contract with such a tenderer; their constituents or the people or bodies (e.g. Parliament) would not only expect the truly most economically advantageous tender to be accepted but also would require an explanation as to why possibly millions of pounds have been wasted by rejecting a so-called "abnormally low" tender from a tenderer who is able effectively to provide the tendered services.*"

ALT – UK CASE LAW ON 2015 UK REGULATIONS (1)

- Interpretation of Regulation 69(1) of 2015 Regulations

  SRCL Ltd v. NHS England [2019] PTSR 383: 27 July 2018

  (a) Key issue: Preferred Varney over Morrison, but had to decide whether the position had changed with the 2014 Directive and 2015 Regulations.

  (b) Answer: no but to get there, had to rely on academic writing of Prof Arrowsmith because of difficulty with the change in the 2015 Regulations wording, which as she said, was the ”*codification of Slovensko*”. The effect of the Court’s determination is that there is no difference in result between the different EU Directives, despite clear change of language

ALT – UK CASE LAW ON 2015 UK REGULATIONS (2)

- SRCL v. NHS England:

  [182] "[Arrowsmith] *also identifies, entirely correctly in my view, that the context of the provisions and the language of the recitals contains indications that there is no duty to reject simply because there is an unacceptable risk of performance, but merely a power to reject. She postulates three potential interpretations of article 69.*"

  [183] "*(1) A duty to investigate in all cases, and a duty to reject when a tender presents an unacceptable risk of default; (2) A general duty to investigate but no general duty to reject tenders based on risk of non-performance. That duty only exists as expressly stated in article 69, namely non-compliance with certain legislation in the specified fields of environmental and social legislation; (3) there is no duty to reject any tender, except under the explicit duty to reject tenders that are abnormally low because of failure to comply with the specified social and environmental legislation.*"

ALT – UK CASE LAW ON 2015 UK REGULATIONS (3)

[185] "*The starting point is to consider the matter purposively. The PCR 2015 exist in order to give effect to the EU principles of equivalent treatment, fairness and transparency and to encourage open competition for the supply of services by contracting authorities in member states, which benefits society by leading to economic provision of those services. A tender cannot be the most economically advantageous tender (what is sometimes referred to as a MEAT tender) if it is abnormally low. It is not economically advantageous to have a tender price so low that there is a realistic and substantial risk of non-performance by the tenderer (or unlawful performance, in the sense that the tenderer can only comply with the terms contracted for by breaching other legal obligations such as payment of the minimum wage or observance of other Regulations), or that low price is achieved as a result of unlawful state aid. The concepts of a tender being "economically advantageous" or "abnormally low" are mutually exclusive.*"

[186] "*By definition, the concept of whether a tender is abnormally low only arises in the context of consideration of whether that tender should be accepted.*"

ALT – UK CASE LAW ON 2015 UK REGULATIONS (4)

[187] "*Further, the obligations imposed upon a contracting authority—which is a public body—must be proportionate and reasonable. These too are also principles of EU law. If, in the process of considering which is the most economically advantageous tender, a contracting authority considers that one or more of the tenders is or are abnormally low, that conclusion must be tested or investigated. Such testing, or investigation, does not arise in the abstract. It arises as part of the fair and transparent process whereby all tenderers are treated equally. A tenderer might have a perfectly reasonable and feasible explanation for its tender, which was so much lower than its competitors. This explanation may never see the light of day unless the explanation is sought from the tenderer.*"

ALT – UK CASE LAW ON 2015 UK REGULATIONS (5)

[188] "*It would be unreasonable and disproportionate to impose upon a contracting authority such a duty in the abstract. Firstly, it would require that authority to form its own freestanding view of what would, or could, constitute abnormally low. There would be potential situations (such as here) where all the tenders in a particularly low and narrow grouping would stand out, in distinction to the highest one. Would this mean that the duty imposed upon the contracting authority would be to investigate all the tenders, save the highest one? Adoption of Professor Arrowsmith's first alternative, a duty to investigate all such tenders, and a duty to reject, would create an entirely separate and secondary round of investigation in many (if not all) cases. That cannot have been the intention either of the Directive or the implementing regulations. The first alternative can be safely rejected.*"

