

Report, Finland, Fair Public Procurements project (draft)

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General information

The law on public procurements is 1397/2016:

<https://www.finlex.fi/fi/laki/ajantasa/2016/20161397> (very outdated [english translation](#))

This law fulfills the EU directives 2014/24/EU (“hankintadirektiivi”), 89/665/ETY, 2007/66/EY, 2014/23/EU (“käyttöoikeusdirektiivi”).

The law recognizes currently several methods of procurement:

1. Open 32§: Publicly available notice + invitations directly to suitable parties
2. Limited 33§: Anyone can indicate they wish to participate, but the CA chooses who can make a proposal. The criteria for inclusion must be publicized. Bids must be asked from enough parties to create competition, minimum 5.
3. Negotiation 34-35§: Public notice, where anyone can indicate they wish to participate. The CA negotiates the bidders on details. This method can be used when the solution requires planning or innovation or cannot be clearly defined beforehand. Also if an open or limited call results in non-fitting proposals, the CA may proceed with the negotiation method. Minimum and maximum amounts of bidders must be disclosed as well as the minimum eligibility criteria. Amount must be sufficient, minimum 3.
4. Competitive negotiation 36-37§: Like the negotiation method, but the negotiation can include all methods to fulfill the CAs needs.
5. Innovation partnership 38-39§: Applicable when existing products and services do not match the CA requirements. Can result in partial contracts with several bidders.

6. Direct 40§: Negotiation with selected parties without a public notice. Applicable only if a) an open or limited method resulted in no acceptable offers; b) only a single provider is available due to eg. ipr; c) unique art work or performance; d) essential urgent contract; e) purpose is experimental or testing; f) basic goods; g) acquisition from a closing company; h) service acquisition that follows a **design competition**.
7. Framework 42§: Longer term contract between CA and provider that fixes prices and terms for acquisitions.
8. E-auction 44§: A series of lowering price bids.
9. Dynamic acquisition 49§: Contractors are accepted to a long term fully electronic acquisition program. Each acquisition within the system is open to competition from the parties accepted into the system.
10. Design competition 54-55§: The winner(s) of the design competition are automatically granted a contract (direct method). 55§ has requirements on the jury of the design competition: they must be independent of any participants, 1/3 of the jury must have equal qualifications that are demanded from participants, decisions must be independent, evaluation done anonymously and based on the competition criteria; anonymity must remain until the jury has made their decision.

A separate law manages the energy and green requirements of vehicles is 740/2021: <https://www.finlex.fi/fi/laki/ajantasa/2021/20210740> (outdated [english translation](#))

1. Compiling of evaluation committees

1. Does the Public Procurement Law in your country regulate compilation of evaluation committees? If it does, then how?

Not explicitly. 3§ states that the CA must treat bidders **fairly, non-discriminantly, openly and considering requirements for relativity**. Some requirements are made for design competition type acquisitions (see above, method 10). Most public sector bodies will follow best practices (eg. EU guidance for public procurements), as everyone knows that a badly run procurement will result in complaints and postpone the project by several months or years.

The national guide on public procurements ([PDF in Finnish](#)) states that all CAs must have written declarations of who has authority to decide on procurements and acquisitions (and up to which monetary level). Any large acquisition must have been first approved in the CAs **procurement plan** and must have a **project initiation decision**. Distribution of work, roles and responsibilities is part of any public body's process of procurement practice development.

2. Do the (bigger) contracting authorities have internal rules how to compile evaluation committees in case of procurements with creative solutions – e.g. social campaigns, public relation campaigns, public events/ conferences, research – such kind of procurements, where the objective of contract is not described in detail in procurement yet, as describing of

tendering object is a part of competition.

Larger CAs such as ministries have their own working groups that are publicly nominated, usually for 4 years. Their tasks are to follow procurements, help in strategy implementation, develop the collaboration forms between and within their area, process and monitor procurement plans and evaluate possibilities for collaboration, collect information on future procurements and harmonize jointly done procurements, as well as make proposals to improve procurement activities.

3. If the contracting authorities have the internal rules about forming such committees, then what is said there – any requirements about the size of committee (if yes, does it depend of the contract amount they evaluate), about their competence on the topic, can they be each-other subordinates, what documents do they have to sign before evaluation, are they carrying any real responsibility (financial, legal) about their decisions.

These internal regulations are not publicly accessible. They may be obtainable through a Freedom of Information request, but collecting and analysing them from all CAs (about 60 large organizations, plus numerous smaller ones) is not feasible.

