



**COUNTRY  
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# **The Legal 500 Country Comparative Guides**

## **Finland**

### **PUBLIC PROCUREMENT**

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This country-specific Q&A provides an overview of public procurement laws and regulations applicable in Finland.

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# FINLAND

## PUBLIC PROCUREMENT



\*"Complex contracts" refers to contracts including: where the needs of the contracting authority cannot be met without adaptation of readily available solutions; contracts involving design or innovative solutions; where prior negotiation is required before a contract can be awarded due to particular circumstances related to the nature, the complexity or the legal or financial make-up of a contract or because of risks attaching to these circumstances; and where technical specifications cannot be determined with sufficient precision with reference to established technical standards, references or specifications.

### 1. Please summarise briefly any relationship between the public procurement / government contracting laws in your jurisdiction and those of any supra-national body (such as WTO GPA, EU, UNCITRAL).

The Finnish acts on public procurement are based on and implement the EU public procurement directives. The Finnish procurement laws apply also to purchases below the EU thresholds, i.e. the so-called national procurements, with lower national thresholds. The national procurements are subject to a lighter regime and only a part of the rules explained here below apply to national procurements as such.

Finland adheres also to the World Trade Organisation's (WTO) Agreement on Government Procurement (GPA).

### 2. What types of public procurement / government contracts are regulated in your jurisdiction and what procurement regimes apply to these types of procurements? In addition to any central government procurement regime please address the following: regulated utilities procurement regime (e.g. water, gas, electricity, coal, oil, postal services, telecoms, ports, airports), military procurements, non-central government (local, state or prefectures) and any other relevant regime. Please provide the titles

### of the statutes/regulations that regulate such procurements.

The Finnish acts on public procurement regulate purchases of goods, services and works.

There are three main acts on public procurement in force in Finland:

**1. The Act on Public Contracts and Concessions (1397/2016).** This act implements Directive 2014/24/EU applying to procurements within the classic sector as well as directive 2014/23/EU on procurement of concessions.

**2. The Act on Public Contracts and Concessions of entities operating in the water, energy, transport and postal services sectors (1398/2016).** This act implements Directive 2014/25/EU and applies to procurements within the utilities sector as well as directive 2014/23/EU on procurement of concessions.

**3. The Act on Public Contracts in the Fields of Defence and Security (1531/2011).** This act implements Directive 2009/81/EC.

The Act on Public Contracts and Concessions is the general procurement law in Finland applying in general to any purchase of supplies, services and works by any procuring entity except those operating in the water, energy, transport and postal services sectors and except those procurements which are regulated by Public Contracts in the Fields of Defence and Security.

The Act on Public Contracts and Concessions include as a separate chapter a national set of rules applying to national procurements that fall below the EU threshold

values but exceed the national threshold values.

**3. Are there specified financial thresholds at which public procurement regulation applies in your jurisdiction? Does the financial threshold differ depending on the nature of procurement (i.e. for goods, works or services) and/or the sector (public, utilities, military)? Please provide all relevant current thresholds in your jurisdiction. Please also explain briefly any rules on the valuation of a contract opportunity.**

The current EU and utilities thresholds apply as of January 2024. All the indicated threshold values here below are without VAT (0% VAT):

EU thresholds:

Nature of the procurement	Thresholds EUR	Thresholds EUR
	Central government	Other procuring entities
Goods and services	143.000	221.000
Works	5.538.000	5.538.000
Design contest	143.00	221.000

Thresholds for entities operating in the water, energy, transport and postal services sectors:

Nature of the procurement	Thresholds EUR
Goods and services	443.000
Works	5.538.000
Design contest	443.000

The Act on Public Contracts and Concessions include as a separate chapter a national set of rules applying to national procurements that fall below the EU threshold values but exceed the national threshold values. National thresholds defining the national scope of applicability of the Act on Public Contracts and Concessions:

