

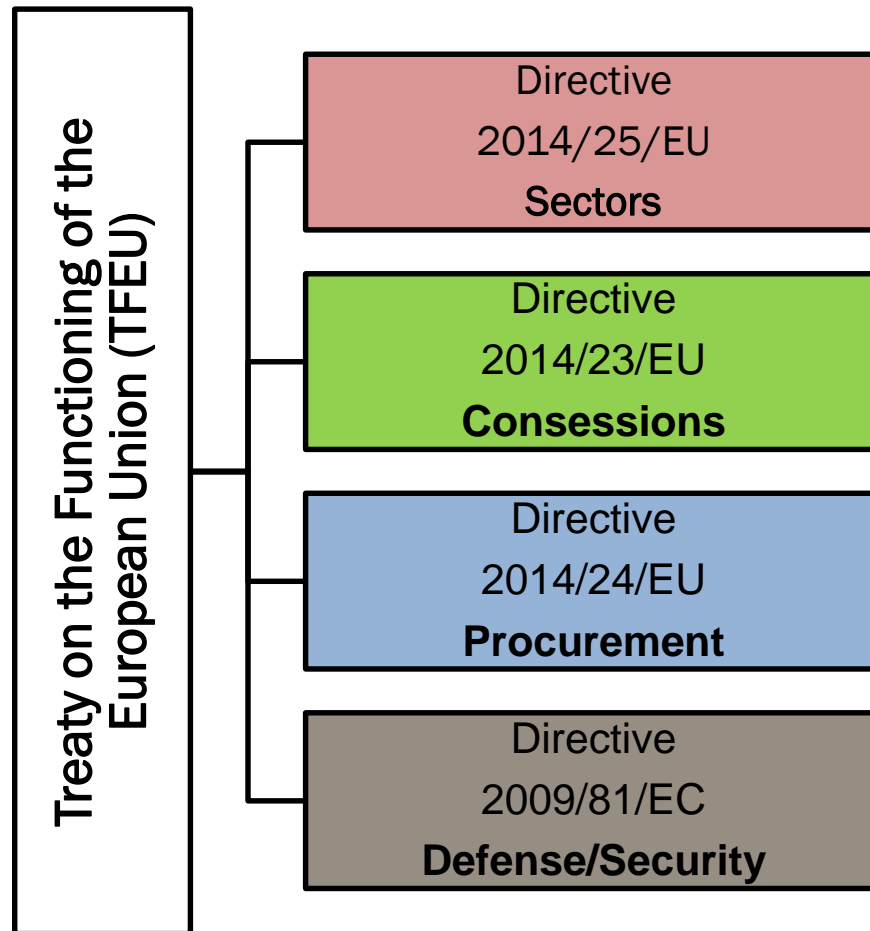


Innovation Procurement under the new Procurement Directive – a new instrument for national authorities in procuring EO services?

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3 December 2015

The new Procurement Directive (2014/24/EU)



The new Procurement Directive (2014/24/EU)

The new Procurement Directive is meant a major overhaul of the public procurement rules across the EU, aiming specially at the following areas:

Simplification and flexibilisation of procurement procedures

Strategic use of public procurement in response to new challenges

Better access to the market for small companies

Sound procedures

Governance

The new Procurement Directive (2014/24/EU)

Directive 2014/24/EU has also introduced several changes, namely the following:

Public contracts between entities within the public sector

Innovation Partnerships as a new procurement procedure (Article 31)

Decrease of the timelines for the procedures

Special rules on social and other specific services

Member States shall transfer the Directive into their national laws the latest by 18 April 2016

The new Procurement Directive (2014/24/EU)

Purchase of R&D services in Art. 16 (f) Directive 2004/18 and Art. 14 2014/24:

Article 16

Specific exclusions

This Directive shall not apply to public service contracts for:

- (f) research and development services other than those where the benefits accrue exclusively to the contracting authority for its use in the conduct of its own affairs, on condition that the service provided is wholly remunerated by the contracting authority.

Article 14

Research and development services

This Directive shall only apply to public service contracts for research and development services which are covered by CPV codes 73000000-2 to 73120000-9, 73300000-5, 73420000-2 and 73430000-5 provided that both of the following conditions are fulfilled:

- (a) the benefits accrue exclusively to the contracting authority for its use in the conduct of its own affairs, and
- (b) the service provided is wholly remunerated by the contracting authority.

