



# *Fighting Against Abnormally Low Tenders (ALT)*

*Rechtsanwalt*

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# ENTERPRISES

- of all sizes
- active in all fields of building and civil engineering

**1905**

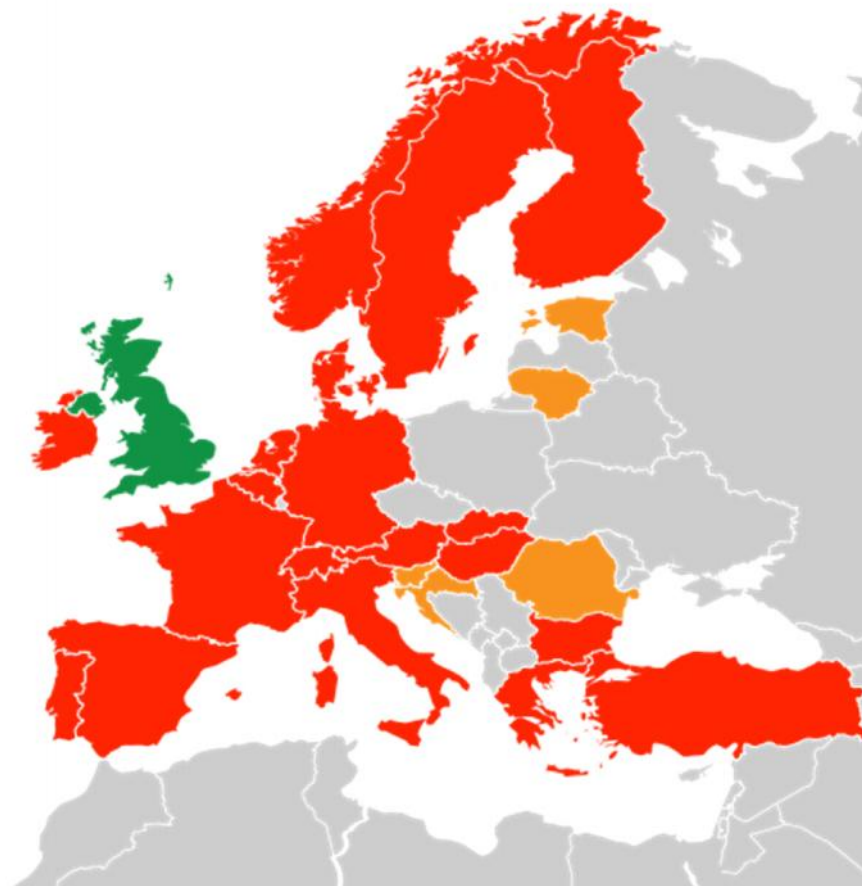
1<sup>st</sup> meeting

**31**

member federations

**28**

countries



## Full members

Denmark  
Netherlands  
Germany  
France  
Spain  
Luxembourg  
Bulgaria  
Finland  
Norway  
Sweden  
Ireland  
Belgium  
Portugal  
Switzerland  
Austria  
Italy  
Cyprus  
Greece  
Hungary  
Slovakia  
Turkey



## Observer members

Czech Republic  
Estonia  
Romania  
Slovenia  
Croatia  
Lithuania

## Co-operation agreement

United Kingdom



## MEAT/ BPQR (Art. 67 Dir. 2014/24)

- ▶ Most Economically Advantageous Tender
  - shall be contract award criterion
  - shall be identified on basis of price or cost
  - shall be assessed on basis of criteria linked to subject-matter of contract
- ▶ "Price/ cost only" allowed, may be forbidden



# ALT – no new phenomenon

- ▶ diverging interests (at first sight)
  - contracting authority  
interested in cheapest price
  - contractor  
interested in fair competition and benefit
- ▶ discussion always interesting

# ALT – consequences (increased risks)



- ▶ risks for contracting authority
  - ultimately more expensive (disputes, claims, quality issues, delays)
  - often litigation by unsuccessful bidders
  - later: sometimes new award procedure

# ALT – consequences (increased risks)



## ▶ risks for contractors

- additional costs, unsuccessful claims
- losses, and subsequently
  - problems to invest in training, R&D etc.
  - financial standing for new contracts
  - in extreme cases, bankruptcy