Nature of the procurement	Thresholds EU
Goods and services	60.000
Concession contracts/services	500.000
Healthcare and social services	400.000
Works	150.000
Works concessions	500.000
Design contest	60.000
Other specific services	300.000

Thresholds in accordance with the Act on public contracts in the Fields of Defence and Security:

Nature of the procurement	National threshold EUR	EU threshold EUR
Goods and services	100.000	443.000
Works	500.000	5.538.000

The provisions for valuation of a procurement contract correspond to Article 5 in the Procurement Directive 2014/24/EU and are the same for procurements above the EU threshold values and procurements under the national set of rules.

**4. Are procurement procedures below the value of the financial thresholds specified above subject to any regulation in your jurisdiction? If so, please summarise the position.**

The Act on Public Contracts and Concessions include as a separate chapter a national set of rules applying to national procurements that fall below the EU threshold values but exceed the national threshold values.

National procurements are subject to a simplified regulatory framework under the national set of procurement rules. These rules allow for more flexibility for contracting authorities. The rules enable the procuring entities to freely decide how to design the procurement procedure as long as it is complying with the procurement principles of non-discrimination, equal treatment, transparency and proportionality. The procedure shall be described in the procurement notice which shall be published.

Even though the Act on Public Contracts and Concessions applies to procurement agreements or concession contracts exceeding the national or EU threshold values, the Act specifically provides that having regard to the size and scope of the procurement efforts shall be made to give consideration to adequate

transparency and non-discrimination in procurements falling below the national threshold values.

**5. For the procurement of complex contracts\*, how are contracts publicised? What publication, journal or other method of publicity is used for these purposes? What is the typical period from the publication of the advert that bidders have to respond to the advert for a complex contract?**

Contract notices on procurements exceeding the EU thresholds and national thresholds are in general submitted electronically for publication on the specified national website at [www.hankintailmoitukset.fi](http://www.hankintailmoitukset.fi). The EU notices submitted for online publication at [www.hankintailmoitukset.fi](http://www.hankintailmoitukset.fi) shall be forwarded to the official publications office of the European Union.

With the definition of complex contracts provided, procuring entities would apply a competitive dialogue to procure a complex contract. The minimum time limit for receipt of requests to participate shall be 30 days from the date on which the contract notice was sent in accordance with the EU procurement directives.

**6. For the procurement of complex contracts, where there is an initial selection stage before invitation to tender documents are issued, what are typical grounds for the selection of bidders? If there are differences in methodology between different regulated sectors (for example between how a utility might undertake a regulated procurement procedure and how a government department might do so), please summarise those differences.**

Only candidates who fulfil the selection criteria may be selected to submit a tender. The criteria for limiting the number of candidates depends on the type of contract. The criteria shall be objective and non-discriminatory stated in the contract notice. No fewer than three candidates must be invited to join a competitive dialogue unless there are fewer suitable candidates.

**7. Does your jurisdiction mandate that certain bidders are excluded from**

**tendering procedures (e.g. those with convictions for bribery)? If so, what are those grounds of mandatory exclusion? Are there any notable features of how this operates in your jurisdiction e.g. central registers of excluded suppliers? Does your jurisdiction specify discretionary grounds of exclusion? If so, what are those grounds of discretionary exclusion?**

The Finnish procurement laws include both mandatory and discretionary grounds for exclusion of a candidate/bidder that correspond to Article 57 in Directive 2014/24/EU.

Bidders shall be excluded from participation in a procurement process if they are subject to any mandatory exclusion grounds as specified in Article 57 of Directive 2014/24/EU including for example corruption, fraud, money laundering or terrorist financing or trafficking.

There is no central register of excluded suppliers or suppliers subject to mandatory exclusion grounds. Procuring entities require an extract from the criminal records to prove that the bidder is not subject to any mandatory exclusion grounds.

