



Innovation Partnerships - workable and watertight or white elephants?

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Issues

- Innovation Partnerships
 - What?
 - Why?
 - How?
- A new flexibility?
- Uses?
- Workable and watertight contractual arrangements?

Innovation

- Innovation in procurements is well-established:
 - *Healthcare at Home (2013) (Inner House) : A process which provides extra marks for creative thinking is unexceptional, as is one which allows a tenderer to include novel methods of working which the contracting authority might find attractive, provided that they fall within the reasonable ambit of the specified criteria as it would have been understood by the hypothetical well-informed tenderer*

- It can be evaluated:
 - Criteria must be formulated in such a way as to allow all reasonably well-informed and normally diligent tenderers (RWINDs) to interpret them in the same way
- Recently re-stated in:
 - *Healthcare at Home Ltd v Common Services Agency* (2014) SC

- *The Clapham omnibus has many passengers. The most venerable is the reasonable man, who was born during the reign of Victoria but remains in vigorous health. Amongst the other passengers are the right-thinking member of society..., the officious bystander ..and the fair-minded and informed observer, all of whom have had season tickets for many years....*
- *In recent times, some additional passengers from the European Union have boarded the Clapham omnibus..... This appeal is concerned with one of them: the reasonably well informed and normally diligent tenderer*
- *The RWIND tenderer was born in Luxembourg. He owes his existence to the EU Directives concerned with public procurement.....*
- *The yardstick of the RWIND tenderer is an objective standard applied by the court*

The what, why and how of Innovation Partnerships

What?

- A new contract award procedure
- Where a CA needs an innovative product, service or works not already available on the market
- And wants to procure the development and purchase in a single award procedure
- A cross between competitive dialogue and competitive negotiated procedures

Why?

- Research and innovation are among the main drivers of future growth
- And have been put at the centre of the Europe 2020 strategy for smart, sustainable and inclusive growth
- Buying innovative products, works and services contributes to achieving best value for public money and wider economic, environmental and societal benefits

(Recital (47))

- Flexibility – more than other flexible procedures (NP or CD)?

How?

Article 31

- Clear, precise, workable and watertight?
- Cabinet Office, Technical Note on Drafting (Sept 14):
 - *Unlike the regulations setting out the other procedures, it does not follow a logical order from the start of the procedure to its finish, but jumps about, with propositions about a similar topic (such as the structure of the partnership) separated from each other by unrelated material...*
 - *...almost each paragraph jumps to something completely different from the paragraph which precedes it, often returning to a theme previously touched on....*
 - *We considered if there was a case for departing from copy-out to inject more sensible reordering of the material, without losing important nuances implicit in existing juxtapositioning, but no obvious way forward emerged....*

The procurement - steps:

- **Applicability:**
 - CAs may apply innovation partnerships “as regulated in this Directive” (Art 26(3))
 - If they need an innovative product etc that cannot be met by products etc already available on the market (Art 31(1), Reg 31(2))
- **Advertisement:**
 - Contract notice, not PIN (Reg 26(8) and (9))

- Procurement documents shall:
 - Identify the need
 - Indicate which elements of the description define the minimum requirements to be met by all tenderers
 - Be sufficiently precise to enable EOs to identify the nature and scope of the required solution and whether to request to participate
 - Provide for termination of the IP and intellectual property arrangements

- Selection :
 - Authorities shall, in particular, apply criteria concerning the candidates' capacity in the field of research and development and of developing and implementing innovative solutions
 - Numbers to be invited to participate can be limited in the usual way

- Negotiation:
 - Authorities shall negotiate the initial and all subsequent tenders, except for the final tender
 - The minimum requirements and award criteria shall not be subject to negotiation
 - May be in successive stages to reduce the tenderers by applying the award criteria
 - Must comply with the principles of equal treatment and transparency

- Confidential information:
 - May not be revealed to other participants without agreement
 - Agreement must be specific, not general
- Award:
 - Only on best price-quality ratio
 - May be to one or more partners, all conducting separate research and development activities

The partnership - steps:

- Successive phases
- Intermediate targets to be attained by partners
- Payment in appropriate instalments
- Option to terminate partnership or reduce the number of partners after each phase

Flexibility

- How flexible is it?
 - Different applicability test from competitive negotiation or competitive dialogue
 - Do you need to know what you want?
 - Are there many rules?
 - Authorities can procure R&D and the product, work or services together

- Less flexible elements?
 - Contract Notice required, not PIN (unlike competitive negotiation)
 - Information provided must be sufficiently precise (like competitive negotiation)
 - Authorities must negotiate (unlike competitive negotiation)
 - No express entitlement to negotiate after final tenders (unlike competitive dialogue)
 - Must be awarded on best price-quality ratio

Uses

- When a authority *needs* an innovative solution (how often does that happen?) that cannot be met by products, services or works already on the market
- Examples given by *Guidance for public authorities on public procurement of innovation*:
 - Reduction of air pollution through photocatalytic concrete in pavements
 - Use of probiotic cleaning products to have a lower impact on the environment and health
 - Reduction in carbon footprint by changing bed cleaning methods or staff uniforms
- When an authority has environmental or social aims?

Contract terms

- IP may have one or more partners
- IP shall be structured in phases, which may include manufacturing, provision of services or completion of the works
- IP shall set intermediate targets to be attained by partners
- IP shall provide for payment in appropriate instalments
- Termination provisions (must be explained in tender documents)

- Arrangements applicable to intellectual property rights (must be defined in procurement documents)
- Authorities shall not reveal confidential information to other partners, without specific agreement
- Structure of partnership – in particular, the duration and value of the phases – shall reflect the degree of innovation and sequence of activities required

Intellectual property

- Key issues
 - Ownership
 - Licence
 - Future use
 - Future procurements
- Arrangements must be defined in the procurement documents
- Disincentive to authorities and bidders?

Workable and watertight or white elephants?

The pros and cons:

- A new, clear, flexible procedure?
- A workable contractual structure?
- Is innovation attractive to authorities? Or does it cost too much, take too long, with too uncertain an outcome?
- Is innovation attractive to tenderers? Or is the risk of termination/reduction of numbers before supply of products too great?