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Tendering in Finland

Winning public contracts

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Successfully tendering for public procurement contracts

Contracting entities of major infrastructure projects in Finland are practically always public authorities or equivalent organisations and are consequently subject to the strict requirements of public procurement law. As such, application of these regulations perceptively opens up the market for cross-border tenderers.

Contracts that exceed certain sector-based thresholds (for example, EUR 5,548,000 for construction contracts, EUR 443,000 for infrastructure planning services) and are consequently of particular interest in terms of international tenders are published in the Official Journal of the EU. These procurement notices can be accessed via the TED database (ted.europa.eu).

Procurement notices falling below the respective threshold are published exclusively in the Finnish HILMA database (www.hankintailmoitukset.fi); however, tenderers from any country may also bid for these contracts.

Qualifying bidder

Technical capacity

- evidence of qualified staff
- evidence of pertinent reference projects
- requirements for evidence are usually specified in the call for tender

Financial standing

- sufficient company size for managing the project risk
- if necessary, with consortial partners
- provision of collateral

Awareness of "local data"

- local employment law
- tax obligations
- pertinent codes and standards
- readiness to use the Finnish language

Rules of thumbs for bidders

The rigidity of the procedure requires tenderers to disengage somewhat from the typical mind-set of a businessperson.

Completeness. The tender must meet all requirements defined in the call for tender from the outset. Subsequent amendment is not possible.

Consistency. Should the tender contain contradictory information, the contracting entity may ask for a clarification – but it does not need to. Tenderers should expect that in cases of contradictions and ambiguities, the least favourable values will be applied for the purposes of tender comparison. This is also the case where such values are stated in a subordinate appendix to the offer.

Form. The procurement notice will often stipulate a specific structure for the tender or may even prescribe the use of a commensurate form. The use of an alternative individual form of presentation by the provider will be disadvantageous in practically all cases and may even result in elimination from the tender.

Improvements? Resist the temptation to offer an even better product than that requested. This will not gain any advantage within the tender comparison process. Independent replacement of the required functionality by a better (but different) alternative frequently results in exclusion from the tendering process.

Procurement notice specifications as a benchmark

When participating in public procurement procedures, the providers of infrastructural services and products face the necessity to set aside their business instincts – to some extent. The procurement procedure is strictly designed to ensure equal opportunity amongst those tendering. As a result, tenders should not deviate in any respect from the specifications determined in the tender document.

Occasionally, in the process of developing their technical solutions, companies may have already achieved a technical level superior to that specified in the procurement notice. The temptation to offer the ‘better’ solution is considerable.

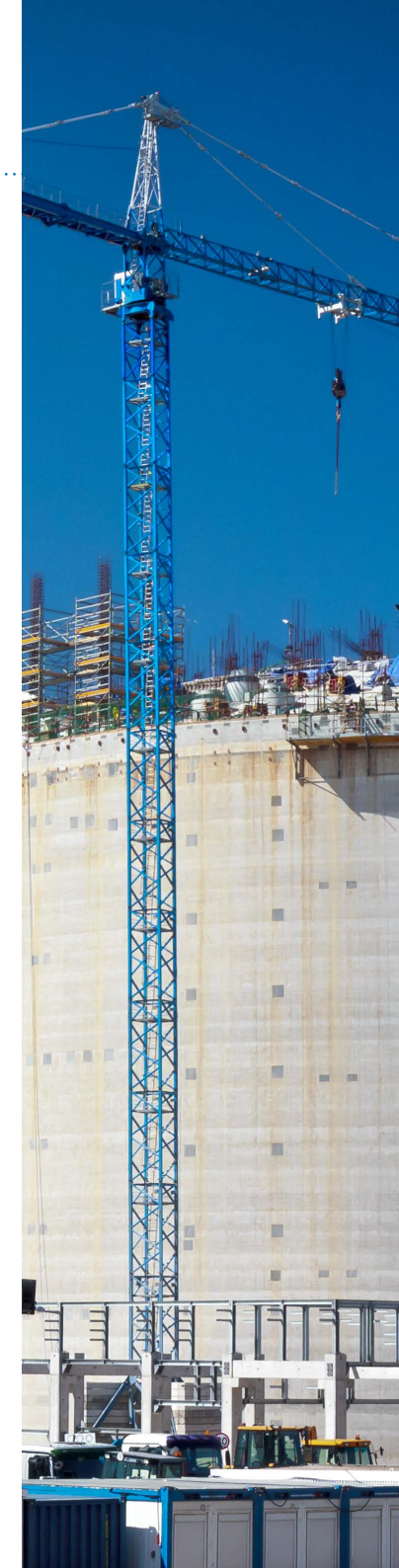
This may be encouraged by the fact that, rather than price alone, the decisive award criterion defined in most Finnish calls

Private Procurement vs. Public Procurement

Free negotiations	↔	Limited flexibility
Convince your customer	↔	Strict procedure – for both sides
Be better than your competitor	↔	Be better – but only where it counts

for tender is the “most economically advantageous tender” criterion. However, this criterion must not be interpreted to mean that the tenderer should bring each and every merit offered by their individual product to bear. On the contrary, the evaluation criteria are clearly specified in the procurement document and defined under an objective scoring system. Deficiencies in the defined criteria cannot be compensated by other benefits.