# ALT – how to identify?

- ▶ definition not in the Directive
- ▶ pragmatic definition
- ▶ no miracles for identification
  - suspicion ("too good to be true")
  - check explanations provided
  - if not plausible, then ALT



## ALT – Art. 69 Dir. 2014/24

- ▶ provides possibilities to deal with ALT
- ▶ mandatory rejection only if non-compliance with environmental/ social/ labour law
- ▶ leaves discretion to contracting authority
- ▶ aims at preventing discretionary rejection more than ensuring indicated rejection



## ALT – Art. 69 Dir. 2014/24

- ▶ Main shortcoming of Art. 69.1:
  - "Contracting authorities shall require economic operators to explain ..."
  - "... where tenders appear to be abnormally low ..."
  - no specific % for mandatory explanations



## ALT – Art. 69 Dir. 2014/24

- ▶ EC had proposed mandatory check, if difference to second tender 20% or more
- ▶ legislators against mandatory check and for discretion of contracting authority
- ▶ does not always work in practice

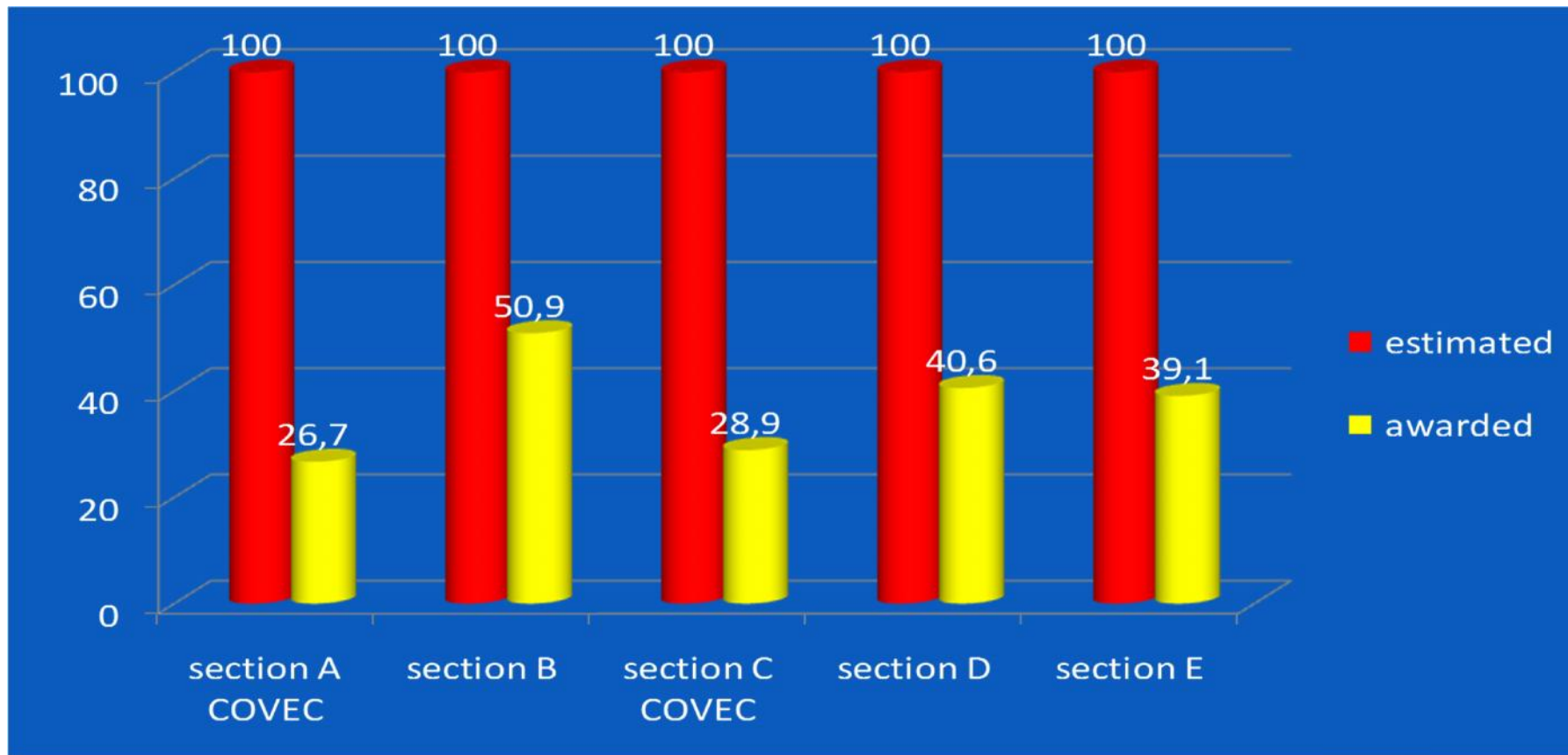


## ALT – Art. 69 Dir. 2014/24

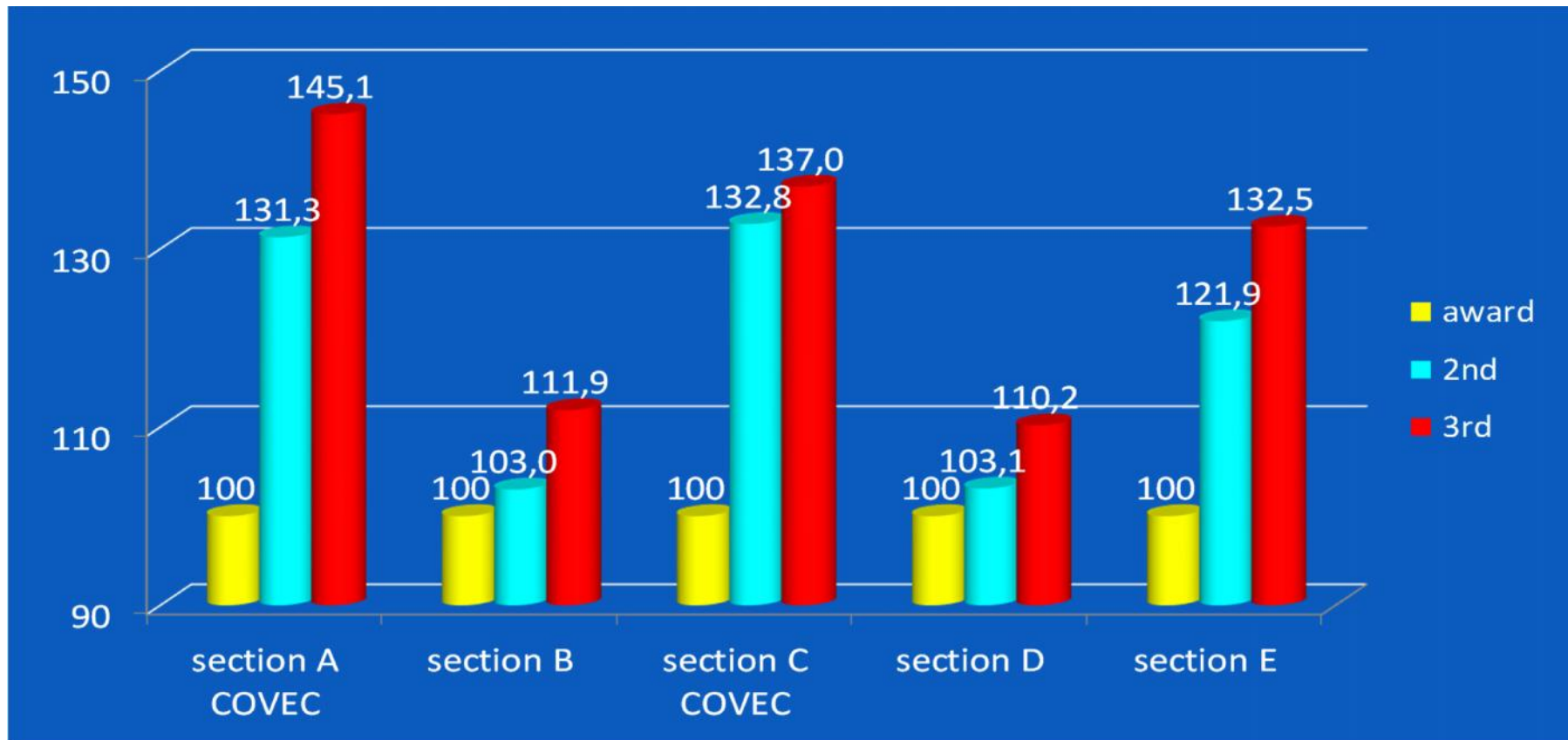
contractors' complaints dealt with by

- ▶ contracting authority
- ▶ national remedy authority
- ▶ national court
- ▶ EU Commission

