

# Abnormally low tenders

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# Defining abnormally low tenders under EU law 1/2

## Directive 2014/24/EU art 69:

### Article 69

#### Abnormally low tenders

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.
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).

## Explanatory note to the directive:

- (103) 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.



## Main conclusions from EU law and ECJ's practise

1

**Purposes of the directive for creating rules on abnormally low prices:**

- avoid the risk of non-performance of the procurement contract
- avoid the possibility that the tenderer would in the middle of performing the contract ask for more money

2

**So, the methods for identifying the price's abnormality aims to eliminate those two risks:**

- that the tenderer does not leave the contract unperformed and
- that it does not ask for more money that would create unequal treatment of the tenderers

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**Additionally, it secures that the competition in the procurement and in some cases outside the procurement in some specific business areas are unharmed**

# Estonian (draft) law





# New Draft Public Procurement Act

In most part the regulation is the same as in the Directive 2014/24/EU art 69

## New method for being suspicions about construction tender prices:

- At least 3 tenders presented and the tender is over 10% cheaper of the tenderer's offer who is next or 20% of the average of those 3 tenders
- The salaries for the workers or the workers of the sub-contractors are less than 70% of the average salaries of the field

## Contracting authority may ask evidences:

- Information about the average salary
- Salaries of each sub-contractors
- Same information about the tenderers who come from abroad
- Comparison period is 6 months before the tender was announced





# Estonians need to be smarter than the law!

## Main topics covered by the Estonian courts recently:

- There are no rules in the law, what exactly the contracting authority needs to ask and thus what the tenderer should ask
- Suspicion may be raised based on all reasonable data (estimated value etc.)
- Empty answers are „banned“
- No right to present new evidences in the court
- If there are no answers, the contracting authority does not need to analyse the price or prove that it is unreasonable

**In average a tender cheaper than 20% of the estimate should raise suspicion. In closed fields also 5-10%**



## What to remember?

- In Estonia (and also based on ECJ's practice) **answering the contracting authority's query is crucial**
- As based on EU law, contacting authority's discretion is vast



**Latvia**





# Abnormally low tenders in Latvia

## The laws do not contain clear criteria

### Court practise has developed the following approach:

- no clear definition of an 'abnormally low tender' → each case evaluated individually
- contracting authority must have doubts about the seriousness of the proposal and whether a tenderer will be able to execute the contract
- big price differences can be an indication, but must not automatically lead to exclusion
- tenderer must provide objective facts to substantiate its proposal

### Before excluding the tender, explanations must be requested and a tenderer must be consulted.

- Form and detailedness of consultations is at the discretion of the contracting authority.
- Contracting authority has to give **objective and rational** reasoning, if the explanations do not substantiate the proposal or if the price does not consider environmental, social, employment and labour protection obligations

**NB!** The obligation to verify salaries of employees is deleted



# Lithuanian (current and new) law





# Abnormally low tenders in Lithuania (1)

## In current PP law no fixed numbers are given, only in the order of the PPO:

- The price is **15%** or more lower than average of the other tenderers, who's bids are not rejected, *or alternatively*
- The price is **30%** or more lower than the budget planned for the procurement

## In the new PP law (from July 1) slightly different number is given:

- The price is **30%** or more lower than average of the other tenderers, who's bids are not rejected and are not exceeding the budget planned for the procurement

**CA can ask for explanations in other cases as well**





## Abnormally low tenders in Lithuania (2)

### What to remember?

- *reasonable* time for provision of the explanations should be given (depends on particular situation, type of the procedure)
- cooperation is crucial (both sides should be active)
- Usually courts approve if:
  - The explanations were detailed enough
  - Technical decisions were explained
  - Special conditions (discounts etc.) were proved
  - Originality was proved etc.



### Other rules similar to other Baltic states



Thank you!

**ESTONIA**

Pärnu mnt 15  
10141 Tallinn  
phone +372 6 400 900  
estonia@sorainen.com

**LATVIA**

Kr. Valdemāra iela 21  
LV-1010 Riga  
phone +371 67 365 000  
latvia@sorainen.com

**LITHUANIA**

Jogailos 4  
LT-01116 Vilnius  
phone +370 52 685 040  
lithuania@sorainen.com

**BELARUS**

ul Nemiga 40  
220004 Minsk  
phone +375 17 306 2102  
belarus@sorainen.com

[www.sorainen.com](http://www.sorainen.com)