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02 November 2023

The Secretary
Public Contracts Review Board
Notre Dame Ditch
Floriana

Reasoned Letter of Reply

Re: CT3032/2022 – Competitive procedure with negotiation: For the design, build/construction and operating of a waste to energy facility in Malta in an environmentally friendly manner (the “Tender Procedure”)

Dear Sir, Madam,

1. Introduction

- 1.1 We are instructed by FCC Medioambiente Internacional S.L.U. (“**FCC**”) to file this written reply in accordance with the provisions of regulation 276(c) of the Public Procurement Regulations (Subsidiary Legislation 601.03) (the “**PPR**”), in reply to the objection filed on 23 October 2023 before the Public Contracts Review Board (the “**Board**”) by Hitachi Zosen Inova AG-Terna S.A. (the “**Appellant**”) in connection with the Tender Procedure (the “**Objection**”).
- 1.2 In terms of regulation 276(b) of the PPR, this Board is required to communicate to all participating tenderers by fax or by other electronic means the Objection filed by the Appellant. This communication was never received by FCC.
- 1.3 FCC notes, at the outset, that it is not privy to the contents of the tender submitted by the Appellant and Paprec Energies International-BBL (the “**Recommended Tenderer**”), including in particular their respective technical offers or the parts thereof referred to in the Objection.
- 1.4 The Appellant relies on certain further information provided by the Department of Contracts, the Central Government Authority acting for the benefit of Wasteserv Ltd (the “**Contracting Authority**”), including two (2) communications dated 21st October 2023, which however are not attached to its Objection. Accordingly, FCC is relying hereon on the facts as set out in the Objection. However, FCC requests that all documentation (including the said communications) forming the subject matter of the Objection are provided to it as soon as practicable.
- 1.5 That said, FCC concurs with certain statements made by the Appellant.
- 1.6 FCC shall set out hereunder its replies on the Objection based on the information available to it at this stage, whilst expressly reserving its right to make submissions and present evidence in relation to matters of fact which will be established during the hearing.



2. Facts

- 2.1 The award criteria in terms of Section 51 of the best and final offer tender document regulating the Tender Procedure (the “**Tender Document**”) is the Best Price/Quality Ratio (BPQR). The weighting of the BPQR was 45 for technical and 55 for financial.
- 2.2 On 13th October 2023, FCC received a letter notifying it that its offer was ranked 3rd (the “**Ranking Letter**”). The offer of the Recommended Tenderer was ranked 1st and (although not expressly stated in the Ranking Letter) the Appellant must have been ranked 2nd.
- 2.3 The financial offers (Contractual Value) of each of the tenderers were as follows:
- 2.3.1 FCC’s financial offer was of €830,665,087.80¹
 - 2.3.2 Appellant’s financial offer was of €781,512,463.00²
 - 2.3.3 Recommended Tenderer’s financial offer was of €599,659,900.00
- 2.4 FCC obtained full marks (45) for its technical offer but ranked 3rd overall as its financial score was the lowest of all three (3) bidders.
- 2.5 On 23rd October 2023, the Appellant filed the Objection.

3 First Grievance – Technical Evaluation

- 3.1 The first grievance of the Appellant (“*Wrong Evaluation of Appellant Bid*”) relates to the evaluation of its offer by the evaluation committee, in particular the technical offer.
- 3.2 FCC agrees that the technical evaluation of the tenders (not just that of the Appellant) appears to have been carried out in a manner which is not reflective of the requirements of the Tender Document and the PPR.
- 3.3 The criteria for award in this case was the Best Price/Quality Ratio (BPQR), with the technical aspect being attributed a weighting of forty-five per cent (45%).
- 3.4 The Tender Document required that, as a minimum, each technical offer obtains a score of sixty per cent (60%) or more. In addition, the offer achieving the highest technical score would be awarded 100% of the technical weight (that is, 45 marks). The other offers would be awarded scores in proportion to the offer with the highest technical score as per formula set out in Section 51 of the Tender Document.
- 3.5 The most material elements of the technical offer related to design, flexibility, construction, delivery programme, environmental performance, testing and commissioning, operation, maintenance, contingency arrangements, key experts and organisation.

¹ The financial value of €616,420,363.30 appearing on the E-tenders website is the net present value price.

² We have assumed that the financial value of the Appellant appearing on the E-tenders website is the actual Contractual Value (not the net present value).



- 3.6 The technical offers would be scored in accordance with Table 6 (Technical Scoring Criteria) and Table 7 (Sub-criteria and Specific Added Values, Technical Element) found on pages 32 and 33 of the Tender Document.
- 3.7 The purpose of the BPQR is to ensure best value for money, as opposed to awarding the contract to the tenderer which meets the minimum requirements and offers the cheapest price. The benefit of issuing tenders in this manner is that the BPQR recognises that works and services are not homogeneous and that they differ in, *inter alia*, quality, delivery, durability, longevity, availability and several other factors. The BPQR therefore uses an equation (based on weighting) which includes price and technical (quality) of the relevant proposal to determine which proposal offers best value for money.
- 3.8 Reference is made to Procurement Policy Note #8 in relation to the BPQR (a copy of which is attached and marked "Annex 1"), which requires each evaluator to award each offer a score **out of a maximum of 100 points** in accordance with the technical criteria and any sub-criteria as outlined. The **aggregate final score** is arrived at by calculating the arithmetical average of the individual final score of each evaluator. Each evaluator must also list the **strengths and weaknesses** of each bidder for each criterion.
- 3.9 It is inconceivable that all tenderers (in this case three (3)) obtain full marks for almost all the technical criteria set out in the Tender Document and have almost equivalent strengths and weaknesses.
- 3.10 In this case, it is evident that the evaluation of the technical offers was, at best, carried out in an extremely superficial manner rendering the decision of the Contracting Authority to opt for the BPQR as opposed to the cheapest technically compliant offer absolutely futile.
- 3.11 The evaluation must necessarily involve an element of subjectivity, which would result in the evaluators considering that one or more offers deserve a higher scoring due to its strengths and weaknesses.
- 3.12 The Board has, on several occasions, had the opportunity to assess the manner in which tenders which were awarded on the basis of BPQR were evaluated.
- 3.13 In particular, this Board has highlighted the need for a proper evaluation of each criteria with scoring varying depending on the qualitative features of the tender in question. Full marks should only be awarded in very exceptional cases, and not simply because the relevant tender meets the minimum requirements.
- 3.14 FCC is a major player in the waste to energy sector and has significant experience in pricing tenders of this nature. The FCC group has thirteen (13) waste to energy projects which are in progress, with a joint capacity of 3.6 million tons per year and the production of 435 MWe of electricity; nine (9) of which are in the United Kingdom, one (1) in Austria and two (2) in Spain.



- 3.15 FCC submitted a detailed offer, considering all aspects of the tender of the contract, with a focus on best technologies and equipment. Offering an optimal solution of course requires significant investment and FCC's financial offer was reflective of this.
- 3.16 However, notwithstanding the above, the evaluation committee awarded essentially the same technical score (difference between them appears to be negligible) to all three (3) bidders, in breach of the principles of equal treatment, non-discrimination and transparency, as well as the principle of self-limitation.
- 3.17 FCC respectfully submits that the technical evaluation was not carried out in the manner required in the Tender Document and the PPR.

4 Second Grievance – Financial Offer (Abnormally Low)

- 4.1 In its second grievance ("*Wrong evaluation of the recommended bid*"), the Appellant argues that the Recommended Tenderer's offer was evaluated in an incorrect manner, namely for two reasons: (a) reliance on third parties, and (b) the price offered by the Recommended Tenderer is "very modest" for the magnitude of the project.

Reliance on third party capacities

- 4.2 FCC is not privy to the information relating to the reliance by the Recommended Tenderer on third party capacities, as well as the documentation furnished by said Recommended Tenderer to the Contracting Authority to evidence such reliance, including joint and several liability thereof, and it is therefore not in a position to deal with this matter in this reply.
- 4.3 FCC reserves the right to examine / cross-examine witnesses and make submissions on this during the hearing.

Abnormally low tender

- 4.4 The Complainant raises certain concerns with the offer of the Recommended Tenderer, which concerns are shared by FCC.
- 4.5 FCC, a reputable player in the waste to energy sector with significant experience in undertaking projects of this nature (as already explained above in para. 3.14), considers it impossible that a solution which complies with the stringent requirements of the Tender Document and, even more so, obtains 98% of the technical weight, can be implemented for a price of €599,659,900.00.
- 4.6 It is evident that this offer is based on technically, economically and, or legally unsound assumptions or practices and is abnormally low in terms of the PPR.
- 4.7 The Tender Procedure is governed by the PPR, the national law which transposes Directive 2014/24/EU (the "**Directive**"). The Directive, in Recital 103, states:

"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. Rejection should be mandatory in cases where the contracting authority has established that the abnormally low price or costs proposed results from non-compliance with mandatory Union law or national law compatible with it in the fields of social, labour or environmental law or international labour law provisions. [emphasis added]

- 4.8 Abnormally low tenders are regulated in terms of Article 69 of the Directive. This article has been transposed into the PPR - in terms of regulation 243. There exists a positive obligation on a contracting authority to require tenderers to explain their tenders if they appear to be abnormally low. Neither the Directive, nor the PPR define "abnormally low".
- 4.9 Identifying, investigating, and (if necessary) rejecting abnormally low tenders is a means of ensuring a level playing field and adhering by the principle of equal treatment above-mentioned, as well as avoiding significant issues arising during the implementation of the relevant contract.
- 4.10 A contracting authority must evaluate whether the offer is economically sustainable and can be performed in accordance with the tender requirements and the applicable legal obligations, or whether the offer is abnormally low. This will require an assessment as to whether the Recommended Tenderer misunderstood the requirements set out in the Tender Document, whether it has underestimated the risks associated with the contract, whether it has considered all social, labour and environmental laws, whether it is benefiting from any illegal state aid or whether it is a commercial strategy of the tenderer.
- 4.11 European Commission "Guidance on the participation of third-country bidders and goods in the EU procurement market" (2019/C 271/02) (the "Commission Guidance", a copy of which is attached hereto and marked "Annex 2") and Brief 35, Public Procurement, September 2016 – Abnormally Low Tenders, published by SIGMA, Creating Change Together (A joint initiative of the OECD and the EU, principally financed by the EU) (the "Sigma Guidance", a copy of which is attached hereto and marked "Annex 3") refer to several ways of seeking to establish whether a tender appears abnormally low, including:
- (a) an assessment of the price of the tender and the object of the contract;
 - (b) an assessment of the difference between the price of the tender and the average price of all tenders;
 - (c) an assessment of the difference between the price of the tender and the contracting authority's own estimated value of the procurement;
 - (d) a valid method can also be to refer to the difference between the lowest and second lowest tenders;
 - (e) a combination of all or some of the above-mentioned methods is applied.
- 4.12 Regulation 243(2) of the PPR provides a non-exhaustive list of what information can be requested to demonstrate the soundness of the technical, economic and legal assumptions and, or practices underlying the tender.



- 4.13 The tenderer whose offer appears to be abnormally low must provide all the evidence necessary to provide a sufficient explanation. This may include detailed information accompanied by appropriate documentation on the production process, facilities, social conditions, certificates, environmental standards, etc.
- 4.14 The reasons provided to justify the viability of the tender must comply with the terms of the initial tender. In this regard, a contracting authority must not limit itself to requesting declarations that the tenderer intends to comply with those obligations, the Guidance states.
- 4.15 In the investigation process, the Contracting Authority may ask additional questions, especially to assess whether the information provided is authentic. The tenderer may also be asked to provide further details on questions and aspects which the contracting authority has not identified in its initial request but which have emerged as a result of the assessment of the information provided.
- 4.16 The Court of Justice of the European Union (the “CJEU”) has considered the matter of abnormally low tenders in a number of its decisions, the following being just a few.

Cases C-285/99 and C-286/99, Impresa Lombardini SpA

In this case, with respect to the Directive provision on abnormally low tenders, the CJEU held:

*“It is apparent from the very wording of that provision, drafted in imperative terms, that the contracting authority is **under a duty**, first, to identify suspect tenders, secondly to allow the undertakings concerned to demonstrate their genuineness by asking them to provide the details which it considers appropriate, thirdly to assess the merits of the explanations provided by the persons concerned, and, fourthly, to take a decision as to whether to admit or reject those tenders. It is therefore not possible to regard the requirements inherent in the inter partes nature of the procedure for examining abnormally low tenders, within the meaning of Article 30(4) of the Directive, as having been complied with unless all the steps thus described have been successively accomplished.” [emphasis added]*

Cases 76/81, SA Transporoute et travaux v Minister of Public Works Transporoute

In this case, the CJEU stated that the Directive requires a contracting authority, when an offer is obviously abnormally low, to seek an explanation of the price or to inform the tenderer that its tender appears to be abnormal, and to allow tenderer a reasonable time within which to submit further details.



Case T392/15, European Dynamics Luxembourg and Others v European Union Agency for Railways

The CJEU held that, whilst the concept of ‘abnormally low tender’ is not *defined*, it has been held that the abnormally low nature of a tender must be assessed by reference to the composition of the tender and the services at issue.

The CJEU confirmed that the first step is determining whether the tenders submitted contain evidence likely to arouse suspicion that they might be abnormally low, such as where the price proposed in a tender submitted is considerably less than that of the other tenders submitted or the normal market price.