# example: Poland, A2 (Łódź - Warsaw)



# example: Poland, A2 (Łódź - Warsaw)



# A2, A+C: procurement aspects



## some food for thoughts (ALT):

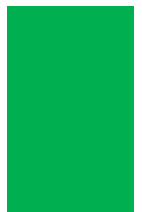
1. tender signed by person without power  
("mentioned too late")
2. guaranteeing Chinese bank not active  
in EU ("tender says 'bank', not more")
3. 30 positions priced "0 zł", despite  
indication "each position to be priced"  
("no unconditional obligation")

# A2, A+C: procurement aspects



## **some food for thoughts (ALT):**

4. 100 million USD cash for tender phase, more promised (COVEC net value 97m)
5. no need for expensive European credits
6. efficient organisation of work
7. no need for risk margins
8. use of own construction machines



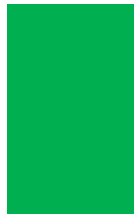
A2, A+C: procurement aspects



**some food for thoughts (ALT):**

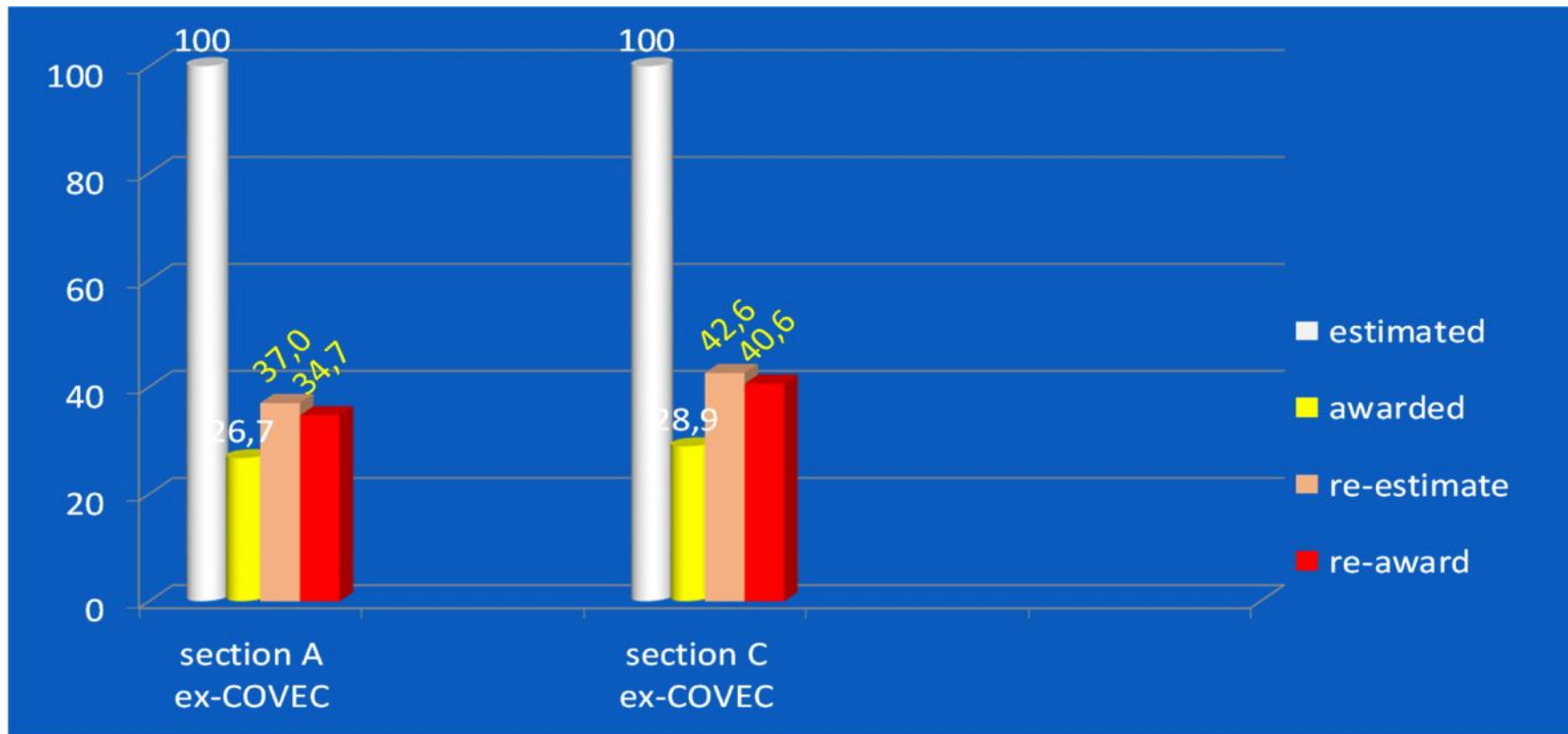
- 9. cheaper costs of Chinese personnel
- 10. unique organisation methods
- 11. low benefit margin
- 12. price calculated on assumption of winning 2 lots, so advantage of scale

