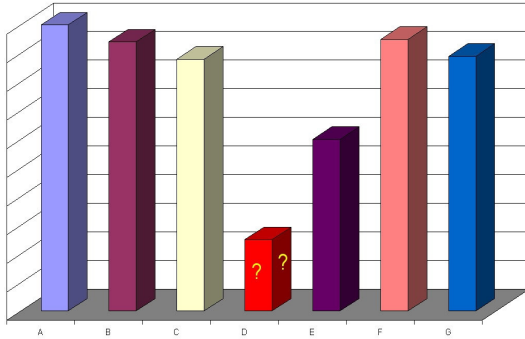


# Abnormally Low Tenders

## Intelligent Procurement



### Introduction

In the current economic climate it is increasingly likely that organisations will submit abnormally low tenders to win new work.

The Contract Services Helpdesk has been received an increasing number of queries around the subject of whether an Employer is able to reject an abnormally low tender and still remain compliant with the European Procurement rules.

This briefing note describes the legal framework within which any decision on rejecting a tender must be based and provides practical advice on how to handle the situation in the event that an abnormally low tender is received.

### Definition

The Public Contracts Regulations 2006 and the Utilities Contracts Regulations 2006 (the Regulations) do not define what constitutes an abnormally low tender.

However, this issue has been addressed in the European Commission's Europa report<sup>1</sup>, which states that a tender is assumed to be abnormally low if:

- In the light of the client's estimate and of all the tenders submitted, it appears to be abnormally low by not providing a margin for normal levels of profit, and
- The low tender cannot be explained by economy of the selected construction method, the technical solution chosen, exceptionally favourable conditions available to the tenderer, or the originality of the work proposed.

### Procurement Regulations

#### Public Contracts Regulations

In accordance with Regulation 30(6) before rejecting an abnormally low tender the Employer must:

- request an explanation of the tender or of those parts which it considers contribute to the tender being abnormally low,
- take account of the evidence provided in response to a request in writing, and
- subsequently verify the tender or parts of the tender being abnormally low with the economic operators.

<sup>1</sup> "Prevention, Detection and Elimination of Abnormally Low Tenders in the European Construction Industry" Europa Report



Reg. 30(7) states that the information provided in response to the request may include:

- economy of the construction method,
- technical solutions chosen,
- exceptionally favourable conditions available to the bidder, and/or
- the originality of the works/services proposed by the bidder.

### **Utilities Contracts Regulations**

The provisions on abnormally low tenders are set out in Utilities Contracts Regulations 21(6) and (7). The rules are substantially the same as those set out in the Public Contracts Regulations referred to above.

### **Rejection of Abnormally Low Tenders Discretion to Accept or Reject Abnormally Low Tenders**

In the cases of *S.A Transporoute v Ministry of Public Works* [1982] (Case 76/81), *Fratelli Costanzo SpA v Comune di Milano* [1989] (Case 103/88) and *SECAP SpA v Comune di Torino* [2008] (Case 76/81), it was held that a Employer's must not under any circumstances exclude an abnormally low tender "automatically" without first asking for an explanation of the tender and allowing for a verification procedure.

The objective of the Regulations would not be achieved if the Employer was free to choose whether or not it was appropriate to seek justification, or was permitted to reject tenders which were abnormally low on purely arithmetic criteria.

A fundamental objective of the Regulations is to promote effective competition in public procurement. When an Employer is

considering the elimination of a bidder because of an abnormally low tender it must therefore:

- give any bidder that has submitted a low tender the opportunity to prove the genuine nature of its tender in respect of all its constituent elements,
- allow the bidder to put forward all explanations it considers appropriate,
- exchange views with the bidders at an appropriate time in the procedure for examining tenders in order to prevent the Employer from acting in an arbitrary manner and to ensure healthy competition as highlighted in the case of *Impresa Lombardini* [2001] EUECJ C-286/99,
- examine the details of all tenders, taking into account any explanations given for any abnormally low tenders,
- give the bidders chance to request a debriefing to the Employer's decision to reject tenders as abnormally low after receiving the requested explanations.

The purpose of the consultation and verification procedure set out in the Regulations is to protect the bidders from arbitrary assessments on the part of the Employer by guaranteeing that, at whatever level this procedure is invoked, the bidders will have the opportunity to prove that their tenders are serious and will be able to perform on the terms proposed before they can be rejected.

Following the consultation and verification of the explanations provided by the bidder the Employer may reject an abnormally low



tender. However any such decision must be made on objective grounds.

The objective grounds and explanations in Reg. 30(7), which are not exhaustive, are considered to be facts which reflect the bidder's superior competitive position, thus there is no risk of non-performance in delivering the contract.

It is held, in *Impresa Lombardini [2001] EUECJ C-286/99*, by the Court that the EU Directives do not preclude certain types of explanation relating to all those elements for which minimum values are laid down by law, regulation or administrative provision or can be ascertained from official data.

#### **State Aid**

In accordance with the Regulations, the possibility of the bidder obtaining state aid would not be an objective reason to reject an abnormally low tender.

In *ARGE Gewässerschutz v Bundesministerium für Land- und Forstwirtschaft [2000] (Case C-94/99)* it was held that an Employer allows a bidder, who received subsidies enabling it to submit tenders at prices appreciably lower than others, to take part in a procedure for the award of a public procurement contract does not amount to a breach of the principle of equal treatment.

However, the abnormally low tender may be rejected if the bidder has not demonstrated within a reasonable time limit fixed by the Employer that the state aid has been lawfully granted.

#### **Risk of Non Performance**

Historical performance data, technical ability, and the financial capacity of bidders must be assessed at the prequalification stage of the

procurement process if they are to be considered in the decision making process.

The tenders at the award stage would be assessed in relation to the characteristics and nature of the contract on the basis that the bidders have been considered to be capable of undertaking the required works/services at the selection stage.

Therefore, unless it is declared at the award stage by bidders that their financial viability and technical capability have materially changed, it assumes that they would be capable of performing the contract, and should be not excluded from the tender process except that their tenders have not been determined to be the most economically advantageous in accordance with the award criteria.

#### **Risk Assessment**

When considering explanations put forward by the abnormally low bidder it is advisable that the Employer carries out a risk assessment based on all the received tenders, to

- identify all reasonable and possible risks leading to the abnormally low bidder not being able to perform the contract; and
- assess the likelihood of each identified risk and whether such risks are acceptable to the Employer.

Following such assessment, if the Employer considers that there is an unacceptable risk of non-performance, it may reject the abnormally low tender.

There is no guidance identified in the Regulations as to what is deemed to be an unacceptable risk of non-performance. Thus, the decision to reject or accept the



abnormally low tender is left to the Employer's discretion.

### Conclusion

Prior to deciding to reject an abnormally low tender, the Employer is required to comply with the consultation and verification procedures as set out in the Regulations.

The Employer may reject an abnormally low tender on the basis that:

- there is an unacceptable risk of non-performance; and/or
- the bidder has not obtained lawful state aid.

The risk of non-performance can be identified and assessed on the basis of all received tender submissions and the explanations provided by the abnormally low bidder.

It is a grey area as to what is deemed to be an "unacceptable risk" of non performance. the Employer may be able to minimise the risk of infringement of EU procurement rules if it can demonstrate that it has undertaken all reasonable steps to reach a non-arbitrary decision to reject an abnormally low tender.

For assistance with addressing issues around abnormally low tenders or for any further information relating to European Procurement generally, please do not hesitate to contact Chrystele Kan in the London Office on +44 (0) 20 7544 152 or alternatively the Contract Services Helpdesk on +44 (0) 20 7544 3999.

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