In principle, Finnish public procurement law allows for deviation from the specified standards if the technical characteristics of the solution offered are commensurate with those of the solution required. Nevertheless, specifically with regard to the comparability of such deviations, award decisions have increasingly been the subject of (often successful) appeals in recent years. As a consequence, when concluding their award decisions, public procurers currently tend to steer well clear of grey areas that run the risk of the decision being subsequently reversed by judicial proceedings. In any case, any risk on the part of the tenderer in this respect is entirely needless.



Defeating ambiguity in technology-based projects

In the field of technology-driven intelligent infrastructure and industry projects, appeals against contract award decisions are a frequent occurrence. This essentially results from the fact that, on the one hand, public procurement law requires clear criteria regarding the contract award that are uniform for all tenderers, while at the same time, in this rapidly developing area, two individual products are rarely entirely comparable.

To fulfil the requirements of public procurement law, the contracting authorities are forced to allow a high degree of abstraction in terms of the description of services and products. This frequently proves unsuccessful not only because the authorities in question lack the sufficient resources in terms of technical know-how, but also due to the fact that technical concepts and terms can often be interpreted in different ways.

Tenderers can contribute considerably to eliminating uncertainties and ensuring that subsequent award decisions are less likely to be the subject of appeal. In all procurement procedures, questions on the part of tenderers are permitted and answered. The respective answers are made available to all tenderers and form a basis of the tender proposal.

Through carefully targeted questions, a tenderer can simultaneously counter hidden competitive advantages for competitors. In essence, ambiguities in the tender document can effectively lead to a situation where offers of poorer technical quality have to be evaluated and permitted as being of equal merit.

The public sector in Finland as a customer (example: traffic infrastructure)

State of Finland

**Finnish Transport
Infrastructure Agency**
(Väylävirasto)

Construction and maintenance
of national road, water, and
rail network

Municipalities and their utilities

Turku

Tampere

Helsinki

Espoo

Others

HKL
(Helsinki City Traffic)

HSL
(Helsinki Region Traffic)

i.a. construction of local rail networks, procurement of
control technology and vehicles

State- and municipality-owned companies

VR Group
(National Railways)

i.a. procurement of trains

Länsimetro Oy
(western metro line)

construction of metro line,
procurement of trains

Procurement procedures

The procurement procedure in its basic form involves an open procedure for a specified performance with an unlimited number of tenderers. However, in infrastructure projects, the contracting authorities generally resort to other procedures.

Qualification and negotiated procedure

The most common procedure is the negotiated procedure, which first involves the qualification of a group of tenderers. Negotiations are carried out with these tenderers to determine the details of the technical and commercial solutions subject to tender.

Of note in respect to tenders under the negotiated procedure is that, on occasion, tenderers have been tempted to take a somewhat relaxed approach when preparing the initial (provisional) offer. This can cause friction within the procedure and in the worst cases may result in denial of qualification. Despite being designated as negotiation, the process is not comparable to business negotiations as they happen in the free market.

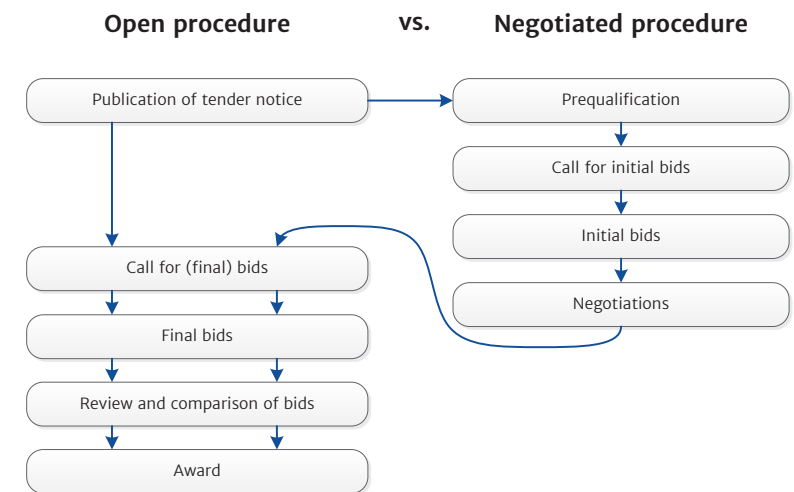
The tenderer may make proposals to the contracting authority during the negotiations. The tenderer may suggest that specific changes in the tender details would result in an economically more favourable offer.

