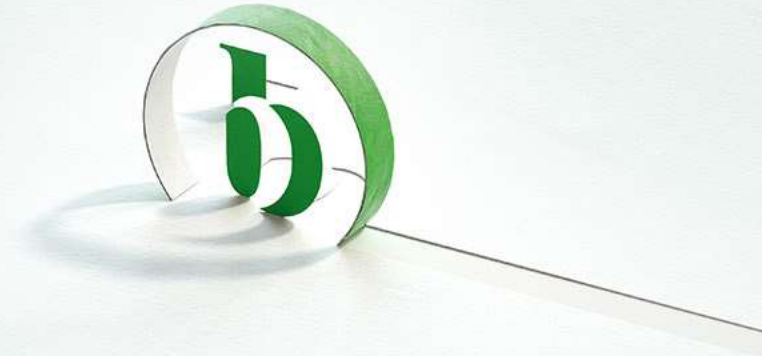


Whitepaper September 2022

Abnormally Low Tenders

Emily Heard, Partner



How do you decide if a tender is abnormally low, and what do you do if it is, supported by case studies and practical examples

Case study: Services and supplies contract pricing schedule (restricted procedure)

Bidder	Supplies (20%)	Implementation costs (20%)	On-going services (60%)	Total Costs
A	£100	£100	£100	£300
B	£500	£500	£0	£1000
C	£500	£0	£100	£600

**Do you have to do anything about
the ALT aspect at all?**

**If intend to reject ✓ (because you
have to ask for explanation first)**

If consider it to be ALT ✓

**If you do not think it is an ALT ✗
(unless there is manifest error)**

Regulation 69(1) PCR 2015

*“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)*



Explanation
may “in
particular”
relate to:

Economics

Technical solutions

Favourable conditions

Originality

Compliance with laws

Sub-contracting obligations

State aid – no longer express



Regulation 69(3) PCR 2015
CA shall assess the information provided



Regulation 69(4) PCR 2015

Does the evidence satisfactorily account for the low level of price, taking into account the elements in (2)?

Yes

May not reject (and therefore must evaluate)

No

May reject and must reject if non-compliant with labour and environmental laws

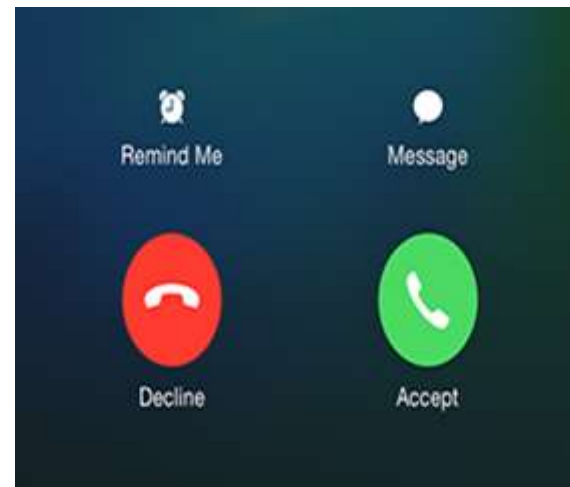


Regulation 69(5) – “shall reject” where non-compliance with environmental, social and labour law



Provided tender is compliant with those laws, rejection is not mandatory in all cases

*SRCL Limited v NHS
England* [2018]
EWHC 1985 (TCC)
[191]



