

B E R G M A N N

General Contractor

Making projects work in Finland

www.bergmann.fi



BERGMANN

Attorneys at Law

Legal Solutions
with Industry Focus

Investments
Projects
Transactions

Contents

Bidding for projects in Finland	3
The EPC contract in Finland, from the contractor's perspective	6
Procedures and permits for industrial building projects in Finland	11



Peter Jaspers
peter.jaspers@bergmann.fi

Bidding for projects in Finland

Plant construction projects in the field of sophisticated infrastructure are being increasingly contracted out as EPC general contracts in Finland. Foreign suppliers are welcome – but are they well-positioned enough to actually land the contract?

By awarding the complete contract to a contractor as a package, from the detailed engineering stage to turn-key handover, the project owner cuts out many interfaces. Conversely, for contractors taking on a general contract involves increased risks.

Generally, the contractor has to accept full responsibility for making sure the plant is completed and fit for the purpose agreed upon. They can only plead uncertainties and obstacles in extremely limited and exceptional situations.

Risk management with experience

From a technical perspective, the risk for an experienced contractor can be calculated, and insured if necessary. The legal and administrative framework, however, poses problems for foreign suppliers if they haven't had solid experience of their own in Finland yet.

For one thing, there are regulatory aspects that have a direct impact on the costs of providing works and services: employment law and safety regulations first and foremost, but also restrictions on importing and transport, and of course taxes and duties.

The question of what is going to be delivered has even greater bearing on calculations and risk assessment. Here's where the peculiarity of the EPC contract comes into play: The owner generally only specifies a rough specification (FEED – Front End Engineering Design) from which the functional objectives of the plant construction project are derived. It remains the responsibility of the general contractor to meet the objectives while keeping in line with the requirements set forth by laws, standards, and authorities.

If the supplier moves outside their geographical home area, they'll lack a foundation for assessing the risks specific to the country. Will the authorities have unanticipated safety requirements or demand extensive documentation? Do the legislators tend to make spontaneous changes to the working environment? Will my usual delivery channels be obstructed by import barriers? Will there be outlandish taxes levied?

Be well-prepared, make successful offers

In practice, it can often be observed that foreign bidders create an insurmountable disadvantage for themselves when competing for an EPC contract in that, due to the risk factors named above, they either calculate an inflated risk premium in addition to the price (causing them to quickly be eliminated from the running, saving transaction costs), or put up too much resistance against accepting the business risks typical of an EPC contract during contractual negotiations (leading to later and more expensive failure).

For prospective contractors to be successful in Finnish EPC projects, it is in fact necessary to be in a position where they can realistically assess and calculate project risks. In this way, they can also convince Finnish clients that they can be relied on to handle a complex project in the Finnish environment.

There are different ways to achieve this in concrete terms. When entering the Finnish market on a long-term basis, consideration can be given to establishing a separate, local staff with the relevant skills. Bringing in external expertise in the form of technical and legal consultants will also be required in most cases.

The EPC contract in Finland, from the contractor's perspective

Drafting and negotiating a general contractor's EPC contract primarily follows the needs of the project. Universal rules cannot generally be established. But of course, conventions and customs in the target market – Finland in this case – are a factor.

Full responsibility and assumption of risk

The basic idea behind the EPC contract is that the contractor assumes far-reaching, full responsibility for the success of the construction project. A lump sum price is usually agreed on for completion in this process.

The contractor's project risk depends on the extent of the contractor's responsibility. This varies quite widely from project to

project, and a fierce tug-of-war is not uncommon in contract negotiations.

The following questions in particular are some of the central points of contention for distributing risk:

- Can the contractor assume the FEED to be correct, or will everything have to be reviewed from scratch?
- Does the contractor have to take care of obtaining permits (building permit, environmental permit, industry-specific permits, etc.), draw up the necessary documentation, and take responsibility for any delays that come up, if necessary?
- Is it enough for the contractor to meet the technical objectives identified in the FEED or the contract, or are they responsible for this in a more general form so that the erected plant actually fulfils its purpose, too?



- Can the contractor demand additional payment and schedule adjustments in the event of unforeseeable circumstances (e.g., soil contamination, actions of third parties, change in legal framework conditions), or do these fall under contractor risk?

By taking an overly risk-averse position in negotiations, a supplier may jeopardise their credibility as an experienced general contractor. Many of these risks can be commercially estimated fairly reliably and priced into the commercial offer, if you are familiar with Finland's legal and factual framework.

Change orders

Even if the project owner wishes to transfer full responsibility to the general contractor to the greatest extent possible, they will generally want to have the last word when it comes to what is actually going to be built. The client may order changes to the work to be carried out.

A Finnish client will not allow themselves to be deprived of this right in the contract. You also won't succeed in making the implementation of a change order dependent on the parties first agreeing on the repercussions for the contract price and the schedule. In Finland, it is common practice in building contracts for the continuation of work and project completion to take priority over all commercial matters.

As a supplier, you are well advised to accept this starting point and focus on the matters in which you can realistically gain something:

- agreement on feasible amendment procedures in which the contractor has clarity regarding whether a change should be implemented, even if the price is not fixed yet;
- agreement on realistic price mechanisms that kick in when changes are to be implemented without agreeing on a price in advance; and
- consideration for the repercussions that change orders may have on the EPC contractor's full responsibility.

And of course, you should plan to maintain comprehensive project documentation throughout the course of the project, which will help track the costs and repercussions of changed orders, and to observe the procedures that the contract provides for enforcing surcharges and adjustments to the schedule.

Guarantee and liability

The matter of which guarantees to assume and for how long depends on the nature of the project. In Finland, a two-year guarantee period is customary. The standard contracts usual in the industry also allow for a subsequent liability for hidden defects, effective for ten years following receipt, if these are due to circumstances such as gross negligence in the quality assurance agreed upon.