Innovation Partnership

Recital 49 of Directive 2014/24:

Where a need for the development of an innovative product or service or innovative works and the subsequent purchase of the resulting supplies, services or works cannot be met by solutions already available on the market, contracting authorities should have access to a specific procurement procedure in respect of contracts falling within the scope of this Directive. This specific procedure should allow contracting authorities to establish a long-term innovation partnership for the development and subsequent purchase of a new, innovative product, service or works provided that such innovative product or service or innovative works can be delivered to agreed performance levels and costs, without the need for a separate procurement procedure for the purchase.

Innovation Partnership

Recital 49 of Directive 2014/24:

(...). Whether in respect of very large projects or smaller innovative projects, the innovation partnership should be structured in such a way that it can provide the necessary 'market-pull', incentivising the development of an innovative solution without foreclosing the market.

Contracting authorities should therefore not use innovation partnerships in such a way as to prevent, restrict or distort competition. In certain cases, setting up innovation partnerships with several partners could contribute to avoiding such effects.

Innovation Partnership

Article 31 (5) of Directive 2014/24:

The innovation partnership shall aim at the development of an innovative product, service or works and the subsequent purchase of the resulting supplies, services or works, provided that they correspond to the performance levels and maximum costs agreed between the contracting authorities and the participants.

The innovation partnership shall be structured in successive phases following the sequence of steps in the research and innovation process, which may include the manufacturing of the products, the provision of the services or the completion of the works. The innovation partnership shall set intermediate targets to be attained by the partners and provide for payment of the remuneration in appropriate instalments.

(...).

Innovation Partnership

Article 3 (22) of Directive 2014/24:

‘innovation’ means the implementation of a new or significantly improved product, service or process, including but not limited to production, building or construction processes, a new marketing method, or a new organisational method in business practices, workplace organisation or external relations inter alia with the purpose of helping to solve societal challenges or to support the Europe 2020 strategy for smart, sustainable and inclusive growth.

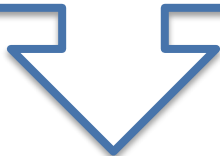
Innovation Partnership

Procurement Steps:

1st Step: Draft procurement documents and publish contract notice



2nd Step: Economic operators submit request to participate by providing the requested information for qualitative selection (within minimum 30 days)



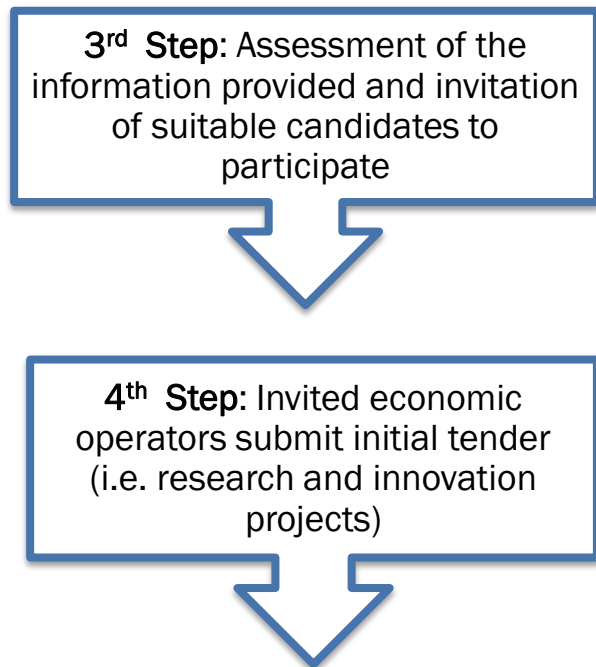
Art. 31 (1): In the procurement documents, the contracting authority shall identify the need for an innovative product, service or works that cannot be met by purchasing products, services or works already available on the market. It shall indicate which elements of this description define the minimum requirements to be met by all tenders. The information provided shall be sufficiently precise to enable economic operators to identify the nature and scope of the required solution and decide whether to request to participate in the procedure.

Art. 31 (6): In the procurement documents, the contracting authority shall define the arrangements applicable to intellectual property rights.

Art. 65 (2): The contracting authorities shall indicate, in the contract notice or in the invitation to confirm interest, the objective and non-discriminatory criteria or rules they intend to apply, the minimum number of candidates they intend to invite and, where appropriate, the maximum number.

According to Art. 67 (5), Art. 31 (5) award criteria shall be specified (including weighting) in the tender notice or procurement documents.