The discretionary grounds of exclusion correspond to the exclusion grounds set forth in Article 57 of Directive 2014/24/EU. These discretionary exclusion grounds include situations where the authority can demonstrate that the bidder is in breach of applicable environmental, social or labor law obligations (except of a few exclusion grounds which are specifically listed as mandatory exclusion grounds in accordance with Article 18(2) of the Directive 2014/24/EU), is insolvent or guilty of grave professional misconduct.

The bidder shall be provided with an opportunity to self-clean in circumstances which the authority considers to be grounds for mandatory or discretionary exclusion before being excluded.

The period of exclusion is five (5) years from the date of the conviction by final judgment in the cases of mandatory exclusion and three (3) years from the date of the relevant event in relation to discretionary exclusion.

For the national procurements subject to national procurement rules there is no requirement to use grounds of mandatory or discretionary exclusion. The contracting authority is thus free to determine the exclusion grounds for each procurement as long as such

grounds conform to the fundamental principles of procurement. Very often the procuring entities refer to the same mandatory and discretionary exclusion grounds applicable in procurements the value of which exceed the EU thresholds.

**8. Please describe a typical procurement procedure for a complex contract. Please summarise the rules that are applicable in such procedures. Please include a timeline that includes the key stages of the process, including an estimation for the total length of the procedure.**

With the definition provided of a complex contract the procurement procedures suitable for the procurement of a complex contract would be the competitive dialogue. The total length of the procedure will depend on several factors such as the complexity of the contract, the volume of the procurement documents and whether there is one or more negotiation sessions.

The contracting entity may choose competitive dialogue in a procurement 1) in which the needs of the procuring entity cannot be met without adapting existing solutions; 2) that includes design or innovative solutions; 3) for which the contract cannot be awarded without prior negotiations, because of specific circumstances related to its nature, complexity or legal and financial form, or because of the risks pertaining thereto; or 4) in which the procurement cannot be defined with sufficient precision with reference to a standard, European Technical Assessment, common technical specification or technical reference. The competitive dialogue may also be used if the contracting entity has previously in an open or restricted procedure received tenders that do not correspond to the request for tenders or if tenders can not be accepted.

The competitive dialogue is a two-stage procurement procedure. The procurement process starts with specifying the contracting entity's needs. Thereafter, the contract notice is published establishing a provisional timetable and project description as well as price-quality award criteria. Candidates are requested to participate. The minimum time limit for submitting a request to participate is 30 days. A minimum of three selected candidates will be invited to negotiate with the contracting entity to determine the best way of satisfying the contracting entity's needs. All aspects of the procurement may be negotiated with the selected candidates and always complying with the principle of equal treatment of the participants. Negotiations which can take months may occur in successive stages in order

to reduce the number of solutions. The tenderers shall be notified of the conclusion of the negotiations and requested to submit the final tenders. The tender shall comply with the requirements specified in the final call for tenders. Tenders may be clarified, specified and optimised at the request of the contracting entity provided that this does not result in any modification of the integral elements of the tender or threaten to discriminate against tenderers or distort competition.

**9. If different from the approach for a complex contract, please describe how a relatively low value contract would be procured. (For these purposes, please assume the contract in question exceeds the relevant threshold for application of the procurement regime by less than 50%)**

Taking into account of the 50 % assumption, such procurements would be considered to be national procurements when exceeding the thresholds for goods, services and works. The national procurements are subject to a lighter regime than those exceeding the EU thresholds. Those procurements which fall below the national thresholds, they are awarded based on the internal procurement guidances and instructions of the procuring entity.

The open and the restricted procedures are the most commonly applied procurement procedures related to national procurements. The open procedure is a one stage procedure where all the interested bidders may submit tenders. There are no pre-selection of bidders or negotiations of any aspects of the procurement when the open procedure is applied. The restricted procedure is used whenever the contracting entity wishes to reduce the number of the bids since the restricted procedure includes a pre-selection of the bidders.