However, the provisional offer remains binding. Subsequent amendments can only be undertaken to the extent in which the contracting authority modifies the final call for tender in

comparison to the provisional call for tender. The contracting authority has also an option to completely skip the negotiation phase and choose the most economically profitable initial offer without negotiations. Consequently, the provisional offer must fulfil all the tender criteria and be structured in a way in which the tenderer is willing to effect supply at the conditions offered.

Competitive dialogue

A special form of the negotiated procedure is the competitive dialogue. This procedure skips the provisional offers and includes rather open negotiations with the participants concerning the way by which the needs of the contracting entity can best be served. It is only on the basis of these negotiations



that the contracting entity formulates the actual requirements and the call for bids.

Innovation partnership – new procurement procedure

With innovation partnership, a new procurement procedure introduced in 2017, the objective is to acquire something that is not available on the market yet. The product development phase and the contract for the finished solution are combined in the procurement – this means that after the product, service or prototype has been developed, it can be acquired from the developer. The research and development work can consider either a whole new product or service or a complete change of an existing one.

The contracting authority has a possibility to create long-term relationships with innovation partnership and the procured product or service can be developed throughout its entire cycle of life. On the other hand, the developer will obtain the pro-

curement contract themselves, meaning that the ideas are not at risk of being revealed to the developer's competitors.

As the contracting authority is about to enter into a long-term contract, it will generally pay special attention to at least two elements: Criteria for the selection of the innovative partner and contract performance clauses. The selection criteria can be based inter alia on performances, references or quality assurance systems. The performance clauses will enable the contracting authority to e.g. monitor quality criteria, terminate the contract if the technical or economic terms are not followed or if an alternative solution is provided on the market and confirm that the IPR are proportionate to the interest of the contracting authority for now and in the future.

The new procedure has received a warm welcome in Finland and more and more contracting entities are using it.



Appeal against flawed contract award decisions

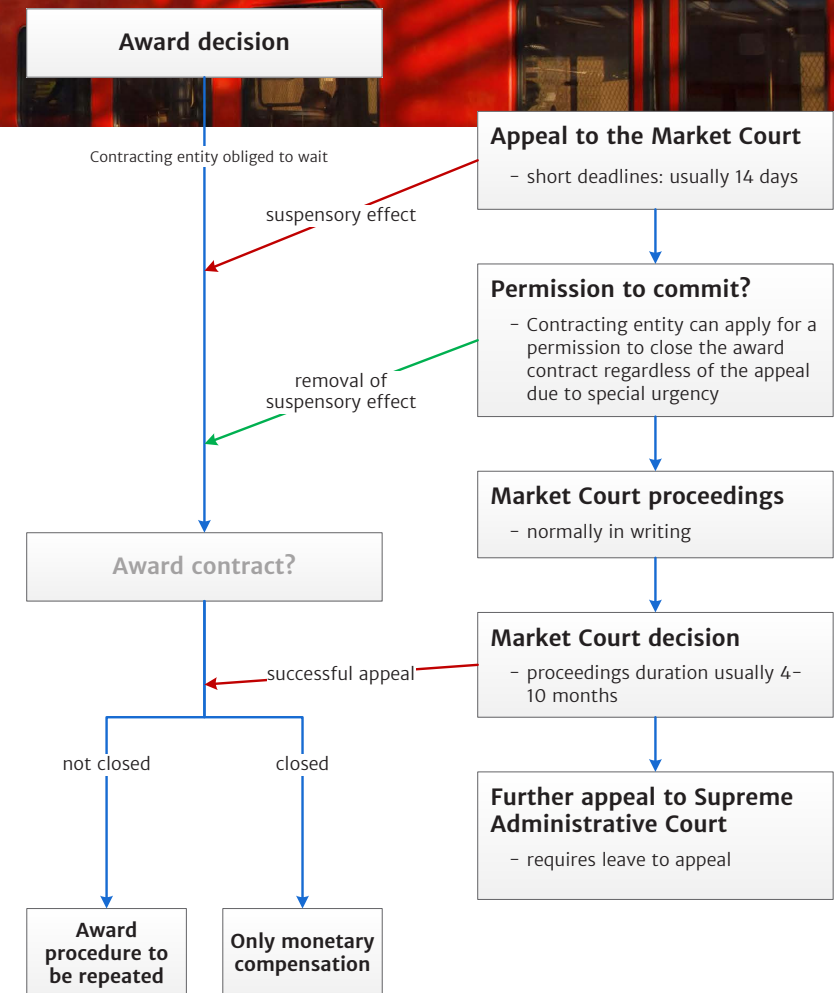
In the event of a flawed contract award, tenderers can bring legal proceedings before the Market Court, whereby extremely short periods of limitation apply.

