

No 94

REPORT**Article 22 of the Constitution of the ILO**

Report for the period 1 June 2016 to 31 May 2021, made by the **Government of Finland**
on the
LABOUR CLAUSES (PUBLIC CONTRACTS) CONVENTION, 1949,
No. 94
(ratification registered on 22 December 1951)

I LEGISLATION AND REGULATIONS

Act on Public Procurement and Concession Contracts (1397/2016), entry into force on 1 January 2017, translation of the Act is available on the following website, link: <https://www.finlex.fi/fi/laki/kaan-nokset/2016/en20161397.pdf>

The Finnish public procurement legislation has undergone an extensive reform. The overall reform aims, among other things, to simplify procurement procedures. The new rules contribute to a better implementation of employment, health and social aspects. The reform was based on the EU Directives on public procurement adopted in April 2014. The Directives modernise practically all current EU rules on public contracts.

The Act on Public Procurement and Concession Contracts (1397/2016) contains section 98 on special terms and conditions of a procurement agreement. Under the section 98, subsection 2 and 3 of the Act on Public Procurement and Concession Contracts (1397/2016), a condition shall be included in a procurement agreement concluded between a central government authority and the successful tenderer in competitive tendering requiring compliance with at least the minimum terms and conditions of employment governing work of the same nature under the law and collective agreements of Finland in work that forms part of a procurement agreement to be implemented in Finland. This provision is based on Convention's (No. 94) articles 1 and 2. The provisions of subsection 2 concerning the duty of a central government authority shall also apply when another contracting entity concludes a procurement agreement concerning a public works.

Section 154 of the Act (1397/2016) contains provisions on sanctions imposed by the Market Court.

Act on the Contractor's Obligations and Liability when Work is Contracted Out (1233/2006)

Act on the amendment of the Act on Contractor's Obligations and Liability when Work is Contracted Out (678/2015), entry into force on 1 September 2015

Act on the amendment of the Act on Contractor's Obligations and Liability when Work is Contracted Out (450/2016), entry into force on 18 June 2016

Act on Posting Workers (447/2016), entry into force on 18 June 2016

Act on the amendment of the Act on Posting Workers (743/2020), entry into force on 1 December 2020

Act on the amendment of the Act on Posting Workers (919/2017), entry into force on 1 January 2018

Act on the Contractor's Obligations and Liability when Work is Contracted Out

In 2015, the Act on the Contractor's Obligations and Liability when Work is Contracted Out (1233/2006) was reformed. The purpose of the reform was to clarify the application of legislation and make it easier for contractors to observe their obligations. The provisions were standardised to apply to all industries. New provisions include specifications to e.g. the contractor's checking obligations and negligence fines. There are specifications to e.g. the contractor's checking obligations and negligence fines. The contractor's obligation to check was expanded to occupational healthcare. In addition, the pension security required for workers posted from abroad was defined in detail.

The contractor can also use the public tax debt register in looking for necessary tax payment information concerning the contracting party. In addition, if a foreign company as a business ID in Finland, besides procuring accounts from the company's domicile, the contractor shall ensure that the company in question is registered in tax-related registers in Finland. In addition, the contractor shall review the company's tax debt details.

As regards pension insurance information, provisions concerning workers posted from abroad were added to the Act. The contracting party shall provide the contractor with an account on the determination of social security before commencing work. The contractor, in turn, shall ensure that the contracting party submits the required information. As regards construction, a provision would be laid down in the act, stipulating that the contractor is perpetually obliged to ensure that the workers posted by the contracting party have valid certificates on the determination of their social security. A fine for negligence can be imposed on the contractor for neglecting this responsibility.

Consequences of a failure to perform the checks were also amended.

Both the standard and higher fines for negligence were increased and the higher fine is applied to all contracts under the contractor's liability act. If the checks required under the act are not performed, the contractor must pay a negligence fee, which is between 2,000 and 20,000 euros.

The raised negligence fee may be imposed if the contractor concludes a contract for work by a trader who has been barred from conducting business. It may also be imposed if, in spite of fulfilling its obligation to check, the contractor shows a clear disregard for the fact that the contracting partner has no intention of complying with its employer or other obligations. In that case the negligence fee is between 20,000 and 65,000 euros. The gravity of the negligence, among other factors, will be considered in determining the size of the sanctions. The decision on the payment is made by the Regional State Administrative Agency under whose jurisdiction the occupational health and safety authority supervising compliance with the act falls.

