

The logo for Byrne Wallace Law Firm is located in the top left corner of a dark grey background with abstract geometric shapes. It consists of a purple rectangular box containing the text "BYRNE WALLACE" in white, serif, all-caps font.

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Clarifications

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Post Tender Clarifications

- Area of contention which requires consideration on a case by case basis
- Is a Contracting Authority obliged to clarify or is it at the Contracting Authority's discretion?

Obligation or discretionary?

- ALT clarifications – Express obligation on Contracting Authority to clarify (Regulation 69)
- Other types of clarifications – No express obligation In Directive/Regulation on CA to clarify
- However, CA might be under an obligation to clarify depending on:
 - the wording of the tender documents and/or
 - the EU General Principles of Public Procurement

Abnormally Low Tender – Duty to Clarify

- Regulation 69 sets the out steps which **must be** followed by contracting authority if the price or costs in a tender appears to be abnormally low
- Cannot exclude a tenderer for suspected ALT without first giving the tenderer the opportunity to explain the ALT

Post Tender Clarifications

Regulation 56(4) of S.I. 284 of 2016:

*“Where information or documentation submitted by an economic operator is, or appears to a contracting authority, to be incomplete or erroneous, or where specific documents are missing, the authority **may** request the economic operator concerned to submit, supplement, clarify or complete the relevant information or documentation within an appropriate time limit, **where any such request is made in full compliance with the principles of equal treatment and transparency.**”*

General Principles of Public Procurement

1 Equal Treatment

2 Non-discrimination

3 Transparency

4 Mutual Recognition

5 Proportionality

6 Good Administration

Tender Documents

- Ensure statement in tender documents that candidates and tenderers are responsible for ensuring the completeness and accuracy of their submissions
- Set out clear and transparent procedure for submission and response to clarifications
- Consider how clarifications are captured contractually at award stage

Tideland Signal v Commission T-211/02

- Ambiguity re validity period of a tender (90 days)
- Whether inaction of Commission was proportionate
- Court held that where the CA is empowered in the tender documents, the **community law principle of good administration** imposes an obligation to exercise that power in circumstances where clarification of a tender is both practically possible and necessary.

SAG ELV Case C-599/10

- Duty to clarify abnormally low tenders
- No **express general** obligation in Directive to clarify tenders
- Subject to position stated in Tender Documents
- Must review all tenders before issuing clarification
- Must not amount to a new or revised tender

SAG ELV Case C-599/10 contd.

- Must treat tenderers equally and fairly
- Must not unduly favour or disadvantage the tenderer(s) to whom a request for clarification is addressed
- Must be sent in an equivalent manner
- Must relate to all parts of the tender which are imprecise or ambiguous

Avoid negotiation/material changes-Reg 72

- “Material” changes to a contract **after it has been awarded** give rise to a new contract which needs to be retendered. The test for material change is:
 - does change introduce conditions, which, had they been part of the initial award procedure, would have allowed for the admission of the tenderers other than those initially admitted or would have allowed for the acceptance of a tender other than the one initially accepted?
 - does change extend the scope of the contract considerably?
 - has the economic balance of the contract shifted in favour of the contractor in a manner not provided for in the terms of the initial contract?

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Questions?



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