- 4.17 In this case:
- (a) the difference between the price of the Recommended Tenderer and the second lowest price (that is, that of the Appellant) is of €181,852,563 or circa 23.3% lower;
 - (b) the difference between the price of the Recommended Tenderer and the average of the two other tenders is of €206,428,875.4 or circa 25.6% lower; and
 - (c) the difference between the price of the Recommended Tenderer and the average price of all three tenders (including that of the Recommended Tenderer) is of €137,619,250.27 or circa 19% lower.
- 4.18 FCC submits that, in this case, the tests set out in 4.11 are to a large extent met. In fact, if one assesses (a) the price of the Recommended Tenderer with the subject-matter of the contract, (b) the difference between the price of the Recommended Tenderer and the average price of all tenderers (c) the difference between the price of the Recommended Tenderer and the second lowest tender and (d) a combination of all or some of the methods set out in Section 4.11 above, it is evident that the Recommended Tenderer’s offer is abnormally low and raises serious doubts as to it being achievable.
- 4.19 In addition to some of the concerns set out in para. 2.2.2 of the Objection, FCC has serious doubts whether the Recommended Tenderer has factored in all costs involved in the project, including for example the canopy, the seawater intake refrigeration intake, the required redundancies in equipments to ensure the availability requirements and the export of all fly ash to adequate final disposal sites.
- 4.20 The Directive and the PPR are there to ensure that offers which are too good to be true are assessed to ensure that these are compliant with all legal requirements, that they take into account all requirements of the project and that they are achievable (without, for example, exposing the Contracting Authority to several requests for additional funding through variation requests).
- 4.21 In this case, it is evident that the solution required by the Contracting Authority is a costly solution, which cannot be achieved at the price proposed by the Recommended Tenderer.



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5 Conclusion

5.1 In view of the above, FCC respectfully requests the Board to:

- (i) revoke the recommendation to award the contract forming the subject-matter of the Tender Procedure to the Recommended Tenderer;
- (ii) order the Contracting Authority to re-open the evaluation process and re-evaluate all tenders submitted through a newly appointed evaluation committee (with no members of the previous evaluation committee), in accordance with the Tender Document (including, in particular, the award criteria) and the Board's findings on the grievances set out above and those set out in the Objection;

or

- (iii) without prejudice to the above, in the event that the Board considers that the process was vitiated by serious errors which cannot be rectified with a re-evaluation of tenders in accordance with (ii) above, order the cancellation of the Tender Procedure in accordance with Regulation 90(3) of the PPR.

5.2 This reasoned reply is without prejudice to such further evidence and submissions that FCC may be allowed to present and make during the proceedings relating to the appeal forming the subject-matter of the Objection.

Yours faithfully,

Steve Decesare

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Directorate Policy Development and Programme Implementation

Procurement Policy Note # 08

Utilisation of the Best Price Quality Ratio (BPQR) – Previously known as MEAT

(Previous Title: Utilisation of Most Economically Advantageous Tender (MEAT) as award criteria)

Date issued: 18.08.2014

1 Purpose

The policy of this department has always been to use very cautiously the Most Economically Advantageous Tender (MEAT) as an award criteria in public tenders. First and foremost it is of utmost importance that before tenders are drafted and published using the MEAT, adequate training for officials drafting such tenders has been given as the use of MEAT requires specialised training on its use in order to draw up measurable and objective criteria.

Through this procurement policy note, this Department intends to open up its position provided that the Contracting Authority is in a position to demonstrate they are able to define clearly and in great detail how points will be awarded for the technical aspect of the tender so that evaluation can be carried out objectively, transparently and fairly.

2 Organisational Scope

This is a Government-wide policy. It shall apply to all Entities/Departments/Ministries falling under Schedule 2 of the Public Procurement Regulations – L.N. 296/2010.

3 Definitions

Current Local Thresholds published through the Department of Contracts:

- Locally-funded tenders: above €120,000 exc VAT
- EU co-funded tenders: above €47,000 exc VAT (as per Contract Circular 13/2010)

4 Policy Content and Guidelines

The MEAT award criteria, both for Departmental Tenders and Department of Contracts' Tenders, can be used only if the criteria and the relative scorings have been approved by the Director General (Contracts).

The following steps must all be followed in order to publish and award a tender utilising MEAT:

STEP 1: Establishing the MEAT Weightings.

The MEAT is established by weighing technical quality against price on a [...] basis respectively for example 60/40, 70/30, 80/20, always adding up to 100.

STEP 2: Drawing up of the Technical Award Criteria and Weightings.

The table indicating technical award criteria and relative weighting and scorings must be broken down as much as possible.

An example of such criteria and its subdivision is as follows:

EVALUATION CRITERIA	SUB CRITERIA	MAXIMUM POINTS
A. Project Management Process	Project Master Plan * Detailed Gantt Chart / Program of work * Description of work plan * Detailed description of deliverables * Dependencies and assumptions * Monitoring and controlling of plan	
	Total	2
	Communication and Reporting Strategies * Proposed internal and external communication strategies * Detailed organograms and/or flowcharts of Communication and Reporting strategies * Proposed communication of project developments * Proposed means and frequency of communication * Reporting and approval procedure	
	Total	2
	Configuration management Strategy * Proposed identification of documentation * Proposed communication of latest documentation/drawings * Proposed updating of other dependent documentation/ drawings * Proposed issue and change control procedure	
	Total	1
	Total for Section A	5

EVALUATION CRITERIA	SUB CRITERIA	MAXIMUM POINTS
B. Administrative Capabilities	Supplementary Warranty and after sales services: <ul style="list-style-type: none"> * Proposed Warranty period (over and above the required as per Special Conditions – Article 71) * Proposed Inclusions and exclusions (conditions) of warranty (over and above the required as per Special Conditions – Article 71) 	
	Total	2
	Staff Training Programmes: <ul style="list-style-type: none"> * Proposed Training programme for educational team * Proposed Training programme for maintenance team 	
	Total	2
	Project Feasibility and Risk	1
	Assessment: <ul style="list-style-type: none"> * Proposed Projects risks and mitigation 	
Total for Section B		5
C. Proposal alignment with NISC Core Ideology Manual	Core Ideology embedded in proposal reflecting the following:	
	<ul style="list-style-type: none"> * Making science attractive for the target audiences 	2
	<ul style="list-style-type: none"> * Highlighting of social issues 	2
	<ul style="list-style-type: none"> * Providing a fun, enjoyable environment 	2
	<ul style="list-style-type: none"> * Ignite questioning, investigation and discovery 	2
	<ul style="list-style-type: none"> * Giving the opportunity for the visitor to be creative and imaginative 	2
Total for Section C		10

EVALUATION CRITERIA	SUB CRITERIA	MAXIMUM POINTS
D. Exhibition Proposal	Exhibition Floorplan concept (Physical, social and personal dimensions reflected in proposal, and state how these dimensions are addressed)	3
	Exhibits match (overall) the General Learning Outcomes identified in Zone Content	2
	Exhibits portrait science relevant to everyday life	2
	Exhibition contains elements relevant to the Maltese geographical and cultural context	2
	Exhibition includes focal point elements for the different areas	2
	Interactivity - a mixture of hands on, physical and multimedia exhibits	2
	Exhibits Fit into building: * Use of height * Consideration of ventilation * Consideration of natural lighting * Positioning of exhibits * Suitability of materials used	3
	Examples of proposed use of graphics: * Integration into the floorplan * Suitability / fit for purpose	2
	Floor layout proposal to address Health and Safety issues such as: * Visitor flow * Wheelchair accessibility	2
	Exhibits Encourage Active Prolonged Engagement	2
	Enquiry based learning exhibits	2
	Open Ended Exhibits	2
	Evidence of assuring Accuracy of Scientific information particularly in relation to exhibits set in a Maltese context	2
	Compliance to relevant sections of Access to All and Smithsonian guidelines	2
	Aesthetics: * Deliberate amalgamation of elements (Shape, colour typography) * Aesthetics addressing target audiences	2
Total	32	

EVALUATION CRITERIA	SUB CRITERIA	MAXIMUM POINTS
E. Technical Assessment	Evidence of your strategy in relation to design, fabrication and control of risk in the process	5
	Access for maintenance in the exhibit design	3
	Health and Safety of exhibits <ul style="list-style-type: none"> * Elimination of hazards * External certification (exhibits to be certified safe to be used by the public by an external independent officer) 	3
	Installation Plan <ul style="list-style-type: none"> * Logistics * Compliance with architectural building issues * Flexibility in relation programme * Protection following installation 	5
	Durability of exhibits <ul style="list-style-type: none"> * Suitability of materials chosen * Future proofing * Standardisation of parts * Continuity of supplies 	3
	Quality assurance <ul style="list-style-type: none"> * Controlling quality in process during concept design and fabrication * External certification 	4
	Total	23
F. Exhibit Examples	Proposals for Prototyping	5
	Proposals for Testing methodology <ul style="list-style-type: none"> * Testing with target audience 	6
	Proposals for Sustainability of exhibit examples containing: <ul style="list-style-type: none"> * Energy ratings * Cost and frequency of replacement of consumables and spare parts * Sustainability of material chosen 	4
	Submission of a Health and Safety Risk Assessment of Exhibit	4
	Submission of Operations and Maintenance Manuals for: <ul style="list-style-type: none"> * A Mechanical exhibit * An exhibit containing an electrical element * An exhibit which contains a multimedia element/game or a multimedia combined with a mechanical element 	6
Total	25	
Total	100	

STEP 3: Evaluation – Technical Offer

As can be noted from this example, after assessing the administrative compliance of the offers received, when evaluating technical offers, each evaluator awards each offer a score **out of a maximum of 100 points** in accordance with the technical criteria and any sub-criteria as outlined. The **aggregate final score** is arrived at by calculating the arithmetical average of the individual final score of each evaluator. **Each evaluator must also list the strengths and weaknesses of each bidder for each criterion.**

An average score threshold for the technical part **MUST** be specified in the tender document clearly stating that only tenders with average scores of at least < X number > of points will qualify for the financial evaluation.

Out of the tenders reaching this minimum threshold, the best technical offer is awarded 100 points. The others receive points calculated using the following formula:

$$\text{Technical score} = \frac{\text{final score of the technical offer in question}}{\text{final score of the best technical offer}} \times 100$$

STEP 4: Evaluation – Financial Offer

The financial offers for tenders which were not eliminated during the technical evaluation i.e. those which have achieved the average score threshold specified are to be evaluated.

The Evaluation Committee after checking the financial offers for any arithmetical errors, the tender with the lowest financial offer receives 100 points. The others are awarded points by means of the following formula:

$$\text{Financial score} = \frac{\text{lowest financial offer}}{\text{financial offer of the tender being considered}} \times 100$$

STEP 5: Ranking of the Most Economically Advantageous Tender

The ranking is then established by weighing technical quality against price on the [...] basis which would have already been stated. The ranking is established by multiplying:

- * the technical scores awarded to the offers by [X/...]
- * the financial scores awarded to the offers by [.../X]

The overall score is finally arrived as follows:

$$\text{Overall Score} = (\text{Technical score} \times [X/...]) + (\text{Financial Score} \times [.../X])$$

The above is also clearly explained with the templates available for download on www.contracts.gov.mt and www.etenders.gov.mt

5 Effective
Immediate.

6 Legislative Compliance
Regulation 28 of the Public Procurement Regulations 2010

7 References
NIL

8 Appendices
NIL

9 Other related policy notes published
NIL

II

*(Information)*INFORMATION FROM EUROPEAN UNION INSTITUTIONS, BODIES, OFFICES
AND AGENCIES

EUROPEAN COMMISSION

COMMUNICATION FROM THE COMMISSION

Guidance on the participation of third-country bidders and goods in the EU procurement market*(2019/C 271/02)**Table of contents*

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GLOSSARY OF ACRONYMS

Acronym Definition

CJEU	Court of Justice of the European Union
EEA	European Economic Area
EMAS	Eco-Management and Audit Scheme
EU	European Union
FTA	Free Trade Agreement
GPP	Green Public Procurement
GPA	Government Procurement Agreement of the World Trade Organization
ILO	International Labour Organisation
IPI	International Procurement Instrument
OECD	Organisation for Economic Cooperation and Development
R & D	Research and Development
TFEU	Treaty on the Functioning of the European Union
WTO	World Trade Organization

Why this guidance?

In March 2019, the European Commission and the High Representative for the Union for Foreign Affairs and Security Policy adopted a Joint Communication to the European Parliament, the European Council and the Council setting out an 'EU — China strategic outlook' ⁽¹⁾ (Communication), calling for 'a proactive approach to strengthening the EU's competitiveness and ensuring a level playing field'.

The EU should continue to seek more balanced and reciprocal conditions in its economic relationships. Public procurement, representing a share of about 14 % of the EU Gross Domestic Product, is an important element in this regard.

The establishment of a single market for public procurement is one of the key achievements of the internal market. EU-wide publication of tenders ensures transparency and creates opportunities for companies across the Union. Better implementation of the rules in the case of foreign bidders aims at ensuring the highest quality standards at all stages of the process, value-for-money, sustainability of projects, and a level playing field between EU and non-EU companies participating in tender procedures.

The Commission has, therefore, committed to 'publish guidance on the legal framework on the participation of foreign bidders and goods in the EU market taking into account EU and international rules on procurement, including on abnormally low tenders, as well as respect of security, labour and environmental standards' (Action 7).

The European Council supported the Commission's approach and called for action by the Union to 'safeguard its interests in the light of unfair practices of third countries making full use of trade defence instruments and our public procurement rules, as well as ensuring effective reciprocity for public procurement with third countries.' It also stressed 'fair competition should be ensured within the Single Market and globally both to protect consumers and to foster economic growth and competitiveness, in line with the long-term strategic interests of the Union' ⁽²⁾.

Moreover, the Commission has also committed, together with Member States, to conduct, before the end of 2019, an overview of the implementation of the current framework to identify shortcomings. Any gaps identified in this exercise will be thoroughly assessed, especially through the lens of potential gaps hindering a level playing field between EU and non-EU companies participating in tender procedures.

⁽¹⁾ JOIN (2019)5.

⁽²⁾ European Council meeting of 21 and 22 March 2019, EUCO 1/19.

Third country bidders, goods and services are not always bound by the same, or equivalent, environmental, social or labour standards as those applicable to EU economic operators. Similarly, third country bidders are not necessarily subject to strict State aid rules similar to those applicable in the EU. This may put EU bidders, goods and services at a disadvantage. There is a need to apply the EU public procurement rules so as to ensure that the same, or equivalent, standards and requirements apply to EU and third country bidders.