Translation on the Act on the Contractor's Obligations and Liability When Work Is Contracted Out (amendments up to 70/2017 included), link: <https://www.finlex.fi/fi/laki/kaannokset/2006/en20061233.pdf>

Act on Posting Workers

In 2016, the legislation on posting workers to Finland was reformed as the EU Directive (2014/67/EU) was implemented. The new Act on Posting Workers (447/2016) entered into force on 18 June 2016. The aim was to improve supervision and to ensure that companies posting workers comply better with Finland's terms of employment. The new Act on Posting Workers contains provisions on, for example, the minimum terms of employment of posted workers in Finland, the obligations of the posting undertaking and the contractor and the penalties for breaches of the Act. The Act (447/2016) replaced the previous Act (1146/1999), which entered into force in 1999.

Posted worker means a worker who normally carries out his or her work in a State other than Finland and whom an employer undertaking that is established and performing activities in another State posts to Finland for a limited period to perform temporary work in the course of a contractual employment relationship within the framework of providing cross-border services as subcontracted work, as an internal transfer within a group of undertakings or as temporary agency work.

The terms of employment of posted workers remained unchanged. Unlike before, the Act (447/2016) applies also to work carried out on the basis of the public procurement agreement concluded between a central government authority and the successful tenderer in competitive tendering. Under the Act (447/2016), certain provisions should be continued to apply to the employment contract of an employee posted to Finland if they are better for the employee. These include the Occupational Safety Act, the Occupational Health Care Act and some of the Employment Contracts Act.

Under the Act (447/2016), all undertakings posting workers to Finland are required to notify the authority of the posting of workers. The notification is submitted to the OSH authority.

The consequences of breaches of the law were altered. Under the Act (447/2016), the posting employer or the subcontractor can receive a negligence fee for the violation of the Act. The negligence fee is at least EUR 1,000 and not more than EUR 10,000, taking into consideration the type, extent and recurrence of the negligence.

The OSH authority could impose a fee, for example, if the posting undertaking has not notified the posting of the worker or if it has not appointed a representative in Finland. A fee could be imposed on the contractor if the contractor had not assisted the authority in reaching the representative.

Negligence fees were also implemented in other EU countries. In other words, the fee received in Finland could also be collected from the employer in other EU country. This improves compliance with and enforcement of the terms and conditions of employment.

Amendment (743/2020)

In 2020, the Act on Posting Workers (447/2016) was amended to implement the amendments made to EU legislation. The amendments concerned:

- more detailed guidelines on pay provisions applicable to posted workers;
- restrictions to the employer's right to set off receivables against an employee's salary;
- a new provision for making pay comparisons according to which any payments made by the employer of an uncertain nature would be regarded as compensation for expenses and not as wage or salary;
- extension of applicable collective agreements in transfers within a subcontracting or corporate group;
- application of the same accommodation quality requirements to posted and local workers;
- additional employment conditions to be applied in long postings of more than 12 months; and
- the employer's obligation to compensate the posted worker's travel, accommodation and meal expenses incurred during travel from the worker's regular workplace in Finland during the posting.

The amendment introduced a protection provision concerning travel and accommodation costs arising from the person's posting to Finland. The provision applies in situations where the posted worker is not entitled to protection on the basis of the law, standard practice or employment contract of the country of origin, or the protection would be substantially below what is considered normal and reasonable for the work in question in Finland. The amendment reconciles the level of protection in the country of origin, protection agreed in the employment contract, and protection in the country of employment.

In addition, the amendment expanded the duty to provide information. Companies are required to make an advance notification of all posted workers. The terms of employment of posted workers continued to be determined by law and generally binding collective agreements.

