

Public Contracts Regulations 2015 - Regulation 31

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Regulation 31 - Innovation Partnership

In Regulation 31 we can find the new innovation partnership "procedure" introduced in Article 31 of Directive 2014/24/EU. The purpose of this new "procedure" is to allow for the public and private sector to establish partnerships with the aim of developing an innovative solution. The contracting authority sets what it wants to solve and then works with partners to develop the innovative solution(s).

The innovation partnership raises a number of issues (grounds, structure, intellectual property, confidentiality and state aid) that need to be addressed, but these are too far and too many to touch here today. For a detailed overview of the procedure, [please see the chapter myself and Luke Butler wrote about the public procurement procedures under the Directive 2014/24/EU](#). You should also check two articles published by Marta Andrecka and Pedro Cerqueira Gomes, both in the Public Procurement Law Review over the last few months. Albert's entry for today is also full of valuable insight, so if you are interested to know more about the intricacies of the innovation partnership, start [here](#). My commentary today will focus instead on the rationale behind why the procedure exists and why I view this procedure as a Trojan horse.

The unknown unknowns of the innovation partnership

I have to confess that I was very puzzled when I saw the procedure for the first time and honestly could not see a way for it to be used in practice, but I can say I was (naively) wrong. As Donald Rumsfeld would have said, I fell into a "unknown unknown" trap.

With the information I had then available, the procedure made no sense. Probably all you can do with it related to innovation, can be done with competitive dialogue or the competitive procedure with negotiation. Why creating a third procedure for this then? It does not seem to add much value in comparison with the other tools on the toolkit. When I see a legal rule out of the ordinary (such as the confidentiality I mentioned yesterday) I try to identify who had an interest in getting such rule into the law. With the innovation partnership I simply could not find a logical reason for a constituency to push hard for this to be included. Who could have spent political capital and/or lobbying money to get the innovation partnership in?

This was my view about the procedure until a couple of months ago when someone much smarter than me showed me the obvious answer: this procedure is tailored for the private sector. It is the private sector who tends to benefit the most from this procedure. How may you ask?

#1 - It can run with a single supplier

The first piece of the Trojan horse puzzle is that the innovation partnership is the only procedure where it is stated from the start that it can be run from start to finish with a single supplier. Yes, technically you can run a competitive dialogue or a restricted procedure with less than 3 or 5 suppliers, but you need to set out from the start with at least those numbers as a ballpark figure. And if 3 or 5 good enough suppliers turn up, they are entitled to participate.

Not so with the innovation partnership as Regulation 31(4) clearly states that the innovation partnership may be set up with one or more participants. Although para. 7 refers to the rules of Regulation 65 in terms of limiting candidates, the damage is already done: Regulation 31(4) is a special rule whereas Regulation 65 is a general one. It is probably no coincidence either that Regulation 65 addresses specifically the cases of restricted procedure, competitive dialogue and competitive procedure with negotiation but not the innovation partnership. Why?

Picture this: a supplier with access to a contracting authority offers an innovative solution for a problem and hey the contracting authority does not even have to waste money doing a competitive dialogue or a restricted procedure. They can use this cool new thing call innovation partnership legally from the start with a single supplier. It is even transparent as a call is made, it is not as seedy as the negotiated procedure, oh no. (Remember that this procedure can be used for anything falling under the definition of innovation under Regulation 1 and that is, in my view, a very low threshold.)

Never underestimate the market's ability, interest or incentive in restricting competition.

#2 - It can last for years

The second Trojan horse leg is what the Regulation 31 says about the duration of the partnership. Well, it does not say anything about the duration. In other words, a resulting partnership can last for a long time before anyone can start asking question. Although effectively only framework agreements are technically limited in time to four years, even in that case whatever the procedure used to create the framework implies the possibility of more than one supplier being qualified at the selection stage.

Truth be told, Regulation 31(26) includes a limitation on value (already prevalent in the Directive): the value of the contract cannot be disproportionate to the investment required for its development. Whomever wrote this either understands nothing of R&D costs or, conversely, knows a lot about it.

At face value, this looks like a reasonable limitation imposed by the Directive. However, the language is vague enough so that a lot of costs can be attributed to the "investment required for its development". Case in point: adapting the tooling of a factory for a slightly modified product to be produced for a client implies that the "investment cost" will include not only the adaptation but also the original tooling and eventually the capital costs for the factory. No original tool, no adaptation. No factory, no product.

Another potential exploit of the "investment required for its development" is intellectual property. It is no secret that many companies are internally organised so that their intellectual property sits on a low-tax jurisdiction and is licensed to subsidiaries elsewhere. Let's look at software for example: a multinational company takes part in a software development innovation partnership, with the contracting authority agreeing to pay £1M/year for the innovative solution. By coincidence the underlying IP is owned by a subsidiary based in Ireland which licenses it to the English subsidiary for the purposes of this contract for £5M. Presto, we have just easily justified 6-8 years of a contract to cover for the "investment cost".

Even a tighter definition of R&D costs would not provide full respite, although it would certainly make the financial shenanigans more difficult to pull off. The reason for my scepticism is that the fair development costs can be multiple times bigger than the price a single client will be paying for a product. Do you think Microsoft charges the full Windows development cost to a single customer? Of course it does not.

Innovation Partnership's redeeming quality: flexibility

After all the negativity and concerns about how the procedure can be used, I want to finish on a higher note. The innovation partnership has a redeeming quality and it is its *flexibility*. The kernel of enabling potential change in a few procurement processes is actually there, and as with the competitive dialogue 10 years ago, the innovation partnership will be what the *leading* contracting authorities make of it.

I have long argued that whatever you can do with the innovation partnership, you can do with competitive dialogue or even the competitive procedure with negotiation. I am not yet ready to change the spots on this particular leopard, but have been able to reconsider at least a scenario where the innovation partnership actually can lead to something completely new.

My idea (hopefully the basis for a research project or something more sustainable, hint hint) is that it can solve a particular problem tech based startups have in public procurement: access to public contracts and also the ability to develop their products hand in hand with what the customer wants.

My road to Damascus moment was looking into the work being done in Philadelphia to develop a local startup ecosystem AND connect it to the needs the city have as a client with the Fast FWD project. Something that matches an acceleration programme for startups with a procurement process was not possible under the old rules, but in my view it is entirely possible with the innovation partnership. I am not sure larger companies would like it, but that is a different story. Anyone interested in doing this in Europe?