Innovation Partnership



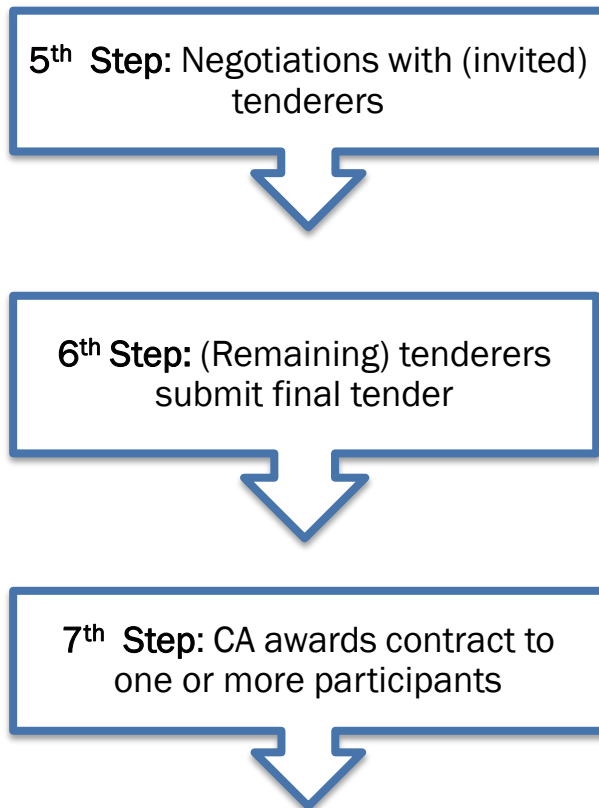
Art. 31(6): In selecting candidates, contracting authorities shall in particular apply criteria concerning the candidates’ capacity in the field of research and development and of developing and implementing innovative solutions.

In (...) innovation partnership the minimum number of candidates shall be three. In any event the number of candidates invited shall be sufficient to ensure genuine competition.

Art. 65(3): The contracting authorities shall invite a number of candidates at least equal to the minimum number. However, where the number of candidates meeting the selection criteria and the minimum levels of ability as referred to in Article 58(5) is below the minimum number, the contracting authority may continue the procedure by inviting the candidates with the required capabilities. In the context of the same procedure, the contracting authority shall not include economic operators that did not request to participate, or candidates that do not have the required capabilities.

Only those economic operators invited by the contracting authority following its assessment of the requested information may submit research and innovation projects aimed at meeting the needs identified by the contracting authority that cannot be met by existing solutions.

Innovation Partnership



Art. 31 (3): Unless otherwise provided for in this Article, contracting authorities shall negotiate with tenderers the initial and all subsequent tenders submitted by them, except for the final tender, to improve the content thereof.

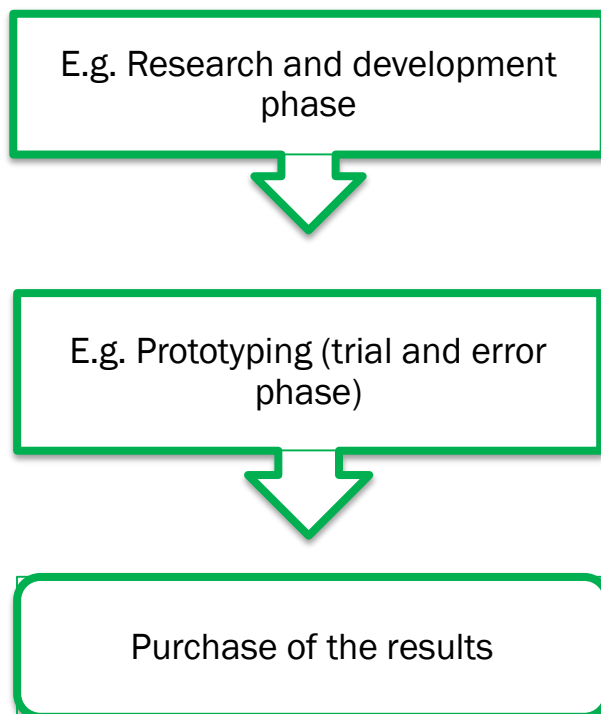
The minimum requirements and the award criteria shall not be subject to negotiations.

Art. 31 (5): Negotiations during innovation partnership procedures may take place in successive stages in order to reduce the number of tenders to be negotiated by applying the award criteria specified in the contract notice, in the invitation to confirm interest or in the procurement documents. In the contract notice, the invitation to confirm interest or in the procurement documents, the contracting authority shall indicate whether it will use that option.

Art. 31 (1): The contracts shall be awarded on the sole basis of the award criterion of the best price-quality ratio in accordance with Article 67.