Addressing distortions in European procurement markets created by third country subsidies, or other forms of state-backed financing, is likely to require a multi-pronged intervention. Application of provisions related to abnormally low tenders is key in this context but may not be sufficient and further analysis may be needed.

The Communication also recalls the Commission's commitment to ensure reciprocity in access to foreign procurement markets. Over the years, the EU has opened up to a large degree its public procurement markets to third countries, but EU companies often encounter difficulties in gaining access to procurement opportunities in some foreign markets. In 2016, the Commission issued a revised proposal for an international procurement instrument (IPI) ⁽³⁾ that, if adopted, will open doors to our companies and allow them to compete on an equal footing with non-EU companies.

By committing to the actions in the Communication, the Commission has confirmed the importance it attaches to fostering fair competition and the level playing field in the internal market in the area of public procurement.

In line with the objectives of the 'EU — China strategic outlook', this guidance aims to offer assistance to public buyers by improving understanding of certain practical aspects of the public procurement procedures laid down in the relevant EU legislation when dealing with third country participation in tenders. It also aims to promote the principle that not only price, but also high European standards in the area of, in particular labour, the environment and security, are taken into account in public procurement procedures. It thereby helps to ensure that there is a level playing field with EU bidders, goods and services. This guidance builds on the Communication 'Making Public Procurement work in and for Europe' ⁽⁴⁾, which established a broad partnership with Member States with the objective of enhancing the effectiveness of public procurement. Knowing and using the opportunities provided by the existing legal framework will help strengthen the Single Market and contribute to a level playing field in the EU procurement market.

Legal framework

The public procurement framework is set out in a number of instruments. According to the Treaty on the Functioning of the European Union (TFEU) ⁽⁵⁾, public procurement in the EU is subject to the basic principles of transparency, equal treatment and non-discrimination. The public procurement directives set out minimum harmonised public procurement rules. These rules govern the way public authorities and certain public utility operators purchase goods, works and services. These rules are transposed into national legislation and apply to tenders whose monetary value exceeds a certain amount. The procedural rules apply to each individual procurement regardless of the origin of a bidder.

In the international context, the treaties concluded by the EU define who has secured access to the EU procurement market. The main relevant treaty is the Agreement on Government Procurement (GPA) ⁽⁶⁾, opening up the EU procurement market to the other parties to the agreement. In addition, several of the EU's Free Trade Agreements (FTA) contain chapters on procurement. This guidance does not replace the relevant public procurement legislation and it should not be understood as an instruction manual on 'how to comply with the requirements set out in the legislation'. Only the Court of Justice of the European Union is competent to provide a definitive and binding interpretation of EU law ⁽⁷⁾. The guidance is without prejudice to the international obligations of the EU in respect of its trading partners.

⁽³⁾ Amended proposal for a Regulation of the European Parliament and the Council on the access of third country goods and services to the Union's internal market in public procurement and procedures supporting negotiations on access of Union goods and services to the public procurement markets of third countries, COM (2016) 34 final.

⁽⁴⁾ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 'Making Public Procurement work in and for Europe', COM (2017) 572 final.

⁽⁵⁾ Consolidated version of the Treaty on the Functioning of the European Union (OJ C 326, 26.10.2012, p. 1).

⁽⁶⁾ https://www.wto.org/english/tratop_e/gproc_e/gp_gpa_e.htm

⁽⁷⁾ The document is not legally binding. While the document occasionally paraphrases the provisions of EU legislation, it is not meant to add to or diminish the rights and obligations set out in that legislation. Insofar as the document could be understood as interpreting EU legislation, it warrants stressing that only the Court of Justice of the European Union is competent to give a legally binding interpretation of EU law. The examples referred to in this document have not been verified for compliance with EU law.

1. Access of third country bidders and goods to the EU public procurement market

Article 25 of Directive 2014/24/EU

In so far as they are covered by Annexes 1, 2, 4 and 5 (*) and the General Notes to the European Union's Appendix 1 to the GPA and by the other international agreements by which the Union is bound, contracting authorities shall accord to the works, supplies, services and economic operators of the signatories to those agreements treatment no less favourable than the treatment accorded to the works, supplies, services and economic operators of the Union.

The EU actively pursues the opening of procurement opportunities for European companies by advocating reciprocal opening of the procurement markets of third countries. In international negotiations, the EU has supported a wider uptake of quality criteria including environmental, social, labour and innovation aspects and an ambitious opening of international procurement markets.

The EU has committed itself under several international agreements (such as the Agreement on Government Procurement and bilateral Free Trade Agreements with Procurement Chapters), to grant access to its public procurement market for certain works, supplies, services and economic operators of several third countries.

Accordingly, the public procurement directives provide, for public buyers in the EU, to accord to the works, supplies, services and economic operators of the signatories to those agreements treatment that is no less favourable than the treatment accorded to the works, supplies, services and economic operators of the EU, in so far as these are covered by these agreements (?).

Beyond that obligation, economic operators from third countries, which do not have any agreement providing for the opening of the EU procurement market or whose goods, services and works are not covered by such an agreement, do not have secured access to procurement procedures in the EU and may be excluded.

1.1. International Procurement Agreements and International Procurement Instrument

Agreement on Government Procurement (GPA)

The Agreement on Government Procurement concluded in the World Trade Organisation (WTO) framework allows operators from the 19 other participating WTO partners to bid for certain public contracts in the EU, and EU companies to bid for contracts of 19 other WTO partners.

Bilateral Free Trade Agreements

The EU has concluded free-trade agreements (FTAs) with countries across the world, which give companies of the parties better access to each others' public procurement markets.

This is the case, for example, with the recent trade agreements with Canada and Japan.

If public buyers receive a tender from a non-EU economic operator, they should verify whether the tender is covered by the international procurement agreements signed by the EU, such as the GPA or FTAs, to determine whether the bidder has secured access to this procurement.

At present, 20 parties are part of the GPA: the EU with regard to its 28 Member States; Armenia; Australia; Canada; Chinese Taipei; Hong Kong (China); Iceland; Israel; Japan; Liechtenstein; Montenegro; Moldova; Norway; New Zealand; South Korea; Singapore; Switzerland; Ukraine; United States; and the Netherlands (with respect to Aruba).

(*) Under the current text of the GPA, the relevant Annexes mentioned in Article 25 now correspond to 1, 2, 4, 5, 6 and 7.

(?) See in this regard Article 25 of Directive 2014/24/EU, Article 43 of Directive 2014/25/EU.

The GPA and government procurement chapters of the FTAs do not automatically apply to all government procurement of the parties. The GPA and FTAs consist of two parts:

- (a) a legal text with rules on principles and procedures; and
- (b) the coverage schedules of each party.

Coverage schedules determine which public entities have to comply with the agreed rules and to which extent their procurement of goods and services is open to participation of economic operators (and their goods and services) of the other GPA parties or FTA partners.

Only procurements exceeding the specified threshold values indicated in each party's coverage schedules, are covered.

The EU's market coverage schedules are specified in its Annexes to Appendix I of the GPA and in the relevant Annexes to the respective FTAs. By checking these sources, a public buyer can determine whether a bidder (or its goods and services) has secured access to its procurement.

The EU promotes, through its FTAs, the use of environmental, social, and labour-related considerations, provided that they are applied in a non-discriminatory way. Those agreements contribute to the further opening of the EU's and third countries' procurement markets.

In the case of Free Trade Agreements (FTAs), contracting authorities have to follow a similar verification process with regard to the coverage of the planned procurement. The EU has included rules about public procurement and market access commitments in many of its FTAs. The FTAs are, in most cases, based on the GPA structure.

The International Procurement Instrument

The Commission has proposed the International Procurement Instrument (IPI) ⁽¹⁰⁾ to foster reciprocity and provide leverage in order to negotiate with third countries the opening of their procurement markets for EU business. There is a clear need to have such leverage to counter discriminatory measures and outright market closures.

This is why, on 21 March 2019, the European Council called in its conclusions '(...) for resuming discussions on the EU's international Procurement Instrument' ⁽¹¹⁾.

1.2. Sector and project specific rules and agreements

Inter-governmental agreements

International agreements with third countries may contain specific procurement rules provided that they comply with the Treaty principles of transparency, equal treatment and non-discrimination.

Utilities sector

In the utilities sector, public buyers can reject tenders for supply contracts if more than 50 % of the products come from certain third countries.

⁽¹⁰⁾ Amended proposal for a Regulation of the European Parliament and of the Council on the access of third country goods and services to the Union's internal market in public procurement and procedures supporting negotiations on access of Union goods and services to the public procurement markets of third countries, COM(2016) 34 fin.

⁽¹¹⁾ European Council meeting of 21 and 22 March 2019, EUCO 1/19.

Defence and security

For defence and security procurements, Member States remain free to decide whether to allow public buyers to admit foreign bidders.

1.2.1. Procurement organised under intergovernmental agreements

In specific cases, and for concrete projects, Member States might plan to award contracts based on international agreements with third countries, which have different procurement regimes compared to the European framework.

Tender procedures under such agreements are exempted from EU public procurement legislation under the conditions laid down in the Directives and as long as the specific procurement rules of the international agreement comply fully with the EU Treaty, especially with the principles of transparency, equal treatment and non-discrimination. Such agreements must be notified to the Commission.

The procurements organised pursuant to such international agreements must comply with the principles of the EU Treaty, including appropriate and open publication, giving all companies, irrespective of their place of establishment or country of origin, the possibility to participate. A direct award, which by its very nature does not ensure transparency and competition, is incompatible with these fundamental principles.

In the external context, no international agreement concluded between a Member State and one or more third countries can constitute a basis to award contracts directly to third countries or their economic operators. This would be incompatible with the exclusive competence of the EU with regard to the common commercial policy and the basic principles of the EU Treaties regarding public procurement. Favourable financing conditions for the project can also not constitute the basis for a direct award.

1.2.2. Measures in the utilities sector**Article 85 of Directive 2014/25/EU — Tenders comprising products originating in third countries**

1. This Article shall apply to tenders covering products originating in third countries with which the Union has not concluded, whether multilaterally or bilaterally, an agreement ensuring comparable and effective access for Union undertakings to the markets of those third countries. It shall be without prejudice to the obligations of the Union or its Member States in respect of third countries.
2. Any tender submitted for the award of a supply contract may be rejected where the proportion of the products originating in third countries, as determined in accordance with Regulation (EU) No 952/2013 of the European Parliament and of the Council, exceeds 50 % of the total value of the products constituting the tender. For the purposes of this Article, software used in telecommunications network equipment shall be regarded as products.
3. Subject to the second subparagraph of this paragraph, where two or more tenders are equivalent in the light of the contract award criteria defined in Article 82, preference shall be given to those tenders which may not be rejected pursuant to paragraph 2 of this Article. The prices of those tenders shall be considered equivalent for the purposes of this Article, if the price difference does not exceed 3 %. However, a tender shall not be preferred to another pursuant to the first subparagraph where its acceptance would oblige the contracting entity to acquire equipment having technical characteristics different from those of existing equipment, resulting in incompatibility, technical difficulties in operation and maintenance, or disproportionate costs.
4. For the purposes of this Article, those third countries to which the benefit of this Directive has been extended by a Council Decision in accordance with paragraph 1 shall not be taken into account for determining the proportion, referred to in paragraph 2, of products originating in third countries.

Article 43 of Directive 2014/25/EU does not grant secured access to the EU procurement market to all third country operators. In addition, it provides for a specific regime for tenders comprising products originating in third countries. This is set out in Article 85 of Directive 2014/25/EU.

Public buyers operating in the water, energy, transport and postal services sectors may reject tenders for supply contracts, if the proportion of the products originating in a third country exceeds 50 % of the total value of the products constituting the tender.

This regime applies only to products originating in third countries that are not covered by an agreement ensuring comparable and effective access for EU undertakings to the markets of these third countries.

If, instead of rejecting such a tender, a public buyer allows its participation in the procurement process, the public buyer is required to give preference to equivalent tenders with less than 50 % of the products originating in third countries⁽¹²⁾. The public buyer is not required to give such preference, if that would oblige the contracting entity to acquire equipment having technical characteristics different from those of existing equipment, resulting in incompatibility, technical difficulties in operation and maintenance, or disproportionate costs.

Recently, a public buyer used the flexibility contained in Article 85 of the Utilities Directive to require from the bidder declarations on the origin of their products. As more than 50 % of the products originated from third countries covered by the provision, it rejected the respective tender.

1.2.3. Purchases in the fields of defence and security

Recital (18) of Directive 2009/81/EU:

Contracts relating to arms, munitions and war material awarded by contracting authorities/entities operating in the field of defence are excluded from the scope of the Government Procurement Agreement (GPA) concluded at the World Trade Organization. The other contracts covered by this Directive are also exempted from the application of the GPA by virtue of Article XXIII⁽¹³⁾ thereof. [...]

This exclusion means also that in the specific context of defence and security markets, Member States retain the power to decide whether or not their contracting authority/entity may allow economic operators from third countries to participate in contract award procedures. They should take that decision on grounds of value for money, recognising the need for a globally competitive European Defence Technological and Industrial Base, the importance of open and fair markets and the obtaining of mutual benefits. Member States should press for increasingly open markets. Their partners should also demonstrate openness, on the basis of internationally-agreed rules, in particular as concerns open and fair competition.

Purchases of goods and services in the defence and security sectors are often of a sensitive nature. Specific requirements for such purchases are laid down in Directive 2009/81/EC⁽¹⁴⁾ in the context of Member States' need to ensure security of supply as well as the protection of classified information.