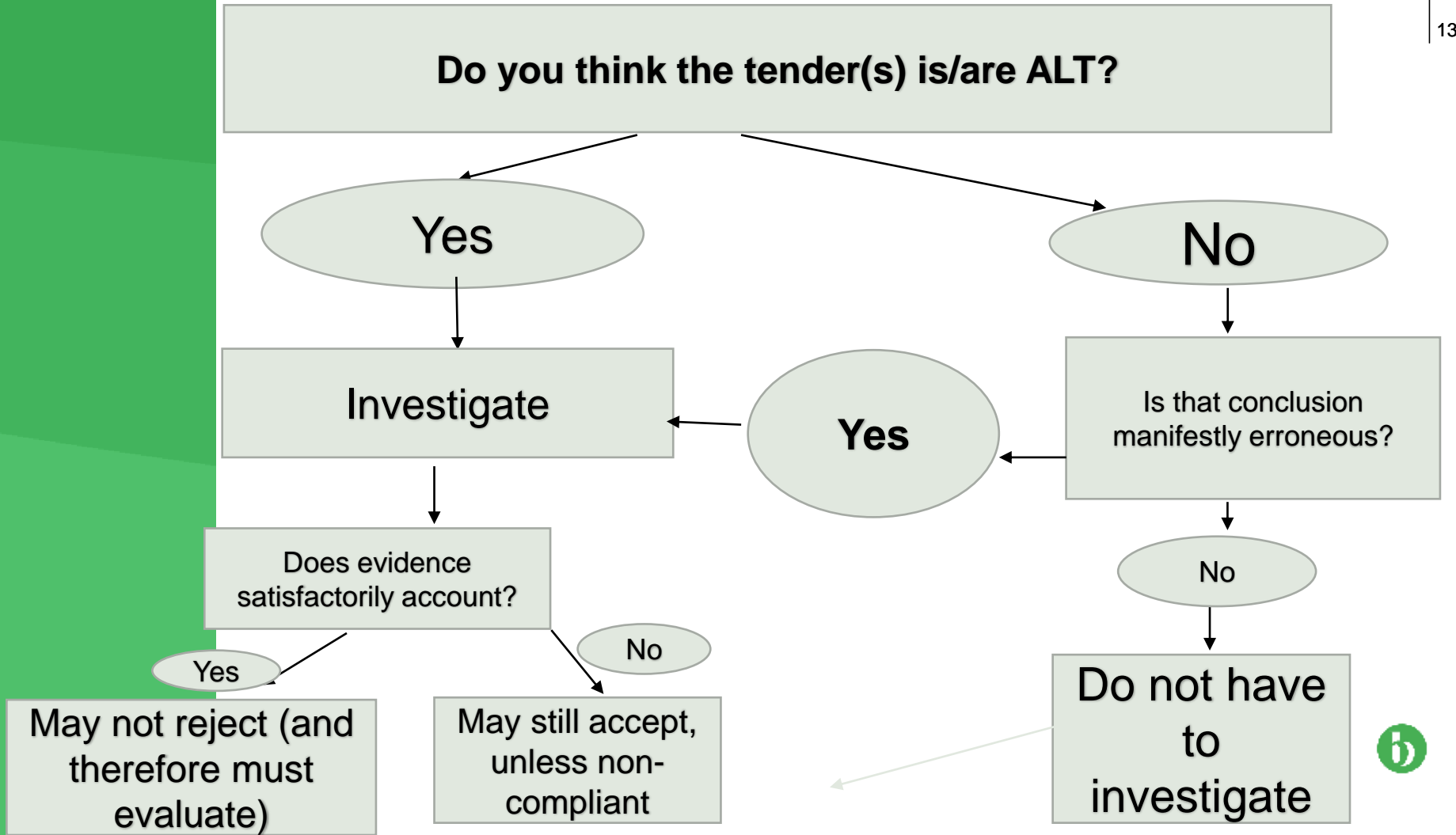
Case study: Mixed services and supplies contract – pricing schedule (restricted procedure)

Bidder	Supplies (20%)	Implementation Costs (20%)	On-going services (60%)	Total Costs
A	£100	£100	£100	£300
B	£500	£500	£0	£1000
C	£500	£0	£100	£600

SRCL says

If an authority **considers*** that one or more of the tenders is abnormally low, that conclusion must be investigated [187]

*subjective test (as long as not manifestly erroneous)



Mixed services and supplies contract – pricing schedule (restricted procedure)

Bidder	Supplies (20%)	Implementation Costs (20%)	On-going services (60%)	Total Costs
A	£100	£100	£100	£300
B	£500	£500	£0	£1000
C	£500	£0	£100	£600

There is no definition of what is an ALT in
the PCR 2015



What about case law?

- There is no definition of what abnormally low means – however the expression must encompass a bid which is **low** (almost invariably lower than the other tenders) and the bid must be beyond and below the range of anything which might legitimately be considered to be **normal** in the context of the particular procurement. [204]
- A CA has a **discretion** as to what test it uses for identifying what may be an ALT [205]

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



What about Guidance?

- https://ec.europa.eu/growth/content/new-guidance-participation-third-country-bidders-eu-procurement-market_en
- Deviation from pre-determined formula is acceptable.
- Comparison with other bids is acceptable.
- Deviation from average of other bids is acceptable



The Sourcing Playbook – May 2021 (publishing.service.gov.uk)

THE SOURCING PLAYBOOK

Government guidance

on service delivery, including outsourcing,
insourcing, mixed economy sourcing
and contracting



UK guidance

“Should Cost Model” should be produced pre-procurement against which tenders are measured to identify ALTs

