

MODULE 3

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1 Introduction

1.1 Objectives

The objectives of Module 3 are to:

- assist legal experts with the implementation of innovation procurements;
- clarify the main legal provisions, illustrated by case law, applicable to a PCP or a PPI;
- explain the legal specificities of PCP and PPI;
- provide examples on how to formulate procurement documents in compliance with the applicable legal provisions.

1.2 Important issues

The most important issues in Module 3 are detailing and explaining:

- the legal pre-requisites for a successful implementation of Pre-Commercial Procurement (PCP) and of Public Procurement of Innovative Solutions (PPI);
- how to prepare and implement a PCP and/or PPI procurement, covering the activities before and during the procurement up to the award of the procurement contract(s) in full compliance with EU legal provisions governing public procurement; and
- how to manage and monitor an ongoing PCP and/or PPI procurement, covering the activities to be undertaken after the award of the procurement contract(s) and during the implementation of the PCP / PPI contract, according to EU legal rules and principles.

1.3 Links

There is a particularly strong link between Module 3 and, respectively, Modules 1 and 2. Module 3 explains the *how* to draft the legal documentation for PCP/PPI and complements Modules 1 and 2 that focus mainly on the *what* and the *why* to implement PCP/PPI for the policy makers and, respectively, decision makers and procurement officers within public purchasers (e.g., the persons responsible for the coordinating, planning, implementing and executing public procurement strategies and procedures).

1.4 Relevance

Module 3 addresses the legal expert(s) of the public procurer, the person(s) responsible for ensuring compliance of the procurement process with applicable legal provisions. It will be of particular help to legal experts in the drafting of the procurement documents (e.g. the market consultation document, the tender documentation, the drafting of the procurement contract(s) etc.).

The information in Module 3 is based on the EU legal framework applicable to public procurement, as well as on lessons learned from PCP and PPI implemented across Europe. Compliance with TFEU principles, the EU competition rules and the EU and international public procurement legal framework are *sine-qua-non* requirements that apply throughout the entire procurement process. Failure to comply with these sine-qua-non requirements could jeopardize the entire procurement process.

2 A step-by-step approach to innovation procurement

2.1 Introduction

Pre-Commercial Procurement (PCP)

Public procurements of R&D services are exempted from the EU Public Procurement Directives¹, provided that at least one of the below two conditions defined in articles 14 and 32 of the Public Sector Directive and of the Utilities Directive, respectively, are fulfilled:

- the procurer does not reserve the benefits of the R&D exclusively for himself;
- the procurer does not wholly remunerate the provided Module 3 outlines the EU legal framework at each stage during the preparation and implementation of a PCP and/or of a PPI procurement.

R&D service

PCP is exempted from the EU public procurement directives because the first condition applies (the procurer leaves ownership of IPR generated by R&D providers during the PCP contract with the R&D service providers). The R&D providers that are selected according to best value for money criteria to provide the R&D services are paid the full price they quoted in their offer for delivering the R&D services under the pre-defined IPR conditions.

PCP is exempted from the application of the EU Public Procurement Directives, but remains subject to:

- the TFEU principles and derived principles (e.g. transparency, non-discrimination, equal treatment);
- the EU competition rules including specific provisions to exclude State aid.
- any applicable national public procurement provisions that apply to PCP specifically or to public procurements exempted from the EU public procurement directives.

In addition, policy documents emanating from the European Commission provide guidance on PCP:

- the Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Region, “Pre-commercial procurement: driving innovation to ensure sustainable high quality public services in Europe”, COM(2007) 799 final, 14.12.2007 (**PCP Communication**);
- the Commission Staff Working Document, Example of a possible approach for procuring R&D services applying risk-benefit sharing at market conditions, i.e. pre-commercial procurement, SEC(2007) 1668, 14 December 2007 (**PCP Staff Working Document**).

A comprehensive list of policy documents regarding implementation of PCP procurements is available here:

<https://ec.europa.eu/digital-single-market/en/news/eu-policy-initiatives-pcp-and-ppi>.

¹ However, the Treaty for the Functioning of the European Union remains applicable.

PPI is, in principle, fully covered by the European Public Procurement Directives:

- [Directive 2014/24/EU](#) on public procurement and repealing Directive 2004/18/EC (Public Sector Directive)
- [Directive 2014/25/EU](#) on procurement by entities operating in the water, energy, transport and postal services sectors and repealing Directive 2004/17/EC (New Utilities Directive)
- Directive [2009/81/EC on defence and sensitive security procurement](#).

Two other directives apply to complaints and review of the procurement procedures²:

- [Directive 89/665/EC](#) on the coordination of the laws, regulations and administrative provisions relating to the application of review procedures to the award of public supply and public works contracts (Remedies Directive for the Public Sector); and
- [Directive 92/13/EC](#) coordinating the laws, regulations and administrative provisions relating to the application of Community rules on the procurement procedures of entities operating in the water, energy, transport and telecommunications sectors (Remedies Directive for the Utilities Sector).

Additional legal deeds complementing the ones above include:

- [Directive 2001/78/EC](#) on the use of standard forms in the publication of public contract notices
- [Regulation 2151/2003](#) amending Regulation 2195/2002 on the Common Procurement Vocabulary (CPV); updated CPV codes were adopted under Regulation 213/2008
- [Regulation 1564/2005](#) establishing standard forms for the publication of notices in the framework of public procurement directives; however, the applicability of this Regulation is questionable, given the fact that the new public procurement directives establish, by means of their annexes, the information that needs to be included in contract / award notices.

Module 3 provides an in-depth analysis of the practical implications of the applicable EU legal framework at each of the following steps in the preparation and implementation an innovation procurement:

- Section 2.2 Needs identification and assessment;
- Section 2.3 Prior art analysis and IPR search;
- Section 2.4 The link to regulation, policy, standardization, labelling and certification;
- Section 2.5 Drafting the business-case;
- Section 2.6 Open market consultation;
- Section 2.7 IPR and confidentiality strategies;
- Section 2.8 Drafting the tender documentation;
- Section 2.9 Conducting the procurement;
- Section 2.10 Monitoring and evaluating the contract performance;
- Section 2.11 Managing after contract issues.

²These so-called 'remedies directives' coordinate national review systems by imposing some common standards intended to ensure that rapid and effective means of redress are available in all EU countries in cases where tenderers consider that contracts have been awarded unfairly. Both remedies directives have been significantly modified by the Directive 2007/66/EC amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts.

2.2 Needs identification and assessment

The main “*how to*” issues pertaining to the conduct of needs identification and assessment have already been addressed in Module 2 dedicated to public procurers (see section 2.1 of Module 2).

There are no express legal requirements regarding the conduct of the needs identification and assessment.

The public procurement legal framework does not prescribe what a public procurer should purchase or how a public procurer should identify its needs. It prescribes the rules and principles to follow when conducting a market consultation and conducting the procurement for a specific need identified by the procurer. The public procurer possesses large discretion in formulating its need.

In certain sectors though, there may be EU or national legislation that prescribes certain characteristics of the purchased products, services or works. The legal expert needs to be aware of any applicable legislation and set the boundaries for defining the public need accordingly.

EXAMPLE

The EU Energy Performance of Buildings Directive requires the EU countries to set minimum energy performance requirements for all new buildings and to ensure they are nearly zero-energy by 31 December 2020. In the Netherlands, for example, legislation (Bouwbesluit) sets minimum energy performance requirements and provides a calculation method (energy performance coefficient (EPC)) to check compliance.

Source: <https://www.rijksoverheid.nl/onderwerpen/bouwregelgeving/inhoud/bouwbesluit-2012>

Generally, such legislation does not constitute an obstacle to innovation procurement. Most of the times, such legislation sets minimum performance criteria, that do not prevent the public procurer from formulating advanced needs that may only be met by innovative solutions or that are still unmet by existing solutions. In other cases, legislation may require the procurer to take into account in the procurement specific impacts (e.g. environmental impacts) linked to the operation of a product (see example below).

EXAMPLE

The EU Clean Vehicles Directive requires public purchasers and private companies operating public transport services to take into account environmental impacts linked to the operation over the lifetime of vehicles in procurement procedures. The Directives defines common rules on how to monetize impacts and calculate the operational lifetime costs for energy consumption, CO2 emissions and pollutant emissions (NOx, NMHC and PM) of vehicles. By applying the formula that calculates the environmental impacts, public procurers will be able to purchase vehicles with improved environmental performance.

Source: <http://www.clean-fleets.eu/about-clean-fleets/clean-vehicles-directive/>

Identifying and assessing needs is the basis (together with the prior art analysis, IPR search and market consultation) for justifying whether to use a PCP or a PPI to address the need (see next section):

2.3 Prior Art analysis and IPR search

The EU public procurement directives do not prescribe how a public procurer should proceed when initiating and conducting initiate, conduct or interpret the results of a prior art analysis / IPR search and how to interpret the results of such a research. Practical guidance in this respect is available under sections 2.2 and 2.3 of Module 2.

For the legal adviser, the prior art analysis and IPR search, together with the needs assessment will:

- a) provide the justification for deciding whether to start a PCP from the Procurement Directives or a PPI. A PCP may be started when the prior art analysis and IPR search reveal that no available solution can meet the need of the procurer, and R&D is still required, and there are several potential customers for the solutions on the market (so it makes sense to leave IPR ownership with suppliers). A PPI may be started when the prior art analysis and IPR search reveal that there are solutions close to the market and/or no real R&D is needed (possibly still some product adaptations or scaling up of production).
- b) signal that a PCP or PPI may not be viable, when there are already parties on the market who own 'key IPR' (IPR that cannot be avoided to address the identified need(s) which they refuse to license out under fair and reasonable market conditions).
- c) signal legal risks related to third-party IP infringement, when market parties own IPR that is partially or fully relevant to addressing the identified need. This is relevant to both PCP and PPI. The contractors may face IPR barriers when trying to deploy their solutions.

The market consultation can help further understand the technological trajectories and IPR strategies of relevant market players. In case the developed solutions are vulnerable to third party IPR infringement claims (see also section 2.7.2.3 below), the public procurer may choose to check if relevant IPR holders are willing to license out their IPR and/or participate themselves in the procurement.

In cases where the IPR-holder refuses to license its relevant IPR, the public procurer may choose to investigate (and discuss at the open market consultation) if it is possible to design around existing blocking IPR and then design the functional specification for the PCP or PPI around this blocking IPR. In cases where this might not be possible, then the public procurer may consider that the risks of third party IPR infringement are too great for the procurement to viably proceed, and may choose to call an end to the procurement. However, this is to be decided on a case-by-case basis and no general rule can be established to this end.

