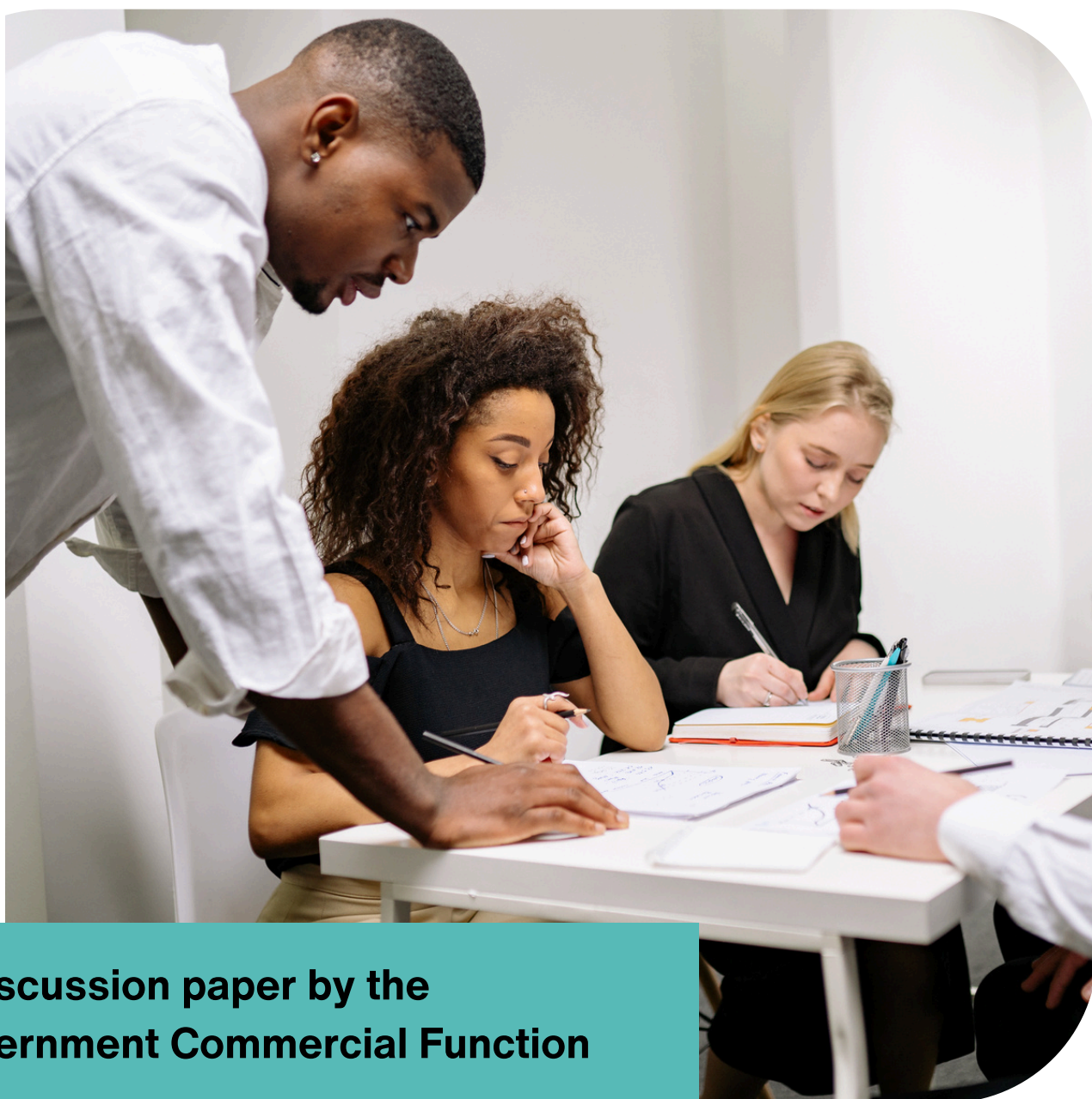




Government
Commercial
Function

Abnormally Low Tenders



**A discussion paper by the
Government Commercial Function**

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Introduction

1. This paper discusses the provisions within the Procurement Act 2023 (the Act) which enable a contracting authority to reject a tender on the grounds that the price is abnormally low. **Please note:** this document is a discussion paper intended to support colleagues in their commercial role and does not constitute policy or legal advice.



What is an abnormally low tender?

2. An abnormally low tender is a tender which has a price that appears abnormally low for the performance of the contract. This might be where the tendered price appears to be unsustainable or unrealistic without compromising deliverability, quality, and/or contractual compliance.
3. In practice, an abnormally low price could be indicated by comparison with:
 - 3.1 - the contracting authority's requirements;
 - 3.2 - the typical price offered by the market;
 - 3.3 - other benchmark data;
 - 3.4 - pricing contained in a 'should cost model' or business case); or
 - 3.5 - other tenders, noting that there is a requirement in the Sourcing Playbook to refer any abnormally low bid that is more than 10% lower than either the average of all bids or the should cost model estimate to the Cabinet Office.
4. A low price tender should not automatically be disregarded on the basis that it is an abnormally low tender. Suppliers may be able to justify that they have priced their tender low (and can deliver the contract nonetheless) because, for example, they:
 - 4.1 - have identified efficiencies or innovative solutions;
 - 4.2 - hold advantageous supply chain agreements;
 - 4.3 - understand the contracting authority's needs better than other suppliers; or
 - 4.4 - wish to break into a new market or seek other opportunities (loss leader).
5. **What makes a tender able to be disregarded because it is abnormally low, is a lack of evidence or justification that demonstrates to the contracting authority's satisfaction that the contract can be performed for the low price tendered.** It follows that, if requested by the contracting authority, a supplier should be able to provide a coherent cost model or other information against the requirement and/or supporting the goods/services set out in their tender. Even in a loss leader scenario a supplier should be able to provide details of the availability/ringfencing of funding or similar assurances to ensure the contract is fulfilled.