**10. What is seen as current best practice in terms of the processes to be adopted over and above ensuring compliance with the relevant regime, taking into account the nature of the procurement concerned?**

Contracting entities have prepared and implemented procurement strategies and internal guidelines for the conduct of procurement processes. For example the State of Finland has prepared a general procurement manual to be of service to any contracting entity, the aim of which is to support the organization of the public procurement function and to give practical advice on how to plan and organize competitions, take care of

contract and supplier management and enhance sustainable public procurement. Also it is a current practice that the contracting entities organize market dialogues including meetings with the potential bidders and requesting their views on the draft procurement documents such as the terms and conditions of the contract.

With reference to the above the procuring entities know they can achieve procurements that adequately meet their needs, do not restrict the number of potential bidders through unnecessary requirements and ensure the best value for money. This could also have the effect of mitigating the risk that a bidder applies for a review of the procurement process in court.

### **11. Please explain any rules which are specifically applicable to the evaluation of bids.**

Public contracts shall be awarded to the bidder with the most economically advantageous tender (MEAT) based on the 1) lowest price or 2) lowest cost or 3) best price-quality ratio. The Finnish legislator has used the possibility under Directive 2014/24/EU to restrict contracting authorities' possibility to evaluate bids solely on the basis of lowest price. Thus, if services or works have been decided to be procured solely based on the lowest price criterion, the procuring entity is obliged to give reasons for such a decision in the procurement documents, in the procurement decision, or in a separate statement on the procurement procedure. Goods may still be procured based on the lowest price criterion.

The cost element may also take the form of a fixed price or cost on the basis of which economic operators will compete on quality criteria only.

The best price-quality shall be assessed on the basis of criteria, including qualitative, environmental and/or social aspects, linked to the subject-matter of the public contract in question. Qualitative aspects may include technical merit, aesthetic and functional characteristics, accessibility, design for all users, social, environmental and innovative characteristics and trading and its conditions, operating costs, cost-effectiveness, after-sales service and technical assistance, maintenance, delivery conditions such as delivery date, delivery process and delivery period or period of completion. Also organization, qualification and experience of staff assigned to performing the contract may be used as criteria, where the quality of the staff assigned can have a significant impact on the level of performance of the contract.

Contracting entities are encouraged by the Finnish legislation to choose award criteria that allow them to obtain high-quality works, supplies and services that are optimally suited to their needs.

Contracting entities are obliged to indicate the contract award criteria and their relative weighting, which may also be expressed by indicating a reasonable range, given to each of the criteria in the procurement documents. Award criteria shall not afford the contracting entity unlimited freedom of choice, and they shall be non-discriminatory and ensure the possibility of genuine competition. The award criteria are considered to be linked with the subject matter where they relate to the works, supplies or services to be provided under that contract in any respect and at any stage of their life cycle.

### **12. Does your jurisdiction have specific rules for the treatment of bids assessed to be "abnormally low" for the purposes of a particular procurement (i.e. a low priced bid, significantly lower than any other bid or a bid whose pricing raises questions of sustainability/viability over the contract term)? If so, is there a definition of what "abnormally low" means and please can you provide a short summary of the specific rules?**

Yes, the Finnish procurement laws include specific rules for the treatment of abnormally low tenders.

The contracting entity shall require the tenderer to provide a clarification of the prices or costs of any tender that seems to be abnormally low. The request and explanation may relate in particular to the manufacturing method, the economic and technical solutions for performing a service or for a construction method, exceptionally lowcost terms and conditions of procurement, the originality of public works contracts, goods or services, compliance with the obligations referred to in discretionary exclusion ground point 5 i.e. infringement of environmental, social and labor law obligations under the Finnish or European Union legislation, collective agreements, or the similar international treaties, and State aid received by the tenderer.