4. In case of such committees, do they usually have to find consensus (discuss until common understanding is reached), or the points given by each individual are added up and average found? Some other methods? Do they usually meet?

A decision must be made in writing with justifications (123§). If a single person in the CA is able to make a decision, then a meeting might not be needed. Most guidelines recommend a committee, but in smaller CAs that might not be realistic. In the end, it is often a single decision maker who makes the decision, based on the evaluation done by other individuals.

Each offer is scored along all the criteria, and the total score is calculated according to the formula given out in the original procurement notice. How each offer's scores are formed may happen by averaging or by consensus.

5. Who is usually the person, who compiles the evaluation committee; what is his/her real responsibility (financial, legal). Is there rule or tradition to involve people from outside of house also? Or a rule to involve experts in the content, if the topic of procurement concerns the whole state, large audience (not only the contracting authority itself).

Undefined. Based on each CAs internal guidelines.

6. How big is usually the scope of subjective criteria in that kind of procurements?

The ratio varies, but is usually 40%-60% for qualitative criteria. There are also procurements that are based fully on price, but those are very specific and can be defined in detail

beforehand. The Finnish Marketing Union recommends that in marketing and communications procurements, the success criteria should have a weight of 80% and price that of 20%.

2. What is really a business secret in public procurement

1. What can be marked in public procurements as business secret by law? Is there a regulation for proposals with creative solutions – what can be covered?

What is a secret is governed by the [law on trade secrets](#) (595/2018). Essentially a trade secret is information that

- a) Is not publicly known or easily acquirable to people who usually handle this type of information
- b) Is commercially valuable in business, AND
- c) Which is protected by the legal owner in commensurate measures

No specific regulation for creative solutions seems to exist.

The electronic system for submitting bids allows the marking of any input fields or attachments as “trade secret” by the proposal maker. However, the CA ultimately makes the decision on what is a trade secret.

2. In case on later dispute, is court asking to uncover more, as the proposal is under dispute, do they include independent expert to help to decide if too much seems to be covered, or they also let the tendered to decide, what is their business secret, and do not interfere.

The law on trade secrets, 19§ says that in a court case, the court may use up to 2 experts. Such experts must have a higher university degree and relevant expertise in either procurement law, ipr law, etc as appropriate.

3. How can one dispute contracting authority’s decision?

1. How is the dispute system in other countries. With which disputes and where can you go? Directly to court?

If the CA seems to have broken laws or regulations other than in the public procurement process, then the first course of action is to notify the CA for corrective measures. If they do not comply, then one should contact the Governing Court (“hallinto-oikeus”) to force a change. The

fee for Governing Court is 260€ if the case is lost, 0€ if the case is one. One can further apply to the High Governing Court, where a fee is 510€ if the case is lost. **This case is rather rare**, since CAs usually do a good job of operating properly.

If the CA has worked according to laws, but the decision criteria and winners are in dispute, one should first contact the CA, and only after then should one complain to the Market Court (“markkinaoikeus”). Market court is governed by [law 100/2013](#). The fee for filing a complaint is 2050€ (or more if the procurement is over 1M€ in size, up to a fee of 6140€). Each party is responsible for their own costs unless there is inappropriate business practices involved, in which case the loser pays the costs of the winner.

A third route is to make a complaint to the [National Audit Office](#) (Valtion tarkastusvirasto). A CA must also self-report any abuse they have detected internally, but the complaint can be done by anyone (whether a party in the matter or not) and it is free of charge. [Complaint form in English](#). It is unknown how often these complaints are made in individual procurement matters, but certainly if a CA seems to be working unethically, this is a viable route. The National Audit Office has done sweeping audits of procurement practices in the past.

Another governing body is the Finnish Competition and Consumer Authority (KKV) that also [supervises public procurements](#). They do note that they only focus on procurements that clearly violate laws (such as direct acquisition instead of procurement), so they most likely will not investigate issues of qualitative evaluation.

2. What can you argue about?

See answers for q1.

3. How big are the state fees, when you go to dispute over public procurement (1) requirements and (2) contracting authority's decisions?

See answers for q1.

4. Is there any financial compensation to those, who argue with success over set requirements of procurement documents? What do they profit?

Usually if a bidder files a complaint to the Market Court, their demands are a) prevent the procurement contract signing and any other method of proceeding with the flawed procurement; b) demand corrected procedure, c) payment of compensation to suffered loss, d) payment of legal fees. They may also demand “inefficiency repercussions”, or a shortening of the winning contract, and payment to the state.