For purchases made under the defence and security procurement directive, it is up to each Member State to define in its national rules⁽¹⁵⁾ on whether or not their public buyers may allow economic operators from third countries to participate in contract award procedures⁽¹⁶⁾. If public buyers decide not to allow economic operators or goods from third countries, they may already indicate such a general restriction in the contract notice and the tender documents. Alternatively, they may opt to reject these offers individually in the award decision. In the latter case, public buyers should indicate in the tender documents that they reserve the right to reject offers on defence and security grounds.

⁽¹²⁾ Combined reading of Article 85(1) with Article 85(2) of Directive 2014/25/EU.

⁽¹³⁾ Under the current text of the GPA, the relevant provisions are no longer included in Article XXIII but in Article III.

⁽¹⁴⁾ OJ L 216, 20.8.2009, p. 76.

⁽¹⁵⁾ Member States should take that decision on grounds of value for money, recognising the need for globally competitive European Defence Technological and Industrial Base, the importance of open and fair markets and the goal to obtain mutual benefits. That decision could also be selective, i.e. allowing only economic operators from all or some GPA countries, but not from other third countries (non-EEA countries which are not members of GPA and with which the EU has no bilateral agreements on opening of public procurement markets).

⁽¹⁶⁾ Cf. second paragraph of Recital 18 of Directive 2009/81/EC.

In order to protect their specific security interests, public buyers can also take other measures:

- They may require bidders to provide national security clearances and to accept foreign security clearances only if they are recognised as equivalent, based on the level of intelligence cooperation between the countries concerned.
- They may require certificates from foreign bidders ensuring that the transport of equipment will be allowed, including additional delivery in crisis situations.
- They may also require bidders to make commitments regarding access to and the confidentiality of classified information.
- They may require providers and solutions to be compliant with additional requirements stemming from specific security legislations. For example in the field of cybersecurity, the Network Information Security Directive⁽¹⁷⁾ contains measures ensuring a high common level of security of network and information systems across the Union.

Public buyers may request from contractors that they open their supply chain to competitive tendering. This can allow new players to join the supply chain⁽¹⁸⁾.

For certain exceptional purchases in the field of defence and security, national security interests are at stake. Some contracts necessitate such extremely demanding requirements in terms of security of supply, or are so confidential and important for national sovereignty that the specific provisions of Directive 2009/81/EC might not be sufficient to safeguard a Member State's essential security interests.

For such purchases, Article 346 TFEU provides for a derogation allowing Member States to award contracts without applying the rules of the Directive⁽¹⁹⁾. Member States have to assess, on a case-by-case basis, whether this exclusion can be applied, identifying the essential security interests at stake and evaluating the necessity of the specific measure, taking into account the principle of proportionality and the need for strict interpretation of such derogation⁽²⁰⁾.

1.3. In practical terms

International procurement agreements

- Public buyers should check whether a third country bidder is covered by the GPA or a bilateral agreement. If they are not covered, they do not have secured access to procurement procedures in the EU.

Procurements under intergovernmental agreements

- The procurements have to respect the Treaty principles of transparency, equal treatment, and non-discrimination.
- Contracts may not be directly awarded under such agreements.

Procurements under the utilities directive

- Public buyers should check whether more than 50 % of products offered in a supply contract originate from third countries.
- If these third countries are not covered by the GPA or a bilateral agreement, the tender may be rejected.

⁽¹⁷⁾ Directive 2016/1148/EU of the European Parliament and of the Council of 6 July 2016 concerning measures for a high common level of security of network and information systems across the Union.

⁽¹⁸⁾ Article 21 of Directive 2009/81/EC.

⁽¹⁹⁾ The definition of their essential security interests is the sole responsibility of Member States, as stated in Recital 16 of the Directive (see also judgement of 30 September 2003 in Case T-26/01).

⁽²⁰⁾ See CJEU judgement of 13 December 2007 in Case C-337/06 *Bayerischer Rundfunk*, paragraph 64.

Defence and security procurements

- These procurements are not included in the GPA or in existing bilateral agreements.
- Public buyers do not have to give access to third country operators.

2. Abnormally low tenders**Article 69 of Directive 2014/24/EU**

1. 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.
2. The explanations referred to in paragraph 1 may in particular relate to:
 - (a) the economics of the manufacturing process, of the services provided or of the construction method;
 - (b) the technical solutions chosen or any exceptionally favourable conditions available to the tenderer for the supply of the products or services or for the execution of the work;
 - (c) the originality of the work, supplies or services proposed by the tenderer;
 - (d) compliance with obligations referred to in Article 18(2);
 - (e) compliance with obligations referred to in Article 71;
 - (f) the possibility of the tenderer obtaining State aid.
3. The contracting authority shall assess the information provided by consulting the tenderer. It may only reject the tender where the evidence supplied does not satisfactorily account for the low level of price or costs proposed, taking into account the elements referred to in paragraph 2. Contracting authorities shall reject the tender, where they have established that the tender is abnormally low because it does not comply with applicable obligations referred to in Article 18(2).

For public buyers, identifying, investigating, and rejecting abnormally low tenders is a means of ensuring a level playing field.

While formulating their tender specifications, public buyers should pay due attention to the expected price or costs of the goods or services. The public buyer's estimate will have to take into account all the criteria established in the tender documents, including contract execution requirements, selection and award criteria.

A thorough calculation before the launch of the procurement procedure will avoid difficulties at a later stage. Information in the tender documents on the order of magnitude, also in monetary terms, that the public buyer expects can give a good indication to bidders on the level of quality expected and will avoid receiving unsuitable offers.

After reception of the offers, the public buyer will have to evaluate whether the tenders appear reasonably calculated. For example, the price or costs offered in a tender may deviate from the price or costs offered by other bidders or from the public buyer's own estimate, while not presenting any particularities as compared to other offers, which clearly justify the difference. Public buyers may doubt whether the offer is economically sustainable and can be performed in accordance with the tender requirements and the applicable legal obligations, or whether the offer is abnormally low.

Know the price

- Market knowledge is key
- Be aware of the price of previous procurements
- Consult with specialists and other procurers

2.1. Identifying abnormally low tenders

The directives do not provide a definition of what constitutes an abnormally low tender, nor a specific method to calculate an anomaly threshold. Some Member States have established voluntary or compulsory methods. Member States are free to set up national rules or methods to be used for identifying tenders that are suspected of being abnormally low, provided that these rules are objective and non-discriminatory⁽²¹⁾. They may apply arithmetical methods, based on an assessment of the deviation of a tender from the average price of all tenders⁽²²⁾, or from the public buyer's own estimated value of the procurement. A valid method can also be to refer to the difference between the lowest and second lowest tenders. Such rules may include specific percentage thresholds to be applied for the identification of abnormally low tenders. In case national law has not set up a method, public buyers themselves can establish transparent and non-discriminatory methods.

Offers may appear to be abnormally low in relation to any of the relevant parameters and award criteria. This may be the case, for example, if the relationship between the quality offered and the price is suspicious.

Where a public buyer receives an offer that it suspects to be abnormally low, it is under a legal obligation to request an explanation of the price offered from the economic operator concerned⁽²³⁾. The public buyer may not reject an offer without having given the economic operator the opportunity to explain and justify the price. This also applies to arithmetical methods used to identify suspicious tenders. Such methods do not allow for immediate rejection without investigation.

Identifying abnormally low tenders

LOOK AT ALL THE PARAMETERS OF THE OFFER

- Does the offer appear reasonably calculated?
- Can the bidder do what he proposes for the price he proposes?
- Is there a method in my country that helps in the identification, assessment, and evaluation?

Not convinced that the offer is sound?

2.2. Investigating abnormally low tenders

As a general rule, public buyers should ask the economic operator to demonstrate the soundness of the technical, economic or legal assumptions or practices underlying the tender. In order to be able to assess the explanations provided by the bidder, public buyers should ask all the details, which they consider appropriate⁽²⁴⁾. In particular, the case-law requires public buyers to ask in writing for details of the elements in the tender suspected of anomaly, which gave rise to doubts on the part of the public buyer in the particular case⁽²⁵⁾. They should especially pay attention to the capacity of the bidder to fulfil all the requirements of the tender documents, including socially responsible and green public procurement requirements, at the price offered.

In principle, public buyers can request information on all issues they consider relevant for the assessment of the level of the price, or cost, proposed. According to the Directive, those issues may include aspects of the economics of the manufacturing process, including the basis for the offered cost over the whole life-cycle, the technical solutions or the originality of the tender⁽²⁶⁾. The list of such aspects is not exhaustive.

Public buyers are also encouraged⁽²⁷⁾ to inquire whether the tender complies with applicable obligations in the fields of environmental, social and labour law established by Union law, national law, collective agreements, or by the international environmental, social and labour law provisions listed in Annex X⁽²⁸⁾. Those obligations apply directly irrespective of their inclusion in the tender documents.

⁽²¹⁾ See point 68 of judgement in Joined Cases C-285/99 and C-286/99, *Impresa Lombardini SpA*.

⁽²²⁾ Such a 'relative' comparison (including all submitted bids) may be preferable in cases where the number of bids received is sufficient, because such a comparison is likely to reflect market conditions best.

⁽²³⁾ CJEU, Joined Cases C-285/99 and C-286/99, point 43 and 73.

⁽²⁴⁾ CJEU, Joined Cases C-285/99 and C-286/99, points 43 and 55.

⁽²⁵⁾ CJEU, Joined Cases C-285/99 and C-286/99, point 51.

⁽²⁶⁾ Article 69(2) of Directive 2014/24/EU.

⁽²⁷⁾ Articles 69(2)(d) and 69(3).

⁽²⁸⁾ Article 18(2) of Directive 2014/24/EU.

The explanations required from the bidder may also relate to potentially unfair trade practices, such as the existence of foreign subsidies or dumping distorting the internal market. When inquiring about unfair trade practices, public buyers should pay special attention to bids offering goods or services from third countries whose prices and costs may be distorted by state-backed financing. The existence of financial support from a foreign state could form part of the global assessment of the viability of the offer.

The bidder will have to provide all the evidence necessary to provide a sufficient explanation. This may include detailed information accompanied by appropriate documentation on the production process, facilities, social conditions, certificates, environmental standards etc. The reasons provided by the bidder to justify the viability of the offer must comply with the terms of the initial tender⁽²⁹⁾. In this regard, public buyers should not limit themselves to requesting solemn declarations from the bidder that he intends to comply with those obligations.

In the investigation process, the public buyer may ask additional questions, especially to assess whether the information provided is authentic. The bidder may also be asked to provide further details on questions and aspects, which the public buyer has not identified in its initial request but which have emerged as a result of the assessment of the information provided.

Investigating abnormally low tenders

REQUEST INFORMATION FROM THE BIDDER

Examples:

- How did the bidder calculate the prices and costs overall?
- How did the bidder arrive at a specific price for a specific item?
- Does the price allow fulfilling all the legal and contractual requirements?
- Does the price allow fulfilling all required labour and environmental standards?
- How is the tender financed? Is the calculation sound?
- Do not hesitate to ask for any information you believe relevant.
- Ask for concrete proof.

Not convinced by the explanation of the bidder?

2.3. Rejecting abnormally low tenders

The public buyer may reject an offer, without having to prove it, when, despite the evidence collected, it is not convinced that the bidder will be able to execute the contract at the price, or cost, offered and in accordance with the tender documents and all applicable legal obligations.

The decision can be based on one element, or on a combination of factors, including compliance with labour and environmental standards and whether State aid has been granted or not, leading to the final appreciation of the public buyer.

Pursuant to Article 69(3) of Directive 2014/24/EU, public buyers are obliged to reject a tender in cases where they establish that the abnormally low price, or costs, offered results from the bidder's non-compliance with mandatory Union or national law, collective agreements or international provisions in the fields of social, labour or environmental law (Article 18(2) of Directive 2014/24/EU in combination with Annex X to the Directive — see already above under Section 2).

⁽²⁹⁾ CFI, Case T-422/11, *Computer Resources International*, point 87.

Rejecting abnormally low tenders

YOU HAVE TO BE CONVINCED

- The bidder has to prove the soundness of his offer.
- Has the bidder done that for all the aspects you requested?
- Do you consider the bidder can fulfil ALL CONTRACTUAL requirements for the price proposed?
- If you still have reasonable doubts you can reject the offer
- If you have established that the offer is abnormally low because it does not comply with the legal obligations under Article 18(2) of Directive 2014/24/EC it has to be rejected

2.4. In practical terms**Abnormally low tenders**

- Public buyers have to check whether a tender is financially sound, or whether it is abnormally low.
- Public buyers have to inquire with the tenderer. They may ask all questions they consider relevant.
- If they are not convinced of the financial viability of the tender, they may reject it.

3. Quality standards — A strategic approach to public procurement

The Commission has recognised the importance of public procurement as a powerful tool for spending public money in an efficient, sustainable and strategic manner. In its communication 'Making Public Procurement work in and for Europe' ⁽³⁰⁾ it has stressed that the use of high quality standards is crucial for central and local government to respond to societal, environmental, and economic challenges. By stressing the relevance of strategic procurement, the Commission aims to raise the awareness in the Member States of the importance of strategic procurement, both internally in the Union and when dealing with tenders from third country operators.

Strategic procurement allows for a more responsible and strategic way of spending public money, supports investment within the EU, and can help levelling the playing field by ensuring that all bidders have to follow the same standards, regardless of their origin.

The opportunities that strategic procurement offers are currently not sufficiently used. More than half of procurement procedures still use the lowest price as the only award criterion, despite the public procurement directives leaving public buyers entirely free to opt for purchases based on cost-effectiveness and quality-based criteria instead.

Using quality considerations in public procurements allows public buyers to procure more sustainable and innovative products and services. Quality considerations can also guarantee compliance with high environmental, social and labour standards, for both EU and third country operators and goods.

Third country bidders, goods and services are not always subject to the same high standards as their EU counterparts. However, the current EU procurement framework provides rules that can and should be used in order to hold third country bidders, goods and services to the same high standards as EU bidders. A strategic approach to public procurement leads to changes in the behaviour of the market, public stakeholders and society as a whole.