Innovation Partnership

Contract Phases:

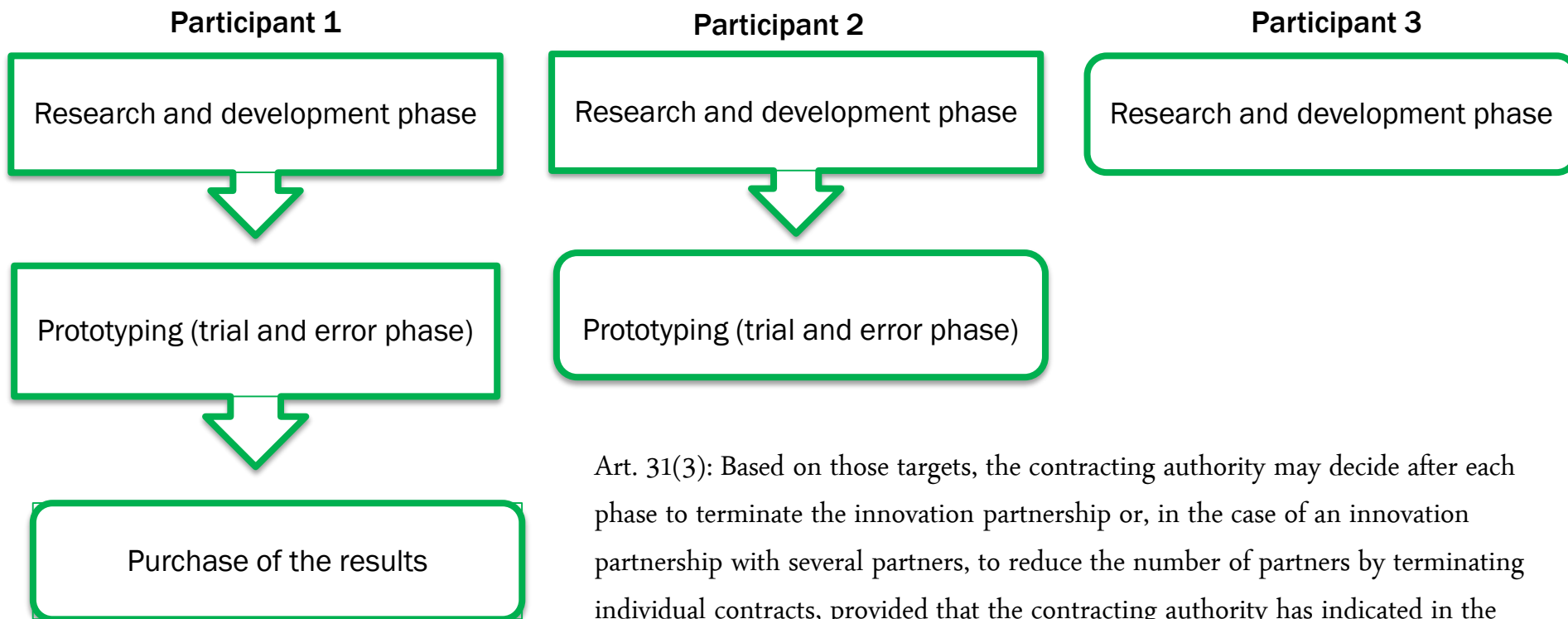


Art. 31(2): The innovation partnership shall aim at the development of an innovative product, service or works and the subsequent purchase of the resulting supplies, services or works, provided that they correspond to the performance levels and maximum costs agreed between the contracting authorities and the participants.

The innovation partnership shall be structured in successive phases following the sequence of steps in the research and innovation process, which may include the manufacturing of the products, the provision of the services or the completion of the works. The innovation partnership shall set intermediate targets to be attained by the partners and provide for payment of the remuneration in appropriate instalments.

Art. 31(7): The contracting authority shall ensure that the structure of the partnership and, in particular, the duration and value of the different phases reflect the degree of innovation of the proposed solution and the sequence of the research and innovation activities required for the development of an innovative solution not yet available on the market. The estimated value of supplies, services or works shall not be disproportionate in relation to the investment required for their development.

Innovation Partnership



Art. 31(3): Based on those targets, the contracting authority may decide after each phase to terminate the innovation partnership or, in the case of an innovation partnership with several partners, to reduce the number of partners by terminating individual contracts, provided that the contracting authority has indicated in the procurement documents those possibilities and the conditions for their use.

