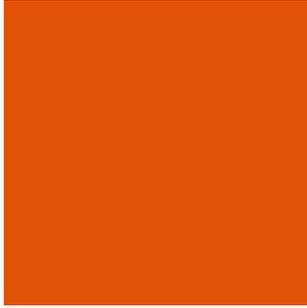
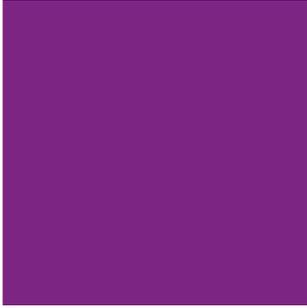
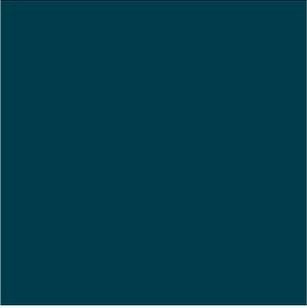
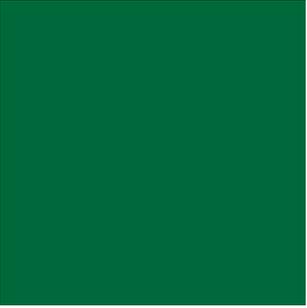
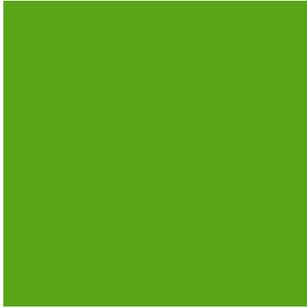
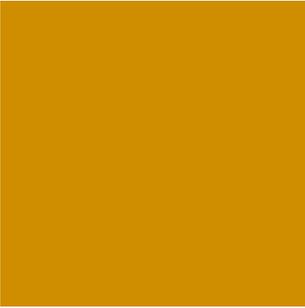
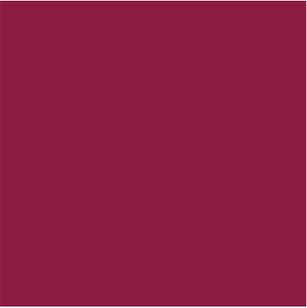




How do you decide if a tender is abnormally low, and what do you do if it is, supported by practical examples of borderline cases?

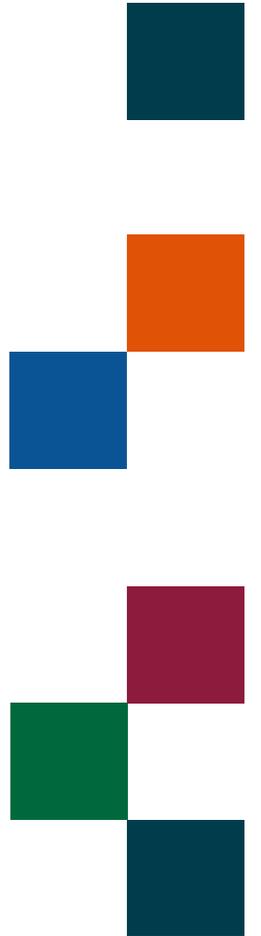
White Paper Conference, 15 October 2024

Dorit McCann
Partner, Mason Hayes & Curran LLP

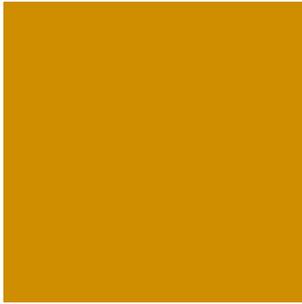
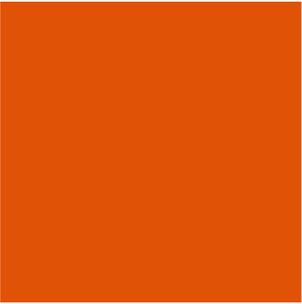
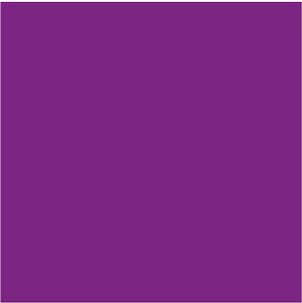