⁽³⁰⁾ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 'Making Public Procurement work in and for Europe', COM(2017) 572 final.

Clear quality standards should allow the widest possible range of bidders to participate on an equal footing. All bidders and goods should be held to the same quality standards, criteria and requirements, regardless of their place of origin. Clearly defined quality standards help public buyers create the right conditions for all bidders to compete openly and on an equal footing.

Socially Responsible Public Procurement, Green Public Procurement (GPP) and Innovation Procurement help public buyers to mainstream sustainability and innovation into their public tenders.

Socially Responsible Public Procurement aims to have a social impact on communities by introducing social considerations in public procurement procedures. It can support sustainable development, contribute to governmental efforts to achieve international sustainability goals⁽³¹⁾, promote ethical markets and supply chains, and promote positive social outcomes at national and local level. The Commission will publish a comprehensive guide on introducing social considerations in public procurement in 2020 and will disseminate a collection of good practices on Socially Responsible Public Procurement.

Green Public Procurement allows public buyers to integrate environmental requirements into all stages of their procurement process. GPP encourages the purchase of goods, services and works with a reduced environmental impact throughout their life cycle. It thus supports the development of green technologies and products. By using GPP, public buyers can contribute to environmental policy goals relating to climate change, efficient resource use, sustainable consumption and the circular economy. GPP also encourages taking into account the full life-cycle costs of a contract and not just the purchase price.

According to the Clean Vehicles Directive, Member States must meet minimum targets for the procurement of clean vehicles, with the objective of promoting and stimulating the market for clean and energy-efficient vehicles. The directive requires Member States to ensure that, when procuring certain road transport vehicles, public buyers take into account lifetime energy and environmental impacts, including energy consumption and emissions of CO₂ and of certain pollutants⁽³²⁾.

The Commission currently offers sets of GPP criteria for 19 product groups⁽³³⁾, which can be directly included in the tender documents. Furthermore, the Commission has developed a Handbook⁽³⁴⁾ on GPP, and a GPP Training Toolkit⁽³⁵⁾ for public purchasers that is designed for training courses and workshops. The Commission is organising GPP training programmes for public buyers in the EU, and is developing a series of sector-specific life-cycle costs calculation tools, and has created a database of good practice experiences for GPP⁽³⁶⁾.

Innovation Procurement may refer to either the procurement of innovation processes (the procurement of research and development) or the procurement of innovation outcomes (the procurement of innovative solutions). By designing their procurement procedures so as to encourage innovation, public buyers increase the chances of receiving more state-of-the-art, better adapted or more versatile solutions, which are also often cheaper, more environmentally friendly or more socially responsible. In 2018, the Commission published a Guidance on innovation procurement addressed to public buyers⁽³⁷⁾.

⁽³¹⁾ For instance, the UN Sustainable Development Goals (SDGs), and particularly SDG target 12.7 (Promote public procurement practices that are sustainable, in accordance with national policies and priorities). The March 2019 Resolution of the UN Environmental Assembly invites all Member States to work towards achieving sustainable consumption and production, to develop sustainable public procurement policies and update their public procurement legal frameworks in accordance with their commitment to achieving SDG target 12.7; see resolution: <http://wedocs.unep.org/bitstream/handle/20.500.11822/28517/English.pdf?sequence=3&isAllowed=y>

⁽³²⁾ Directive (EU) 2019/1161 of the European Parliament and of the Council of 20 June 2019 amending Directive 2009/33/EC on the promotion of clean and energy-efficient road transport vehicles (O) L 188, 12.7.2019, p. 116).

⁽³³⁾ http://ec.europa.eu/environment/gpp/eu_gpp_criteria_en.htm

In the international context especially relevant are the following product groups: GPP Computers and monitors (2016), Road Transport (2019), Electrical and Electronic Equipment used in Healthcare Sector (2014). For each criterion, the set of EU GPP criteria specifies whether it should be used as a selection criterion, a technical specification, an award criterion or a contract performance clause. The GPP criteria are based on data from an evidence base, on existing ecolabel criteria and on information collected from stakeholders of industry, civil society and Member States. The evidence base uses available scientific information and data, adopts a life-cycle approach and engages stakeholders who meet to discuss issues and develop consensus.

⁽³⁴⁾ <http://ec.europa.eu/environment/gpp/pdf/Buying-Green-Handbook-3rd-Edition.pdf>

⁽³⁵⁾ http://ec.europa.eu/environment/gpp/toolkit_en.htm

⁽³⁶⁾ http://ec.europa.eu/environment/gpp/case_group_en.htm

⁽³⁷⁾ For further information: Guidance on Innovation Procurement C(2018) 3051 final published 15.5.2018, <https://ec.europa.eu/docsroom/documents/29261>

SOCIALLY RESPONSIBLE PUBLIC PROCUREMENT

Swedish county councils — Due diligence in the supply chain for surgical instruments

The NGO Swedwatch reported the existence of child labour, hazardous working environments and violations of international labour obligations in the production of surgical instruments in third countries. On this basis, the Swedish county councils decided to introduce specific performance conditions in their contracts. These require that any supplier agrees to implement due diligence in their supply chain and to work towards compliance with international social and labour obligations. By using questionnaires, audits and by building a close relationship with the supplier, the county councils ensure the successful follow-up of the conditions. This also contributes to a level playing field between EU and third country operators.

GREEN PUBLIC PROCUREMENT

City of Hamburg — Quality recycled road asphalt

The City of Hamburg, aiming to recycle 100 % of the original construction materials when refurbishing and resurfacing roads, allowed a group of private companies, which had developed a recycling technology, to test their product on public roads. Checks confirmed the quality of the technologies and the City proceeded to launch a restricted tender procedure. Tendering companies were required to follow certain steps in the production and provision of the recycled asphalt. Hamburg saved 30 % compared with the costs of conventional road resurfacing and the execution was faster. Green asphalt has the same properties and durability as conventional asphalt.

INNOVATION PROCUREMENT

Strategic cooperation on procurement across the EU for more energy-efficient computing

High Performance Computing (HPC) is of strategic importance for Europe in a number of areas within the public sector, including cybersecurity, energy, climate change and health. It makes it possible to develop, test and implement particularly complex applications. In 2014, leading supercomputing centres from Germany, France, Italy, UK and Finland joined forces in the PRACE3IP pre-commercial procurement to procure together the research and development of more energy efficient supercomputers. The use of place of performance conditions ensured that suppliers performed their entire range of research and development in Europe. Since 2017, the supercomputing centres have started public procurements of innovative solutions on the basis of the previous research.

Setting quality objectives, with a view to achieving high social, environmental and state-of-the art technological quality standards is crucial to maximise the impact of the procurement process. The strategic decisions made by public buyers at the beginning of the process feed into the subsequent steps, all of which must fit the public buyer's broader purchasing strategy.

Public buyers have at their disposal a full range of tools to include social, innovation and environmental considerations in public contracts. They can use diverse solutions to find the best combination of technical specifications, selection criteria, award criteria, and performance clauses.

3.1. *Investment planning*

- Identify needs and potential solutions
- Open, transparent market engagement
- Cost-benefit analysis and risk assessment
- Building capacities and resources

Before deciding on a procurement, public buyers should conduct a rigorous cost-benefit analysis and ensure the necessary capacities and resources to manage the procurement. Early market engagement is essential to identify potential solutions that the market can offer, as well as to inform potential bidders about the design of the procurement process and contracts. Such consultations can be an opportunity to bridge the distance between the needs of public buyers and the solutions that can be offered by potential suppliers, including smaller providers or social enterprises. The dialogue with potential suppliers may reveal that there are environmentally friendly or readily applicable innovative options. Furthermore, it can help public buyers to verify the feasibility of certain technical and procedural solutions, and the availability on the market of goods, works and services with their desired characteristics. Public buyers may conduct preliminary market engagement, as long as it does not distort competition, is open, transparent, non-discriminatory and all interested operators are treated equally ⁽³⁸⁾.

It is also advisable to consult other public buyers to learn about similar projects and purchases.

Early in the process, public buyers should identify potential risks in the supply chain, including ethical issues in the production process. The risks may vary significantly depending on the geographical location of suppliers, especially in the main exporting countries. They can be related to various elements such as:

- the sector and category of purchase and, consequently, the type of production process involved (e.g. construction works may entail specific health and safety risks; textile production may involve breach of labour rules, exposure of workers to hazardous substances, etc.),
- the geographical location of the production process (workers' conditions may vary significantly in the main exporting countries on the market),
- the complexity of the supply chain (the more complex and geographically fragmented the supply chain, and the less transparent, the more likely malpractice and human rights violations become),
- respect for privacy, data protection, confidentiality, intellectual property rights (including copyright law) and open access obligations.

Choosing the right procedure is key to the success of the procurement. Public buyers should consider carefully all procedural options of the legal framework.

For example, innovation processes are most frequently procured by means of research and development (R & D) services. R & D services may be procured separately or together with commercial volumes of the final solution implemented in practice.

The EU excluded from the scope of the directives public procurement of R & D services in which the public buyer does not reserve all the benefits resulting from the R & D exclusively for its own use ⁽³⁹⁾. The EU's international commitments at bilateral or multilateral level generally do not cover these services. Where R & D services are procured separately and the ownership of intellectual property rights resulting from the R & D is left with suppliers — as is the case in pre-commercial procurements — economic operators from third countries do not have secured access. They can be subject to place of performance conditions.

Where innovation outcomes are procured, public buyers need to ensure that their purchasing procedures are designed in such a way that both innovative and traditional solutions can compete on equal terms. Making optimal use of functional and performance based specifications and allowing suppliers to submit variant offers can help achieve this.

⁽³⁸⁾ Article 40 of Directive 24/2014/EU and Article 58 of Directive 25/2014/EU include provisions on preliminary market consultations.

⁽³⁹⁾ COM (2007) 799 final and associated Staff Working Document SEC(2007) 1668 'Pre-commercial Procurement: Driving innovation to ensure sustainable high quality public services in Europe'.

Good practice

- Know and consult the market
- Engage openly and transparently
- Ensure support of political decision-makers
- Cooperate with other public buyers
- Choose an appropriate procurement procedure

3.2. Defining quality criteria in the procurement procedure

- Clearly define quality criteria in the tender documents
- Set quality standards by means of exclusion, selection and award criteria
- Set strict requirements to verify compliance with quality criteria (using standards and labels)
- Implement quality requirements in contract performance clauses

It is important to bear in mind that technical specifications, requirements and criteria in the selection and award phase, as well as contract performance clauses must always be linked to the **subject matter of the contract**.

The **technical specifications** should clearly define the subject of the contract, taking into account all quality requirements identified in the planning process. Technical specifications can include the specific process of production or provision of the requested works, supplies or services at any stage of their life cycle ⁽⁴⁰⁾. A forward-thinking design of technical specifications already takes into account the means of proof required.

Public buyers may require, for instance, that the goods purchased are made from a specific material or contain a certain percentage of recycled or reused materials. Requirements regarding the restriction of hazardous substances in the product can also be included. Under EU law, public buyers have a specific obligation to take into account minimum accessibility requirements in the technical specifications for the products, services and built environment they procure and which are meant for use by natural persons ⁽⁴¹⁾.

Article 18 of Directive 2014/24/EU

[...] (2) Member States shall take appropriate measures to ensure that in the performance of public contracts economic operators comply with applicable obligations in the fields of environmental, social and labour law established by Union law, national law, collective agreements or by the international environmental, social and labour law provisions listed in Annex X.

Article 57 of Directive 2014/24/EU

[...] (4) Contracting authorities may exclude or may be required by Member States to exclude from participation in a procurement procedure any economic operator in any of the following situations: (a) where the contracting authority can demonstrate by any appropriate means a violation of applicable obligations referred to in Article 18(2).

⁽⁴⁰⁾ Article 42 of Directive 2014/24/EU.

⁽⁴¹⁾ On 13 March 2019, the European Parliament adopted the European Accessibility Act (Directive 2019/882/EC of the European Parliament and of the Council of 17 April 2019 on the accessibility requirements for products and services). The Act establishes mandatory European requirements on certain products and services, including in the award of public contracts.

Exclusion criteria ensure that the public buyer can rely on trustworthy operators. The directives list the exclusion grounds. Corruption, fraud, money laundering, child labour or trafficking, criminal and terrorist offences or a binding decision certifying failure to pay taxes or social contributions must lead to an exclusion from the procedure ⁽⁴²⁾.

In other cases, public buyers may choose or be required by their Member State to exclude a bidder in a situation, which jeopardises their trustworthiness ⁽⁴³⁾. This is the case, for instance, for violations of the social, labour, and environmental obligations referred to in Article 18(2) of Directive 2014/24/EU. The directive lists the compulsory international environmental and labour standards to be observed, in particular those enshrined in the 'Core' ILO Conventions ⁽⁴⁴⁾. Article 71(1) of Directive 2014/24/EU extends the requirement to subcontractors. In a number of Member States, the national rules explicitly provide for mandatory exclusion of bidders failing to comply with the applicable environmental, social and labour obligations.

In case the public buyer has doubts as to the validity or authenticity of a required document related to the verification of exclusion grounds, it can ask for additional explanations. It should require documentation from third countries in an official language of the European Union, with a certified translation. It may require other means of authentication.

Ensuring the respect for environmental, social and labour law obligations

- Exclusion of bidders for prior violation — voluntary or obligatory
- Obligation to reject bidders if a violation leads to an abnormally low tender
- Obligation to ensure compliance in the contract execution, including by subcontractors

Setting and enforcing high social, environmental and labour standards

- Defining selection criteria
- Defining contract execution requirements (e.g. prohibiting the use of certain chemicals)
- Defining adequate reporting and monitoring mechanisms
- Setting penalties or other consequences of violation
- Extending obligations to subcontractors and suppliers
- Cooperation to build sustainable and responsible supply chains and labour obligations should be required and thoroughly checked throughout the supply chain, including at the level of subcontractors.