Having received the clarification from the tenderer the contracting entity has the discretion to reject a tender if the clarification and/or other evidence provided does not satisfactorily account for the low level of prices or costs tendered. Notwithstanding the foregoing the contracting



entity is obliged to reject any tender whose abnormally low price or costs are due to an infringement of environmental, social and labor law obligations under the Finnish or European Union legislation, collective agreements, or the similar international treaties, and State aid received by the tenderer. In case of unlawful State aid received the contracting entity may only reject a tender of abnormally low price or costs if the tenderer is unable to prove, within an adequate time limit imposed by the contracting entity, that the State aid was lawfully granted.

**13. Please describe any rights that unsuccessful bidders have that enable them to receive the reasons for their score and (where applicable in your jurisdiction) the reasons for the score of the winning bidder. Are regulated procuring bodies required to provide these reasons for their award decision before awarding the contract in question?**

The procurement laws state that a contracting entity shall make a written decision on all resolutions affecting the status of candidates and tenderers and as well as on the award decision. The decision shall provide reasons that have integrally affected the decision, at least the grounds for rejecting a candidate, tenderer or tender, and the main grounds relating to the comparing of all the tenders including the winning tender and the unsuccessful tender(s). The reasoning requirement is a bit lighter in procurements based on a framework agreement. The contracting entity shall however not be required to make the decision and thus give reasons for specified additional purchases and interim procurement arrangements made for the duration of market court proceedings.

The above referred reasoned decision and the instructions for appeal and rectification shall be served in writing to all the parties concerned including the unsuccessful bidder. Thus the reasons for the award decision is not required to be submitted to the tenderers before the award decision.

There are no statutory time limits for the reasoned award decision to be submitted to the tenderers. However, the contract entity can not conclude the public contract before submitting the award decision to the tenderers and the 14 days deadline to challenge the award decision does not start before the submission of the same. This applies to procurements exceeding the EU thresholds. The reasoned award decision of the smaller national procurements may however be

submitted to the tenderers also after the contract has been concluded.

**14. What remedies are available to unsuccessful bidders in your jurisdiction? In what circumstances (if any) might an awarded contract be terminated due to a court's determination that procurement irregularity has occurred?**

Unsuccessful bidders may initiate either a rectification process at the contracting entity or bring a case concerning a procurement to the Market Court by filing an appeal claiming that the contracting laws have been breached. These processes are separate from one another but have the same time of appeal i.e. 14 days from the receipt of the award decision. Also, the unsuccessful bidder may file a damages claim at the district court if the contracting entity has caused loss or damage to such a bidder by breaching the procurement laws.

The Market Court primarily annuls the award decision and orders the contracting entity to correct its breach of contracting laws. However, if the public contract has already been concluded before the Market Court decision, only a compensatory fine remedy is available. A compensatory fine may be imposed if the harm caused by the previously mentioned remedies to the contracting entity, to the rights of others or to the public interest could outweigh the benefits that the measure would bring, or if the appeal was filed only after the procurement agreement had been concluded. The determining of the fine is based on the nature of the error or default of the contracting entity, the value of the procurement or concession contract that is the subject-matter of the appeal, and the costs and damage caused to the appellant. The fine may not exceed ten per cent of the value of the procurement agreement without special reasons. The Market Court may waive the compensatory fine if the contracting entity has refrained from implementing the procurement decision for the duration of proceedings at the Market Court..

An inefficiency sanction, a penalty fine and shortening of an agreement period may be decided upon in a procurement and concession contract concerning services under Schedule E (=social and healthcare services and other specific services) that exceed the national threshold value, and in other procurements that exceed the EU threshold value.

The Market Court may find a procurement agreement or concession contract to be inefficient 1) if the contracting entity has made a direct procurement without legal

grounds for doing so, 2) the contracting entity has concluded a procurement agreement or concession contract, notwithstanding the duty to observe a standstill period 3) the contracting entity has concluded a procurement agreement or concession contract in even though the procurement case had been referred to the Market Court. A supplementary condition in the cases 2)-3) is an error made by the contracting entity in breach of the procurement laws which had affected the appellant's prospects of securing the procurement agreement or concession contract.