II Direct Request, 2016

The Committee notes the observations of the Central Organization of Finnish Trade Unions (SAK), the Confederation of Unions for Professional and Managerial Staff in Finland (AKAVA) and the Finnish Confederation of Professionals (STTK), communicated with the Government's report. The workers' organizations refer to their joint statement of 2006 in which they underlined the lack of clarity in relation to whether municipalities could be considered central authorities within the meaning of Article 1(1) of the Convention, and noted that in Finland the Convention is not deemed to apply to contracts concluded by municipalities. *The Committee requests the Government to provide its comments in this respect.*

Under the section 98, subsection 2 and 3 of the Act on Public Procurement and Concession Contracts (1397/2016), a condition shall be included in a procurement agreement concluded between a central government authority and the successful tenderer in competitive tendering requiring compliance with at least the minimum terms and conditions of employment governing work of the same nature under the law and collective agreements of Finland in work that forms part of a procurement agreement to be implemented in Finland. This provision is based on Convention's (No. 94) articles 1 and 2. The section 98, subsection 2 of the Act (1397/2016) is not applied to municipalities unless the procurement agreement concerns a public work. Under the section 98, subsection 3, the provisions of subsection 2 concerning the duty of a central government authority shall also apply when another contracting entity, for example municipality, concludes a procurement agreement concerning a public works.

The Committee requests the Government to indicate whether the reforms include clauses ensuring workers' rights in relation to wages (including allowances), hours of work and other conditions of labour. The Committee further requests the Government to provide information on the manner in which organizations of employers and workers have been consulted and participated in the determination of the terms and clauses to be included. It further requests the Government to provide information on any developments in amending the public procurement legislation and to provide a copy of the text as soon as it is adopted.

The Act on Public Procurement and Concession Contracts (1397/2016) contains section 98 on special terms and conditions of a procurement agreement. Under the section 98, subsection 2 and 3 of the Act on Public Procurement and Concession Contracts (1397/2016), A condition shall be included in a procurement agreement concluded between a central government authority and the successful tenderer in competitive tendering requiring compliance with at least the minimum terms and conditions of employment governing work of the same nature under the law and collective agreements of Finland in work that forms part of a procurement agreement to be implemented in Finland. This provision is based on Convention's (No. 94) articles 1 and 2. The provisions of subsection 2 concerning the duty of a central government authority shall also apply when another contracting entity concludes a procurement agreement concerning a public works.

The condition referred to in the section 98, subsection 2, should also be included in contracts concluded with an undertaking established in another EU State. The minimum conditions should be applied to work carried out in Finland, for example when an undertaking established in another Member State posts workers or temporary agency workers to Finland.

In addition, under the section 98, subsection 1, the contracting entity may impose special terms and conditions on the implementation of a procurement agreement, provided that the said terms and conditions are linked to the procurement in the manner referred to in section 94. The terms and conditions may relate to the financial or social aspects of the procurement, or to its innovative, environmental and employment aspects. The special terms and conditions of the procurement agreement shall be indicated in the contract notice, in the invitation to negotiate or in the documents of the call for tenders.

According to the preliminary work on section 98(1) of the Procurement Act (HE 108/2016 vp. p. 207-208) the specific terms of the contract refer to contractual clauses. The special conditions must therefore be sufficiently precise and unambiguous so that the parties to the agreement have a common understanding of them. The specific terms of the contract may relate, for example, to environmental, social and employment aspects. A special condition may require that the tenderer and its subcontractors comply with the generally binding collective agreement in their employment relationships and with the minimum wage conditions laid down in legislation or in a generally binding collective agreement.

The reform of procuration legislation was prepared in a working group, where employers and workers were represented by the social partner's organisations.

Recalling its previous comment that informing tenderers of labour clauses seems to be left to the discretion of the contracting authorities, the Committee once again requests the Government to provide information on the manner in which it is ensured that tenderers have prior knowledge of the terms of the labour clauses.

Sections 13 and 14 of the Act on Confirmation of the General Applicability of Collective Agreements (56/2001) provide for the publication of decisions of the confirmation committee and collective agreements that have been confirmed as generally applicable. The final decisions of the confirmation committee and the decisions of the Labour Court regarding the confirmation of general applicability must be published without delay in a compendium of regulations maintained by the Ministry of Justice. The confirmation committee shall make the collective agreements declared generally applicable by a final decision free of charge in Finnish and Swedish available to everyone on the public information network in the list of generally applicable collective agreements. With regard to both decisions and collective agreements, it must be stated that further information on the generally applicable collective agreement is available in Finnish and Swedish from the committee confirming the general applicability. Decisions and collective agreements are published in the Finlex service, link <https://www.finlex.fi/fi/viranomaiset/tyoehto/>, in Finnish and Swedish, there is no website in English). Many trade unions also publish collective agreements on their own websites.

Consequently, the Committee reiterates its requests that the Government indicate how it is ensured that information concerning the applicable laws and regulations are brought to the notice of all persons concerned and how it is ensured that persons responsible for complying with this obligation are defined. It further requests the Government to provide examples of the notification forms on public procurements.