Setting the appropriate **selection criteria** is essential to ensure that bidders have the capacity to execute the contract. In restricted and negotiated procedures, and in competitive dialogues, they are used to shortlist the candidates invited to tender. The directives ⁽⁴⁵⁾ include an exhaustive list of categories of criteria that may be required, relating to the financial capacity of the bidder, as well as their professional suitability, technical ability, and experience.

Selection criteria may include specific training or skills of the team performing the contract (e.g. in handling hazardous material or in installing complex technology), professional qualifications or the availability of necessary equipment. Public buyers may also require proof of the bidders' experience in carrying out similar or related projects. Selection criteria, which need to be closely and specifically tailored to the characteristics necessary to deliver the contract, can be very effective in safeguarding the interest of the public buyer as long as they are non-discriminatory.

⁽⁴²⁾ Article 57(1) and (2) of Directive 2014/24/EU. See also Art. 80(1) of Directive 2014/25/EU.

⁽⁴³⁾ Article 57(4) of Directive 2014/24/EU exhaustive list of categories.

⁽⁴⁴⁾ ILO Convention (No 87) on Freedom of Association and the Protection of the Right to Organise; (No 98) on the Right to Organise and Collective Bargaining; (No 29) on Forced Labour; (No 105) on the Abolition of Forced Labour; (No 138) on Minimum Age; (No 111) on Discrimination (Employment and Occupation); (No 100) on Equal Remuneration; (No 182) on Worst Forms of Child Labour).

⁽⁴⁵⁾ Article 58 of Directive 2014/24/EU. See also Art. 80(2) of Directive 2014/25/EU.

More than half of procurement procedures still use the lowest price as the only **award criterion**. Qualitative criteria are still underused although the public procurement directives give public buyers great flexibility to purchase based on cost-effectiveness and quality criteria. Public buyers can and are encouraged to take account of the best price-quality ratio when evaluating the most economically advantageous tender (MEAT).

If public buyers choose to use the best price-quality ratio instead of the lowest price or cost, the evaluation of the offer takes into account different criteria, including social and environmental considerations, quality and price or cost.

For instance, public buyers may give preference to bidders that:

- offer better working conditions in the execution of the contract,
- favour the integration of disabled and disadvantaged workers,
- make smart use of innovations to offer higher quality or lower cost solutions, and
- offer sustainably produced goods.

This is irrespective of the existence of legal obligations to offer such working conditions or fulfil sustainability criteria.

A life-cycle costing also allows for the assessment of the environmental impact of products. Awards that are based on a price-only criterion do not allow public buyers to take into account the long-term costs and benefits of projects, thus leading to lower value-for-money. Calculating the full life-cycle costs of the procurement is particularly important for long-term infrastructure projects, which tend to have high capital and operating costs. In this sense, already in 2013 ⁽⁴⁶⁾, the Commission recommended Member States to use the Product Environmental Footprint method or the Organisation Environmental Footprint method in measuring the life cycle. Life-cycle costing may include, for instance, the extraction and refinement of raw materials, the manufacture and other stages of production through to the use and disposal phase.

Public buyers should choose award criteria that best enable them to obtain works, supplies and services suited to their needs ⁽⁴⁷⁾. A smart setting of award criteria, rewarding both quality and price, represents important potential for public buyers to stimulate competition between bidders and to get the best value for money, while pursuing strategic policy objectives.

The use of **standards, labels or certifications** in public procurement is a practical and reliable way for public buyers to verify the compliance of bidders with particular sectoral or quality requirements. Standards or labels used in procurement procedures usually refer to quality assurance, environmental certification, eco-labels, environmental management systems and fair trade products. Labels and label requirements can be used to set minimum standards of quality in the technical specifications, or to reward more ambitious offers through award criteria. Candidates who meet the label requirements but have not obtained the label must have the possibility to prove compliance through alternative means.

Public buyers should only refer to standards drawn up by independent bodies, preferably at EU or international level, such as the EU Ecolabel ⁽⁴⁸⁾, the Eco-Management and Audit Scheme (EMAS), Product Environmental Footprint/Organisation Environmental Footprint or certifications at the EU level, such as the CE Marking, or from the International Organisation for Standardisation (ISO). The use of European standards, labels or certifications ensures compliance of solutions with European legislation on safety, public health protection, environment, etc. Where public buyers require national or regional certification, they are required to accept equivalent certifications from other EU Member States, or other evidence proving that the requirement is met. Clear and unequivocal requirements on how to provide evidence about equivalence on quality, safety and public health protection standards can effectively contribute to guaranteeing high environmental and other standards.

⁽⁴⁶⁾ Commission Recommendation 2013/179/EU of 9 April 2013 on the use of common methods to measure and communicate the life cycle environmental performance of products and organisations (OJ L 124, 4.5.2013, p. 1). See also developments under EU Pilot phase and transition phase: <http://ec.europa.eu/environment/eussd/smgp/index.htm>

⁽⁴⁷⁾ Cf. Recital (92) of Directive 2014/24/EU.

⁽⁴⁸⁾ www.ecolabel.eu

Often an effective and appropriate way to promote high quality standards will be to include respective **contract performance clauses**. They may refer to qualitative aspects of the performance of the contract, including economic, social, environmental, employment or innovative features. Contract performance clauses have to be linked to the subject matter of the contract and cannot require general company policies.

Contractors can be required to ensure that all the goods offered, irrespective of their origin, fulfil a high level of quality, social and environmental standards, standards that have to be clearly defined in the tender documents.

For instance, the contractor may be required to:

- hire workers from certain disadvantaged backgrounds,
- provide the staff with professional or safety training related to the specific performance of the contract,
- report on emissions or on measures to identify and prevent human rights breaches,
- adopt specific measures for the disposal of waste.

Specific performance clauses in the contract may be used to require operators to comply with a code of conduct that requires them to disclose information concerning their suppliers and their compliance with labour conditions, as well as to identify, prevent and mitigate the risk of human rights violations, in line with the United Nations Guiding Principles on Business and Human Rights and the OECD Due Diligence Guidance for Responsible Business Conduct. Public buyers can also require that bidders comply in the execution of the contract with core international fundamental labour standards, irrespective of legal obligations in the country of the bidder or the place of production. Where breaches have been detected, contractors may be required to take enforcement actions and sanction the supplier up to the point of suspension of the supply operations.

Contractors may be expressly required to comply with environmental and social standards that are not legal obligations imposed by EU or domestic law. Equally, foreign contractors may be required to comply with the legal obligations incumbent on an EU economic operator in the execution of the contract, whether or not they are subject to the same legal obligations. Such requirements may also be applied to the production of goods that are subject to the contract.

Failure to meet these conditions in the offer leads to rejection of the tender. Such requirements help to level the playing field, which might be unequal due to different legal requirements in the countries of origin of the bidder or the services or goods they propose.

Good practice

- Use the full range of tools — exclusion, selection, award, contract execution
- Tailor your criteria to each specific procurement
- Ensure that all bidders and suppliers are obliged to fulfil the same requirements

3.3. Monitoring contract execution

- Enforce quality standards at performance level
- Reporting requirements
- Clearly defined sanctions

The use of quality criteria in public procurement is only effective when the public buyer ensures a high level of expertise in the preparation of tenders and the selection procedure, and when it monitors the execution of the contract continuously and effectively, and ensures that, in the performance of the contract, the contractor remains compliant with the tender requirements.

Contract monitoring can take various forms and can demand varying degrees of engagement on the part of the public buyer: The contract conditions may be accompanied by requirements to:

- report periodically information on certain aspects of the execution,
- fill in questionnaires concerning compliance with the contract clauses,
- provide written evidence of compliance, or
- allow on-site audits or inspections.

Applicable environmental, social and labour obligations should always be thoroughly checked, including at the level of subcontractors, and where appropriate, throughout the supply chain. Including sanctions and systems for gradual enforcement of the conditions also provides public buyers with leverage over the contractor during the contract execution phase to ensure compliance with the terms of the contract.

Foreseeing methods of engagement with the contractor, e.g. by requiring explanations, providing deadlines to remedy the situation or issuing warning notices, greatly increases the bargaining power of the public buyer.

Realistic contract conditions and monitoring methods increase the chances of proper execution of the contract and ensures that the level playing field created at the time of launching the procurement is maintained throughout the contract execution.

Good practice

- Only monitoring ensures compliance of contractors with YOUR requirements
- Develop effective and simple monitoring mechanisms
- Exploit the full range of modern communication tools for monitoring at a distance
- Team up with NGOs or specialised bodies for independent contract monitoring.

3.4. In practical terms

Achieving high quality standards and a level playing field

- Public buyers are encouraged to use procurement as a strategic tool to foster societal goals such as social, green and innovation objectives.
- Public buyers should ensure in the design of their procurements that EU and third country bidders are held to the same standards, thereby helping to ensure a level playing field.
- When defining their tender requirements, they should use technical specifications, exclusion, selection, and award criteria to set high quality standards for all bidders, regardless of their origin.
- They should use contract performance clauses to ensure that the quality standards are effectively implemented by all operators in the performance of the contract, irrespective of the place of production.
- They should introduce and implement effective monitoring mechanisms to ensure that the standards are met.
- A number of Commission guidelines support public buyers in integrating quality requirements.

4. Practical assistance by the European Commission

The European Commission provides practical assistance to public buyers and Member States in several forms⁽⁴⁹⁾. This is part of the partnership created under the Communication of the Commission 'Making Public Procurement work in and for Europe'. In this way, the Commission fosters the exchange of information, knowledge and experience. This Communication has been the basis of a broad policy dialogue, as well as cooperation and collaboration with national and local authorities, EU institutions, and other stakeholders, moderated by the Commission.

⁽⁴⁹⁾ https://ec.europa.eu/growth/single-market/public-procurement_en

For individual large infrastructure projects, the Commission offers assistance through the helpdesk and notification mechanism in the context of the 'ex-ante assessment of the procurement aspects for large infrastructure projects' ⁽⁵⁰⁾. In such projects, public buyers incur a higher risk of major infrastructure projects not being completed in time or made available as planned, of cost increases for various reasons during the implementation phase, or of risks shifting to public buyers. Public funds might be spent in a way that does not always ensure the highest possible added value for citizens and the society. Therefore, public buyers are encouraged to take advantage of all the available assistance.

An overview of the different mechanisms providing clarification and assistance can be found below ⁽⁵¹⁾.

Overview of practical assistance

- The helpdesk and notification process for large infrastructure projects,
- Networks of stakeholders, including workshops, especially on green and social procurement, and professionalisation,
- Regular high level conferences on various thematic issues, including award criteria, strategic procurement, transparency, professionalisation, and large infrastructure, improving access to procurement, digital transformation, and new projects and challenges,
- E-competence centre 'support tools for public buyers',
- Issuing guidance, including on innovation procurement, green public procurement, social procurement, defence procurement, and for practitioners dealing with European funds.

5. In a nutshell

The legal framework and its opportunities

The current EU legislative framework on public procurement includes directives regulating public contracts, utilities, concessions, and defence and security procurement as well as access to review procedures. The rules set forth in these legal instruments offer public buyers across the EU great flexibility to purchase goods, services and works:

- They offer the possibility to use quality criteria, and to award contracts based on the Best Price-Quality Ratio and life-cycle costing.
- They allow them to choose the most appropriate and effective procurement procedure.
- They also allow them to choose which quality requirements to introduce in the tender documents.
- They offer them mechanisms to ensure compliance with environmental, social and labour obligations.
- They offer them great freedom in preparing the tender process by engaging with the market and relevant stakeholders.
- They equip them with instruments to deal with bids, which are abnormally low in price.

⁽⁵⁰⁾ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions 'Helping investment through a voluntary ex-ante assessment of the procurement aspects for large infrastructure projects' COM(2017)573.

⁽⁵¹⁾ All relevant references and links are contained in Section 5 'In a nutshell'.

- They determine which third country bidders enjoy secured access to the EU procurement market.

Overall, the directives offer public buyers ample flexibility to tailor their procurements to their needs.

Questions and Answers

- May a public buyer require compliance with labour, social and environmental standards that go beyond the legal requirements at the place of execution of the contract?

Yes, a public buyer may set any such requirements as long as they are non-discriminatory have a link with the subject matter of the contract, and are compatible with Union law.

- Is it not unfair to require from bidders that they comply with labour, social and environmental standards that go far beyond their legal obligations?

No, legal obligations can be very different according to the place of establishment of the bidder or the place of production of goods. To require only compliance with local law can distort competition. Tailored requirements that apply to all bidders and goods help create a level playing field.

- How should a public buyer prepare for a tender in which it is planning to use quality criteria?

Public buyers should start with an assessment of their own needs and the potential solutions. They may consult market operators and any other stakeholders. Any useful tool may be used as long as the public buyer is transparent and treats all potential bidders equally.

- Does setting numerous quality criteria and applying them to all bidders creates only administrative burden?

Setting quality requirements allows the buyer to invest in more sustainable, socially responsible and innovative products and services and to ensure fair competition for the benefit of citizens. It is up to each public buyer to decide what is the most effective way of spending the public money to achieve the desired result. This flexibility comes together with certain obligations, like ensuring adequate monitoring.

- How can quality and sustainability criteria be integrated in the tender documents?

Public buyers have great flexibility. They can integrate such considerations in the selection criteria, the technical specifications, the award criteria and contract performance clauses, as long as they are related to the object of the contract. They have to be clearly defined, objective and must not discriminate among potential bidders, so as to create a level playing field in which bidders can compete based on the same high qualitative standards.

- Can the violation of environmental, social and labour obligations lead to the exclusion of a bidder?

Yes, public buyers have the possibility to exclude a bidder who fails to comply with the applicable environmental, social and labour obligations.

— Is it possible for a public buyer to verify compliance with legal and tailor-made conditions for bidders and goods?

A public buyer has numerous possibilities to verify such conditions. They may, for example, request reports from the bidder, or from independent quality-control bodies or Non-Governmental Organisations.