The public procurer may also become that certain providers hold background IPR that is relevant to the planned PCP or PPI. In this case, the public procurer may request bidders to grant to the procurer a license to use his background IPR and to grant licenses to other suppliers.

In case of PPI, the needs identification and assessment together with the prior art analysis can also form the basis for justifying reliance on article 32(3)(a) of the Public Sector Directive and using the negotiated

procedure without prior publication for buying a limited set of prototypes or test products that were developed in a preceding PCP. As the limited set of prototypes of test products were manufactured (during the preceding PCP) purely for the purpose of research, experimentation, study or development (as PCP is an R&D services contract) and nor the PCP nor the procurement to buy the limited set of prototypes and test products includes quantity production to establish commercial viability or to recover R&D costs, the conditions to use the negotiated procedure without prior publication are fulfilled. However, this should not affect competition at the subsequent stage in later procurements when the procurer is purchasing commercial volumes of the solution for wide implementation.

2.4 Legislation, policy, standardization, labelling and certification

As mentioned in section 2.4 of Module 2, both existing and new-to-be-created legislation, policy targets, standards, labels or certifications applicable in the sector of the innovation procurement play an important role in the shaping of both the innovation procurement process and of the procurement documents.

The procurer may need guidance from the legal expert on how to best:

- translate requirements that innovative solutions should comply with "existing" policy targets, legislation, standards, labels or certifications into the functional specifications, evaluation criteria, clauses for testing / validation of solutions and contract performance monitoring for the PCP or PPI.
- trigger the creation of "new" legislation, policy targets, standards, labels or certification to facilitate the market uptake of the new innovative solutions addressed by the PCP or PPI. The legal expert may be called upon to foresee contractual obligations in the tender documents (functional requirements and monitoring mechanisms) that require vendors that participate in the PCPs or PPIs to contribute to standardization, certification or labelling and/or he may be asked for legal arguments to convince the legislator or policy makers to set "new" legislative requirements or policy targets for innovative solutions.

Preamble 95 of the EU public procurement directive 2014/24/EU refers to the possibility to set mandatory sector-specific legislative requirements (e.g. in the energy/transport sector) that would be applicable in innovation procurement.

For more information regarding how to use legislation, standards, labels and certification in the drafting of the procurement documents, see section 2.8.3 (B) hereunder.

EXAMPLE Shockwave Jam PCP

Example of contractual obligation requiring vendors to comply with existing standards

The solution developed by the supplier should comply with all relevant EU and national legislation and any relevant standards deriving from this legislation.

Example of contractual obligation to make solutions from different PCP lots interoperable

In the Shockwave PCP, the Brabant province chose to develop parts of the needed innovative solution (in this case innovative software) in several PCP lots. In each lot several suppliers would compete in developing the best software. The procurer required the suppliers to create connecting software that would ensure interoperability between the solutions developed in different lots.

To this end, the following contractual clauses were included:

“Both Parties [the procurer and the supplier] will designate a contact person. The task of the contact persons is to represent the Parties, to make and coordinate appointments and to take decisions regarding any aspect that may be relevant to the completion of the contract. The contact persons will periodically consult each other with respect to the execution of the contract.”

“Upon request, the supplier will transfer the procurer the IP ownership of the Connecting Software. The Parties are aware and explicitly agree that the Procurer will subsequently make the Connecting Software available to the market under EUPL license.”

Source: Framework Agreement and Phase I Agreement, Shockwave PCP. For more information regarding the Shockwave PCP, see http://www.spookfiles.nl/sites/www.spookfiles.nl/files/documenten/shockwave_traffic_jams_a58_-_background_information.pdf

2.5 Building a business case

Practical guidance on “how to” build a business case are available in section 2.5 of Module 2.

The public procurement legal framework does not prescribe how a public procurer should build a business case for a planned procurement. For the legal expert, the business case will provide a relevant overview of the risks and the expected benefits of the PCP or PPI as well as of the underlying assumptions for the business case to end up positive.

Based on the business-case, the legal expert should draft provisions:

- **To effectively mitigate the risks** identified in the risk analysis that is part of the business case (e.g. when successful uptake and use of the solution depends heavily on how user friendly the deployed solutions are, the legal expert should define tender specifications that require testing of user friendliness by end-users ; when there is a big risk that the solution won't be relevant any more if it's not ready before a certain time, a strict time schedule for monitoring of contract performance can be set in the contract with penalties for late delivery of solutions; to ensure that the procurement does not run out of budget, strict penalty/payment/termination clauses could be foreseen.
- **To ensure that vendors meet the expected benefits** that are needed for a positive business case (the desired quality and/or efficiency improvements in public services that the innovative solutions need to deliver to make the investment in the innovation procurement worthwhile), the expected benefits from the business case analysis should be translated into minimum functionality and/or price requirements, a monitoring framework and possibly also value engineering clauses in the tender documents.

EXAMPLE

1. Termination clause: “The Public Procurer shall terminate the contract when the Supplier/Service Provider is unable to deliver or perform any or all of the goods/Outputs/Deliverables within the periods(s) specified in the contract.”

2. Review clause: “The Public Procurer may decrease the budget available for the next PCP Phase when the business case is recalculated and the procurement becomes less profitable than initially estimated.

Source: Corvers Procurement Services BV

2.6 Open market consultation

2.6.1 Introduction – legal relevance of the market consultation

For preparing an innovation procurement, organizing an open market consultation is preferable compared to hiring one private adviser to help prepare tender specifications. By consulting all interested economic operators, the risk of favoring certain suppliers or certain technologies can be effectively mitigated. Also, the open market consultation helps cross-check the procurer's analysis of the prior art/IPR and standardization/regulatory environment.

For info on different ways of conducting an open market consultation, see section 2.6 in Module 2.

For the legal expert, it is particularly important that the open market consultation confirms the legal justification for the choice of a PCP or a PPI procurement. It should clearly reveal whether the procurement need still requires R&D and thus a PCP may be conducted³; or whether there are solutions that have already moved beyond the R&D stage but are not yet widely commercially proven, in which case a PPI in compliance with the EU public procurement directives may be conducted.

The legal adviser can take the following actions:

- Clarify the aim of the market consultation in the call for participation and explicitly request participants to provide information regarding the stage of development of the needed solutions;
- Stress the importance of obtaining relevant information from the market, during internal discussion with the technical personnel/expert in charge of conducting the consultation.

It is thus important that the legal adviser contributes to the drafting of the open market consultation documents and to the conducting of the open market consultation itself. The legal expert should thus be aware of the legal rules governing open market consultations and how to avoid breaching procurement and competition rules when "consulting the market".

³ In line with article 14 of the new Public Sector Directive and article 32 of the new Utilities Directive.

2.6.2 Legal basis

The legal basis for the conduct of an open market consultation is:

- The TFEU principles and derived principles (equal treatment, non-discrimination, transparency);
- The EU public procurement directives and their transposition into national legislation;
- EU competition rules (e.g. related to distortion of competition and information exchange between competitors).

2.6.2.1 The public procurement rules

The 2014 EU Public Procurement Directives contain specific provisions about consulting the market:

- Article 40 of the Public Sector Directive and article 58 of the Utilities Directive provide that *“Before launching a procurement procedure, contracting authorities may conduct market consultations with a view to preparing the procurement and informing economic operators of their procurement plans and requirements. For this purpose, contracting authorities may, for example, seek or accept advice from independent experts or authorities or from market participants. That advice may be used in the planning and conduct of the procurement procedure, provided that such advice does not have the effect of distorting competition and does not result in a violation of the principles of non-discrimination and transparency.”*;
- Furthermore, article 41 of the Public Sector Directive and, respectively, article 59 of the Utilities Directive complete the general provisions aforementioned and provide the rules for the prior involvement of candidates and tenderers: *“Where a candidate or tenderer or an undertaking related to a candidate or tenderer has advised the contracting authority, whether in the context of Article 40 / 58 (market consultation) or not, or has otherwise been involved in the preparation of the procurement procedure, the contracting authority shall take appropriate measures⁴ to ensure that competition is not distorted by the participation of that candidate or tenderer.”*

Note that these provisions apply irrespective of the subsequent decision of the public procurer to conduct a PCP procurement outside the scope of the EU Public Procurement Directives, or a PPI procurement subject to the EU Public procurement Directives. Also note that according to these provisions, a market consultation can broach the views of the market not only on the tender specifications, but any aspect that may be relevant for the planning and conduct of the procurement (e.g. technological possibilities, suitable procurement procedure, suitable exclusion and selection criteria, suitable IPR conditions, feasibility of budget and time limitations on the procurement etc.).

Stadt Halle case (C-26/03)

The Court of Justice of the EU decided that “every decision of a contracting authority falling under the Community rules in the field of public procurement and liable to infringe them is subject to [...] judicial review [...]”. However, “acts which constitute a mere preliminary study of the market or which are purely preparatory and form part of the internal reflections of the contracting authority with a view to a public award procedure” are not amenable to review.

⁴ All the measures taken during the conduct of the market consultation need to be duly documented in the tender procedure report that public procurers need to draft, in accordance with the provisions of article 84 of the Public Sector Directive and, respectively, article 100 of the Utilities Directive.

The legal expert needs to make sure therefore that the market consultation:

(i) does not violate the principle of non-discrimination

Thus the market consultation must be open to all potentially interested bidders on the entire market (so that it is truly an "open" market consultation); According to the derived Treaty principle of non-discrimination, the market consultation may not restrict participation to the market consultation to national economic operators or operators of a certain type (e.g. SMEs), in the detriment of economic operators from other EU countries or other company sizes. This obligation applies also to PCPs that are exempted from the EU public procurement directives.

Question: Can I promote the Open Market Consultation to specific vendors/industry sectors?

Answer: Yes, as long as you provide the same info about the OMC to all potentially interested vendors and don't inform certain vendors earlier than others.



Good practice:

- publish first the info about the OMC and then send dedicated e-mails/promo messages to specific vendors that you want to encourage to participate in the OMC;
- publish any replies that you give to questions from any vendor via a published FAQ list.

Question: Can I have one-to-one meetings with individual vendors when doing an open market consultation, can vendors provide commercial/confidential info about their solution in confidential way only to me as procurer, or does the whole OMC have to be done *en pleine public*?

