

Public Procurement of infrastructure projects and energy projects

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1. Legal framework on public procurement in Finland

1.1 Introduction to Finnish legal framework

The legal framework for public procurement in Finland is based on implemented EU Directives and in the GPA agreement. The implemented EU Directives are the Directive on public works, supply and service contracts (2004/18/EC)¹, the Directive on procurements of entities operating in the water, energy, transport and postal services sector (2004/17/EC)² as well as the Directive on procurements of entities in the fields of defence and security (2009/81/EC)³. These three directives have been implemented in Finland in three separate acts following the same division as the directives:

- The Act on Public Contracts (348/2007)⁴ regulating the ‘general scope’ of procurements
- The Act on Public Contracts of entities operating in the water, energy, transport and postal services sectors (349/2007)⁵ regulating the so-called special sector/utilities procurements (hereafter also referred to as the ‘Utilities Act’)
- The Act on Public Contracts for Defence and Security Procurements (1531/2011)⁶

In addition to these main regulations, there are a number of supporting acts, such as the Act on Electronic Auctions and Dynamic Purchasing System (698/2011)⁷ and the Public Transport Act (869/2009)⁸, which include provisions for specific procurement procedures. There are no specific acts concerning energy projects or large-scale infrastructure projects, as they are regulated either in the Act on Public Contracts or in the Utilities Act depending on the object of the procurement.

¹ Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, OJ L 134, 30.4.2004, p. 114–240.

² Directive 2004/17/EC of the European Parliament and of the Council of 31 March 2004 coordinating the procurement procedures of entities operating in the water, energy, transport and postal services sectors, OJ L 134, 30.4.2004, p. 1–113.

³ Directive 2009/81/EC of the European Parliament and of the Council of 13 July 2009 on the coordination of procedures for the award of certain works contracts, supply contracts and service contracts by contracting authorities or entities in the fields of defence and security, and amending Directives 2004/17/EC and 2004/18/EC, OJ L 216, 20.8.2009, p. 76–136.

⁴ *Laki julkisista hankinnoista*, 30.3.2007, 348/2007.

⁵ *Laki vesi- ja energiahuollon, liikenteen ja postipalvelujen alalla toimivien yksiköiden hankinnoista*, 30.3.2007, 349/2007.

⁶ *Laki julkisista puolustus- ja turvallisuushankinnoista*, 29.12.2011, 1531/2011.

⁷ *Laki sähköisestä huutokaupasta ja dynaamisesta hankintajärjestelmästä*, 17.6.2011, 698/2011.

⁸ *Joukkoliikennelaki*, 13.11.2009, 869/2009.

1.2 Act on Public Contracts

The Act on Public Contracts represents the general regulation concerning public procurement procedures in Finland. It is based on the EU Directive 2004/18 and is more of a procedural regulation than a practical one. The act includes national thresholds that oblige procuring entities to conform to the regulations even in procurements that are below the EU thresholds but above the national thresholds. There is also a difference in the scope of the act compared to the directive, as the Act on Public Contracts includes rules on public service concessions as well as public works concessions that the directive does not include.

The Act on Public Contracts is divided into general provisions that apply to all procurements, provisions that apply only to national procurements and provisions that apply only to EU procurements. The value and the object of the contracts define which sections and rules apply to it.⁹ The general provisions section regulates, e.g. the principles of public contracts, definitions and general exclusions as well as provisions on decisions, entering into contracts and remedies. The differences between the provisions concerning national procurements and EU procurements are merely procedural. However, the national procurement procedure rules are less strict than the EU rules.

1.3 Utilities Act

The Utilities Act is an act concerning so-called special sectors. It applies to public procurements regarding goods, services or works made by contracting entities operating in the water, energy, transport and postal services sectors. It is based on EU Directive 2004/17.