— Have all economic operators from around the world a right of access to EU procurement markets?

No, only operators covered by multilateral and bilateral trade agreements have secured access to EU procurement markets.

— What should a public buyer do if it suspects the price offered by a third country bidder is too low? Is it possible to enquire further?

Yes, it is not only possible, but it is advisable to enquire further so that the public buyer can ensure the reliability of the bid and a level playing field between all participants to the tender.

— What kind of information may be asked to check whether the offer is abnormally low?

Any information that can help the public buyer to assess the viability of the offer.

— When should a tender be rejected as abnormally low?

A tender may be rejected when the public buyer is not convinced of the explanation of the bidder.

Commission support tools and guidance on public procurement

— Commission Communication: Making public procurement work in and for Europe: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM%3A2017%3A572%3AFIN>

— Commission public procurement website: https://ec.europa.eu/growth/single-market/public-procurement_en

— E-competence centre 'support tools for public buyers':

https://ec.europa.eu/info/policies/public-procurement/support-tools-public-buyers_en

— Commission Recommendation (EU) 2017/1805 of 3 October 2017 on the professionalisation of public procurement — Building an architecture for the professionalisation of public procurement (OJ L 259, 7.10.2017, p. 28)

— Commission Communication: Closing the loop — An EU action plan for the Circular Economy: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52015DC0614>

— Public procurement for a circular economy (good practice and guidance): http://ec.europa.eu/environment/gpp/pdf/Public_procurement_circular_economy_brochure.pdf

— Buying Green! — A Handbook on green public procurement: <http://ec.europa.eu/environment/gpp/pdf/Buying-Green-Handbook-3rd-Edition.pdf>

— EU GPP Criteria: http://ec.europa.eu/environment/gpp/eu_gpp_criteria_en.htm

- GPP Good Practices: http://ec.europa.eu/environment/gpp/case_group_en.htm
- GPP Help Desk: <http://ec.europa.eu/environment/gpp/helpdesk.htm>
- GPP Training Toolkit for public buyers: http://ec.europa.eu/environment/gpp/toolkit_en.htm
- GPP Training programmes: http://ec.europa.eu/environment/gpp/index_en.htm
- GPP life cycle costing tools: <http://ec.europa.eu/environment/gpp/lcc.htm>
- Product/Organisation Environmental Footprint method:
http://ec.europa.eu/environment/eussd/smgp/policy_footprint.htm
- Buying for Social Impact workshops:
<https://www.aeidl.eu/en/projects/social-development/bsi-buying-for-social-impact.html>
- Buying Social — a guide to taking account of social considerations in public procurement: taking account of social considerations in public [\\NET1.cec.eu.int\homes\083\lupilaa\Social\Buying Social guide EMPL-MARKT.pdf](https://www.aeidl.eu/en/projects/social-development/bsi-buying-for-social-impact.html)
- Commission Guidance on Innovation Procurement:
<https://ec.europa.eu/transparency/regdoc?fuseaction=list&coteld=3&year=2018&number=3051&version=F>
- Innovation Procurement Toolkit, European Assistance For Innovation Procurement: <http://www.eafip.eu/>
- European network of competence centres on innovation procurement: <http://www.procure2innovate.eu/>
- Public Procurement Guidance for Practitioners: http://ec.europa.eu/regional_policy/en/information/publications/guidelines/2015/public-procurement-guidance-for-practitioners
- Commission guidance on cooperative procurement in the fields of defence and security: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2019.157.01.0001.01.ENG&toc=OJ:C:2019:157:TOC
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Public Procurement

Abnormally Low Tenders

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Introduction

The activities of public institutions and the decisions made by them should be governed by the pursuit of objectives in the public interest and by the need to spend public funds efficiently. Public procurement decisions and activities are no exception, as a significant part of taxpayers' money is spent in this way.

In many cases, procurement decisions are made on the basis of the lowest price, which is a permitted award criterion falling within the concept of the "most economically advantageous tender". Contracting authorities may argue that the least expensive offer ensures the achievement of the important financial goal of budgetary savings.

The lowest price, however, is not always the offer that is the best value for money in the long term. The 2014 Public Sector Directive (the Directive)¹ acknowledges this fact by requiring that "contracting authorities shall base the award of public contracts on the most economically advantageous tender". The Directive also provides a framework for the use of life-cycle costing and other cost-effectiveness approaches, encouraging contracting authorities to consider more than just the initial purchase price and to take into account qualitative issues in their evaluation of tenders. See SIGMA Public Procurement Brief 8, *Setting the Award Criteria*, and SIGMA Public Procurement Brief 34, *Life-cycle Costing*, for further information on these issues.

In the current economic climate, there is often keen competition between economic operators, which submit competitive, low-price bids in order to secure work, retain employment and maintain their presence on the market. Low prices can, potentially, result in significant financial benefits to contracting authorities. It may also be the case that low-priced tenders are "too good to be true" and will be very poor value for money or will not be delivered at all. It is in this context that the concept of "abnormally low tenders" arises.

The Directive contains provisions for dealing with tenders that are suspected of being abnormally low. These rules enable contracting authorities to avoid the negative consequences of accepting a tender that appears extremely advantageous but, in practice, is not viable. In addition to protecting the public interest against the risk of non-performance or poor performance of a contract, these provisions are also aimed at supporting genuine competition between economic operators and reducing unfair advantages. For example, the provisions permit a contracting authority to reject a low-priced tender where the low price is a consequence of illegal support from public funds or from breaches of specific labour, social or environmental laws.

The Directive does not define an "abnormally low tender". This concept is nevertheless 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.

There are various reasons for the appearance of abnormally low tenders in public procurement procedures.

Misunderstanding or misinterpretation: The submission of an abnormally low tender may be the result of the economic operator's misunderstanding or misinterpretation of the requirements of the contracting authority.

For example, Company A may not understand the full scope of the procurement and, as a consequence, it submits a tender that does not include all of the mandatory requirements. Company A's tender may be for a much lower price than the prices of the tenders of other economic operators, which took into account all of the contracting authority's requirements in their tendered price.

¹ Directive 2014/24/EU on public procurement and repealing Directive 2004/18/EC, 26 February 2014.

In such a case, the price offered seems to be very good, but further investigation shows that the tender is not compliant with the requirements of the contracting authority, as it does not provide for all of the services or works required.

Underestimation of risks: The submission of an abnormally low tender can be the result of an underestimation of the risks attached to the execution of the contract. This phenomenon is referred to in economic literature as “the winner’s curse”.

For example, Company B submits a tender that is compliant with all of the requirements of the contracting authority, but in calculating the tendered price Company B was too confident about the cost of executing the contract. There is a risk that Company B may not be able to perform the contract correctly or that it will perform the contract, but with delays or with a product of lower quality.

Non-compliance with social, labour and environmental laws: The submission of an abnormally low tender can be the result of non-compliance with binding legal requirements concerning social, labour or environmental law.

For example, if Company C does not pay wages in accordance with legal requirements or does not ensure labour conditions that comply with those regulations, then it has an unfair competitive advantage.

Subsidy: The submission of an abnormally low tender may be the consequence of the receipt of a subsidy by the economic operator.

For example, Company D is in receipt of financial support from the government accorded to start-up companies. Company D may be in a position to offer a price that is much lower than those of its competitors, which do not have access to this support. Subsidised companies are allowed to participate in public procurement procedures but, as explained below, their tenders should be rejected if they are abnormally low because of illegal state aid.

Deliberate strategy of an economic operator: The submission of an abnormally low tender may represent the deliberate action or strategy of an economic operator.

For example, Company E offers an extremely low price in order to provide continued employment for staff. Company F offers a low price in order to drive competitors out of the market. Company G offers a low price on the assumption that it will be able to agree on future amendments to the contract and increase remuneration by means of negotiation during the execution phase of the contract.

Risks related to choosing an abnormally low tender

Awarding a contract to an economic operator that offers an abnormally low tender is hazardous for the contracting authority (and in general for the public interest) for a number of reasons, as follows.

Default risk: An abnormally low tender entails a risk of default, particularly in the case of an economic operator that has misunderstood the complexity of the procurement or has not taken into account all of the risks related to the delivery of the object of the procurement. The result could be that the economic operator would be unable to fulfil the contract or would even become insolvent. The contracting authority would then need to re-tender the services or works that the economic operator has failed to deliver. The outcome would be lost time as well as additional administration and costs incurred by the contracting authority.

Additional charges or price increases: An economic operator that was chosen on the basis of a very low tender might, in the course of the execution of the contract, seek to charge the contracting authority for extra costs and request increased remuneration. During the execution phase, the economic operator’s bargaining position is often strong. For example, an economic operator may demand additional payments that were not included in the contract

and threaten to opt out of the contract if the contracting authority does not agree to those additional payments.

Quality risk: Another risk is that the goods or services provided will be of a lower quality than they should be according to the terms of the contract. For example, an economic operator that had proposed a very low tender could try to cheat the contracting authority by replacing materials of high quality with less expensive substitutes or by not performing all of the required services.

Avoidance of social, labour and environmental obligations: With an abnormally low tender there is also a risk that binding social, labour and environmental regulations will not be correctly applied. For example, the economic operator will try to avoid paying due taxes, minimum wages or social charges. In consequence, the market will be distorted and honest, law-abiding companies will be discouraged from applying for public contracts. In the long term, competition is lowered, as a smaller number of firms take part in procurement procedures, and in turn, prices are inflated.

How to identify an abnormally low tender

The Directive neither defines an abnormally low tender nor provides any specific methods of identifying such tenders. The Directive states only that a contracting authority should require explanations from economic operators proposing prices or costs that “appear to be abnormally low in relation to the works, supplies or services”.

In practice, the following methods are often used for the identification of tenders that appear to be abnormally low:

- An analysis of the price (costs) proposed by an economic operator is made in comparison with the object of the procurement.
- A comparison is launched of the tender price with the value of the procurement, as estimated by the contracting authority prior to the procedure. The contracting authority assesses the proportion of deviation of the price from the estimated value.
- A comparison is made of the tender price with the prices proposed in all of the other compliant tenders. The contracting authority assesses either the deviation from the mean price or verifies the extent of the difference between the tenders, or it applies both methods.
- A combination of all or some of the above-mentioned methods is applied.

According to the case law of the Court of Justice of the European Union (CJEU), arithmetical methods can be applied in order to identify abnormally low tenders, but they may not result in the “automatic” exclusion of such tenders². The CJEU has made it clear that a contracting authority having received a bid that it suspects to be abnormally low must request an explanation of the bid from the relevant economic operator. The economic operator must have the opportunity to explain why it was able to submit such a tender and cannot be automatically excluded without having had the opportunity to explain the bid in question³.

In any event, an arithmetical method should be applied cautiously for a number of reasons, as outlined below:

- An arithmetical method may not be very practical for intellectual services, where differences between prices may be significant.

² CJEU, Case C-285/99 *Impresa Lombardini*.

³ CJEU, Cases 76/81 *Transporoute*, C-103/88 *Fratelli Costanzo*, C-599/10 *SAG ELV Slovensko and Others*.

- Such a method may be misleading in cases where a very small number of tenders were submitted; some Member States require a minimum number of tenders for the use of this method.
- The average price of tenders used as a reference may be affected by “outliers”. This term refers to very high “courtesy” offers, where an economic operator participates in a procurement procedure for the purpose of attracting the attention of the contracting authority to its existence, but it does not expect to obtain the contract. For this reason, legislation in some Member States excludes such outliers from an average price assessment.
- A significantly lower price may be a genuine and correct price where, for example, some economic operators have colluded in a bid-rigging scheme and have proposed inflated prices, whereas the offer with a significantly lower price has been made by a bidder that is not involved in this scheme.

National solutions concerning the identification of abnormally low tenders

Many Member States do not provide for any specific method for the identification of abnormally low tenders. The contracting authority makes this assessment on a case-by-case basis, taking account of specific circumstances.

Arithmetical methods for the identification of tenders that are suspected to be abnormally low have also been applied in the past in some Member States, for example in Italy, Poland, Portugal, Romania, Slovakia and Slovenia. Those methods are based on a comparison of the tender price with the estimated value of the procurement, the average price of submitted tenders, or differences between the lowest and second lowest tenders.

Italy – the “anomaly threshold”

In Italy, although the price is the only criterion for the award of contracts, the law provides for the investigation of tenders showing deviations from the “anomaly threshold”. Five different methods may be used for the calculation of the anomaly threshold, and the contracting authority determines the one that is to be applied in a specific case by lottery. To avoid the manipulation of prices by bidders, the method of calculation of the anomaly threshold is not revealed in advance⁴.

For example, the contracting authority is obliged to request explanations from all bidders that have submitted tenders with a discount that is equal to or higher than the mean of all discounts proposed in compliant tenders compared to the “base price” (set by the contracting authority), with the exclusion of 10% of the highest and lowest discounts (rounded up to full figures) and increased by the average divergence from the mean of discounts above this average discount.

For example, there are 11 compliant tenders with the following discounts: 8%, 9%, 11%, 13%, 14%, 16%, 17%, 18%, 20%, 21% and 25%. For the purposes of calculation of the average discount, the two lowest discounts – 8% and 9% – and the two highest – 21% and 25% – are set aside (10% of 11 = 1.1; rounded up to a full figure, it becomes 2). The average discount is 15.57%. Four tenders show discounts larger than 15.57%: 16%, 17%, 18% and 20%. Their average deviation from the average discount amounts to 2.18%. The threshold for mandatory investigation (“anomaly threshold”) is then 17.75% (15.57% + 2.18%). In conclusion, the contracting authority will have to request explanations from bidders that proposed the discounts of 18%, 20%, 21% and 25%, since their tenders had discounts

⁴ *Decreto Legislativo 18 aprile 2016, n. 50 Attuazione delle direttive 2014/23/UE, 2014/24/UE e 2014/25/UE sull'aggiudicazione dei contratti di concessione, sugli appalti pubblici e sulle procedure d'appalto degli enti erogatori nei settori dell'acqua, dell'energia, dei trasporti e dei servizi postali, nonche' per il riordino della disciplina vigente in materia di contratti pubblici relativi a lavori, servizi e forniture, Article 97.*

exceeding the “anomaly threshold”.