Answer: Yes, the OMC can consist of a combination of one part that takes place *en pleine public* and another part that is done as one-to-one meetings with individual vendors. It is up to each vendor himself to decide which info he shares *en plein public* (with other vendors as well) and which info he provides on confidential basis only to the procurer (e.g. via one-to-one meetings). But the procurer has to ensure that he gives exactly the same information to all vendors about the planned procurement/his procurement need (the procurer cannot limit certain info to only some preferred vendors). For example, if the procurer answers a question that other vendors did not ask to a specific vendor in his one-to-one meeting, then he must publish the answer that he gave to this vendor also in a FAQ so other vendors can also check the reply to this question.

(ii) does not distort competition

The market consultation will not distort competition when:

- all relevant information that the procurer provides to economic operators in the market consultation is also communicated to the other economic operators in a transparent, non-discriminatory manner.

- all interested economic operators receive equal chances to formulate an offer in the subsequent procurement and all requirements imposed in the subsequent procurement are not biased towards a specific economic operator or towards a specific proprietary technology;

Question: Can I allow vendors to present their solution approach during an OMC meeting?

Answer: Yes, as long as you give all vendors that are potentially interested in doing this the same chances to do this.

When conducting the open market consultation, the legal expert needs to make sure there is a clear distinction between the open market consultation and the subsequent public procurement.

EXAMPLE of provision in the market consultation document

Any company may participate in this market consultation. Participating in this market consultation is free of any engagement and will never lead to any obligation between the procurer and your company. (Non) participation by a company will neither exclude this company from future tenders nor will it have any influence on its opportunities.

Source: CHARM PCP project, Market consultation document



Encouraging competition does not mean that the public procurer may not formulate ambitious requirements that may not be fulfilled by all economic operators.

Question: What can I present as procurer to vendors at an OMC?

Answer:

- Any information about the upcoming procurement that you want vendors to be aware about (e.g. the planned scope of the procurement, the planned conditions (e.g. IPR) for the procurement)
- Any questions you have as procurer on which you want to broach the views of the market (e.g. is this time frame, budget, scope of the procurement that I have in mind realistic? Am I correct that there are no solutions existing yet for this procurement need that I want to address?)

In addition, article 41 of the new Public Sector Directive and article 59 of the new Utilities Directive detail measures that a public procurer should adopt in order to ensure that competition is not distorted when an economic operator who participated in the market consultation or provided advice on the planning and conduct of the procurement, submits an offer for the subsequent procurement: *"Such measures shall include the communication to the other candidates and tenderers of relevant information exchanged in the context of or resulting from the involvement of the candidate or tenderer in the preparation of the procurement procedure and the fixing of adequate time limits for the receipt of tenders. The candidate or tenderer concerned shall only be excluded from the procedure where there are no other means to ensure compliance with the duty to observe the principle of equal treatment. Prior to any such exclusion, candidates or tenderers*

shall be given the opportunity to prove that their involvement in preparing the procurement procedure is not capable of distorting competition. The measures taken shall be documented in the individual report required by Article 84."

To ensure that information is shared with all the market players who are interested in bidding in the subsequent procurement (whether they participated in the market consultation or not), while protecting commercially sensitive information, the market consultation document could specifically mention that:

"All ideas submitted by industry will be treated as Commercial in Confidence. No part of these will be made public. However, relevant insights (shared openly by industry during the open market consultation meeting) are subject to publication and may be used by procuring entities to shape future strategies".

Source: CHARM PCP project, Market consultation document; <http://www.projectcharm.info/>

Question: Can I reveal commercial information or technical information obtained in confidence during the OMC from one vendor to other vendors?

Answer: No, the procurer may not disclose commercial info or confidential info from one vendor to another vendor. See Module 2 section 2.6.3 regarding the use of the Planning Poker technique in the Smart@Fire PCP, to ask the opinion of vendors on certain issues related to the procurement without making them reveal commercial/confidential information to each other.

(iii) does not violate the principle of transparency

The principle of transparency is essentially intended to preclude any risk of favoritism or arbitrariness on the part of the public procurer.

Succhi di Frutta case

In *Succhi di Frutta* case,⁵ the European Court of Justice stated that the transparency principle requires that all the conditions and detailed rules of the procurement procedure must be drawn up in a clear, precise and unequivocal manner in the notice or contract documents so that:

1. all reasonably informed tenderers exercising ordinary care can understand their exact significance and interpret them in the same way; AND
2. the public procurer is able to ascertain whether the tenders submitted satisfy the criteria applying to the relevant contract.

In the case of a market consultation, the principle of transparency implies the following:

- to announce in advance the intention to organise a market consultation to all possibly interested vendors (e.g. by publishing a PIN) (see the market consultation PIN template attached to this Toolkit);
- to allow sufficient time to interested economic operators to express their interest in participating;
- to publicize in advance the rules for participation;

⁵ Case C-496/99 *Commission of the European Communities v CAS Succhi di Frutta SpA* [2004] ECR I-3801 paras 110-1.

- after the market consultation, to publish the information provided by the procurer to economic operators (e.g. by means of a FAQ list, by videotaping the entire Open Market Consultation etc.);
- to allow economic operators to submit comments.

The Public Procurement Directives do not mandate a specific form for publishing Open Market Consultations notices. However, in order to ensure compliance with the transparency principle, it is advisable to conduct the market consultation in English and announce it via a PIN in the Official Journal of the European Union. This allows a large number of economic operators to participate.

The market consultation may also reveal information needed to justify compliance with national procurement legislation. The legal expert should design the market consultation such as to produce the needed information.

EXAMPLE

In the Netherlands, the Public Procurement Law prohibits unnecessary clustering of contracts. A procurer who wants to cluster contracts, should consider, among others, the composition of the relevant market and the impact clustering would have on small and medium size suppliers. The market consultation has the potential to reveal the composition of the market and to substantiate the procurer's decision to cluster contracts or not.

Source: Aanbestedingswet 2012 <http://wetten.overheid.nl/BWBR0032203/2016-07-01>

2.6.2.2 The EU competition rules

In order to prevent the exchange of information which eliminates uncertainties about the actions and strategies of competitors within the context of a market consultation, the public procurer should not share commercially sensitive information with other competitors. Specifically:

- information should be anonymized;
- reference to specific economic operators should be left out of market consultation reports, etc.

But the procurer may publish the names of the companies that participated in the OMC. However, for privacy reasons, the names of the individual persons that attended should not be published without their explicit permission.

The procurer is not responsible if companies engage in collusive practices during the Open Market Consultation, at least if he did not encourage those companies to do so.

To sum up...

If competitors who together make up a significant market share engage in the frequent exchange of recent / future, detailed, individual, private information (to have an effect on inter-MS trade), either directly or by means of an intermediary, this is classified under competition law as an infringement by object, which is,

based on the provisions of the 2011 Commission Communication⁶, presumed to cause competitive harm. Nonetheless, due to the specificities of each case, the competition authority investigates such a potential exchange of information between competing firms on a case-by-case basis, also taking into consideration the characteristics of the industry concerned.

2.6.3 Legal considerations related to the organization of a market consultation

In this section we focus on guidance to the legal expert of the public procurer, regarding the rules applicable at each stage in the market consultation process:

(i) **Announce an open market consultation widely and well in advance:**

- ❖ Publish a Prior Information Notices (PIN) in the Official Journal of the European Union (OJEU) to ensure legal compliance with the transparency principle in terms of announcing an upcoming open market consultation widely (see the market consultation PIN template attached to this Toolkit); In case of multiple open market consultation meetings, announce all of them via a PIN or multiple PINs.

Publication of the PIN 'well in advance' (e.g. 2 months instead of 1 week) before the actual market consultation starts is important to give all potentially interested bidders enough time to make the necessary practical preparations (e.g. preparing responses, travel arrangements) to participate in the open market consultation.

Keep in mind that additional promotion of the market consultation (e.g. at sector specific industry events, online communities etc.) should be done 'after' publication of the PIN, to ensure that all vendors are being treated equally (no vendors receive preferential treatment / earlier information access than others).

- ❖ Ensure that the PIN calls for an 'open' market consultation. All potentially interested bidders should be allowed to participate from all the countries with which the EU has public procurement agreements. Don't limit open market consultations to companies from only your country, to only specific types of companies (e.g. SMEs), or to companies only from EU Member States (even for PCP there can be no discrimination of potential bidders from countries with which the EU has an association or stabilization agreement in the context of the EU neighborhood policy).

(ii) **Define the market consultation documentation:**

The market consultation document should clearly describe the procurement and public procurers, the goals of the market consultation, the form and planning of the consultation etc. A potential indicative structure of a market consultation document is outlined below:

⁶ The Commission Communication establishing the Guidelines on the applicability of article 101 of the Treaty on the Functioning of the European Union ("TFEU") to horizontal co-operation agreements (2011/C 11/01).

- reasons for holding a market consultation and procurement background
- goals of the market consultation
- approach
 - an explicit assurance by the public procurer that no economic operator involved in the market consultation phase will be excluded from the tender procedure, based on the mere fact that it participated in the closed brainstorming sessions and/or open market dialogue;
 - express warning that it is the responsibility of all participating parties to respect relevant legislation in the field of public procurement, competition, intellectual property, etc.
- criteria to allow/select participants (e.g. particularly in security sensitive projects).
- planning/timetables.



The market consultation document should reserve the right of the public procurer to amend the timetable of the market consultation.

EXAMPLE of market consultation timetable (CHARM project)	
Industry Event – PIN Notice	9 March 2012
Publication of Market consultation round 1	29 March 2012
Industry Event	29 March 2012
Deadline for questions about the market consultation	10 April 2012
Publication of answers of the CHARM consortium to the questions about the market consultation	17 April 2012
Deadline for return of questionnaire	1 May 2012
Insights of round 1 to be communicated widely	June 2012
Market consultation round 2	June – October 2012
Insights of round 2 to be communicated widely	December 2012

- expected input (including specific questions):
 - a mutual explicit expectation for an ambitious and innovative outcome is advisable.
- procedural steps during the market consultation:
 - explain the different stages in the market consultation (e.g. written questionnaire followed by oral consultations, public and/or individual closed door meetings);
 - explain how confidentiality will be safeguarded (e.g. in case of security sensitive procurements);

Example of a confidentiality clause

“All data provided by the Applicant will be handled confidentially, unless statutory obligations demand the publication of this data and/or the Applicant agrees with the publication of the provided data.”

Source: Corvers Procurement Services BV

- legal framework for the market consultation:
 - outline the applicable rules deriving from the Public Procurement Directives for PPI;
 - outline the relevant EU competition rules;explain what outcomes will be published (at least all Q&A) and where they will be published.