Agenda

- 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

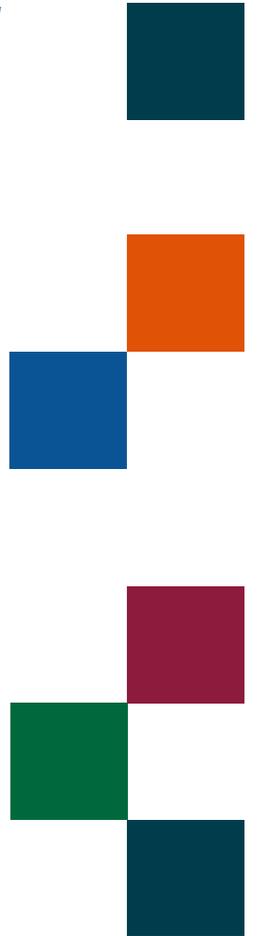


Introduction



Introduction

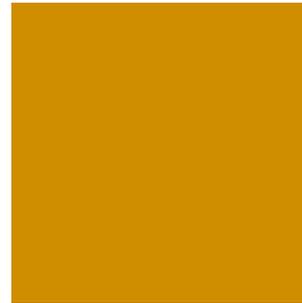
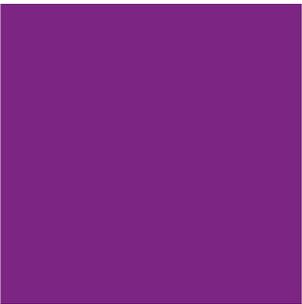
- Recital 103: *Tenders that appear abnormally low...might be based on technically, economically or legally unsound assumptions or practices...*
- Risks for contracting authorities (CA):
 - Non-performance or poor performance of contract
 - Contractual claims to recoup 'lost' consideration which can 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



Overview of obligations

- EU and Irish courts have outlined the obligations on authorities:
 1. Duty to identify suspect tenders
 2. Duty to investigate tenders suspected to be abnormally low
 3. Duty to afford tenderers an opportunity to explain by asking them to provide details
 4. Assess the merits of the information provided to determine whether it satisfactorily accounts for the low level of price or costs proposed
 5. Discretion to **admit or reject** ALT (except where breach of applicable legislation)

How do you identify an abnormally low tender?



How do you identify ALTs?

- No definition of ALT in Directive or Regulations
- 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 invitation to tender concerned*. **Comparison with other, competing tenders**, however useful it may be in certain cases for the purpose of identifying any anomalies, **cannot constitute the sole criterion** used by the [CA] (C-669/20 *Veridos*)

Duty to identify suspect tenders

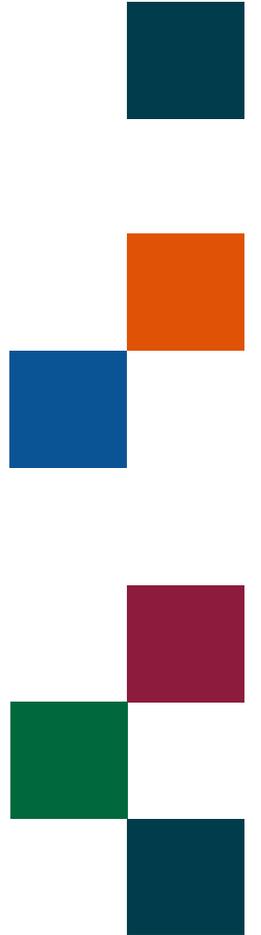
- *White Mountain Quarries v Mayo CC* (13 Feb 2024)
 1. No statutory definition
 - *generally recognised as referring to the situation where the price offered by an economic operator raises doubts as to whether the offer **is economically sustainable and can be performed properly** (OECD)*
 2. A tender which does not comply with applicable statutory obligations, eg the payment of wages, **must** be treated as ALT
 3. ALT encompasses a bid which is low (almost invariably lower than the other tenders) and ***below the range of anything which might legitimately be considered to be normal in the context of the particular procurement***
 4. Where a price proposed in a tender is **considerably lower than that of the other tenders or the normal market price**, this is evidence that the tender might be abnormally low