Energy is one of the sectors that the Utilities Act applies to. The procedures applicable to procurements under this act are mostly the same as in the Act on Public Contracts, but the Utilities Act has some differences and particularities. For example, there are no national thresholds, meaning that the act applies only to procurements that exceed the EU thresholds. One difference is also that it is always possible to use the negotiated procedure when procuring under the Utilities Act. There are also differences in minimum time limits and some procedures, but for example, the remedies are the same, since there are no separate provisions concerning remedies in the Utilities Act, but only a reference to the Act on Public Contracts.

⁹ There are exceptions, for example the provisions concerning the national procurements apply to all secondary service contracts defined in the Annex B of the Act, to all service concessions and public contracts concluded by the foreign affairs administration relating to development cooperation contracts, independent of the value of the contract that is even if the contract exceeds the EU thresholds. There are also different kinds of exceptions in which provisions apply to design contents and to public works concessions.

1.4 National thresholds

As said above, in addition to the EU thresholds, there are national thresholds in Finland in the Act on Public Contracts and in the Act on Public Contracts for Defence and Security. The Utilities Act has only an EU-wide threshold, so procurements falling under the scope of the Utilities Act are regulated by national law only when the EU thresholds are exceeded. Utilities procurements that do not exceed the EU thresholds are to be carried out following the basic EU principals (i.e. equal treatment, non-discrimination, transparency, proportionality).

In the Act on Public Contracts, the current national thresholds (the estimated maximum value of the total contract excluding VAT) are:

- EUR 30,000 for supply and service contracts, design contests or service concessions;
- EUR 100,000 for health care and social services contracts (listed in Annex B, Group 25) and certain other services; and
- EUR 150,000 for public works and public works concessions contracts.

In the Act on Public Contracts for Defence and Security procurements, the national thresholds are EUR 100,000 for goods and services and EUR 500,000 for public works contracts.

There are no special thresholds for energy projects or large-scale infrastructure projects in any act. Of course, large-scale projects usually exceed the EU thresholds, and are regulated as EU procurements by the Act on Public Contracts, the Utilities Act or The Act on Public Contracts for Defence and Security procurements. The national thresholds can be amended only by legislative procedure.¹⁰

2. Procurement procedure of energy projects and large-scale infrastructure projects

2.1 Legislative framework for procurement of energy and large-scale infrastructure projects

As mentioned above, energy-related procurements are regulated in the Utilities Act. Infrastructure projects, on the other hand, are regulated either in the Act on Public Contracts or in the Utilities Act, depending on the focus of the project and the focus of the contracting authority, i.e. the sector in which the contracting authority operates.

2.2 Procurement procedures

¹⁰ The last time the thresholds have been amended was in 1.6.2010 and it is anticipated that the thresholds will be updated next in connection with the implementation of the new directives.

The procedures available in the Finnish legal framework are those set out in the EU Directives, namely open procedure, restricted procedure and negotiation procedures (negotiated procedure and competitive dialogue). The open procedure and restricted procedure can be used in every situation.

If the scope of procurement of energy or infrastructure projects can be easily specified or the projects do not have especially challenging aspects, the restricted procedure can be applied. However, in more complex projects the contracting entities often prefer a more flexible procedure with a possibility for carrying out negotiations with the contenders. The conditions for use of the negotiation procedures are expressly set out in the Act on Public Contracts.

According to the Act on Public Contracts, the contracting authority may choose the negotiated procedure in the following situations:

1. in exceptional cases, when the nature of the procurement or the risks attaching thereto do not permit prior overall pricing;
2. in the case of services, such as financial services, services involving the design of works and other expert and skill-based services, insofar as the nature of the services to be provided is such that the invitation to tender or the contract specifications cannot be established with sufficient precision to permit the award of the contract by selection of the best tender according to the rules governing open or restricted procedures;
3. in respect of public works contracts, for works which are performed solely for purposes of research, testing or development and not with the aim of ensuring profitability or recovering research and development costs; and
4. in respect of selecting concessionaires.