(iii) Conduct the consultation:

At this stage the legal expert should safeguard compliance with the equal treatment, non-discrimination and transparency principles. The legal expert may remind participating companies what exchanges of information are prohibited by the competition rules (as detailed in section 2.6.2 above).

(iv) Publish a report of the consultation:

- ❖ the report of the market consultation should outline the broad topics of discussion and all answers that were given by the procurer to questions from potential tenderers in an anonymous form;
- ❖ the open market consultation can be filmed and put online (see e.g. www.imaile.eu)
- ❖ the draft report could be offered to the participants for verification;
- ❖ as the open market consultation is a public event, names of companies that attended the open market consultation could be published to encourage further networking also between vendors that were not able to attend;
- ❖ in order to ensure compliance with the transparency principle, the report should be available to all other potentially interested bidders. It is normally published openly (e.g. on the website of the envisaged procurement).

The public procurer may need to obtain from the economic operators sensitive commercial information, in order to formulate a suitable procurement documentation. In this case, the public procurer will not be able to make this information public through the market consultation report. One suitable approach is for the public procurer to keep sufficient documentation (individual report on the preparation and conduct of the procurement) to demonstrate that the sensitive information was not used in the procurement to distort competition.⁷

(v) process into the procurement decisions the intelligence gathered during the market consultation:

- ❖ interpret results to decide whether the solution to the identified need already exists or it needs to be developed;

⁷ Article 84(2) of the new Public Sector Directive.

- ❖ interpret results to see if there is a need to go back to the market for further input;
- ❖ interpret results to define outcome based specifications; etc.

At this stage the legal expert will safeguard compliance with the procurement principles (in case of PCP) and with the provisions of the Public Procurement Directives (in case of PPI). This is discussed in detail in section 2.8 below.

2.7 IPR and confidentiality strategies

2.7.1 Introduction and legal basis

Section 2.7 of Module 2 discussed the general IPR-related issues that procurers face when they engage in PCP and PPI.

It is important to clarify that for all procurements of R&D, including but not only limited to PCPs, several competition considerations must be taken into account in the definition of the tender documents preceding the generation of IPRs.

Section 2.3 article 33 of the State Aid Framework for R&D&I provides that:

“In all other cases, including pre-commercial procurement, the Commission will consider that no state aid is awarded to undertakings where 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, in particular where all of the following conditions are fulfilled:

- a) 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,
- b) **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,**
- c) 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, and
- d) one of the following conditions is fulfilled:
 - all results which do not give rise to IPR may be widely disseminated, for example through publication, teaching or contribution to standardization bodies in a way that allows other undertakings to reproduce them, and any IPR are fully allocated to the public purchaser, or
 - 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.

In exclusive development type R&D procurements all IPRs are kept by the procurer and the first bullet under d) applies. As discussed in section 2.7 of Module 2, in PCPs this is not the case and the second bullet under d) applies. In PCPs there is:

- allocation of the IPR ownership of the PCP results to the R&D service provider;
- a free license to use the PCP results for internal use for the procurer;
- the right for the procurer to grant licenses (or to require the R&D service provider to grant licenses) to third parties to the PCP results on fair and reasonable market conditions;
- an IPR 'call back' provision which enables the procurer to assume ownership of the generated IPR in the situation where the R&D service provider fails to commercialise the results within an agreed time-frame.

The legal expert should ensure that the contract requires vendors to transfer the IPR obligations (e.g. under the call back clause) also to other vendors in case they get taken over, merge with other vendors.

Before deciding on how to formulate the legal clauses for the IPR distribution, the legal expert should check whether and how national legislation,⁸ transposing Directive 2004/48/EC on the enforcement of intellectual property rights, is governing the division of IPR in public procurement.⁹

In some EU countries the default situation in public procurement law (if no clauses are foreseen in the procurement contracts that change this) is that all IPR rights are allocated to the vendors (e.g. Sweden), in other countries that all IPR rights are allocated to the public procurers (e.g. Netherlands, Greece).

Question: Can the procurer chose him/(her)self how to distribute the IPR rights/obligations? Can the procure, for example, give all IPR rights to the vendors and not keep anything for himself?

Answer: There are countries with mandatory rules about how to deal with IPR in public procurement or default rules about how to deal with IPR in public procurement. The legal expert should verify whether and under which conditions the procurer may deviate from the rules (e.g. the procurer may have to justify the need to deviate from the rules). From a practical point of view, there are some minimum IPR related rights that a procurer should keep himself to not lock himself knowingly into certain vendors, thus to avoid State aid (such as royalty free rights to use and right to require to give license to third parties).

In R&D procurements that do not comply with the above conditions in article 33 of the R&D&I State aid rules and are implemented as State aid, the procurer will be limited to the percentages for the R&D&I aid intensities that are defined for the different categories of R&D in the State aid rules.¹⁰

⁸ In Greece, for example, L. 2121/1993 on Intellectual Property Rights governing the division of IPR in public procurement.

⁹ The survey on the status of implementation of PCP, performed by the EC in 2010 confirmed that all standard IPR conditions foreseen in national public procurement legislations across Europe allow the specific IPR arrangement that is used in PCP. See <http://cordis.europa.eu/fp7/ict/pcp/pcp-survey.pdf>.

¹⁰ See Framework for state aid for research and development and innovation C(2014) 3282.

Question: Why should all IPR rights/obligations be clarified up front in the contract? Can I not just agree on IPR issues during or after the procurement if and when IPR is eventually created/needs to be exploited?


Answer: As IPR allocation determines to a significant extent the price setting of vendors for their procurement offer, the procurer needs to publish up front in the tender documents the distribution of IPR rights/obligations that it wants to apply in this particular procurer in order to get comparable offers and determine correctly the market price. When the IPR distribution is not made available upfront, the procurer does not benefit of the 'market price' presumption offered by para.33 of the Framework for state aid for R&D&I.

Having now dealt with the IPR-related issues that arise *before* the initiation of the PCP, it is important to look at some of the issues that arise *during and after* the PCP. The following discussion will highlight which aspects are relevant to PPIs as well.

In case of PPIs, the importance of clearly identifying IPR related obligations is recognized by the Public Procurement Directives. Accordingly:

- recital 107 of the Public Sector Directive provides that a new procurement procedure is required in case of material changes to the initial contract, in particular to the scope and content of the mutual rights and obligations of the parties, including the distribution of intellectual property rights. Consequently, clear provisions regarding the IPR arrangements prior to the conduct of the PPI significantly reduces the risk of having to initiate a new procedure due to the need to change the initial distribution of IPRs;
- article 42 of the Public Sector Directive regulating technical specifications also specifically provides that "*the technical specifications may also specify whether the transfer of intellectual property rights will be required.*";
- last but not least, violation of intellectual property rights could be a cause for exclusion or barring economic operators from participating in public procurement procedures, as specifically stated under recital 101 of the Public Sector Directive.

Section 2.7.2.1 in Module 2 explains that the procurer may choose to retain ownership of foreground ownership, usually over solutions that incorporate highly sensitive information or may have national security consequences if it was disseminated or if the provider is not able to commercialize the solution, for example due to the high customer specificity of the solution (e.g. critical ICT infrastructure or Defense-related procurements). In such cases, the legal expert may advise the procurer not to apply for registered IPR (such as patents), but to maintain all knowledge internally as trade secrets and confidential information, regulated by contract (such as Non-Disclosure Agreements, see Section 2.7.3).

 The legal expert should define in the tender documentation any IPR and obligations that the procurer wants to allocate to preferred partners, if any (preferred partners meaning other procurers who decide to follow up the progress of the ongoing procurement without investing in it) .

2.7.2 Managing IPR-related risks

2.7.2.1 Vendor Lock-in

The risk of ‘supplier lock-in’ usually occurs when suppliers of essential products, components or intellectual property maintain their exclusive proprietary rights over the latter, significantly raising costs of switching suppliers. Lock-in situations are common in relation to ICT-systems, where for example, proprietary data formats prevent users from switching to other systems due to lack of interoperability. The downsides of being locked in to a single supplier are essentially those associated with utilizing products produced by a monopoly: significantly higher costs, poorer quality, and less innovation – all due to lack of competition. The risk of lock-in is muted in the case of PCPs because of the approach to work with multiple vendors in all stages. Provided the solutions generated in the PCP meet criteria of interoperability (see ‘open standards’ below and ‘Standardization’ section of Module 2), then lock-in issues can be adequately managed. However, the risk of lock-in in the case of PPI (when it was not preceded by a PCP) may be higher. This is due to the fact that given the pioneering nature of the technology, the private PPI partner may well be the only supplier on the market.

A well-known approach to avoid vendor lock-in is for procurers to insist that suppliers make use of so-called ‘open interoperability standards’ in their supplied technologies; make use of designs that are ‘modular’, wherever possible; and attempt to ensure dual or multi-source supply arrangements for project-critical deliverables. In cases of unavoidable supplier lock-in however, the procurer can still mitigate the risks posed to business continuity (e.g., supplier insolvency) by setting up an escrow with triggering conditions. These approaches will be briefly reviewed below.

Open standards

‘Interoperability standards’ are aspects of technology that enable devices to work together, like the wireless standards ‘Wi-Fi’ or ‘Bluetooth’, or document standards for word processing or spreadsheets. A standard is ‘open’ when there are minimal legal or financial barriers to its use. ICT systems utilizing open standards enable data to be easily migrated between different systems and enable their interoperability with ICT systems produced by other suppliers in subsequent procurement rounds. ‘Open standards’ often require that the IPR ‘reading on’ to them are licensed on either royalty-free or Fair, Reasonable, and Non-Discriminatory (‘FRAND’) conditions. The legal expert is encouraged to stipulate in the tender documents that all standards utilized in the procured solutions conform to the definition of ‘openness’ as defined in the Digital Single Market.

Modular designs

‘Modular designs’ enable hardware parts and software blocks (‘functional units’) to be easily modified, upgraded and replaced without disturbing the rest of the system. Clearly, the possibility of modular designs may be conditioned upon the availability of open standards over the interfaces between the functional units. Although modularity of design may not be possible for all aspect of the project technology, it is well-advised that project-critical deliverables are designed with forethought as to their ease of future upgradeability, maintenance and replacement, including by technology provided by other suppliers. Such

requirements may be included as functional specifications in the tender documents for PCPs, and in some cases, PPIs.