Duty to identify suspect tenders

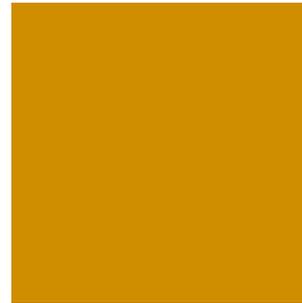
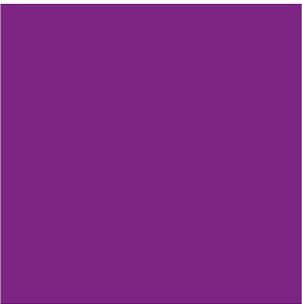
- Frequently used methods to identify suspect tenders:
 - Analysis of the price or cost proposed in comparison with the subject of the procurement
 - Comparison of tender price with the pre-tender estimated value
 - Comparison of tender price with prices proposed in all other **compliant** tenders and assessment of deviation from mean price and/or the extent of the difference between tenders
- *...if financial characteristics of a bid are such that on any potential scenario ... the **contract can only be performed by such a tenderer at a loss which...is not nominal or marginal, ...at a minimum this must be regarded at least as suspected to be an abnormally low tender***
- *Where a question arises as to whether **rates proposed are below statutory or industry standard rates**, such as in sectoral employment orders, there must at least be a suspicion aroused*

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)

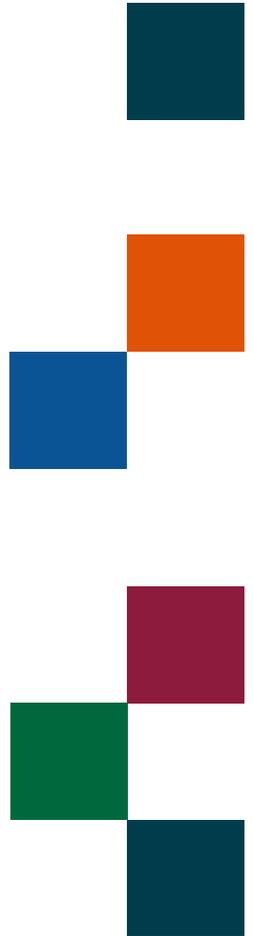
- Art/Reg 69 (Art 93 - Utilities): *Contracting authorities **shall require economic operators to explain the price or costs proposed in the tender where tenders appear to be abnormally low in relation to the works, supplies or services***
- If tender appears abnormally low, duty to investigate, even 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*)
- **Not sufficient for authority to accept generic and formulaic explanations** from tenderers that they can perform the work for the amount tendered, **there must be a robust interrogation of responses** received to establish if pricing is genuine (*White Mountain*)

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

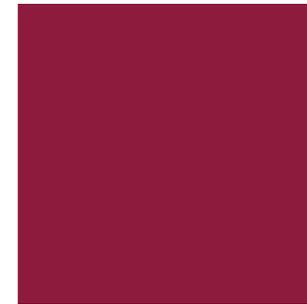
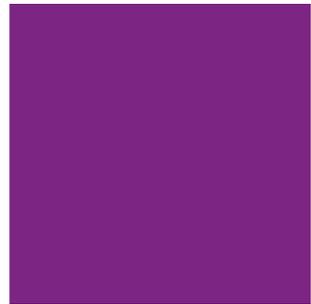
- If above steps are followed, CA can **accept or reject** ALT
- No general duty to reject ALT but CA **must reject** where tender violates applicable laws, eg environmental / social / labour law
- Discretion must be exercised in accordance with **EU principles** of equal treatment, proportionality, 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
 - Where an unsuccessful tenderer requests reasons for a determination that a tender is not abnormally low, CA is required to provide a detailed response; this must be more than a pre-emptory statement without any justification (*White Mountain*)
 - CA should keep records of prima facie assessment
- **Art/Reg 69 inquiry**
 - CA must formally adopt a **reasoned decision** admitting or rejecting tender (*White Mountain*)

