



The legal framework for Innovation Procurement in Europe

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PCP=Procurement of R&D Services

COM(2007) 799

The scope is R&D services only: R&D can cover activities such as :

solution exploration , design , prototyping, up to the original development of a limited volume of first products or services in the form of a test series

"Original development of a first product or service may include limited production or supply in order to incorporate the results of field testing and to demonstrate that the product or service is suitable for production or supply in quantity to acceptable quality standards"

WTO GPA Article XV (1)(e) and Article XIII(1)(f) of the revised WTO GPA 2014.

R&D does not include commercial development activities such as quantity production, supply to establish commercial viability or to recover R&D costs, integration, customisation, incremental adaptations and improvements to existing products or processes.

PCP Services Procurement: 50 % of contract value must be R&D services



The R&D categories

The boundaries of what R&D may cover under PCPs are set by:

- the 2014 EU State aid framework for R&D&I and
- the WTO Government Procurement Agreement (GPA).

The R&D categories defined in the State aid framework for R&D&I/ (C(2014) 3282) are :

- **Fundamental research**
- **Industrial research**
- **Experimental development**



MAIN CHARACTERISTICS OF PCP



The application of risk-benefit sharing in PCP under Market Conditions

In PCP the public purchaser does not reserve the R&D results exclusively for its own use.

IPR ownership rights are assigned to companies participating in the PCP.
In a way that does not give the companies any form of unfair advantage

To ensure that the risk-benefit sharing is done according to market conditions any R&D benefit shared by the public purchaser with a company participating in the pre-commercial procurement should be compensated by the company to the public purchaser at market price.

This can be achieved through:

- Price reduction compared to exclusive development cost that reflects the market value of the benefits received and the risks assumed by the company
- Royalties on the sales



A competitive procurement designed to exclude State aid

- Challenge the market in an open and transparent way
- Organise the procurement as a stepwise process, including evaluations after each R&D phase, in order to select progressively the best solutions
- Increase efforts after each R&D phase to achieve interoperability and product inter-changeability between the alternative solutions under development
- Retain at least two participating companies until the last phase to ensure a future competitive market and avoid lock ins



Separation between R&D phase and deployment of commercial volumes of end-products

Pre-commercial procurement is a preparation exercise which enables public purchasers to filter out technological R&D risks of potential alternative solutions before committing to procuring a large scale commercial roll-out.

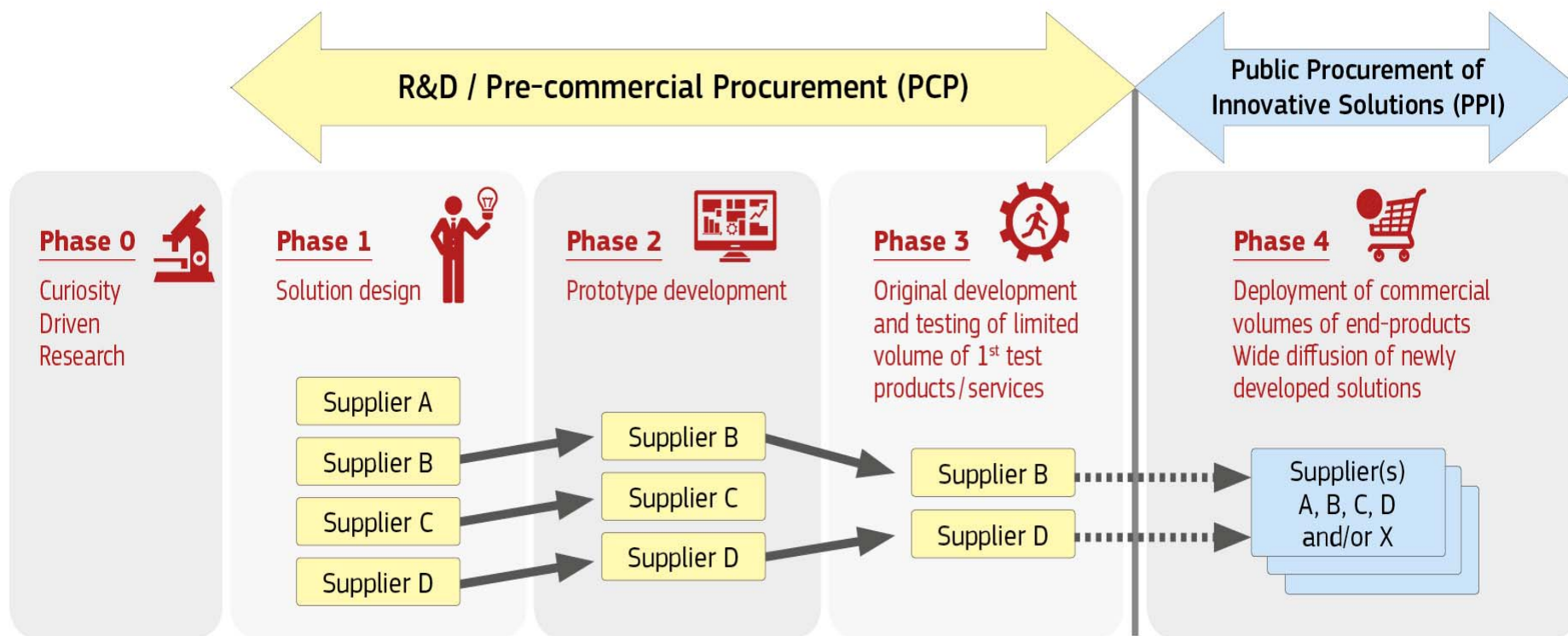
Separation from public procurement for commercial roll-out enables pre-commercial procurement to focus on acquiring the knowledge needed to identify the "best" possible solution the market can offer at the time of commercial roll-out, without leading to unilateral State aid to industry.

