



Abnormally low tenders: a litigator's perspective

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“Abnormally low” challenges (1)

- Current EU legislation confers protection on tenderers bidding low prices (or service levels)
- There are older CJEU cases from, in particular, Italy challenging the exclusion of tenders on “abnormally low” grounds, where the procedures allowing for explanations were not followed.
- In the UK, it is very rare for tenders to be excluded on “abnormally low” grounds
- Challenges have come in the form of claims that the winning tender is “abnormally low” and should not have been accepted.

“Abnormally low” challenges (2)

Issues

- Is the authority’s duty limited to not rejecting a tender on “abnormally low” grounds before dialogue with the tenderer?
- Or is there also a duty owed to unsuccessful tenderers to reject a tender which is “abnormally low”?
- Does it matter that the authority has in fact decided not to reject a tender on “abnormally” low grounds?
- How is an authority to decide whether or not a tender is abnormally low?
- Is “abnormally low” an objective criterion for the court?
- Once it has been decided that a tender is “abnormally low”, what steps should be taken to seek justification of the offer?
- When is an authority entitled to take a risk on an “abnormally low” tender?

Morrison v Norwich CC

- Contract for maintenance and repair of social housing, won by Connaught Partnerships Ltd.
- Connaught's price was £17.5m pa; next highest bid was £23m; most bidders £23-26m.
- Most of the costs were staff costs, fixed due to TUPE; other costs easily ascertainable.
- Authority had asked Connaught to verify its prices on at least two occasions.
- Claim by Morrison was that authority had a duty to verify prices which were abnormally low and had failed to do so diligently.
- High Court held (February 2010) – arguable, injunction granted.
- Case settled for payment by the authority.
- Connaught went into receivership in September 2010.

J Varney & Sons v Hertfordshire CC

- Tender process for right to operate Household Waste Recycling Centres.
- Most winning tenders bid prices which were substantially less than staffing costs.
- But save for one outlier, which was investigated, were consistent with mean average prices.
- Claimant argued authority in breach of duty to verify prices, and to infer that low prices would lead to poor performance.
- Low prices explained by anticipation of income from bonus scheme and sale of salvage; cross-subsidy from another contract with same authority; and probably mistake.
- High Court held no duty owed to losing tenderer to investigate low prices; no mistake made in considering that prices were not abnormally low, using “anomaly threshold”; and no error in failing to exclude the tender that was investigated.

SAG ELV Slovensko

- Contract for motorway toll collection services. Tenderers asked for clarification, then excluded on “abnormally low” grounds. Authority claimed it had not been required to ask for clarification and so could not be criticised for how it had in fact asked.
- CJEU held that the provisions on abnormally low tenders were “intended to require the awarding authority to examine the details of tenders which are abnormally low” (§28) and that “[i]f a tenderer offers an abnormally low price, the contracting authority must ask it in writing to clarify its price proposal”.
- It rejected an argument that a contracting authority was not required to request a tenderer to clarify an abnormally low price.
- Also rejected an argument that a contracting authority had a free hand as to what factors should be taken into consideration in deciding whether or not a tender is abnormally low and/or whether to reject it (§30). Tenderers must be able to show “fully and effectively” that their tenders are genuine.
- Ruling appears inconsistent with *Varney* but NB not a claim by a competitor saying that an abnormally low tender should have been rejected and wasn't.



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