

### ***Tactical bidding – what is “abnormally low”?***<sup>5</sup>

The High Court in England has given further guidance on the obligation on a contracting authority to investigate a potential abnormally low tender.

An unsuccessful tenderer (**SRCL**) in a procurement for clinical waste disposal by the National Health Service Commissioning Board (**Board**) has claimed that there was a duty on the Board to investigate both the successful and second ranked tenderers as abnormally low (both bids were c.35% cheaper than SRCL).

The court considered the wording of Regulation 69 of the Public Contracts Regulations 2015 (as amended) i.e. *“Contracting authorities shall require tenderers to explain the price or costs proposed in the tender where tenders appear to be abnormally low.”*

The Board submitted that the duty to investigate only arose where the price in question appears to be abnormally low and the contracting authority is considering rejecting the tender for that reason, neither of which were applicable in the present circumstances.

The court, whilst not entirely agreeing with the position put forward by the Board, held that that there was no general duty to investigate the winning and second ranked bids purely because they may have appeared abnormally low (based on a significant difference in the price proposed by one bidder). The court highlighted that assessment of an abnormally low tender does not simply involve a comparison of the numbers and should be considered using commercial judgement, in particular the skill and experience of the tenderer in question.

The court in this case also criticised SRCL for bringing the claim which the court classed as “contrived” as SRCL *“took a conscious decision not to bid on a commercial basis, but fix its margins at an artificially high figure of 25% and try to engineer a situation where the other bids were far lower than its own, in order to justify an attack using the “abnormally low tender” approach.”*

### **Comment**

This case reinforces the generally accepted position that contracting authorities and utilities are not obliged to investigate a tender which appears low in all circumstances i.e. only where the authority itself considers/has a suspicion the price to be abnormally low as opposed to, as in this case, the successful bidder is considerably cheaper for legitimate reasons. The case also confirms that there is a reasonable degree of flexibility for authorities in identifying abnormally low bids and demonstrates that it is not necessarily easy to challenge the authority’s discretion.

The court’s comments regarding the claimant’s approach to pricing at rates which could potentially be considered “abnormally high” are also interesting. This approach by an unsuccessful bidder is something for contracting authorities and utilities to look out for in their procurement processes.

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<sup>5</sup> *Ocean Outdoor UK Limited v London Borough of Hammersmith and Fulham* [2018] EWHC 2508 (TCC)