In addition, contracting authorities may use the negotiated procedure when they have received tenders in response to an open procedure, restricted procedure or competitive dialogue the content of which does not match the invitation to tender, or if the tenders may not be accepted, provided that the initial conditions of contract in the invitation to tender are not substantially altered. In such cases the contracting authorities do not need to publish a new contract notice wherever they include in the negotiated procedure all of the tenderers which satisfy the minimum criteria set and which, during the prior procedure, have submitted tenders in accordance with the formal requirements of the tendering procedure.

In addition to the rules governing the use of negotiated procedure, the Act on Public Contracts includes provisions on competitive dialogue¹¹. This procedure can be used in particularly complex contracts where:

¹¹ In Finnish competitive dialogue is called 'competitive negotiated procedure' (in Finnish: *kilpailullinen neuvottelumenettely*).

1. the contracting authorities are not objectively able to specify the legal or financial conditions or technical solutions capable of satisfying their needs or objectives; and
2. the criterion for the award is that of the economically most advantageous tender.

The course of the procedure is the same as in the negotiated procedure, but in a competitive dialogue, the aim of the negotiations is to define one or more *solutions* to realise the contract. The contracting authority will conclude the dialogue when it can identify solutions which are capable of realising the contract.

As it is common for energy and infrastructure projects to have aspects that make the nature of the procurement or the risks related thereto such that prior overall pricing is difficult, the contracting entities often have legal grounds for choosing the negotiated procedure or the competitive dialogue when applying the Act on Public Contracts.

In the Utilities Act there are no restrictions or requirements for the use of negotiated procedure and hence it is always possible to use the negotiated procedure. There are no provisions on competitive dialogue in the Utilities Act.

2.3 Award criteria

As in the EU directives, the award criteria can be lowest price or most economically advantageous tender. Almost without exception, in demanding projects the contracting entities want to specify the evaluation criteria that are in their opinion relevant to the project (e.g. circumstances related to quality, output capacity, technical attributes etc.), so the most economically advantageous tender is by far the most commonly used award criteria.

2.4 Challenges in complex projects

The problems related to procurement of complex projects stem more from practical issues rather than restrictions in legislation.

For example, in multi-faceted projects it may even prove challenging to define the object of procurement distinctly enough to ensure obtaining comparable tenders. Also, the use of different criteria in comparing the tenders needs to be carefully considered: contracting entities often obtain help from legal and financial consultants to ensure the criteria and the comparison process is transparent enough. In the case of actual large-scale projects in both sectors, both contracting entities and tenderers typically use external help in preparing documentation and evaluating their risk position prior to and during the course of the procurement and in finalising the contracts.

One practical issue to consider is a functional and expedient allocation of risk between the parties. There are some experiences of cancellations of procurement of large projects due to the fact that the risk position required by the procuring entity was deemed unacceptable by the tenderers (leading to no bids) or priced at

a very high premium (leading to budget overruns). When planning the project, it is recommendable to also take into account the possibility of insurance coverage for certain risks to be transferred to the contractor, and the price thereof. It is unfortunate if certain transfers of liability prove to be uninsurable: this usually leads to high price levels.

A crucial task for the procuring entities to keep in mind is also to sufficiently and openly justify the reasoning behind the evaluation of tenderers and bids (based on and as described in the evaluation criteria in the invitation to tender, including all disclosed sub-criteria). Failure to carefully justify procurement decisions is an unfortunate stumbling block and one of the most common grounds for complaints.

Finally, as for the tenderers, it is essential to remember the absolute binding effect of the (final) bids. Thus, if the tenderer whose bid wins the award withdraws from the contract afterwards, he is liable for damages caused to the procuring entity by doing so. It is also to be noted that after the procurement decision, no change that could be considered material in comparison to the contract under procurement may be carried out when finalising terms of agreement between parties.¹²

2.5 Concession procedures

As mentioned earlier, the national legislation in Finland also regulates concession procedures, service concessions as well as public works concessions.¹³

Service concessions and public works concessions are regulated in the Act on Public Contracts. Concession procedures are not widely used in Finland, but in some sectors they are more popular than in others.¹⁴ However, in energy projects and in large-scale infrastructure projects, concession procedures are used infrequently.