Without any contractual limitation of liability, the contractor's liability – be it for construction defects or the results of any breaches of contract – is legally unlimited according to Finnish law. Even the standard conditions for construction contracts that are usual in the industry, YSE 1998, do not include any limitation of liability.

In contract practice, agreeing on liability limitations, particularly the exclusion of indirect damage and the establishment of liability caps, is not uncommon. Willingness to accept responsibility is naturally just as presumed on the market as proper insurance coverage. Thus suppliers should avoid sending the wrong signals with exaggerated ideas about liability limitation. However, the EPC contractor has an understandable interest in not becoming the centre of risk in the contractual value chain: Passing on liability risks to subcontractors, planners, and other contracting partners is only possible to a limited extent.

Arbitration clauses

Agreeing on arbitration procedures for settling legal disputes is common practice in Finnish project contracts. This is motivated by a number of circumstances, including the sluggishness of Finnish court proceedings and the parties' interest in handling proceedings privately (court files are public in Finland as a matter of principle).

For transnational projects, there is also the fact that only in arbitration it is possible to choose English as the language of proceedings, and to appoint arbitrators from neutral jurisdictions.

The Finnish Central Chamber of Commerce operates an institute of arbitration whose proceedings enjoy great popularity in the Finnish construction industry. For proceedings of an international calibre, however, it may also be appropriate to use other arbitration institutes, such as the International Chamber of Commerce (ICC).



Procedures and permits for industrial building projects in Finland

The timely presence of authority permits is a determining factor for a project's schedule. Permits have to be applied for in the project owner's name. But technical preparation of applications often falls to the general contractor – occasionally along with the risk of the permit's timely issue. This article provides a preliminary overview.

Planning and communication

Every industrial project in Finland requires a number of permits for which different authorities are each responsible. The different procedures are independent of one another, with no centralised procedure in the sense of “one-stop shopping.”

Many procedures also entail public hearings and/or obtaining statements, which require budgeting for time. Therefore, it is important to plan out procedures from the beginning and

dovetail them appropriately in order to adhere to the project schedule.

The processing time for different permit applications is little more foreseeable than the question of whether or not the authorities in individual cases will be satisfied right away with the documentation handed in.

But the uncertainty arising from this in terms of the schedule can be mitigated to a considerable extent through proactive and close communication with the officials in charge. Finnish authorities are very open-minded about directly exchanging information, and clerks are usually responsive to an informal phone call or even available for meetings. You should make use of this opportunity.

Permits unrelated to the industry

At the beginning, there is municipal land-use planning, which in many cases has to be adapted for the planned project. This is a decision process at the level of local politics, but preparation is often done in cooperation with the project owner (and frequently at their own expense).

Likewise, the environmental impact assessment has to be done in an early stage of preparation if the size of the project makes this a requirement.

Actual licensing procedures include the following in particular:

- The building licence (under building law) from the municipality is based on urban land-use planning.

- An environmental permit, which is generally issued by regional environmental authorities, certifies the planned action's compatibility with environmental values and investigates disruptions for neighbours.
- A separate water permit is required for any use of natural water bodies.
- Other permits for traffic regulation, over- and under-passes on streets and rails, interference with air traffic due to high buildings, impact on nature reserves or similar may be required.

Tukes

The Finnish Safety and Chemicals Agency (Tukes) is far and away the most important licensing authority for industrial plant construction. Their scope of responsibility includes supervising a multitude of industrial applications.

The Tukes work areas most relevant to plant construction cover all plants in the gas sector (particularly liquefied gases, natural gas, and LNG), containers for chemicals, pressure tanks, and electrical and measurement engineering.

Particularly plants in which chemicals are going to be processed, transported, or stored on a large scale, require a prior construction licence from Tukes. Natural gas also counts as one of the chemicals.

The licence must generally be present before construction starts. This is issued upstream through a public hearing. If the project comes under the scope of the mandatory environmental impact assessment, this has to be present before applying. All

of this must be taken into consideration during project scheduling.

If the project requires a construction licence, it generally also needs an operating licence which is issued after completion and a commissioning test.

Other licensing authorities specific to the industry

Not all projects fall under Tukes's scope of responsibility. Depending on the object of the project, one or more other licensing authorities may be relevant. These include:

- Finland's Radiation and Nuclear Safety Authority (STUK) is the authority for monitoring and licensing nuclear plants, but also for industrial applications in which radiation is used or formed.
- The Finnish Medicines Agency, Fimea, issues permits for manufacturing and selling pharmaceutical products.

Renewable Energy

- Acquisition, development, and operation
- Project agreements
- Project financing

Environment and Permitting

- Regulatory aspects of energy, construction, and infrastructure projects
- Planning law and permitting
- Environmental compliance

Construction, Engineering, Infrastructure

- Civil engineering projects
- Industrial plant construction
- Partners of the project management from procurement to completion

Bidding and Contracting

- Contract drafting and negotiating for projects and supply chains
- Bidder advisory in public procurement
- Post-award appeal procedures

Real Estate and M&A

- Transaction advisory with industrial focus
- Commercial feasibility, bankability, and risk control
- Financial arrangements

Dispute Resolution

- Change management and dispute avoidance
- Litigation and arbitration
- Special focus on disputes relating to complex projects and transactions

BERGMANN

Helsinki

INDUSTRY-FOCUSED LAWYERS
DEDICATED TO YOUR SUCCESS

Bergmann Attorneys at Law

Pohjoisesplanadi 35 E
00100 Helsinki, Finland
Phone: +358 10 339 8800
office@bergmann.fi
www.bergmann.fi

February 2019