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## Traffic Hubs as Competitive Arenas for Service Providers

Methods to acquire legal protection in public procurement

**Public procurements offer significant economic opportunities for logistics and transportation businesses in Finland. The logistics and infrastructure services within traffic hubs are of particular interest. The contracting authorities regularly put these services out to tender and the procedure is regulated by the strict rules of the Public Procurement Act.**

by

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One of the contracting authorities is the Finnish aviation authority, Finavia. This is subordinate to the Ministry of Transport and Communications and responsible for the organisation of various services in Finnish airports. The organisations managing the large commercial ports are also regarded as public awarding authorities. In this context, the construction of the new harbour, Vuosaari, in Helsinki is of current interest, leading to new tenders for many logistics contracts.

The Public Procurement Act gives all tenderers the right to have their offers assessed adequately. In practice, mistakes are still made in the tender processes. However, a company that has suffered disadvantage as a result of defects in the procedures followed to assess its tender is not obliged simply to accept the situation. Legal protection against defective tender awards has played an increasing role in Finnish praxis.

### **Typical mistakes in tender procedures**

Finnish public procurement law contains an abundance of specif-

ic provisions relating to procedure as well as to the criteria used when awarding public contracts. In principle, each and every violation of such provisions renders the award decision in question subject to appeal. In practice, however, successful appeals against award decisions rely on a number of central sources of error.

The law obliges the awarding authority to observe strict equality of opportunity as between the participants involved in the procurement procedure. Violation of this principle may occur in particular if, during the negotiations, one participant is given certain information not available to the others, and thereby gains an advantage. In a negotiated procedure necessarily involving both individual and separate negotiations with the various candidates, this error can easily occur.

It is rare nowadays for the actual award decision to be made on the basis of a simple price comparison. Instead, particularly in economically significant procurements, the award is usually given to the most economically

advantageous tender. Issues as diverse as the quality of the product, the technical merit of the provider, aesthetic and functional characteristics, delivery date, or environmental aspects may influence determination of economic advantage in this regard. However, this plethora of possible considerations cannot be allowed to result in obscure decisions being made. The awarding authority must specify the criteria and the relative weighting given to each issue, in the invitation to tender itself, and the result of the weighting must be substantiated in the award decision. As a consequence, the weighting process is fully subject to appeal.

The exclusion of candidates from the procurement procedure also gives grounds for appeal. This may happen for various reasons. The invitation for tenders may provide that bidders must fulfil certain requirements as to economic and technical capabilities, the lack of which will lead to exclusion. A tender can also be excluded because it does not conform with the technical specifications given in the invitation to tender. However, a tender may



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not be rejected due to deviations from codes or standards if the tenderer is able to prove that it meets the requirements defined by the technical specifications in an equivalent fashion.

**Legal protection against defective award decisions**

There are generally two legal protection options for a tenderer whose rights have been violated by an award decision in a public procurement procedure. The first of these is to seek revocation of the defective decision on appeal, and the substitution of a new, correct procedure. Under certain circumstances, the tenderer may also demand financial compensation for the damage suffered.

Appeals against defective award decisions may be made to the Market Court in Helsinki. The application must be made within 14 days of the date on which the tenderer was notified of the decision. In proceedings before the Market Court, errors made in the award decision regularly result in the annulment of the decision. The authority must then initiate a new procedure if it still wishes to continue with the procurement originally planned. Financial compensation may be awarded by the Market Court only if annulment of the award decision is no longer possible or will not be sufficient to protect the applicant's interests. This is the case in particular if the contract has already been awarded and executed.

Even if the award decision cannot be annulled anymore, the Market Court is empowered to grant financial compensation only if the applicant 'would have had

a real chance to win the award'. The amount of compensation is not fixed by law but is essentially in the discretion of the court. In practice, it rarely exceeds 10 per cent of the contract price.

Hence, in order to receive financial compensation, the applicant must demonstrate to the court that it would probably have been awarded the contract if the tenders had been evaluated correctly. This possibility exists particularly for tenderers whose tender the awarding authority regarded as the second best. In order to make proper argumentation possible in the first place, the participants in a public procurement procedure have the general right to examine the tenders made by other tenderers. The law protects business secrets to some extent; however, competing bidders can always examine the pricing data.