➔ **Conclusion: all is fine!** 😊 😊 😊

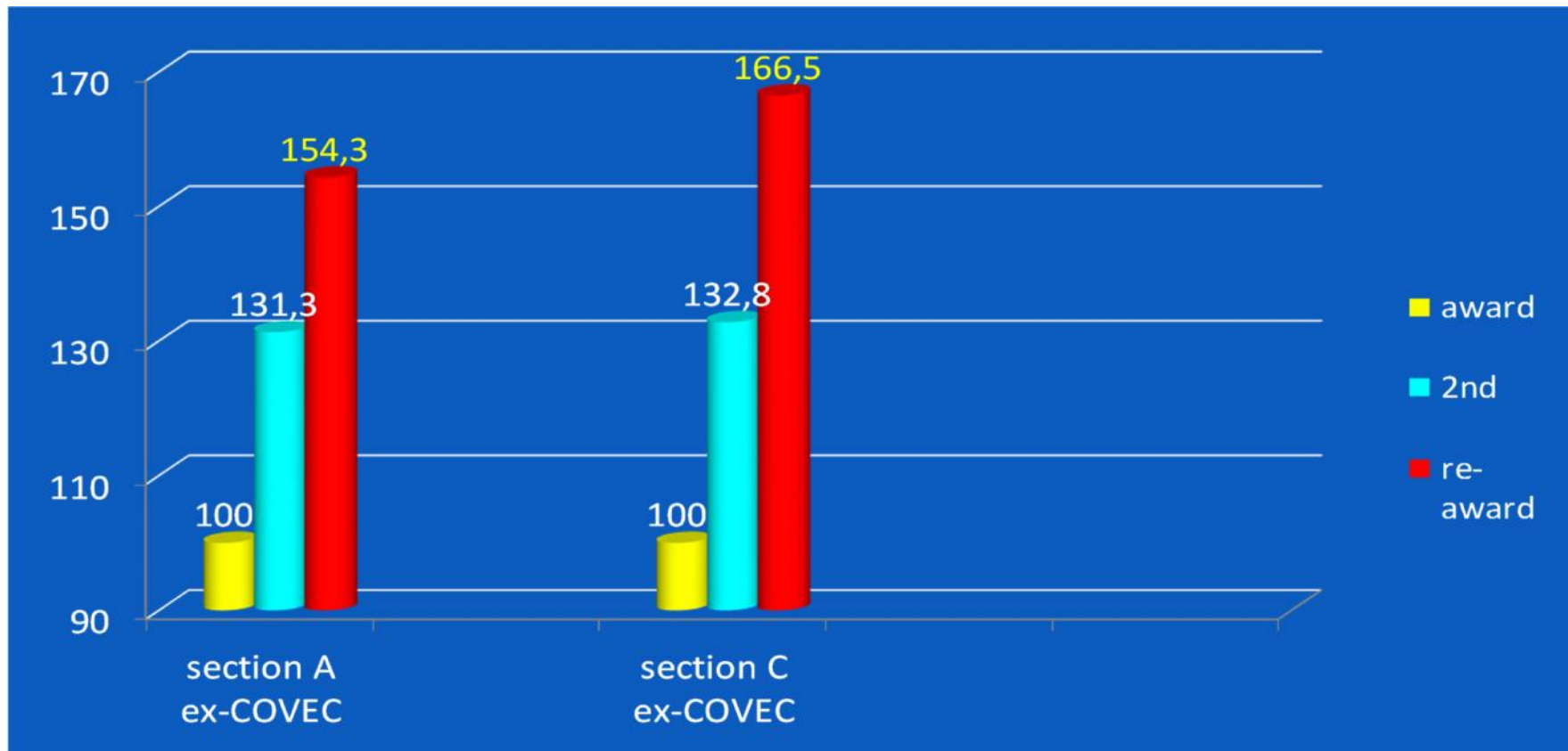




# example: PL, A2, re-award



# example: Poland, A2, re-award



## ALT – Art. 69 Dir. 2014/24

example: "Pelješac bridge"

- ▶ award to third-country SOE
- ▶ -23/26% "does not appear to be ALT"
- ▶ no real check of prices
- ▶ no state-aid issue raised
- ▶ complaints rejected (on-going)

# example: Croatia, Pelješac bridge

|  | Company X  | CRBC JV (SOEs) |                        |
|--|------------|----------------|------------------------|
|  | (HRK)      | (HRK)          | (% of Company X price) |
| Bridge - Preparation works demolition -<br>3. Procurement and installation of automatic<br>sea current monitors: | 2.500.000  | 143.000        | 5,7%                   |
| Bridge - Preparation work -<br>Additional geotechnical works:  | 3.100.000  | 517.000        | 16,7%                  |
| Bridge - Lower structure -<br>3. Pilots - Excavation of interior :   | 60.500.000 | 13.200.000     | 21,8%                  |
| Bridge - Lower structure -<br>3. Pilots - Excavation under the pilot socket                                      | 33.700.000 | 1.900.000      | 5,6%                   |
| Bridge - Lower structure -<br>3. Pilots -Transportation and depositing of<br>rubble:                             | 14.500.000 | 562.000        | 3,9%                   |



## ALT – improve Art. 69 Dir. 2014/24

- ▶ obligation to check if difference 20% or more