Multi-sourcing arrangements

Ensuring dual or multi-source supply for project-critical technology is another strategy of avoiding lock-in by a single supplier. By maintaining commercial relationships with more than one company with respect to the provision of project-critical technology, the procurer can ensure a degree of competition and business continuity that would be absent in the case of a single supplier. The fact that PCP's include a minimum of three R&D service providers creates the potential for multi-sourcing. Furthermore, clauses which permit the procurer to grant (or to mandate that the R&D service provider grant) non-exclusive licenses to the PCP results under market conditions to third parties also creates the potential for assuring multi-sourcing.

Competitive pricing and continuous innovation by the suppliers is encouraged by the fact the companies must compete to supply the technology in the PPI. Business continuity is ensured since if one of the suppliers becomes insolvent or unable to continue supplies, the second supplier may then take over its volumes. It should be noted that sourcing substitute products from two or more suppliers may also require that the procured technologies are interoperable. To this end, dual and multi-sourcing models may only be possible in the case where an 'open standards' policy is adhered to.

Dealing with 'unavoidable' vendor lock-in

Situations may also arise where the necessary technology is so unique that there is only one supplier on the market and therefore lock-in situations occur by default. Such situations may occur in PPIs rather than PCPs, since PCPs ensure there are at least two possible suppliers, and contain clauses permitting third party licensing of PCP results. PPIs on the other hand may be likely to result in single-supplier scenarios since the technology is often of a pioneering nature with very few, if any, substitutes.

If such indispensable IP is selected despite the risk of lock-in, then public procurers should carefully weigh the following things. They should ensure to only select such IP for inclusion if the projected 'present costs' of the R&D required to reproduce its (non-infringing) functionality is greater than the expected 'future costs' incurred due to supplier lock-in, over the lifetime of the technology. Although these costs cannot be estimated with any certainty, at least a rough calculation should be performed as the long-term nature of many procurements means that the costs associated with technological lock-in might be significant. One persistent risk of lock-in is that procurers become vulnerable to the economic fate of their suppliers. For instance, if a supplier becomes insolvent and unable to continue to invest in its technology or merely decides to stop investing or supporting the technology for some other business reason, then the continued viability of the public procurer's technology is at risk. One way to deal with this risk is for the public procurer to insist that under such 'triggering conditions', the ownership (or license under favorable and broad conditions) of the technology IP transfers to the procurer. A mutually agreed fee may also condition such a transfer. All necessary source code, technical data, documentation, blueprints and other necessary information to use the IP should be put in a third party 'escrow' and only released to the procurer under the mutually agreed triggering conditions (see 'source code escrow' discussion in section 2.7.3 below).

2.7.2.2 Open source software related risks

In addition to the various hardware deliverables that may be procured during a PPI (either following a PCP or otherwise), there may also be a number of software deliverables.

It is increasingly common for software developers to use a combination of both proprietary software and so-called 'open source software'. 'Open source software' refers to software licensed under a particular set of licenses that enable users access to the source code in exchange for certain obligations related to distributing any modified source code.

The use of open source software in conjunction with proprietary software may present risks that are best allocated to and managed by the private party in a PCP or PPI contract. These risks are detailed further below, but include the inadvertent 'opening up' of proprietary code stacks (which may also be trade secrets) by poorly-managed integration of open source and proprietary software.

Although the Open Source Initiative ('OSI' - the de facto open source license certifying body) has approved more than 70 open source licenses, there are essentially only two main license types. These are the 'permissive' and the 'hereditary' types.

Permissive open source licenses place very little burden on users in terms of compliance: source code which enters the code base under a permissive license – for example, a 'Berkeley Software Distribution' – style license ('BSD-style') can be used and re-combined with any other code (including proprietary code), provided the copyright notice remains intact.

'Hereditary' licenses on the other hand are more burdensome. For example, the GNU General Public License (GPL)- style licenses require that source code 'combined' with other code in a certain way automatically renders that other code covered by the GPL from the point of distribution on, whether it is proprietary or not.

If significant funds have been invested in developing proprietary code then it is (often, though not always) extremely undesirable that such code is mandatorily released under an open source license.

For this reason, participants in a PCP or PPI who plan on producing software deliverables should be made aware of how to develop software in a manner which does not risk making any proprietary code fall under an open source license. Such code may also contain other software elements covered by trade secret law.

To this end, it is advisable that PCP/PPI participants are required to adhere to an 'open source software policy' or software development best practice guidelines, which can help them manage these risks. Such a policy could be formulated by the public procurer (on advice from an external expert or consultant) and included as an addendum to the PPI or PCP contract.

2.7.2.3 Third party IPR infringement risk

One of the central IP-related risks associated with using solutions from the ‘technological frontier’ concerns the matter of Third Party IPR infringement. “Third Party IPR” refers to any IPR owned by a party which is not part of the PCP or PPI but which is required in the use of the R&D results or PPI-procured solution. Third Party IP owners pose a risk to the public procurer because they have the legal right to prevent the public procurer from using the innovative solution (by applying for injunctions) or to demand extra licensing fees. Indeed, one objective of procurers engaging in an IPR search prior to initiating a PCP or PPI is to identify the ‘IPR landscape’ (see section 2.3 of Module 2 and section 2.3 above), together with identifying the main IPR holders in the technological field.

In order to deal with such risks, public procurers are advised to try to allocate the risks of such eventualities to the private party. This is normally done by including legal clauses in the contract which extract a “warranty of non-infringement” and an “indemnification duty” from the private party. Both these clauses aim to create a scenario where the private party has strong incentives to ensure that the created technology is free of Third Party IPR.

This risk can also be managed by the procurer more directly by encouraging private parties to a PCP or PPI to participate in a ‘Third Party IPR’ notification system, including a ‘register’ containing the following information:

- identify and notify any potentially blocking Third Party IPR in advance;
- identify licensing terms related to such IPR in advance;
- identify any potential design-around solutions.

In the case of PPI, such a notification system may not be of any practical utility since the R&D-cycle is in most cases already completed and thus Third Party IP rights would be difficult to avoid. Therefore, procurers should rely on the contractual provisions of warranties of non-infringement and indemnification duties.

In the case of PCP, however, such a system could be fruitfully implemented at the end of each R&D phase. This would allow the public procurer full transparency over Third Party IP risk and the ability to instruct private parties to either seek out licenses, design around patents, or alternatively, leave out infringing components from a final design.

2.7.3 Key IPR-related contractual terms

Special attention should be given to the following IPR-related clauses in any contract regulating PCP or PPI.

2.7.3.1 Indemnification

‘Indemnification’ refers to the duty of one party to a contract to reimburse the other party with respect to losses or injury experienced under the contract. In an IPR context, indemnification usually relates to losses due to third party IPR infringement claims.

A standard clause would include the IPR owner providing indemnification (for both awarded damages and legal costs) to the procurer if any third party files a suit against the procurer claiming its use of the technology infringes its IPR.

2.7.3.2 Assignment

‘Assignment’ refers to the sale or transfer of IPR from one party in a licensing contract to a third party. Assignments most often occur in the context of company buy-outs, mergers and acquisitions. The most important point for the public procurer is that the obligations attached to the procured R&D, technology or software continue to be performed by the new IPR owner in case the private partner is acquired. This can be assured contractually by inserting a suitable ‘assignment’ clause in the contract which only permits IPR assignment with consent of the public procurer, and/or, requires that any IPR acquisition by a third party includes the continuation of the private partner’s obligations.

2.7.3.3 Royalties

‘Royalties’ or licensing fees refers to the revenue the parties to a contract may expect to pay or be paid under a licensing contract for use of the technology. In lieu of the usual method for assessing market compensation discussed in section 2.7 above, the procurer and R&D service provider may instead come to an agreement whereby instead of reducing the value of exclusive development by the allocated IPR value, the parties agree on a royalty once the solution is commercialized.

It is also possible that the procurer will be entitled to royalties from the private partner’s commercialization of the technology on the market in any case, such as where the public partner contributed Background or Foreground IP to the technology, and in situations of joint ownership. It is essential that royalty rates are worked out long before the private partner brings the technology to market, although the royalty clause should provide some flexibility to respond to changing market conditions.

2.7.3.4 IPR ownership clause

According to the European Commission guidance on PCP, the IPR ownership belongs to the private partner, while the procurer obtains a free license to use the solution and the right to call-back the ownership if the private partner does not commercialise within a certain period of time after the end of the PCP. In the context of PPIs, where the private party has performed the R&D before the start of the PPI contract, all IPR would belong to the private party. However, when the parties wish to deviate from this default position and vest the IPR in the public procurer, then the IPR will need to be expressly assigned to the other partner by way of an instrument of assignment for copyright or registering the change of ownership in the patent register of the relevant patent office. A clause reflecting the obligations of the parties with respect to the latter should be included in the contract.

Furthermore, since public disclosure of inventions before their registration as patents or patent applications may make protection unavailable, it is crucial that the party filing for registered IPR takes suitable contractual precautions such as binding employees, contractors and other third parties by Non-

Disclosure Agreements. This duty of maintaining confidentiality may also be included in any contract between the innovating parties (see confidentiality section below).

2.7.3.5 Confidentiality

During all phases of a PPI or PCP, parties may exchange confidential or privileged information which could be covered by trade secret law. For example, during market consultations or competitive dialogues, companies may provide the public procurer with confidential information outlining their R&D activities or capacities. If this information is labeled or otherwise indicated to constitute ‘confidential information’, then the public procurer will be bound not to disclose the information to any third party. Often this duty is formalized into a separate contract called a ‘Non Disclosure Agreement’ or NDA. This duty is also included in Section 21 of the Procurement Directive, and is also the subject of a Directive on the protection of trade secrets against their unlawful acquisition, use and disclosure.¹¹

Sometimes the content covered by an NDA may constitute inventions for which patents have not yet been applied, and therefore premature disclosure would result in significant loss of investment. In other cases, the content of NDAs may include strategic information related to pricing or R&D trajectories. For more information in this regard, please refer to the section addressing market consultations (see section 2.6 above regarding market consultations).

Another option available to tackle the confidentiality related risks in an innovation procurement process is to establish a structured approach regarding confidentiality and business secrets. This could be done by employing the following actions:

- Developing and implementing a process for safeguarding business confidentiality and assign qualified personnel to handle any sensitive issues
- Clearly defining the concept of business secrets
- Informing potential bidders during the market consultations on what falls under the category of ‘confidential information’ and ‘trade secrets’, and how far and under which circumstances this sensitive information could be protected.