Innovation Procurement = PCP + PPI / Complementarity



Pre-Commercial Procurement(PCP) to steer the development of solutions towards concrete public sector needs, whilst comparing/validating alternative solution approaches from various vendors

Public Procurement of Innovative Solutions(PPI) to act as launching customer / early adopter / first buyer of innovative commercial end-solutions newly arriving on the market





LEGAL FRAMEWORK OF PCP

IN RELATION TO ITS CHARACTERISTICS



PCP LEGAL FRAMEWORK

Recital 47 Directive 2014/24/EU (Public Sector Directive)

Recital 57 Directive 2014/25/EU (Utilities Directive)

- Encourage Contracting authorities/entities to make the best strategic use of public procurement to spur innovation**
- Clearly state that PCP lies outside their scope**

NEW These provisions were not included in the Directives 2004/18/EC and 2004/17/EC



PCP LEGAL FRAMEWORK

PCP exempted from EU Procurement Directives:

article 14 of Dir 2014/24/EU (Public Sector Directive)

art.32 of Dir. 2014/25/EU (Utilities Directive)

art.13(f)(j) of Dir 2009/81/EC(Defense/Security Directive)

The Directives only apply to contracts for research and development services 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.

PCP is excluded from the Remedies Directives (in particular Dir.2007/66/EC which amended Directives 89/665/EEC and 92/13/EEC)



PCP LEGAL FRAMEWORK

The fundamental principles of the Treaty for the Functioning of the European Union (TFEU) and the principles deriving therefrom are applicable.

In particular:

Transparency - contract procedures must be transparent and contract opportunities should generally be publicised

Equal treatment and non-discrimination - potential suppliers must be treated equally

Proportionality - procurement procedures and decisions must be proportionate



PCP LEGAL FRAMEWORK

- *The European Economic Area (EEA) and Stabilisation and Association Agreements with partner countries of the European Neighbourhood Policy.*
- *The EU competition rules*



PCP FRAMEWORK

**COMMISSION STAFF WORKING DOCUMENT
SEC(2007) 1668**

that accompanies the

**COMMISSION COMMUNICATION COM(2007) 799 final
*"Pre-commercial Procurement: Driving innovation to
ensure sustainable high quality public services in Europe"***



PCP = State aid free

Article 33 of the Framework for state aid for R&D&I/ C(2014) 3282

PCP is a state aid free case if implemented according to COM(2007) 799

In particular:

- the price paid for the **relevant services fully reflects the market value** of the benefits received by the public purchaser and the risks taken by the participating providers.
- the selection procedure is **open, transparent and non-discriminatory**, and is based on objective selection and award criteria specified in advance of the bidding procedure
- the envisaged **contractual arrangements describing all rights and obligations of the parties**, including with regard to IPR, are made available to all interested bidders in advance of the bidding procedure
- the procurement **does not give any of the participant providers any preferential treatment in the supply of commercial volumes** of the final products or services to a public purchaser in the Member State concerned



PCP = State aid free

Framework for state aid for R&D&I/ C(2014) 3282

In addition :

any service provider to which results giving rise to IPR are allocated is required to grant the public purchaser unlimited access to those results free of charge, and to grant access to third parties, for example by way of nonexclusive licenses, under market conditions



PCP EXEMPTED FROM WTO GPA

R&D services are excluded from the scope of the WTO GPA
(ANNEX IV GPA)

PCP is exempted from the WTO GPA on condition that the PCP is
limited to original development

WTO GPA 1994 Article XV (1)(e) and Article XIII(1)(f) of the
revised WTO GPA 2014 applicable for subsequent –
limited/developed through PCP prototypes - supply contracts after
the PCP has finished.