Article 4. Posting of notices.

Under the chapter 2, section 4a of the Employment Contracts Act (55/2001), the employer must provide a written account of the principal terms and conditions of work to the employee, if these are not laid down in a written employment contract. The terms and conditions include:

- start date of the employment relationship
- duration of and basis for a fixed-term employment contract or specification that the fixed-term contract is concluded with a long-term unemployed
- employee's work tasks
- place of work
- grounds for determining pay and other remuneration
- regular working hours
- determination of annual holiday
- period of notice or the grounds for determining it, and
- applicable collective agreement.

Under the chapter 13, section 10 of the Employment Contracts Act (55/2001), the employer shall keep the generally applicable collective agreement freely available to employees at the place of work. If the document in question is something other than a generally applicable collective agreement, on the basis of section 12 of the Collective Agreements Act (436/1946), the availability requirement also applies to every employer who is bound by a collective agreement, and they must post up a copy the collective agreement in the workplace.

In addition, the Working Hours Act (872/2019) and the Annual Holidays Act (162/2005) require that the employer keep a working hours and annual holiday register. This requirement also applies to any company that uses temporary agency work.

The Committee requests the Government to provide information of the changes to the Act on Public Contracts as part of the legislative reforms.

Article 5, Penalties

Section 154 of the Act (1397/2016) contains provisions on sanctions imposed by the Market Court.

If the procedure in the procurement was contrary the Act (1397/2016), to European Union legislation, or to the World Trade Organisation Agreement on Government Procurement, then the Market Court may:

- 1) annul the decision of the contracting entity in whole or in part;
- 2) prohibit the contracting entity from applying an incorrect point in a procurement document or otherwise adhering to an incorrect procedure;
- 3) order the contracting entity to rectify its incorrect procedure;
- 4) order the contracting entity to pay a compensatory fine to a concerned party that would have had genuine prospects of winning the competitive tendering under a correct procedure;
- 5) order the contracting entity to pay an inefficiency sanction;
- 6) order the contracting entity to pay a penalty fine to the State;
- 7) shorten the agreement period of the procurement agreement or concession contract to expire within the period stipulated by the court.

When imposing the sanctions referred to in points 4–7 of subsection 1, the Market Court may deem a procurement agreement or concession contract to have arisen on the basis of circumstances if the contracting entity has explicitly set about implementing the procurement. An inefficiency sanction, a penalty fine and shortening of an agreement period may only be ordered in a procurement and concession contract concerning services under Schedule E that exceeds the national threshold value, and in other procurements that exceed the European Union threshold value. The sanction referred to in subsection 1 may only be ordered if the unlawful procedure affected the outcome of the procurement procedure or the status of a concerned party in the procurement procedure.

Under the section 155 of the Act (1397/2016), The Market Court may impose a compensatory fine. A compensatory fine may be imposed if the harm caused by a measure referred to in points 1–3 of subsection 1 of section 154 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 process of determining the compensatory fine shall consider 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 Market Court may nevertheless waive the compensatory fine if the contracting entity has refrained from implementing the procurement decision for the duration of proceedings at the Market Court. A compensatory fine may not exceed ten per cent of the value of the procurement agreement without special cause.

The Committee requests the Government to continue to provide information on inspections focused on public administration, indicating the number of inspections, the number and type of infringements detected, and sanctions imposed. Furthermore, it requests the Government to provide up-to-date information on the manner in which the Convention is applied in practice, including, for instance, statistics on the average number of public contracts granted annually and the approximate number of workers engaged in their execution, as well as information on any practical difficulties in the application of the Convention.

Article 4 (b) (ii) of the Convention.

During the reporting period, public administration actors have been subject to two monitoring projects related to supervision of contractor's obligations and liability.

- In 2018, a monitoring project targeting municipalities was implemented. A total of 174 inspections were carried out on the project from 1 January 2018 to 31 December 2018. A total of 389 guidelines were issued during the inspections. 147 inspections revealed negligence of the obligation to check. Guidelines for obtaining pre-contractual clarifications were issued in 139 cases, for the validity of clarifications in 58 cases and for the retention of clarifications in 32 cases. A negligence fee process was initiated in 13 cases due to negligence of the obligation to check, in one of which the contractors was also suspected of having entered into an agreement even though the contractor

must have known that the contracting partner did not intend to meet its payment obligations. By March 2020, a negligence fee was imposed on 5 contractors and 7 contractors received a decision for non-imposition of a negligence fee.