- ▶ obligation for real, thorough analysis, transparent for verification by courts (if ...)
- ▶ SOE indicates illegal state aid, unless contrary is proven
- ▶ obligation to exclude confirmed ALT



# ALT – improve attitude/ behaviour

contractors and contracting authorities:

- ▶ think of negative consequences of ALT
- ▶ do not offer/ accept ALT

Cheap can become very expensive!

# ALT – improve practice

contracting authorities:

- ▶ favour competition on quality, not price
- ▶ do not award to the cheapest at any price
- ▶ use possibilities provided by the Directives
- ▶ well-prepared project, serious cost estimate
- ▶ contract price ./ . cost on completion



# ALT – improve practice

contracting authorities:

- ▶ fair contract conditions
- ▶ reasonable risk distribution
- ▶ publish "ALT-check threshold" (x % difference)



# ALT – improve practice

contracting authorities:

- ▶ really check tender prices, thoroughly
- ▶ if in doubt, ask for explanations
- ▶ if explanations not plausible, reject tender

Accepting ALT favours unfair competition!



**CONSTRUCTION 4.0**

COMPETITIVENESS

**GROWTH**

ENERGY NETWORKS

EMPLOYMENT

**ENERGY EFFICIENCY**

SOCIAL INFRASTRUCTURE

**BIM**

WATER NETWORKS

ENVIRONMENT

**TRANSPORT INFRASTRUCTURE**

IT-NETWORKS

## **CONSTRUCTION IS THE SOLUTION INDUSTRY**

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RESOURCE EFFICIENCY

**JOB**

SKILLS TRAINING/EDUCATION

ENERGY PRODUCTION

**STANDARDISATION**

INFRASTRUCTURE

CLIMATE CHANGE

RECYCLING

INNOVATION