The Market Court may order a contracting entity to pay a penalty fine to the State if the Court has waived the inefficiency of a procurement or concession contract. Instead of imposing a penalty fine, the Market Court may shorten the agreement period of the procurement or concession contract to expire within the period stipulated by the Court.

**15. Are public procurement law challenges common in your jurisdiction? Is there a perception that bidders that make challenges against public bodies suffer reputational harm / harm to their prospects in future procurement competitions? If so, please provide brief comment. Assuming a full hearing is necessary (but there are no appeals), how much would a typical procurement claim cost: (i) for the defendant and (ii) for the claimant?**

The challenges are quite common when taking into account that there are a couple of hundreds of procurement claims (313 initiated cases in 2023 and 411 initiated cases in 2022) initiated at the Market Court per each year. However, a certain amount of bidders are concerned that challenging an award decision would cause them reputational harm in future public procurement processes of the same procuring entity or even more general in their field of business. Some bidders think that even if there was a breach of the procurement laws it is no use challenging the procedure because of the costs, administrative burden or that they do not believe that challenging would result in them getting the public contract.

The contracting entities consider the rectification process less harmful since it is not public in the same way as the Market Court claims. That is why bidders dare to initiate rectification processes more often than submit a claim at the Market Court.

A typical procurement claim at the Market Court costs

around 8.000 EUR- 18.000 EUR for the claimant and a bit less for the defendant 5.000 EUR – 14.000 EUR. In principle the costs for a rectification process are less since there is normally only one round of statements to be submitted by the initiator.

**16. Typically, assuming a dispute concerns a complex contract, how long would it take for a procurement dispute to be resolved in your jurisdiction (assuming neither party is willing to settle its case). Please summarise the key stages and typical duration for each stage.**

Looking at the statistics of the Market Court the average time for a procurement dispute was 7,3 months in 2023 and 6,5 months in 2022. This includes both complex and simple disputes as well as those that are withdrawn in the middle of the process. Complex disputes at the Market Court require quite often many rounds of arguing from all of the parties which will make the processes last a bit longer.

The normal procedure and the approximate time tables of each stage:

1. The procurement claim is submitted to the Market Court
2. The Market Court will send the claim to the procuring entity within a couple of days as well as to the winning bidder for comments. The deadline for any comments are usually within 2-3 weeks. Quite often the procuring entity requests for a prolonging of the deadline for comments to 4-6 weeks.
3. The Market Court will send the comments of the procuring entity and the winning bidder to the claimant which will then have around three weeks to make his/her comments.

For complex cases there are usually some further comments submitted by the parties as well as questions asked by the Court itself. Commenting is not limited. Thus, any comments of any party submitted to the Court before the case is decided upon are taken into account by the Court.

**17. What rights/remedies are given to bidders that are based outside your jurisdiction? Are foreign bidders' rights/remedies the same as those afforded to bidders based within your**



**jurisdiction? To what extent are those rights dependent on whether the host state of the bidder is a member of a particular international organisation (i.e. GPA or EU)?**

In general, the Finnish public procurement laws do not differ between bidders within the EU and suppliers based in countries outside the EU.

However, according to the Act on Procurement in the Water, Energy, Transport and Postal Services Sectors, contracting entities have the possibility to restrict an award to tenders covering products originating from third countries with which the EU has not concluded, whether multilaterally or bilaterally, an agreement ensuring comparable and effective access for EU undertakings to the markets of those third countries.

According to the Act on Public Procurement and Concession Contracts the tenderers and tenders from other States Parties in procurements falling within the scope of the World Trade Organisation Agreement on Government Procurement (GPA, Finnish Treaty Series 5/1995) are governed by the same terms and conditions as tenderers and tenders from Finland and other European Union Member States. However, there is no such clause included in the legislation on tenderers and tenders from countries that are not within the scope of the WTO on GP.