Usually the CA will in turn demand the plaintiff to cover their legal fees (which include lawyer fees etc). Most likely the winner of the procurement may also have demands eg. payment of their legal fees.

5. Does the contracting authority usually hire external lawyers in public procurement disputes against a disappointed tenderer? From what does this depend of? Can they do that, if they have in-house Public Procurements department and also legal department?

No law clearly forbids the use of external legal aid. Looking at past case records, the CAs usually have legal fees they want compensated. These fees may of course be just calculated based on their own legal staff's work expenditure, so there is really no major difference if they use their own legal department or external legal aid.

6. If they hire external legal aid, to support their in-house lawyers and public procurement department, do they ask the disputing tenderer to compensate their external legal aid costs, and does court agree with that?

All of the legal costs are usually demanded to be compensated. The court may adjust the values down.

7. If there is a third party in the dispute, or several third parties (the contract winner, or other potential winners) and if they use legal aid to protect their rights, does the one who lost the dispute pay their legal aid costs too? Even if they were in court by their free choice (that was option, not mandatory for them), and even if the Contracting Authority is already disputing on their side?

Yes, the loser of the case pays. The court may adjust down especially the cost demands of corporations (usually not the public sector CA).

8. Does the tenderer have a right to demand to know, how the evaluation took place? Does he have a right to ask the court to control afterwards the procedure – did the committee members ever discuss the proposal, or some just signed the decision. If not, then who must control it (contracting authority is not interested to uncover its employees mistakes; prosecution office usually need a sound proof of violation).

The Market Court works strictly by looking whether the procurement process and decision is legal. They will not make moral judgment nor go very much into detail in qualitative criteria and whether the CA was competent in evaluating them. They may look at the criteria and whether they are appropriate and legal. One legal measure is that no criteria should give the CA "uncontrolled authority" over the decision.

9. Has state/contracting authority ever paid compensation in your country to a company which proves later in court that they should have won the contract (but someone else got it, and executed it)?

At least legal fees have been compensated in all cases where the plaintiff has won the case. CAs have been ordered to re-evaluate their procurements again. Although at that time it is possible for the CA to just cancel the procurement and initiate a new one later.

There are cases where the bidder has lost, complained, selected the winner, but during the court proceedings they have not been actually given the contract, and they have then complained to the supreme court for compensations, and won. [Example case with 100k€ in compensations](#).

4. In case of creative solutions contracting authority has vast discretion, that can't be argued at courts

1. Is it possible to demand that court must find one more independent expert opinion, if you present to court an expert opinion that is radically different from contracting authorities one?

The Market Course **may** use up to 2 experts, but is not required to do so. However, that should be something that the plaintiff can request during their proceedings.

2. Do courts consider expert opinions added by disputing party in case of creative tenders?

All parties are given the chance to present their case.

3. How are these situations solved – has there ever been any tender (with creative solution) evaluated by a new committee, as demanded by court.

Unknown - needs more research.

4. Have any creative solution evaluation ever been disputed with success?

Unknown - needs more research.

5. Transparency of the opening procedure – it is digital now

1. Do you still have opening of real paper envelopes?

Not really. Everything is done digitally nowadays.

2. Is the opening of electronic proposal/ envelopes public (for tenderers who participate), can tenderers see it online or at the place of opening, if they want to?

No.

3. In case of procurements (bigger/smaller) do they have to make a proposals opening protocol? If they do, when do they make it public? What information is said there?

124§ requires that in large procurements (over the EU threshold), a procurement report (hankintamenettelyä koskeva kertomus) must be written, detailing all of the steps, decisions and justifications made. The legal requirements for the report are:

1. CA details, procurement target description and value
2. Bidders excluded based on 80§, 80§, 83§ (legal disqualification, disqualification based on consideration, economic disqualification criteria)
3. Justification for disqualifying exceptionally cheap offers
4. Justification for using only the price to find the “overall most economical proposal”
5. Justification for not splitting the procurement
6. Justification for requiring more turnover than double that of the bid value
7. Winner name, justifications, estimate of subcontracting parties, portions and values
8. Justification for using direct method, negotiation method or competitive negotiation method
9. Justification for aborting the procurement
10. Justification for using other than digital communication tools in the procurement process
11. Description of potential conflicts of interest and their corrective actions

All phases must be documented in sufficient detail and stored for at least 3 years.