2.6 Foreign bidders

For foreign bidders to get interested in procurement processes in Finland, the volume of the projects needs to be attractive, i.e. large enough. Projects with a volume of this scale are typically fairly rare on the Finnish market, but when such projects emerge, foreign interest is common. Of course, there are certain companies – mostly from nearby European countries – that actively seek to expand their operations into Finland and bid for smaller infra and energy projects

¹² As established in the European Court of Justice ruling in Case C-454/06 *Pressetext v Austria*.

¹³ A service concession is defined in the act as a contract of the same type as a public service contract except for the fact that the consideration for the provision of services consists either solely of the right to exploit the service or of this right together with payment. A public works concession is defined in the act as a contract of the same type as a public works contract except for the fact that the consideration for the works to be carried out consists either solely of the right to exploit the work or of this right together with payment.

¹⁴ For example, chimney sweeping services are commonly procured and provided as a service concession (perhaps a Finnish peculiarity). Public works concessions can be used, for example, when building rest-homes or health centres.

as well. It is also more common for contracting entities to put effort into spreading knowledge of their upcoming projects on a European scale in advance, and carry out ‘market testing’ to make their projects more appealing to foreign bidders.

2.7 Legal form and relations between parties

According to section 61 of the Act on Public Contracts and section 53 of the Utilities Act, groups of suppliers may submit tenders or put themselves forward as candidates. In order to submit a tender or a request to participate, these groups of candidates or tenderers may not be required by the contracting authorities to assume a specific legal form. However, the group may be required to do so during the term of the contract, if deemed necessary for the satisfactory performance of the contract. Otherwise it is not typical for procuring entities to specifically stipulate on relations between the contractor(s) and investors, or other parties of the contract.

Subcontracting is so customary in construction and delivery contracts that the procuring entity rarely wants to limit the possibility thereof. Under Finnish law, the main contracting party is in any case liable for work and actions of the subordinates and parties he has used in completing the contract. The procuring entity can however stipulate on specific procedures in accepting subcontractors, or clauses of particular relevance to the client that need to be specifically stated in subcontracting agreements (to ensure overall compliance with important terms during the term of the agreement).

2.8 Model contracts

In large infra and energy projects, it is common to include a model contract already in the invitation to tender so that tenderers get a sense of the most important contract requirements and specific terms, particularly related to overall liabilities, and can conform to them when submitting the tender. Including the contract already in the early phase of the procedure means that the tenderers cannot offer something that deviates from the contract and cannot decline the provisions of the contract after the decision has been made.

In traditional construction and energy industry practice, the local contracting practice in Finland – especially in construction – is based on the YSE 1998 General Conditions for Building Contracts. FIDIC suites of contract or Orgalime terms may also be used. However, in almost any large-scale project, the case-specific terms require careful tailoring, so standard-form model contracts only form the basis for drafting at best, or sometimes are abandoned altogether. Depending on the expected range of bidders, the procuring entities may find it beneficial to benchmark their individually drafted terms against commonly used national or international general terms (i.e. by making a detailed list of exceptions/modifications to the standard-form clauses), to help the interested participants evaluate the risk position in comparison to what they are typically used to seeing in the market.

Models of liability preferable to the client include everything from construction-only to turn-key deliveries. It is typical in both infrastructure and energy sectors to require at least some level of design liability from the contractor in addition to purely construction related liabilities.