The Act on public procurement in the Fields of Defence and Security allow that certain defence and security procurements based on TFEU article 346 are not open to any tenderer from any country if the crucial interests of the Finnish State so require.

**18. Where an overseas-based bidder has a subsidiary in your territory, what are the applicable rules which determine whether a bid from that bidder would be given guaranteed access to bid for the contract? Would such a subsidiary be afforded the same rights and remedies as a nationally owned company bidding in your jurisdiction?**

A subsidiary in Finland of a foreign owner is afforded the same rights and remedies as a nationally owned company bidding in Finland.

**19. In your jurisdiction is there a specialist**

**court or tribunal with responsibility for dealing with public procurement issues? In what circumstances will it have jurisdiction over a public procurement claim?**

Yes, the procurement claims are submitted as a first instance to a specialist tribunal called the Market Court. It is the only tribunal who has the jurisdiction over the claims arguing that public procurement laws have been breached. The second and at the same time the last resort of procurement claims is the Finnish Supreme Administrative Court.

**20. Are post-award contract amendments/variations to publicly procured, regulated contracts subject to regulation in your jurisdiction? Are changes to the identity of the supplier (for example through the disposal of a business unit to a new owner or a sale of assets in an insolvency situation) permitted in your jurisdiction?**

Yes, post-award contract modifications are regulated in the Finnish public procurement laws. Changes of the identity of the supplier are permitted as shown here below:.

A public contract or a framework agreement may not be amended in any integral respect during the contract period without a new procurement procedure. An amendment shall be considered integral for example if:

- 1) the amendment introduces conditions which, had they been part of the initial procurement procedure, would have allowed for the admission of other candidates than those initially selected or for the acceptance of a tender other than that originally accepted or would have attracted additional participants in the procurement procedure;
- 2) the amendment changes the economic balance of the agreement or framework agreement in favor of the contractual partner in a manner that was not specified in the original agreement or framework agreement;
- 3) the amendment considerably broadens the scope of the agreement or framework agreement;
- 4) a new contractual partner replaces the contractual partner with which the contracting entity originally concluded the agreement.

Notwithstanding the provisions above a public contract

and a framework agreement may be amended with no new procurement procedure if:

1) it is based on contractual terms and conditions or on terms for their amendment that were known during the procurement procedure and referred to in the procurement documents, irrespective of their financial value, and the said terms and conditions are clear, precise and unambiguous and do not modify the general character of the procurement agreement or framework agreement;

2) it is necessary for the original contractual partner to perform additional work, services or extraordinary deliveries of goods that were not included in the original agreement, and a change of contractual partner is not possible for financial or technical reasons and would cause significant inconvenience or a significant overlap of costs for the contracting entity;

3) the need for amendment is due to circumstances that a diligent contracting entity could not have foreseen, and the amendment does not affect the general character of the procurement agreement;

4) the original contractual partner is replaced with a new contractual partner under an unambiguous condition for amending the agreement in accordance with point 1, or the status of the original contractual partner is wholly or partly assigned to another operator that satisfies the originally established qualitative selection criteria due to corporate restructuring, takeovers, mergers, changes of controlling interest or insolvency, provided that this does not entail other substantial amendments to the agreement and does not seek to circumvent the application of this Act;

5) the case concerns a minor contractual amendment that falls below the national threshold values in procurements and concession contracts concerning the services referred to in Schedule E, or the European Union threshold values in other procurements, and does not affect the general character of the agreement.

The value of the amendment referred to in points 2 and 3 above shall not exceed 50 per cent of the value of the original agreement. The value of the amendment referred to in point 5 shall be less than 10 per cent of the value of the original service procurement or supply contract, or concession contract for services, and 15 per cent of the value of the original public works contracting agreement or concession contracting agreement.