European Dynamics Luxembourg and Others v Commission, T-536/11

The Court of First Instance of the European Union has recognized the right of the procurer not to disclose confidential information and business secrets to parties who require judicial review of a procurement decision. The Court judged that “the adversarial principle does not mean that the parties are entitled to unlimited and absolute access to all of the information relating to the award procedure concerned. On the contrary, that right of access must be balanced against the right of other economic operators to the protection of their confidential information and their business secrets. The principle of the protection of confidential information and of business secrets must be observed in such a way as to reconcile it with the requirements of effective legal protection and the rights of defence of the parties to the dispute and, in the

¹¹ See Directive (EU) 2016/943 of the European Parliament and of the Council of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure.

case of judicial review, in such a way as to ensure that the proceedings as a whole accord with the right to a fair trial.”

2.7.4 Advanced IPR tools

IPR management can be a complex task, with many nuances and edge-cases requiring specific approaches. Below are explained some common advanced IPR management tools which sometimes arise in joint public-private innovation activities. The legal adviser of the procurer should consider translating these approaches into contractual clauses.

2.7.4.1 Source code escrow

In the case where the technology involves software and the R&D service provider owns the IPR and is not under an obligation to grant licenses to other suppliers, the public procurer may be at risk of vendor lock-in. This risk can be mitigated by establishing a software source code *escrow* in the control of a neutral third party, whereby the software source code is released to the procurer with a right to grant sub-licenses on certain agreed ‘triggering’ circumstances. Another practical solution is to establish a source code repository, which gives the procuring entity the constant access to the current version of the code and protects against lack of access to the code in case of any disputes.

2.7.4.2 Patent pools

In the case where both the public procurer and private party (and possibly other third parties) own essential patents over the technology and the technology is intended to be widely commercialized, one strategy is for the patents to be licensed in a ‘one stop shop’ to third parties. How royalties are divided among the parties is decided in advance and is usually proportional to either the quantity or quality of the patents contributed by each party. Patent pools are an efficient way to deal with patent-heavy technology where ownership is fragmented. They may be administered either by the patent owners themselves or by a third party ‘licensing administrator’.

2.8 Drafting the tender documentation

2.8.1 Introduction

Important aspects to be decided before drafting the tender documents are (more info in section 2.8.2):

- A) Type of procedure to be followed;
- B) Defining the subject-matter of the contract and the technical specifications;
- C) Defining exclusion criteria;
- D) Defining selection criteria;
- E) Defining award criteria;
- F) Deciding on the use of variants;
- G) Deciding on the use of value engineering

H) Defining criteria to monitor vendor performance

The subsequent step is to draft the tender documentation. Sections 2.8.3 and 2.8.4 below outline the content of the main tender documents as applicable to a PCP and, respectively, a PPI:

1. Prior Information Notice (in case of PPI): to publish the intention to buy and the time by which vendors need to prove (e.g. via conformance testing / product labelling) that they can deliver solutions compliant with the procurers' requirements);
2. Contract Notice;
3. Request for tenders (also called Tender Regulation or Invitation to Tender);
4. Procurement Contracts;
5. Optional Tender Forms (these documents can help the provider in structuring their tender; but the procurer can also decide to let the providers structure their tenders as they wish).

Before outlining the specific legal considerations related to the tender documentation, we describe the legislative framework for PCP and PPI.

2.8.1.1 Legal framework for PCP

R&D scope of a PCP

The boundaries of what R&D may cover under PCPs (which clarifies also how PCP maps to TRLs) are set by the following two legal frameworks: the 2014 EU State aid framework for research, development and innovation (R&D&I) and the WTO Government Procurement Agreement (GPA).

PCP covers the following activities: solution exploration and design, prototyping, original development and validation/testing of a limited volume of first products or services in the form of a test series.

According to Article XV (1)(e) of WTO GPA 1994 and Article XIII(1)(f) of the revised WTO GPA 2014 that defines original development as the boundary of where R&D stops, 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, but does not include quantity production or supply to establish commercial viability or to recover R&D costs.

This fits with the 2014 EU State aid framework for research, development and innovation (R&D&I), which states that in order for PCP to exclude State aid, the object of a PCP contract must fall within one or several categories of research and development defined in this framework and must be of limited duration, it may include the development of prototypes or limited volumes of first products or services in the form of a test series but the purchase of commercial volumes of products or services must not be an object of the same contract.

The R&D categories defined in the [R&D&I State aid framework](#) that may thus be covered by PCP are

- fundamental research
- industrial research
- experimental development

Where:

- **'Fundamental research'** means experimental or theoretical work undertaken primarily to acquire new knowledge of the underlying foundations of phenomena and observable facts, without any direct commercial application or use in view;
- **'Industrial research'** means the planned research or critical investigation aimed at the acquisition of new knowledge and skills for developing new products, processes or services or for bringing about a significant improvement in existing products, processes or services. It comprises the creation of components parts of complex systems, and may include the construction of prototypes in a laboratory environment or in an environment with simulated interfaces to existing systems as well as of pilot lines, when necessary for the industrial research and notably for generic technology validation;
- **'Experimental development'** means acquiring, combining, shaping and using existing scientific, technological, business and other relevant knowledge and skills with the aim of developing new or improved products, processes or services. This may also include, for example, activities aiming at the conceptual definition, planning and documentation of new products, processes or services. Experimental development may comprise prototyping, demonstrating, piloting, testing and validation of new or improved products, processes or services in environments representative of real life operating conditions where the primary objective is to make further technical improvements on products, processes or services that are not substantially set. This may include the development of a commercially usable prototype or pilot which is necessarily the final commercial product and which is too expensive to produce for it to be used only for demonstration and validation purposes. Experimental development does not include routine or periodic changes made to existing products, production lines, manufacturing processes, services and other operations in progress, even if those changes may represent improvements. The latter are considered innovation / commercial development activities (see below).

Services scope of a PCP

PCP is an R&D services contract, not an R&D supplies or R&D works contract. PCP is thus a public procurement having as its object the provision of services. Vendors participating in a PCP are thus contracted to perform research, development and testing services (activities) with the objective to investigate, develop and test for the procurer whether it is possible to bring a solution to the market that meets the procurer's requirements.

An R&D services contract may involve the use and provisioning of supplies (products). Vendors participating in a PCP may need certain pieces of equipment to perform the research, development and testing and build the solution. The procurer may also wish to become the owner of the prototypes (resulting from phase 2) and/or the limited set of products (resulting from phase 3) developed and tested during the PCP.

In this context, it is important to note that under the EU legal framework for public procurement, contracts that are providing more than only services are still considered a public service contract if the value of the services exceeds that of the products covered by the contract. This condition is fulfilled if the total value of the services over all the PCP phases in question exceeds the value of products covered by the PCP contract

over all the PCP phases. It is important to note that if the services condition is not fulfilled the provisions for R&D supply contracts apply, and the R&D contract is not exempted from the EU public procurement directives or WTO GPA.

Public procurers thus have two choices to procure a limited set of prototypes or end-products that were developed during the project:

Option (1) The public procurer chooses to procure "as part of" the PCP contract products that were covered by the PCP contract if the total value of all the products covered by the PCP contract does not exceed the total value of all the R&D services covered by the PCP contract. In this scenario (option 1) the public procurer already has to request all the vendors when they make their offers for the PCP to budget their activities so that the value of the products to be delivered is included in the offer.

Option (2) The public procurer can choose to procure "after" the PCP contract products that were developed during the PCP contract. In this scenario (option 2) the public procurer can wait until the results of the PCP contract are known to decide whether or not to buy resulting prototypes or end-products and if so how many of them and from which vendors that participated in the PCP. The public procurer can then use article 32(3)(a) of the Public Sector Directive or article 50(b) of the Utilities Directives and use the negotiated procedure without prior call for competition for buying a limited set of prototypes or test products that were developed in a preceding PCP from one or more vendors that participated in the PCP. As the limited set of prototypes or test products were manufactured (during the preceding PCP) purely for the purpose of research, experimentation, study or development (as PCP is an R&D services contract) and nor the PCP nor the procurement to buy the limited set of prototypes and test products includes quantity production to establish commercial viability or to recover R&D costs, the conditions to use the negotiated procedure without prior call for competition are fulfilled.

However, please note that it is not possible to buy commercial volumes of end-products via option (1) during a PCP or via option (2) using the negotiated procedure without call for competition after a PCP. From the moment quantity production is needed to deliver more products than originally developed during the PCP and/or additional modifications are needed to products originally developed during the PCP, the procurer must launch a new procurement procedure (a PPI) to buy commercial volumes of the innovative solution developed during a PCP for wide implementation, because at this stage the EU public procurement directives, and possibly also the WTO GPA, apply.

Applicable legal framework

PCP falls outside the European Public Procurement Directives. This is an expressly stated exception from the general rule establishing the obligation of public procurers to comply with the procedural rules set out in the public procurement directives when procuring services, goods or works. This exception is based on the provisions of article 14 of the 2014 Public Sector Directive and, respectively, article 32 of the 2014

Utilities Directive which state¹²: “this Directive shall only apply to public service contracts for research and development services [...] provided that both of the following conditions are fulfilled: (i) the benefits accrue exclusively to the public procurer for its use in the conduct of its own affairs, and (ii) the service provided is wholly remunerated by the public procurer”.

The Court of Justice of the EU has not yet ruled on matter related to PCP, but national case-law is already available about public procurements that were based on the R&D services exemption in the EU public procurement directives (see examples below).

EXAMPLE

VK Köln, Beschluss vom 26.04.2006, VK VOL 5 / 2006

The case concerned a nationwide R&D pilot project for the introduction of a mobile phone ticket system for the public transport sector. According to the draft contract, the contractor did not have to provide an end product. The procurer, a transport association whose members are transport operators and public authorities, had selected 8 companies to submit an offer. When the first offers didn't meet his need, the procurer requested a modified offer. One supplier, who was not invited to the negotiations, initiated legal action. Amongst others, the claimant argued that the contract was not a research and development services contract within the meaning of section 100(2) lit.n of the German Procurement Act (Gesetz gegen Wettbewerbsbeschränkungen - GWB), as it went beyond the conceptual nature of mere research and development.

The court determined that the service to be awarded was a R&D service within the meaning of Article 100 (2) GWB. The aim of the contract was to gain a nationwide standard for a mobile phone ticket system ticket including a technically reliable process with high customer acceptance. Moreover, the Court concluded that the procurer would only receive non-exclusive rights, the business process for mobile ticketing remained open for third parties and after the successful pilot is finished, the transport operators and public authorities would (in compliance with applicable procurement law) decide about finding a company to operate and implement the system.