- In 2019-2020, a monitoring project targeting joint municipal authorities was implemented. During the project, 107 inspections were carried out from 1 January 2019 to 31 March 2020. A total of 187 guidelines were issued during the inspections. 80 inspections revealed negligence of the obligation to check. Guidelines for obtaining pre-contractual clarifications were issued in 74 cases, for the validity of clarifications in 23 cases and for the retention of clarifications in 25 cases. The negligence fee process was initiated in 4 cases, all due to non-compliance with the obligation to check (there is no information on the outcome of these processes at the time of reporting).

In addition, public administration actors have been subject to some monitoring in other monitoring projects related to supervision of a contractor's obligations and liability.

- In 2016, in a monitoring project targeting the logistics sector, 37 inspections focused on public administration actors. A total of 97 guidelines were issued. 2 cases led to a negligence fee process (negligence of the obligation to check). In 2017, a total of 27 inspections were carried out. A total of 55 guidelines were issued. One case led to a negligence fee process (negligence of the obligation to check). The negligence fee has been imposed on one contractor (situation at the end of March 2020).
- In 2016, in a monitoring project targeting the construction sector, 7 inspections focused on public administration actors. A total of 5 guidelines were issued, no negligence fee processes were initiated. In 2017, a total of 9 inspections were carried out. A total of 8 guidelines were issued. One case led to negligence fee process on the grounds that the contractor was suspected of having entered into a contract with a person subject to a business ban. An increased negligence fee was imposed in the case (situation at the end of March 2020).
- In 2016, in a monitoring project targeting the service sectors, 5 inspections focused on public administration actors. A total of 13 guidelines were issued and one negligence process was initiated.
- In 2017, in a monitoring project targeting primarily other sectors, 2 inspections focused on public administration actors. A total of 3 guidelines were issued. No negligence fee processes were initiated.
- In 2018, in addition to the monitoring project on municipal sector, in a monitoring project targeting site inspections in the construction sector, 7 inspections focused on public administration actors. A total of 6 guidelines were issued. No negligence fee processes were initiated.

In other respects, no information is available on the statistics compiled by the occupational safety and health authority or on the control information system.

III APPLICATION OF THE ARTICLES IN FINLAND

The Ministry of Economic Affairs and Employment of Finland has published a guide to socially responsible public procurement. The guide describes through practical examples how social aspects can be taken into account at different stages of a procurement process. The guide describes, what the different options are, what kind of requirements are laid down for responsible procurement in the Act of Public Procurement and other relevant acts, and the approaches to social responsibility adopted by different contracting entities

The guide to socially responsible public procurement (2017), published on the following website, link: <https://julkaisut.valtioneuvosto.fi/handle/10024/160318>.

Please also see the answers in sections I and II.

IV

A copy of this report has been sent to following labour market organizations:

1. The Confederation of Finnish Industries (EK)
2. The Central Organization of Finnish Trade Unions (SAK)
3. The Finnish Confederation of Salaried Employees (STTK)
4. The Confederation of Unions for Academic Professionals in Finland (Akava)
5. The Commission for Local Authority Employers (KT)
6. The State Employer's Office (VTML)
7. The Federation of Finnish Enterprises (SY)

Statements of the labour market organisations:

The Central Organization of Finnish Trade Unions (SAK), The Finnish Confederation of Salaried Employees (STTK), The Confederation of Unions for Academic Professionals in Finland (Akava)

We refer to the joint statement by SAK, Akava and STTK in 2006 and 2016 which includes inter alia a following note:

“We would like to underline the lack of clarity in the interpretation of central authorities. In Finland Convention 94 as well as the Recommendation 84 are not seen to apply to contracts concluded by municipal authorities, only by state authorities. However, in Finland governing system principles governing municipal administration and the duties of the municipalities as well as the provisions on the principles governing tax liability and the grounds for the municipal tax are laid down by the State (Parliament Act).

State also provides funds for municipalities to fulfil their duties. Unfortunately, there are underpayment cases in municipal contracts, especially in construction and cleaning services. To avoid this discrimination especially of immigrant workers in sub-contracting, it should be also obligatory for the municipalities to inform tenderers about labor clauses and include collective agreement as one part to the public contracts.