As the criterion of the most economically advantageous tender is applied, the contracting authority is obliged to request explanations from bidders that obtained, in terms of the price and other award criteria, at least 4/5 of the maximum number of points envisaged in the contract notice. For example, the following criteria are applied in the procurement procedure: the price – maximum of 20 points; the quality – maximum of 20 points, the organisation and qualifications of the team – maximum 20 points; the innovation – maximum of 20 points; and the time frame for execution – maximum of 20 points. The investigation procedure concerns all tenders that obtain at least 16 points for their prices and at least 64 points for all other criteria.

Other Member States do not provide for such sophisticated arithmetical methods.

Poland

In Poland, contracting authorities are obliged to require explanations from bidders that submit tenders containing prices that are lower by more than 30% than the estimated value or the average price of all submitted tenders. There is no requirement concerning a minimum number of submitted tenders for this method to be applied⁵.

Portugal

In Portugal, a tender is regarded as being abnormally low if its price is lower than the budgeted price set by the contracting authority (“base price”) by the following:

- 40% or more for public works contracts;
- 50% or more for other types of contracts.

The contracting authority may also set different “anomaly thresholds”, but it should provide this information in advance to potential bidders in the tender documents⁶.

Romania

In Romania, former procurement regulations provided that a tender would be considered as abnormally low in relation to what was to be performed or provided when the tendered price, excluding VAT, was (a) less than 85% of the estimated value of the contract – if fewer than five valid tenders had been submitted; or (b) less than 85% of the arithmetic average of the price of the submitted tenders, without taking into account the lowest and highest prices proposed – if at least five valid tenders had been submitted⁷. These provisions were deleted when a new Public Procurement Law was adopted in 2016, and the new Law does not envisage an arithmetical criterion for the identification of an abnormally low tender⁸.

Slovakia

In Slovakia, a tender is understood as abnormally low if the following conditions have been met:

- 1) At least three tenders, submitted by qualified bidders, fulfil the requirements of the contracting authority.

⁵ Public Procurement Law of 29 January 2004, as amended, Article 90 (1), available at: https://www.uzp.gov.pl/data/assets/pdf_file/0015/30336/Public_Procurement_Law_2015_consolidated.pdf

⁶ *Código dos contratos públicos aprovado pelo Decreto-Lei nº 18/2008, de 29 de janeiro*, Article 71.

⁷ *HOTĂRÂRE nr. 925 din 19 iulie 2006 pentru aprobarea normelor de aplicare a prevederilor referitoare la atribuirea contractelor de achiziție publică din Ordonanța de urgență a Guvernului nr. 34/2006 privind atribuirea contractelor de achiziție publică, a contractelor de concesiune de lucrări publice și a contractelor de concesiune de servicii.*

⁸ *Lege Nr. 98/2016 din 19 mai 2016 privind achizițiile publice.*

- 2) The tender offers a price that is at least 15% lower than the average price of all other offers.
- 3) The tender offers a price that is at least 10% lower than the second lowest offer.

It is enough to consider the tender abnormally low if conditions (1) and (2) or conditions (1) and (3) are met⁹.

What the Directive says about abnormally low tenders

Contracting authorities are obliged to require economic operators to explain the price or costs proposed in their tenders where those tenders appear to be abnormally low in relation to the works, supplies or services (Article 69 (1) of the Directive).

This means that the contracting authority is not allowed to:

- accept a tender that appears to be abnormally low without having first conducted this investigation;
- reject a tender that appears to be abnormally low without having allowed the bidder to explain the low level of the price or costs.

The Directive stipulates that the explanations required from economic operators may refer “in particular” to the:

- economics of the manufacturing process, services provided or methods of construction;
- technical solutions chosen or any exceptionally favourable conditions available to the tenderer for the supply of the products or services or for the execution of the works;
- originality of the works, supplies or services proposed by the tenderer;
- compliance with obligations deriving from mandatory EU law or from national law that is compatible with EU law in the fields of social, labour or environmental law or international labour law;
- possibility for the tenderer to obtain state aid.

The Directive uses the words “in particular” before listing the possible explanations and therefore the list is not exhaustive. It is nevertheless not purely indicative either. According to the case law of the CJEU, contracting authorities are not allowed to limit the scope of factors or elements to which explanations may relate.

Investigation procedure

The Directive requires the contracting authority to assess the information (explanations) provided by the consulting economic operator.

In accordance with good procurement practice, the contracting authority should set a reasonable time limit for the submission of explanations concerning the low level of the price or costs. The Directive does not specify the minimum time period to be set by the contracting authority. This period is determined by national regulations or jurisprudence, and Member States have different approaches in this regard. For example, Italian provisions require the time period for the submission of explanations to be no shorter than 15 days, whereas French case law confirms that a period as short as four days is sufficient.

⁹ ZÁKON z 18. novembra 2015 o verejnom obstarávaní a o zmene a doplnení niektorých zákonov, §53 (3).

The Directive does not specify whether the contracting authority may make only one request for information. The wording of the Directive does not preclude requests by contracting authorities for additional information or clarifications if the first explanations provided by the bidder were not sufficiently clear. The details are determined by national laws or by practices in Member States.

Decisions concerning tenders accepted after conclusion of the investigation process: Following the investigation process, the contracting authority must make a decision concerning the tender that was suspected of being abnormally low.

The Directive¹⁰ states that the contracting authority may only reject a tender where the evidence supplied does not satisfactorily account for the low level of the proposed price or costs, taking into account the explanations provided by the economic operator. The contracting authority is only entitled to reject the tender where it has established, following investigation, that the tender is, indeed, abnormally low. If the explanations provided by the economic operator, which the contracting authority has analysed in consultation with that economic operator, show that the price (cost) is genuine, the tender cannot be considered to be abnormally low and cannot be rejected.

If the contracting authority decides to reject a tender on the grounds that it is abnormally low, it is obliged to inform the economic operator of the reasons for the rejection of its tender as rapidly as possible, and in any event within 15 days of receipt of the economic operator's written request for that information¹¹.

The reasons for the rejection of tenders found to be abnormally low should also be included in the individual report on the procurement procedure prepared by the contracting authority¹².

Abnormally low tenders and state aid

One of the explanations for the submission of a tender with a low price or low costs may be that the economic operator benefits from state aid. The Directive provides special rules concerning the rejection of tenders in such cases.

A contracting authority may reject the tender on these grounds alone, but only if the economic operator is unable to prove, at the contracting authority's request, that the aid it has received was compatible with the internal market. The burden of proof concerning the legality of the aid is on the economic operator.

The contracting authority must set a "sufficient", i.e. reasonable, time limit for the economic operator to prove that the aid received was lawful state aid. The contracting authority, in consultation with the economic operator concerned, conducts an analysis of compliance with the provisions on state aid. The economic operator must respond within the time limit fixed by the contracting authority.

Furthermore, the contracting authority is obliged to inform the European Commission of the rejection of a tender under these circumstances.

Questions and Answers

Is a contracting authority obliged to reject abnormally low tenders? The Directive does not state clearly whether the contracting authority is obliged to reject in all cases a tender where the explanations provided by the bidder do not justify the abnormally low price or costs.

¹⁰ Art. 69 (3)

¹¹ Art. 55 (2) b)

¹² Art. 84

However, in one specific case the Directive obliges the contracting authority to reject a tender. This case concerns a situation where the contracting authority has established that the tender is abnormally low because it does not comply with “applicable obligations in the fields of environmental, social or labour law established by Union law, national law, national collective agreements” or by provisions of international environmental, social and labour law.

The fact that the Directive emphasises the obligation to reject a tender in this specific case may suggest that in all other cases where the low price/costs is not convincingly explained by the bidder, the contracting authority is not obliged to reject that tender but merely allowed to do so. In other words, it is up to the contracting authority to decide whether to accept such a tender or to reject it.

The national laws of some Member States are explicit in this regard. For example, in Poland and in France contracting authorities are clearly obliged to reject a tender where it has been confirmed that the price is abnormally low. The national laws of other countries reflect the wording of the Directive.

Is a contracting authority permitted to automatically exclude a tender that is suspected of being abnormally low? A contracting authority is prohibited from automatically excluding a tender that appears to be abnormally low. Before excluding such a tender, the contracting authority must first allow the economic operator concerned to explain the low price or costs.

Member States are not permitted to require contracting authorities to automatically reject abnormally low tenders. The prohibition of automatic exclusion applies not only to contracts covered by the Directive but also, in accordance with the case law of the CJEU, to contracts having smaller values but a particular cross-border interest.

The automatic exclusion of tenders that are considered to be abnormally low in the case of contracts of a particular cross-border interest may amount to indirect discrimination. It may be discriminatory because, in practice, it may place economic operators from other Member States at a disadvantage. An economic operator from another Member State may have genuine reasons for the low tender, while the execution of the contract remains viable. The low price or costs may, for example, be due to different cost structures, economies of scale, or a deliberate reduction in profit margins with a view to entering the market.

According to the case law of the CJEU¹³, it may nevertheless be acceptable, in public procurement *below* the EU financial thresholds, to automatically exclude tenders on the grounds that they are abnormally low. This exclusion is possible, provided that certain conditions are met. First, there must be an unduly large number of tenders. Second, the obligation to undertake a comparative evaluation of such a large number of tenders would exceed the administrative capacity of the contracting authorities. Third, the delay that such an evaluation would entail might jeopardise the implementation of the project.

In such limited circumstances, national or local legislation or even the contracting authorities themselves would be entitled to set a reasonable threshold for the automatic exclusion of abnormally low tenders.

An example of a situation where national legislation would permit this type of approach is found in Italy. The Italian provisions on public procurement allow contracting authorities to automatically reject tenders with prices that are lower than a particular “anomaly threshold”, provided that:

¹³ CJEU Case C-147/06 *SECAP and Santorso*.

- the award criterion is the price only;
- the value of the procurement is below the EU thresholds;
- at least ten tenders were submitted in the procurement procedure.

Is a contracting authority permitted to automatically reject the lowest tender and the highest tender? One of the popular myths of public procurement is the existence in some Member States of a procedure according to which both the lowest priced tender and the highest priced tender are automatically rejected, and the best tender is chosen after evaluating the remaining tenders. This practice is not permitted.

The origin of this myth may be a misconception relating to the use of “anomaly thresholds”, which are set on the basis of the average bidding price. Indeed, according to some national legislation, any tenders involving prices that diverge significantly from the average price are not taken into account when the average price of the submitted tenders is calculated. This practice does not mean, however, that these divergent tenders are “rejected”. They are in fact evaluated, but when the contracting authority calculates the average price of tenders, with a view to identifying tenders that should be further examined due to their divergence from the average price, those tenders are not included in the calculation of the average price (in order to avoid the impact of divergent tenders on the average price).

Another possible explanation of this myth is the application in Italy and Spain in the 1980s and 1990s of the “average price” criterion, where the contract was awarded to the tenderer offering a price that was closest to the average price of all offers. The contract was not awarded to the bidder proposing the lowest or most economically advantageous tender, but to the bidder with the “average” price tender. Such a practice was found to be unlawful by the CJEU¹⁴.

Is the concept of an abnormally low tender limited to consideration of the price (costs) only or does it also relate to other factors or award criteria applied by the contracting authority? The Directive refers to “abnormally low tenders” and not to tenders with abnormally low prices (costs). The provisions in the Directive on abnormally low tenders refer specifically to the requirement to investigate “price or costs” that appear to be abnormally low. These provisions do not prohibit, however, the assessment of factors other than price or costs that may indicate that a tender is abnormally low.

There is no express provision stating that the concept of an abnormally low tender cannot be applied to criteria other than the criterion of price. If the contract is awarded to the most economically advantageous tender by applying a range of award criteria in addition to price, then the requirements stemming from provisions on abnormally low tenders apply not only to the price criterion but also to the other criteria used for the evaluation of tenders.

The Directive also permits the contracting authority to set a fixed cost or price, with the result that economic operators compete only with regard to quality criteria. In this situation, the offer may be abnormally low due to exceptionally favourable conditions offered by a tenderer, such as hours of service, duration of the guarantee period, or period of execution of the works or services. The price itself may be not so low as to raise doubts about its “normality”, but the whole tender may be abnormally low in terms of what is offered for the price tendered. In such a case, the explanations sought by the contracting authority do not concern the price itself but what is offered for this price.

The question of whether a tender is abnormally low should be considered with reference to all features of the tender. For example, if an economic operator offers substantially more services for the same or almost the same price as other economic operators offering fewer services, this tender may also be considered as abnormally low. The same applies to a tender with a

¹⁴ CJEU Case 274/83 *Commission v. Italy*.

significantly shorter period of execution of a contract or a smaller number of hours required to deliver a contract¹⁵.

Is a contracting authority permitted to seek explanations from economic operators in advance, for example in the tender documents? The case law of the CJEU¹⁶ confirms that a contracting authority may, in order to streamline the procurement process, seek explanations in advance from economic operators concerning low prices (costs). In that case the contracting authority must disclose in advance in the contract notice (or procurement documents) the estimated value (or the "base price") of the contract. It must also set the financial level below which economic operators that propose lower prices should provide explanations. In that way, the contracting authority may not automatically disqualify low tenders without first analysing the explanations given and allowing economic operators to provide additional clarifications or explanations.

Utilities

Article 84 of the Utilities Directive¹⁷ contains identical provisions to those of the Directive on abnormally low tenders.

¹⁵ CJEU Case T-495/04 *Belfass*.

¹⁶ C-285/99 *Impresa Lombardini*.

¹⁷ Directive 2014/25/EU on procurement by entities in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC, 26 February 2014.

Further information

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