¹² Also article 13(j) of the Defence Directive states: “This Directive shall not apply to the following: j) research and development services other than those where the benefits accrue exclusively to the contracting authority/entity for its use in the conduct of its own affairs, on condition that the service provided is wholly remunerated by the contracting authority/entity.

EXAMPLE

VK Südbayern, Beschluss vom 27.09.2002, 36 - 08 / 02

This case concerned the detection and analysis of potential military hazardous waste sites in Bavaria. Three suppliers were invited to submit an offer. When the procurer awarded the project to supplier Y, one of the other suppliers initiated a legal action, complaining among others that the procurer was indeed obliged to follow a formal procurement procedure, as the project didn't fall under the R&D exception of Art. 100 Abs. 2 GWB (Gesetz gegen Wettbewerbsbeschränkungen - GWB).

The Court fully agreed with the supplier, and concluded that the R&D contract would not be excluded from the scope of procurement law, since (1) the service cannot be considered as R&D service, but as analysis of existing files, archives and photographic materials and (2) the service is fully remunerated by the procurer and the results will become property of the procurer, who is by law obliged to procure such services; whether the results will then also be delivered to other authorities, to scientists or the general public was irrelevant for the court.

Because of its exemption from the public procurement directives, PCP procurements are also not subject to the remedies directives. Non-applicability of the Remedies Directive means that the review procedure regime and hence inter alia the following obligations as stipulated by the Remedies Directive are not applicable:

- jurisdiction of national review bodies
- ex ante communication of contract award decision and standstill period
- interim measures by review body
- minimum time limits for review applications
- declaration of contracts ineffective that are illegally awarded without prior publication or in breach of the standstill period

However, even in absence of the Remedies Directive, the above-mentioned obligations could be established by the national law of the respective Member state. Further, EU primary law also might impose some obligations with regard to judicial protection.

Although PCP is exempted from the European Public Procurement Directives, it remains subject to the principles established under the TFEU, the EU State aid rules¹³ and any national legislation implementing the above. Moreover, a legally-compliant approach to PCP is described in the PCP Communication and related PCP Staff Working Document.

¹³ Commission, 'Framework for state aid for research and development and innovation' C(2014) 3282 (2014 State Aid Framework).

The PCP Communication and the PCP Staff Working Document

The PCP Communication defines PCP as an instrument to commission R&D services in the form of a three-stage approach process, based on:

- (i) risk-benefit sharing according to market conditions,
- (ii) competitive development in phases, and
- (iii) the clear separation of the R&D phase from deployment of commercial volumes of end-products.

Moreover, the PCP Staff Working Document provides an example on how to conduct a PCP process in line and full compliance with the EU legal framework.

The TFEU principles

The Court of Justice of the European Union ('Court') has not yet judged in matters related to PCP. The Court has though decided in a series of cases on the applicability of the Treaty provisions to the procurements of contracts that (partially) fall outside the scope of the Public Procurement Directives (e.g. contracts with a value under the threshold set by the public procurement directives). The Court applies a consistent approach to all these cases. This suggests that the Court would apply the same interpretation of the Treaty principles and the same reasoning when considering PCP contracts.¹⁴

The Court decided that the Treaty is applicable to contracts that present a certain cross-border interest (when companies from other Member States are potentially interested in bidding for the tendered contract).

A certain cross-border interest – Coname and SECAP cases

The Coname case¹⁵ concerned a non-competitive award of a service concession. The Court decided that the Treaty is applicable, unless it can be proven that undertakings from other Member States would not be interested in the contract. Only special circumstances, such as '*the very limited economic value*' of the contract could justify non-applicability of the Treaty.

In case of a certain cross-border interest, the Court decided that the non-discrimination principle and the transparency principle apply. The transparency principle entails an obligation for the procurer to allow access to an appropriate information regarding the contract before it is awarded, '*so that, if an undertaking from another Member State had so wished, it would have been able to express its interest in obtaining the contract*'.

In the SECAP cases¹⁶ which dealt with the discriminatory nature of a national legislation imposing the automatic exclusion of abnormally low tenders in contracts with a value below the threshold, without granting the opportunity to tenderers to prove that their offer is genuine and viable, the Court provided additional circumstances that indicate the presence of a cross-border interest: the monetary value of the contract in question, in conjunction with its place of execution and its technical complexity.

¹⁴ Ramona Apostol, 'Trials and Tribulations in the implementation of pre-commercial procurement in the European Union' (Springer Verlag 2016, forthcoming).

¹⁵ Case C-231/03 *Coname* [2005] ECR I-7287.

¹⁶ Joined Cases C-147/06 and C-148/06 *SECAP SpA and Santorso Soc. Coop. Arl. Comune di Torino* [2008] ECR I-3565 (SECAP cases).

This has also been established in Belgian national case-law.

Council of State (Belgium) 23 december 2015, nr. 223.335 KINEPOLIS MEGA

In the KINEPOLIS MEGA case, the Belgian Council of State ruled that a contract concerning a land lease, although not a public procurement contract, should be awarded according to the TFEU principles, when the contract has a certain cross-border interest. In this specific case only a few articles were published in newspapers with few information regarding the contract (scope etc.). Given the fact that the value of the contract was over 6 million euros in total and the location where the land lease would be granted was in Antwerp, a Belgian city, not far from the border with the Netherlands, were sufficient indications for the Council of State to rule that the contract had a certain cross-border interest. In that respect the Council of State judged that the contract was not awarded according to the TFEU principles since the principle of transparency was insufficiently observed.

Based on the Court's case-law, one can conclude that PCP will generally present cross-border interest and will need to comply with the TFEU principles.

In several cases, the Court explained which concrete obligations derive from the application of the Treaty principles of non-discrimination, equal treatment and transparency in cases of procurements exempted from the Procurement Directives. These obligations are outlined in the box below. They equally apply to a PCP.

In the SECAP cases, the Court ruled that the equal treatment principle is breached when national legislation does not allow tenderers the possibility to prove that their bids are genuine and viable, despite offering a low price.

In the Wall case,¹⁷ which regarded the change of a subcontractor in a service concession contract, exempted from the application of the Procurement Directives, the Court judged that the equal treatment principle prohibits a change of subcontractor, even when this change was foreseen in the contract, if the use of one subcontractor rather than another was a decisive factor in concluding the contract. A change of the subcontractor under these circumstances would amount to a substantial amendment that demonstrates the intention of the parties to renegotiate the essential terms of the contract. In this case, the procurer should start a new award procedure.

In May 2010, the Court of First Instance validated the 2006 Communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives.¹⁸ It decided that the Commission's Communication limited itself to explaining the obligations arising from the

¹⁷ Case C-91/08 *Wall AG v Stadt Frankfurt am Main* [2010] ECR I-0000 (Wall case).

¹⁸ Commission, 'Interpretative Communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives' 2006/C 179/02.

fundamental principles of the Treaty and did not create new obligations for public procurers.¹⁹ The Court of First Instance thereby validated this Communication in which the Commission stated that contracts (partially) excluded from the Procurement Directives need to be awarded following a competitive procedure, whenever a cross-border interest cannot be excluded. The Commission detailed the procedural steps:

- prior publication of an advertisement of the public contract through a sufficiently wide coverage medium, including a description of the award procedure;
- non-discriminatory description of the subject-matter of the contract;
- use of non-discriminatory selection criteria;
- recognition of equivalent diplomas, certificates and other evidence of formal qualifications from other member States;
- allowing sufficient time for expressions of interest and submission of offers;
- prior announcement of the rules for award;
- avoiding de facto unjustified advantages to a specific tenderer (for example by providing the same amount of information).

The EU State aid rules

According to the 2014 State Aid Framework, the Commission will consider, a priori that, in principle, no state aid is awarded to undertakings where the price paid for the relevant services fully reflects the market value of the benefits received by the public procurer and the risks taken by the participating economic operators, when the following cumulative conditions are met:

- a) the conduct of R&D services procurements via open, transparent and non-discriminatory procedures, based on objective selection and award criteria provided upfront in the tender documentation;
- b) the upfront provision of contractual arrangements describing all rights and obligations of the parties, including with regard to Intellectual Property Rights (IPR);
- c) strictly avoiding giving 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.

Additionally, it is required that:

- (i) all results which do not give rise to IPR be widely disseminated and any IPR are fully allocated to the public procurer; OR
- (ii) the service provider to whom results giving rise to IPR are allocated is required to grant the public procurer unlimited access to those results free of charge, and to grant access to this parties, for example by way of non-exclusive licenses, under market conditions.

National legislation

In addition to the above, when implementing a PCP procurement, the legal expert should check the provisions of the national legislation governing PCP. Some Member States have translated the provisions of

¹⁹ Case T-258/06 *Germany v Commission* [2010] ECR II-2027.

the PCP Communication into national legislation, giving them legal force and transforming them into binding rules for public procurers conducting this type of procurements.

EXAMPLE: National PCP legislation in Lithuania

For example, in Lithuania, the Government passed a law decree in 2015 on the approval of procedures for PCP, based on the 2007 PCP Communication. This legislation mandates the following steps in the implementation of PCP:

- Procurer prepares a description of the object of PCP and the technical specification
- Procurer submits the above mentioned documents to coordinating authority (Agency for Science, Innovation and Technology)
- The coordinating authority checks compliance of the envisaged pre-commercial procurement with requirements for approval (e.g. whether R&D services are required to develop needed functionalities and there is no evidence that market players will develop such functionalities in the nearest future (less than a year))
- Upon approval, the procurer sets up a commission to implement the pre-commercial procurement
- The coordinating authority co-finances the implementation of pre-commercial procurement and supervises the use of the funds

See dr. Deividas Soloveicik, 'Pre-commercial and Innovation Procurement in Lithuania' presentation available at http://ec.europa.eu/information_society/newsroom/image/document/2015-50/lithuania_12535.pdf

International legal framework (WTO)

The Main Parties to the WTO Agreement on Government Procurement (GPA), including the EU, have excluded R&D services²⁰ from the scope of the GPA, i.e. both from the national treatment²¹ and the non-discrimination obligation. Except for the EEA and Stabilisation and Association Agreements with partner countries of the European Neighbourhood Policy, the EU has no national treatment and non-discrimination obligations vis-à-vis other parts of the world for the procurement of R&D services, but it does for supplies²².

As pre-commercial procurement concerns R&D services, public purchasers can decide case by case on the openness to worldwide offers and on the relevant conditions, taking into account the full potential of the European Research Area. This means that the PCP procurement could be organised so as to stimulate companies to locate a relevant portion of the R&D and operational activities related to the pre-commercial development contract in the European Economic Area or a country having concluded a Stabilisation and Association Agreement. Allowing companies from anywhere in the world to make offers regardless of the geographic location of company head offices or their governance structure would be an open and effective

²⁰ Annex IV of WTO GPA

²¹ The national treatment obligation implies that Members do not operate discriminatory measures between domestic services or service suppliers and foreign ones.