As a rule, proceedings must be instigated directly following the contract award decision. However, where a tenderer has already been ruled out of the procedure by a preceding decision (e.g. in the qualification procedure), this prior decision must be promptly appealed against.

Under normal circumstances, before concluding the award of contract the contracting authority is required to wait for the final decision in the legal proceedings. Where the legal action is successful, the award of contract must be repeated while ensuring avoidance of the established flaw.

However, particularly in the case of major infrastructure projects, in the interests of expediency the contracting authority will often be authorised by the Market Court to execute the contract award decision. Where the contract is duly concluded, it will not be rendered invalid in the event that the contract award decision is subsequently judged unlawful.

In this case, the petitioner will only be entitled to financial compensation; however, such a claim can only be asserted where it can be shown with a probability bordering on certainty, that the party in question would have successfully been awarded the contract had the decision been flawless.



Bidding for Project Alliances in Finland

Enterprises engaged in offering infrastructure works and services in Finland are facing a new trend. Public purchasers are conducting a growing number of procurements for large projects in the form of so-called project alliances. What does this mean?

In a nutshell, a project alliance is based on the idea that the parties form a joint, integrated project organization in which risks and liabilities as well as opportunities are shared by the parties.

Recently, the Tampere City Tunnel, a 180 mio. euro project, was finalized as a project alliance, with significant success in terms of timeliness and total cost. The Tampere tram project (ca. 283 mio. euro) and the Jokeri Light Rail Line ("Raide-Jokeri", 367 mio. euro) in Helsinki are also being implemented as project alliances.

A paradigm shift

Bidders are facing a challenge, as nothing seems to be as it was. The alliance concept implies that the opposition of the client on the one hand and the supplier on the other hand is removed. Both of them work closely together on planning and implementing the project. In the end, either all parties win, or all of them loose.

Of course, it is still the client who is paying, and the supplier will have to provide its services. But the parties will not agree

on a certain price, the sufficiency of which may then be debated later. Instead, both work and agree on a cost budget. In the course of project implementation, the supplier will be compensated for all costs actually incurred, and a certain percentage is added as a premium. It is this percentage that actually constitutes the "price" element in the supplier's bid.

The alliance concept assumes that the interests of client and supplier are identical. In order to achieve this, an incentive system is created, granting bonuses for savings in cost or overachievements in terms of the work result. Maluses may be "earned" as well, i.e. in cases of cost overrun or delays.

Earlier investment

The members of the alliance are expected to contribute substantial resources to the common project management. Most decisions are to be made unanimously. The common decision-making organs are expected to settle all questions swiftly. In turn, the alliance contract models in use in Finland provide for an almost complete exclusion of any legal remedy for either side.

When talking to people involved in the earlier alliance projects, one meets a considerable degree of enthusiasm. It is obvious that the model is capable of creating a cooperation environment in which all resources are focused on the success of the project (rather than securing one's own rights). It is equally obvious that the desired effect will depend on many factors. Procurement agencies underline that the choice of the right alliance partners is key in this process.

For bidders, this means that they will have to invest more resources into the bidding process earlier in the project timeline. The bidder must convince the client that they will be capable of cooperating productively in the alliance model. They will have to provide their own vision of the project and also already present a team of people that are to represent the bidder in the project management group.

Participation as subcontractor

On the other hand, not every party supplying goods or services for the project is necessarily a member of the “alliance”. The latter generally consists of high-level suppliers and designers. It is possible and common that works are awarded to subcontractors. These generally conclude standard work contracts with one or several of the alliance members.

Regardless of which alliance member(s) acts as the contract partner for the subcontractor, it is part of the alliance concept that the whole alliance is factually the client. This is because the compensations to be paid to the subcontractor are regarded as project costs and will be reimbursed in full to the alliance partner that contracted the subcontractor (the alliance partner's premium added). In turn, the choice of subcontractors and the approval of their terms is part of the alliance's decision-making process, with the unanimity requirement in force.

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Legal Services – Public Procurement

Before bidding

- Risk analysis of procurement terms
- Advice on relevant business environment
- Ensuring compliance of bid with requirement of procurement notice

After filing the bid

- Strategy advice in negotiated procedure
- Q&A procedures
- Appeal against unlawful award decisions

After winning the contract

- Project-time contract, change, and claims management
- Human resources
- Regulatory advice
- Dispute resolution

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April 2019