The Procurement Act 2023

6. Section 19(3)(c) of the Act states that a contracting authority “may disregard any tender that offers a price that the contracting authority considers to be abnormally low for performance of the contract.” Note that a contracting authority is not expressly required by the Act to disregard (reject) the tender, only that it may do so.
7. Before disregarding a tender, a contracting authority must first notify the supplier and provide it with a reasonable opportunity to demonstrate that it will be able to perform the contract at the price offered.
8. If the supplier is able to demonstrate to the contracting authority’s satisfaction that it will be able to perform the contract for the price offered, the tender must not be disregarded as abnormally low.
9. If the supplier does not satisfy the contracting authority, the tender may be disregarded.



How do I use this provision?

10. It is not necessary to set out in the tender documentation that the contracting authority reserves the right to reject any abnormally low tenders or the process for doing so. This is because the Act provides the right to reject (see above).
11. Although not required by the Act, contracting authorities would normally have some data on the expected price documented within their business case. As part of good commercial practice a contracting authority would not normally rely just on a competitive procurement process to establish what price represents value for money.
12. As part of good commercial practice contracting authorities would consider what information they would like to be submitted as part of tenders to provide evidence that the price offered does not appear abnormally low. For example:
 - 12.1 a breakdown of total price will help identify whether mistakes have been made in pricing, incorrect assumptions made, line item prices are missing or lower than expected to meet requirements. In line with open book accounting, a greater degree of price transparency would be expected as service complexity grows or where contracts are multi year;
 - 12.2 high level plans will help identify if key and costly steps have been omitted.
13. Where the risk of errors in tenders is high contracting authorities could use a competitive flexible procedure to enable key elements of tenders to be submitted in draft format so that they can be checked and any concerns resolved through dialogue.
14. **Step 1: Identify whether any tenders appear to be abnormally low:** Following receipt of tenders a contracting authority should consider whether any tenders appear to be abnormally low as described in paragraph 2 above. Indicators might be, noting this is not an exhaustive list:
 - 14.1 clear price outliers against other tenders;
 - 14.2 a premium service offered at a budget price;
 - 14.3 incomplete price breakdowns;
 - 14.4 bid inconsistencies e.g. resourcing proposals which do not align with delivery methods;

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- 14.5 pricing schedules that do not add up or appear incomplete; for example, missing mobilisation or reliance on future savings with no credible plan of how they will be achieved;
 - 14.6 low supply chain costs without supporting evidence.
15. To comply with the Act, a contracting authority must treat all suppliers equally, i.e. it should apply the same test to all tenders in the same way, unless a difference between the suppliers justifies different treatment.
16. **Step 2: Request the supplier to demonstrate the tender is not abnormally low:** Under the Act a contracting authority must notify the supplier that it considers the price to be abnormally low and give the supplier a reasonable chance to demonstrate the contract is deliverable for the price offered before it can disregard the tender for being abnormally low. (Note that the onus is on the supplier to demonstrate that it will be able to deliver the contract for the price offered.)
17. It would be good practice for the contracting authority to write to the supplier covering such points as:
- 17.1 why it considers that the price of the tender is abnormally low;
 - 17.2 what evidence and/or explanation the contracting authority expects to demonstrate that the tender is not abnormally low;
 - 17.3 the deadline by which the supplier must respond and the consequences of not doing so i.e. the tender will be disregarded on the grounds of it being abnormally low. Note that the deadline should provide a reasonable opportunity for the supplier to respond (but need not be longer than is necessary for this purpose).
18. **Step 3: Assess the supplier's response:** The contracting authority should carry out an assessment of the explanation provided by the supplier and whether it demonstrates to its satisfaction that the contract can be performed for the price offered. Note that the onus is on the supplier to demonstrate this to the contracting authority.

How do I use this provision?

19. **Whilst it may be acceptable to allow the supplier to correct obvious errors in its tender, this will depend on the process that has been defined in the tender notice and associated tender documents. It is likely that the process will not allow the supplier the opportunity to change its tender substantially.**
20. **Step 4: Advise the supplier of the decision:** The contracting authority should advise the supplier in writing of its decision, including details of whether and, if so, how and why it has concluded that the tender is abnormally low and that it is not satisfied that the contract can be performed for the price offered.



Record keeping

21. Contracting authorities must keep such records that they consider appropriate to explain material decisions (section 98 of the Act), which would include any decision to disregard a tender under s.19(3)(c) for being abnormally low. This record might, for example, cover such matters as:

- 21.1 why the tender appeared to be abnormally low;
- 21.2 what evidence was requested of the supplier;
- 21.3 what information was received from the supplier;
- 21.4 how it was assessed, by whom and their role;
- 21.5 why the tender was accepted or disregarded;
- 21.6 any further actions e.g. in-contract monitoring;
- 21.7 a chronology of events against time.