2.9 Securing the performance

There are no provisions in the Act on Public Contracts or the Utilities Act on securing the performance of contracts. Since the Act on Public Contracts and the Utilities Act are procedural acts, they do not regulate contractual matters, and hence, the Finnish procurement provisions are silent on matters occurring after the final awarding decision has been made (except for provisions on remedies).¹⁵

As for typical instruments in obtaining sureties for the performances under the contracts, performance bonds range from bank guarantees (a common instrument) to parent company guarantees as for their own debt, and on demand guarantees as the most easily enforceable from the client's point of view. Naturally, the larger the project, the more you see combinations of the above instruments to give more comfort to the procuring entity as the client in a high-interest project.

3. Other issues

3.1 The language for procurements

Finland is a bilingual country where Finnish and Swedish are both official languages and the Language Act¹⁶ regulates the use of languages in official documentation. According to the act, bilingual authorities and municipalities have the responsibility to provide information in both languages to the public. The provision does not apply directly to the tendering process, since the tendering process is not directed to the public but to the companies that are involved. However, authorities should promote the use of both national languages on an equal basis.

The Language Act does not set mandatory language requirements for the tendering process itself or its documentation, but the authorities must in any case ensure equal and non-discriminatory treatment and, therefore, they should consider which languages they use in the tender process in order to take the provisions of the Language Act provisions into account.

The Act on Public Contracts does not include provisions on the language of the contract notice or the invitation to tender, but its preparatory work states that the invitation to tender may be written in Finnish or Swedish or in *any other official*

¹⁵ After the decision has been made and the contract has been signed, the general provisions of contract law apply. In Finland, the act that regulates contracts is the Contracts Act, dating back to 1929 – in Finnish, *laki varallisuus oikeudellisista oikeustoimista* (13.6.1929, 228/1929).

¹⁶ *Kielilaki*, 6.6.2003, 423/2003.

European Union language.¹⁷ However, there are no provisions concerning the language of procurement contracts.¹⁸

3.2 Publicity

In Finland, the Act on the Openness of Government Activities¹⁹ also regulates the publicity of procurement procedures. The publicity of all procurement documents (including offers, award decisions and contracts) is governed by the act, and covers both the publicity of the documents to the parties involved, i.e. all tenderers/candidates, and publicity to everyone else, i.e. the general public. The documents become public to the parties involved in the procedure when a procurement decision has been made and to others only after the procedure has been concluded and the contract has been signed. The basic publicity principle in Finland is that all documentation either made by the contracting entity or submitted to it is public, however, excluding business secrets, which have to be expressly marked out by the tenderers when submitting documents.

3.3 Appeals

In Finland, the relevant authority to appeal against the procurement procedure is the Market Court.²⁰ The parties involved in the procedure may appeal against the award decisions or other measures taken by the procuring entity during the procedure that has affected their position and the outcome of the procurement procedure. The Market Court is a special administrative court hearing market law, competition law, public procurement and civil IPR cases in Finland. It is the first instance for procurement cases.

There is also the possibility for a *correction procedure*, in which the contracting entity corrects an incorrect decision either on its own initiative or at the request of a party involved. The correction procedure can be used in cases when there has been a defect in the application of law during the procurement procedure.

The appeal to the Market Court as well as the request for correction to the contracting authority should be submitted no later than 14 days after receiving the written decision including appeal instructions. However, the contracting authority can correct its decisions on its own initiative no later than 60 days from the day of the decision. There is no right of appeal if the contracting authority dismisses the request for correction.

¹⁷ Government Proposal on the Act on Public Contracts, 50/2006 vp, p. 87

¹⁸ For more information on applying the Language Act to public contracts [http://www.tem.fi/en/consumers_and_the_market/public_procurement/legislation_\(public_procurement\)/national_legislation_concerning_public_contracts](http://www.tem.fi/en/consumers_and_the_market/public_procurement/legislation_(public_procurement)/national_legislation_concerning_public_contracts)

¹⁹ *Laki viranomaisten toiminnan julkisuudesta* (21.5.1999, 621/1999)

²⁰ www.markkinaoikeus.fi

An appeal of the Market Court's ruling can be submitted to the Supreme Administrative Court 30 days from receiving the ruling.