ALT – UK CASE LAW ON 2015 UK REGULATIONS (6)

[189] "*Nor do I consider the second alternative to be the correct one. If there were a general duty to investigate, this would suffer from the same objections as the first alternative in terms of the added (and potentially disproportionate) burden upon contracting authorities. Further, if that general duty went hand in hand with a discretion whether tenders should be rejected based on the risk of non-performance (which is the only sensible way of interpreting the lack of a general duty to reject tenders based on risk of non-performance) then that would introduce the risk of arbitrariness into a process designed to avoid precisely that. Why should a particular tenderer, considered to have submitted an abnormally low tender, have that tender rejected on those grounds (after explanation by the tenderer), where as another tenderer, who had also submitted an abnormally low tender, could have that tender accepted?*"

ALT – UK CASE LAW ON 2015 UK REGULATIONS (7)

[190] "*It is axiomatic that the contracting authority must treat all tenderers equally. There is a general duty to reject, but this duty only exists as expressly stated in article 69, namely non-compliance with certain legislation in the specified fields of environmental and social legislation. The lack of express statement of such a duty in respect of all abnormally low tenders is telling, and in my judgment justifies the conclusion that there is no such general duty. It is made clear when one considers the wording of recital (103) to the Directive, which states: "Where the tenderer cannot provide a sufficient explanation [for an abnormally low tender] the contracting authority should be entitled to reject the tender. Rejection should be mandatory in cases where the contracting authority has established that the abnormally low price or costs proposed results from non-compliance with mandatory Union law or national law comparable with it in the fields of social, labour or environmental law or international labour law provisions.*"

ALT – UK CASE LAW ON 2015 UK REGULATIONS (8)

[191] "*The expression "should be entitled to reject" cannot be equated with an obligation to reject, contained in the term "rejection should be mandatory in cases where". The recital states that rejection should be mandatory in certain cases. It therefore follows that it cannot be mandatory in all cases. If there is no express obligation to reject such tenders, there is no sensible reason to impose upon contracting authorities such as NHSE a duty to seek explanations in all cases either.*"

[192] "*The PCR 2015 have to be interpreted in accordance with the Directive. This was plainly in the mind of draftsman when regulation 69(4) was drafted, as this states: "[The contracting authority] may only reject the tender where the evidence supplied does not satisfactorily account for the low level of price or costs proposed.""*

ALT – UK CASE LAW ON 2015 UK REGULATIONS (9)

[193] "*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. Absent a satisfactory explanation, it is obliged to reject that tender as expressly stated in article 69,namely non-compliance with certain legislation in the specified fields of environmental and social legislation. Otherwise, it is entitled to reject it if the evidence does not satisfactorily account for the low level of price, but it is not required to do so."*

[194] "*This is the third of Professor Arrowsmith's alternatives and in my judgment it is the correct one. It therefore follows, and I find, that the relevant provisions of the PCR 2006 and PCR 2015 are to be interpreted in the same way as one another, and Varney [2010] LGR 801 remains good law.*"

COMPASS READINGS

- "Nothing to see"
  - No change, despite the wording change and ¨Slovensko"
  - Pragmatic UK approach – market knows best: [20] NATS

  OR

- "Help"
  - No appellate authority
  - Clestra and Strabag deal with the 2012 EU Regulation – its wording reflects the 2004 Directive not the 2014 Directive
  - Potential for a preliminary reference to CJEU (Brexit permitting)
  - Long-term uncertainty

PS – B'DAY

- Brexin/Brexit

  (a) Brexin

  - General election
  - WAB
  - s.1A(3)(f)(ii): "*the United Kingdom to be treated as if it were a member of the EU during the implementation period*" – BRINO

  (b) Brexit – no deal

  - UK no deal notice
  - ALTs - ? change – national preference – Singapore-on-Sea

- What Immanuel Kant might have said about B'day: *Three things fill the human mind with awe: the starry heavens above us, the moral law within us and the dogged British insistence that trade deals with Fiji and the Faroe Islands can help compensate for Brexit.*

THANK YOU

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