## 21. How common are direct awards for complex contracts (contract awards

### without any prior publication or competition)? On what grounds might a procuring entity seek to make a direct award? On what grounds might such a decision be challenged?

In my experience the direct awards are quite often made under the additional sales exception during the contract term in a different types of public contracts and in general secretly in order to avoid the procurement procedure. Direct awards for complex contracts are not that common. The reason sometimes used for direct award of complex contracts is the technical reason or that there is no competition for the goods or services in question.

The direct awards are regulated to be exceptional and to be made strictly under the following grounds:

1) no (suitable) requests to participate or tenders have been received in response to an open or restricted procedure and no essential changes have been made to the terms and conditions of the original call for tenders;

2) only a certain supplier can implement the procurement for a technical reason, or for an exclusive right and no reasonable alternatives or substitute solutions available and that the absence of competition is not due to an artificial narrowing of the terms and conditions of the procurement;

3) the aim of the procurement is the creation or acquisition of a unique work of art or artistic performance;

4) it is absolutely essential to conclude the agreement and the prescribed time limits cannot be observed due to extreme urgency arising from unforeseen circumstances beyond the control of the contracting entity;

5) the goods to be procured are manufactured only for research, testing, product development or scientific purposes, and the procurement does not concern mass production to ensure the financial viability of goods manufacturing or to cover the costs of research and development;

6) the procurement concerns goods that are quoted and purchased on the commodity market;

7) the goods are procured under particularly advantageous conditions from a supplier that is winding up its business, from an administrator or from a liquidator in the course of insolvency proceedings, an arrangement with creditors, or corresponding

proceedings;

8) the case concerns a service procurement made on the basis of a design contest and awarded to the winner(s) of that contest in accordance with its rules; all of the winners shall be invited to participate in the negotiations in such cases;

Direct procurement may also be made when a procurement of goods to be made from an original supplier is an additional purchase that has been placed in order to partially replace or expand a previous delivery or installation, provided that a change of supplier would result in procuring goods with different technical characteristics, causing incompatibility or disproportionately great technical difficulties in operation and maintenance. The duration of such agreements may exceed three years only in exceptional cases. Additional sales are acceptable also for public works contracts or services made with the original supplier, provided that the direct procurement corresponds to the previously concluded public works contract or service procurement and that the contract notice concerning the original procurement indicated a possible subsequent direct procurement, and that the estimated value of the additional service or new public works contract was taken into consideration when calculating the total value of the original contract. A direct procurement may be made within no more than three years of concluding the original agreement.

As the direct award of a contract is only exceptionally accepted, the reasons justifying the direct award do not fulfill that often. In those situations, the procuring entity may wish to submit a direct award notice for publication prior to concluding the procurement agreement and hope that no one challenges the direct award within 14

days after publishing the notice in the Official Journal of the EU. In my experience there are a number of published direct award notices the reasons for the direct award of which are not regarded as legally acceptable. However, if no one challenges the reasons in a notice within 14 days, the direct award becomes legally binding.

## **22. Have your public procurement rules been sufficiently flexible and/or been adapted to respond to other events impacting the global supply chain (e.g. the war in the Ukraine)?**

In my opinion the public procurement rules are quite flexible. They specifically allow the contract modifications for example based on unforeseen circumstances and up to 50 % of the value of the original contract. There is also the urgency exception which may be used / has been used to procure in various conflict situations.

Of course the contract modifications are not only up to the private partner to decide upon and the procuring entities have been somewhat reluctant to agree on the contract modification on other grounds than the max 10 % value exception due for example to the fear of doing something illegal and due to the lack of money. The 10 % has been too limited on many occasions since the covid, energy crisis, war in Ukraine, inflation etc have raised prices more than 10 % and subsequently the need for contract modification is bigger in terms of value than just 10 %.

During covid the EU emergency guidance was helpful for the procuring entities.

## **Contributors**

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