Mandatory for central government complex outsourced services

Bid is 10%
lower than
Should
Cost
Model

Bid is 10%
lower than
average of
all bids

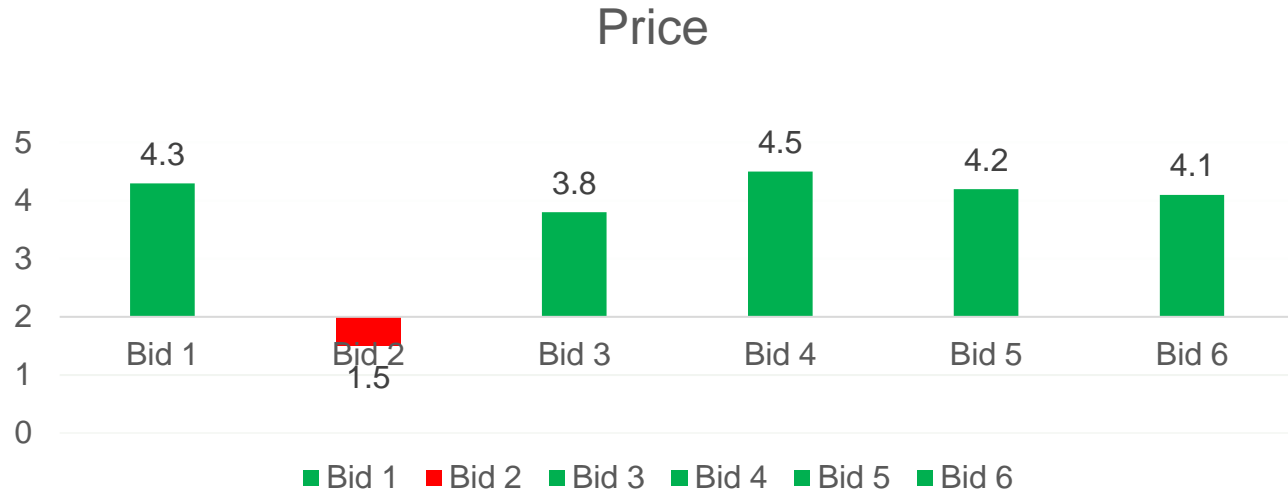
Bid must be referred
to a Continuous
Commercial
Improvement Team



So you can choose a method



2) Deviation from should cost model ✓ - Should Cost minimum is 2



1) Comparison between bids ✓

A comparison with other tenders is a perfectly permissible approach



Mixed services and supplies contract – pricing schedule (restricted procedure)

Bidder	Supplies (20%)	Implementation Costs (20%)	On-going services (60%)	Total Costs
A	£100	£100	£100	£300
B	£500	£500	£0	£1000
C	£500	£0	£100	£600

But SRCL also says...

No requirement to seek explanations for tender price where, upon initial examination, a tender appears abnormally low.
[202]

What was the purpose of the provision?

*“Tenders that appear abnormally low in relation to the works, supplies or services might be based on **technically, economically or legally unsound assumptions or practices**. Where the tenderer cannot provide a sufficient explanation, the contracting authority should be entitled to reject the tender”*

Recital 103 to Directive 2014/24/EU



Option 1 – Audit Trail!

These bids are not abnormally low BECAUSE:

- Despite Bid A being so much lower, it is still close to the benchmark we established.
- Despite Bids B and C having £0 price submissions for certain elements, this practice of off-setting and subsidising is a known and accepted practice in this particular market

→ No investigation MAY be a lawful approach???

Option 2 - Audit Trail!

These bids may be abnormally low BECAUSE *[to be completed based on method you chose]:*

→ Investigation will be carried out

What might you ask?

- Proof that the calculation of price is sound
- How did the bidder arrive at a specific price for a specific item?
- Does the price allow for fulfilling all legal and contractual requirements (referring to any in particular that you are concerned about)? – including supply chain
- Does the price allow for fulfilling all required labour and environmental standards (again raising any you are particularly concerned about)?
- How is the tender financed, including any subsidies?
- Any other particular questions about the solution or deliverability that you are particularly concerned about in view of the price.



Bidder A response (the £300 bid)

“Our costs exceed the price we have submitted. The reason we have bid at a negative margin is because we want to secure a foothold in this market. Our accounts show that we are sufficiently financially robust to deliver. We confirm that we are willing to commit to these prices, and that no renegotiation of price will be attempted once in contract.”



NATS (Services) Ltd v Gatwick Airport Ltd [2014] EWHC 3728 (TCC) [206]

...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

.... 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;



So a very low price is ok – provided it is sustainable



Bidder B response (the £1000 bid with £0 for on-going services)

“We confirm that we will deliver against all specified requirements regarding provision of on-going services.”

Is this enough?



Are you able to ask for documentary evidence?

- Regulation 69 refers to the bidder providing explanations, information and evidence.
- European Commission guidance emphasises that the bidder should provide all the evidence necessary to provide a sufficient explanation, which may include detailed information accompanied by appropriate documentation on the production process, facilities, social conditions, certificates and environmental standards.



Ask the bidder to back up its explanation with evidence to start with



Bidder C response: £600 bid with £0 implementation costs

- “We don’t have any implementation costs as we are the incumbent contractor”
 - You notice that their tender does not address the specified requirement to interface with new third party software. This will be a cost regardless of whether they are incumbent or not. Their method statement fails to address this.



**Is the tender compliant with labour, environmental and social laws? (If not, must reject).
If YES:**

**Discretion to evaluate
or reject**

Taking into account the factors from Regulation 69(2),
does it seem rational to evaluate this tender?



Concluding Thoughts

- Duty to investigate if you intend to reject
- If you consider a bid to be abnormally low, you shall investigate it
- You do not have to reject it unless it is non-compliant with labour, environmental and social laws.
- You have a discretion (subject to manifest error).
- Some kind of pre-determined test may be useful.
- Audit trail justifying your approach is crucial.



Contact details



Emily
Heard

Partner

0370 194 8997 | 07917 792597

emily.heard@bevanbrittan.com



Bevan Brittan LLP