Innovation Partnership

Rules the CA has to apply to during the negotiations:

Equal treatment of all tenderers. To that end, they shall not provide information in a discriminatory manner which may give some tenderers an advantage over others. They shall inform all tenderers of any changes to the technical specifications or other procurement documents other than those setting out the minimum requirements.

Following those changes, contracting authorities shall provide sufficient time for tenderers to modify and re-submit amended tenders, as appropriate.

CA shall not reveal to the other participants confidential information communicated by a candidate or tenderer participating in the negotiations without its agreement.

In the case of an innovation partnership with several partners, the CA shall not reveal to the other partners solutions proposed or other confidential information communicated by a partner in the framework of the partnership without that partner's agreement.

The minimum requirements and the award criteria shall not be subject to negotiations.

Critical voices

Telles/Butler, Public Procurement Award Procedures in Directive 2014/24/EU:

With regard to the research and innovation process, this may include the manufacturing of the products, the provision of the services or the completion of the works.¹⁵⁰ However, the sequence of steps in the research and innovation process is not clear. The Directive does not define research, or, more specifically, R&D nor prototyping and manufacturing processes. Further, it has not been made clear in Article 31 or elsewhere in the Directive whether these steps correspond to Pre-Commercial Procurement (“PCP”) phases.¹⁵¹ It appears anomalous to provide guidance on the PCP model but no guidance on the corresponding use of such pre-commercial procurement phases under the innovation partnership procedure. Comparable guidance on the R&D phase under the innovation partnership procedure could prove useful to contracting authorities.

Critical voices

Art. 31(6) stipulates: In selecting candidates, contracting authorities shall in particular apply criteria concerning the candidates' capacity in the field of research and development and of developing and implementing innovative solutions.

Telles/Butler, Public Procurement Award Procedures in Directive 2014/24/EU:

It is questionable whether this additional provision is necessarily productive of more legal certainty. Firstly, clarity is not aided by the absence of any definition of R&D.¹³⁸ Secondly, potential issues arise in relation to relatively new suppliers to the market (e.g. start-ups) proposing a solution but which may lack the experience to demonstrate capability. It has been observed that the initial proposal for the Directive made reference not only to the tenderer's capacity but also to their experience whereas Directive 2014/24/EU has omitted reference to experience, allowing contracting authorities to select start up companies that generally have the capacity but not the experience of a large company.¹³⁹

Critical voices

Foreclosing of the market

Telles/Butler, Public Procurement Award Procedures in Directive 2014/24/EU:

It has also been observed that another potentially problematic issue concerns the fact that the preferred supplier is selected before the market has started R&D and without firm evidence of who will be able to develop the best solution.¹⁴² Instead, selection is based on antecedent qualification criteria such as financial capacity (e.g. minimum turnover) and technical capacity (e.g. prior customer references).¹⁴³ On this basis, it has been suggested that there is a risk of lock-in, thereby precluding competition at a point in which there is no substantial proof that the preferred supplier will be able to develop a more suitable solution than other providers.¹⁴⁴ Consequently, there is a risk that offers are not compared on the basis of which offer can deliver the most suitable solution (in the absence of evidence of any results that will come from the R&D) but rather based on other selection criteria and negotiation.¹⁴⁵

Critical voices

Telles/Butler, Public Procurement Award Procedures in Directive 2014/24/EU:

It has also been observed that the Innovation partnership is “poorly drafted” on the duration and cost aspect, allowing significant discretion in deciding the value and duration of any contract.¹⁵⁹ It is possible but difficult to envisage how the EU legislator could realistically regulate the cost variable. However, with regard to duration, there is a conceivable risk of market foreclosure as contracting authorities could potentially set up “innovation partnerships” to get around time limits imposed on framework agreements, for example.

Personal questions and remarks

The procurement documents must be very precise and contain all award criteria which cannot be negotiated, on the other hand the innovation partnership aims to find new solutions and new products, flexibility is needed here. These two approaches seem to be in conflict and it is questionable how this will/can work out in practice.

In the selection phase, candidates are filtered by applying selection criteria. This approach seems feasible in “ordinary” procedures, where existing products and services are purchased and where the experience of the candidates is important. Within the innovation partnership though the “usual” application of selection criteria could exclude newcomers where newcomers should actually be welcomed.

The disadvantage of the standard procedures is that they do not include the contract phase. It is therefore difficult to purchase complex products and services. These products and services need to be developed step by step together with the CA. This is different with the innovation partnership. Since the arrangement of the contract phase of the innovation partnership is open to the CA, the innovation partnership could become an instrument to develop new software through agile methods such as SCRUM in the context of EO services.



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