LEGAL FRAMEWORK OF PPI



PUBLIC PROCUREMENT OF INNOVATIVE SOLUTIONS (PPI)

- Public sector buys innovative solutions acting as a launch customer for innovative goods or services which are not yet available on large scale commercial basis

- PPI contains also the deployment of the purchased innovative solution

- R&D stays out of the scope of the PPI

- PPI may include conformance testing before the awarding of the contract

Testing to determine whether a product or system or just a medium complies with the requirements of a PPI procurement specification (or regulation)



(Legal) framework of PPI

- EU Procurement Directives are applicable – where applicable - / EU Remedies Directives are also applicable
- Any type of procurement described in the EU Procurement Directives can be chosen for its implementation – No Innovation Partnerships
- PCP/PPI - Legally separated procurements. PCP may or may not precede a PPI
- Early notifications (through PINs) about the intention to buy trigger the market
- Open market consultations/meet the buyers events help the communication of the need/call for tenders
(**NEW** Market consultations art.40 Dir 2014/24/EU, Art.58 2014/25/EU)
- Aggregation of demand through joint procurements – and cross-border - (**NEW** articles 38/39 Dir 2014/24/EU and art. 56/57 Dir.2014/25/EU) for the benefit of procurers/market



INNOVATION PARTNERSHIPS VS PCP/PPI



INNOVATION PARTNERSHIPS

Article 31 Directive 24/2014 – Main characteristics

- **Content:** Combination of the purchase of R&D and the subsequent purchase of the resulting supplies, services or works in one procedure
- **Set up:** The procurer may decide to set up the innovation partnership with one or several suppliers
- **Execution :** Innovation partnerships are structured in successive phases following the sequence of steps in the R&I
- **Termination:** procurer 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 such possibilities / conditions.



Innovation Partnerships and state aid

Framework for state aid for R&D&I/ C(2014) 3282

Article 33 par.c – Not a priori consideration that it is a state aid free case if:

"the procurement gives any of the participant providers any preferential treatment in the supply of commercial volumes of the final products or services to a public purchaser in the Member State(29) concerned"

Reference 29 introduces an exception for the following case

"Without prejudice to procedures that cover both the development and the subsequent purchase of unique or specialised products or services."



MAIN DIFFERENCES BETWEEN PCP/PPI – INNOVATION PARTNERSHIPS . 1

PCP/PPI = A priori are state aid free (if implemented according COM(2007) 799/ EU Procurement Directives respectively)

Only the purchase of unique or specialised products or services through Innovation Partnerships is state aid free.



Purchase of unique or specialised products or services through Innovation Partnerships

- Procurer intends to buy a specialized/unique product/service
- He is the only customer
- Limited amount of economic operators can perform the contract
- All of them can be accommodated to participate as candidates during the R&D phase and are allowed to make offers for the purchase of the final end-products
- A new supplier arrives on the market – worldwide – the procedure should be stopped in order not to foreclose competition.
- Zero competition distortion risk only if procurer is 100% that the product/service is so unique that there is only 1 possible supplier



CONCLUSION

- There is no way to prevent foreclosing of competition where there is a larger market for the innovative solution (or components or variations) and interest among the economic operators to develop these solutions.
- Innovation Partnerships should be used only for the purchase of specialized/unique product/service
- Only separation between the R&D and the purchase/deployment stages (PCP/PPI) is preventing the distortion of competition
Reason why PCP/PPI are state aid free (if implemented according COM(2007) 799/ EU Procurement Directives respectively)



MAIN DIFFERENCES BETWEEN PCP/PPI – INNOVATION PARTNERSHIPS .2

- PCP/PPI : Legal separation between R&D and purchase /deployment of the innovative solution
- Innovation Partnerships – combination of R&D and purchase/deployment of the innovative solution in one procedure
(Commitment to purchase the outcome of R&D – Procurer may decide to terminate earlier the contact . The procurer must evidence the reason for the early termination of the contract / not satisfied with the R&D outcome)
- PPI cannot be implemented through Innovation Partnerships



MAIN DIFFERENCES BETWEEN PCP/PPI – INNOVATION PARTNERSHIPS .3

PCP = multi phased / multi sourced procurement – competition is kept at the execution stage (MUST)

Single sourced PCPs are not possible

Innovation Partnerships=The procurer can decide whether an innovation partnership with one or more suppliers will be executed

Single sourced innovation partnerships are possible



Thank you for your attention Questions ?

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