Case law



Dublin

London

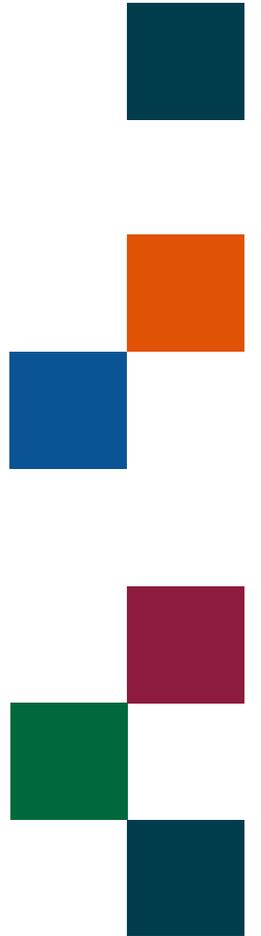
New York

San Francisco

MHC.ie

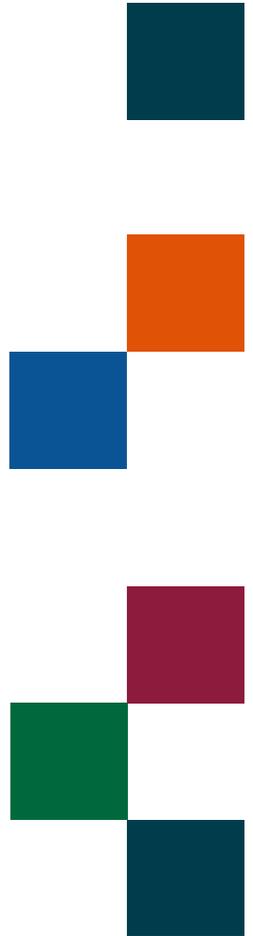
Owens v Kildare County Council [2020]

- 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]

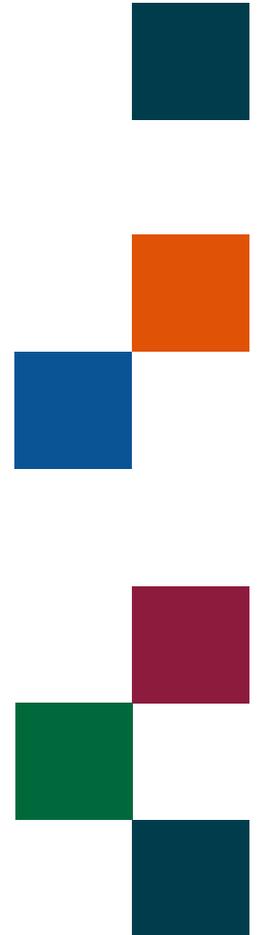
- Many tendered rates were below those in sectoral employment orders
- Difference in price between tenders was, according to Council, *massive*
- Consortium argued that rates were blended and could be offset by high rates for plant/equipment etc
- Contract contained requirement to comply with employment law
- Tender was accepted by Council
- No Reg 69 inquiry took place

White Mountain Quarries v Mayo CC [2024]

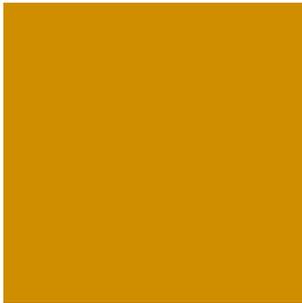
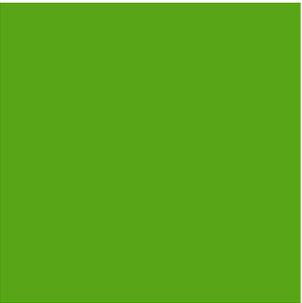
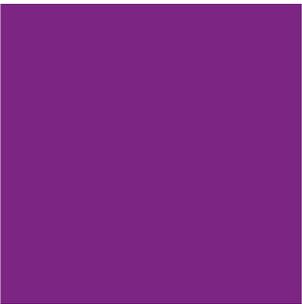
- Preferred bidder's prices were considerably lower than that of other tenderers, ie suspiciously low, and should have been subject of a Reg 69 inquiry
- A tender which does not comply with applicable obligations, eg labour law, must be treated as ALT - not cured by
 - **'blended rates'** (ie sufficient 'fat' to enable bidder to perform contract)
 - **contract clause (Z6) requiring that rates of pay and conditions of employment comply with applicable law**
- Limited evidence that preferred bidder had general reserves and capacity to perform the contract - costs tendered on comparator projects was of limited use as no information on what actual costs on those projects were
- Strategic pricing to enter a particular market at cost/loss not itself problematic but Council failed to interrogate whether tender was genuine – it accepted **bare and formulaic assurances** that bidder will not break law 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, for the same service or for same work
 - 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



Key takeaways

CA must always conduct prima facie assessment to identify suspect tenders

If suspect tenders identified, CA must always conduct Art 69 inquiry

Investigate tenders thoroughly and give tenderers right to reply

If tender is ALT, exercise discretion to accept or reject tender

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

Thank you



Dorit McCann

Partner and Head of Public Procurement

[Email: dmccann@mhc.ie](mailto:dmccann@mhc.ie)

Ph: +353 (0)87 7850016