²² This obligation does not only concern commercial end-products. R&D supply contracts are also not exempted from the non-discrimination obligation.

way for Member States to promote the creation of growth and jobs in Europe without excluding non-European firms.

As the TFEU principles apply to PCPs it is NOT allowed to restrict the participation to the PCP procurement to economic operators from a specific EU country, region or city or to require economic operators to perform a specific percentage of the R&D for the PCP contract in a specific EU country, region or city (it is not allowed to discriminate economic operators from other EU countries). As the EEA and Stabilisation and Association Agreements with partner countries of the European Neighbourhood Policy apply to PCPs, it is NOT allowed to restrict the participation to PCP procurements to economic operators from EU Member States or to require economic operators to perform a specific percentage of the R&D for the PCP contract in the EU Member States (it is not allowed to discriminate economic operators from countries in the EEA and the partner countries having signed a Stabilisation and Association Agreement in the context of the European Neighbourhood Policy).

EXAMPLE

A valid approach of formulating a place of performance requirement for a PCP procurement would be to require economic operators to perform at least 50% of all the R&D services in the European Economic Area or in a country having concluded a Stabilization or Association Agreement in the context of the EU neighbourhood policy.

2.8.1.2 Legal framework for PPI

Innovation scope of a PPI

PPIs do not procure R&D but innovative commercial end-products/services. A PPI is started when products/services are near-to-the market or already on the market in small quantities. In order to deliver those innovative solutions with the required quality/price level to the procurer for the PPI, vendors may still need to do 'innovation' activities e.g. to customise existing solutions to specific client needs and/or scale up their production chain from R&D to commercial production volumes. **According to the 2014 EU State aid framework for research, development and innovation (R&D&I), non-R&D type 'innovation' activities include:**

- **'organisational innovation'**: the implementation of a new organisational method in an undertaking's business practices, workplace organisation or external relations, excluding changes that are based on organisational methods already in use in the undertaking, changes in management strategy, mergers and acquisitions, ceasing to use a process, simple capital replacement or extension, changes resulting purely from changes in factor prices, customisation, localisation, regular, seasonal and other cyclical changes and trading of new or significantly improved products;
- **'process innovation'**: the implementation of a new or significantly improved production or delivery method (including significant changes in techniques, equipment or software), excluding minor changes or improvements, increases in production or service capabilities through the addition of

manufacturing or logistical systems which are very similar to those already in use, ceasing to use a process, simple capital replacement or extension, changes resulting purely from changes in factor prices, customisation, localisation, regular, seasonal and other cyclical changes and trading of new or significantly improved products.

Applicable legal framework

PPI is, in principle, fully covered by the European public procurement directives²³ and the remedies directives. It is thus subject to the European public procurement legal framework implementing the TFEU principles, the state aid rules and applicable national legislation.

Public procurement legal framework and TFEU principles

In designing the procurement process and the related tender documentation, the public procurer follows the provisions established under the public procurement directives in terms of choice of procedure, the drafting of exclusion, selection and award criteria, the drafting of tender specifications and the like.

The legal expert should check the tender documentation for compliance with the legal rules for the formulation and application of the procurement criteria (e.g. technical specifications, exclusion grounds, selection criteria, award criteria). The legal expert should also check compliance with any other relevant national legislation governing the industry sector in which the procurement takes place.

Furthermore, the legal experts should ensure compliance of the procurement with the principles established by the TFEU. The public procurement directives include specific provisions in this respect in the very first recital thereof, which states that *“The award of public contracts by or on behalf of Member States’ authorities has to comply with the principles of the Treaty on the Functioning of the European Union (TFEU), and in particular the free movement of goods, freedom of establishment and the freedom to provide services, as well as the principles deriving therefrom, such as equal treatment, non-discrimination, mutual recognition, proportionality and transparency.”*

EU Competition rules

Compliance with EU competition rules should also be ensured to avoid State aid in **PPI**.

As a general note, art. 107(1) TFEU qualifies as incompatible with the common market any aid granted by a Member State or through state resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods, as long as it affects trade between Member States. In order to qualify as state aid and thus be subject to the prohibition aforementioned, four cumulative conditions must be met: (i) the measure has to be granted out of State resources; (ii) the measure needs to confer an economic advantage to certain undertakings; (iii) the advantage needs to be selective and distort competition; and (iv) the measure has to affect the trade

²³ Exceptions from the applicability of the European Public Procurement Directives are expressly regulated there under and are of strict interpretation.

between Member States.²⁴ Most of the above conditions could easily be met by certain public procurement activities:²⁵ public contracts are financed from State resources, the award thereof is selective and the effect on trade between Member States could be significant. The one thing that requires additional analysis is whether the public contracts awarded pursuant to public procurement procedures confer an economic advantage to the contractor which it would not receive under normal market conditions.²⁶

The official position of the European Commission is that as long as a public contract is awarded in line with an open or restricted procedure as defined by the public procurement directives, will normally not amount to the grant of state aid.²⁷

RELEVANT CASE LAW

In the **London Underground Public-Private Partnership case**, the Commission concluded that *“when these types of infrastructure arrangements are concluded after the observance of an open, transparent and non-discriminatory procedure, it is, in principle, presumed that the level of any market sector support can be regarded as representing the market price for the execution of the project. This conclusion should lead to the assumption that, in principle, no State aid is involved”*. See Case N 264/2002 London Underground Public Private Partnership, para 79

ECJ’s judgement in the **Altmark Case** backs the European Commission’s established presumption that no State Aid incompatible with the TFEU exists where the award of the contract:

is a pure procurement transaction and the procurement procedure is compliant with the EU public procurement directives and suitable for achieving best value for money – in as much as no economic advantage which would go beyond normal market conditions will usually arise under these circumstances.

See Case C-280/00 *Altmark Trans GmbH and Regierungspräsidium Magdeburg v Nahverkehrsgesellschaft Altmark GmbH* [2003] ECR I-7747

However, when another public procurement procedure is applied (in compliance with the 2014 Public procurement Directives), the State aid rules do not consider the public procurement procedure automatically State aid free. For example, when the procurement is not in line with the actual needs of the procurer, State aid rules may be breached.

Joined Cases T-116/01 and T-118/01 **PVO European Ferries (Vizcaya) SA and Diputación Foral di Vizcaya v Commission**

²⁴ Dr. Albert Sanchez Graells, ‘Public Procurement and State Aid: Reopening the Debate?’, available at <http://ssrn.com/abstract=2037768>.

²⁵ S. Arrowsmith, ‘The Law of Public and Utilities Procurement’, 2nd edition, London: Sweet and Maxwell (2005)

²⁶ A. Doern, ‘The Interaction between EC Rules on Public Procurement and State Aid’, 13 P.P.L.R. 97 (2004).

²⁷ Framework for State aid for research development and innovation (2014/C 198/01) para 32.

The European Court of First Instance ('CFI')²⁸ ruled that a purchasing decision which does not correspond to 'actual needs felt by the authorities' involves State aid even when the purchase was made on market conditions which a private investor would have accepted (regarding for example duration, and price). In this case, the public authority had bought a much larger number of transportation vouchers from the private transportation supplier than there was demand for (the end-users were in this case private citizens who availed themselves of the transportation services).

Whenever the procurer has doubts regarding compliance with the State aid rules, it should notify the envisaged procurement to the European Commission for state aid assessment and/or to national competent authorities.²⁹

RELEVANT CASE LAW – THE WELSH PUBLIC SECTOR NETWORK SCHEME³⁰

In 2007, the UK authorities submitted a notification regarding a procurement of high bandwidth network services by the Welsh Assembly Government for public sector organizations in Wales.

Background:

Traditionally, public procurers in Wales had their own networks, which were procured separately by the different public service organizations. This approach resulted in higher costs, lack of sufficient connectivity and duplication of resources, the fragmentation and lack of interconnectivity, interoperability and common network standards between the Welsh public service bodies which translated into a reduced efficiency of public services and hampered their improvement. Based on these pre-requisites, the Welsh Assembly Government decided to award a service contract for the provision of consolidated network services, including: (i) a collective electronic communications network service consisting of a range of core infrastructure services; (ii) an initial connection of selected public sector organizations (around 1000 connections shared between the Health Service, local government and the Higher Education / Further Education Sectors).

Scope of the centralized procurement:

- common standards of service;
- increased interoperability;
- extended service reach throughout Wales;
- improved public sector service delivered to citizens;
- avoiding duplications;
- reaching economies of scale.

²⁸ Joined cases T-116/01 and T-118/01, *PfO European Ferries (Vizcaya) SA and Diputación Foral de Vizcaya v Commission* [2003] ECR II-2956, para116.

²⁹ In Greece for example, the Central State Aid Unit (CSAU).

³⁰ *Ibid.* 24.

Conduct of the procurement:

Procedure: competitive dialogue procedure in compliance with the Directive 2004/18/EC;
Award criteria: MEAT, comprising several sub-criteria concerning commercial, technical and quality aspects, risk distribution and contractual compliance;
Specific mechanisms were also considered to ensure that the price paid would remain cost effective (gain sharing, benchmarking by means of independent reviews of tariffs and service performance, etc.).

The state aid assessment was conducted prior to the award of the contract and the main scope of the assessment was to check whether the procurement as described above provides an economic advantage to any undertaking within the meaning of article 107 TFEU (former article 87 EC Treaty). In assessing the presence of state aid, the Commission looked at the way the tender documentation was drafted and how the procurement procedure was conducted. The Commission also verified the presence of State aid concerning the users of the network and third parties. The Commission's conclusion was that the procurement of the Welsh Public Sector Network Scheme does not constitute State aid within the meaning of article 107 TFEU (former article 87 EC Treaty).

Findings of the Commission:

The award of the contract would not provide any economic advantage to the service provider which would go beyond market conditions;
the award of the contract was a pure procurement transaction, aiming to satisfy a public need (the objective was to purchase network services for UK public service organisations);
the award procedure was conducted in line with the EU procurement directives, using a competitive procurement procedure with prior publication at EU level in which any economic operator could request to participate under equal conditions;
the award criteria (MEAT) corresponds to the objective of achieving best value for money;
the contract did not give rise to extra advantages to the service provider beyond the scope of the contract (beyond the initial order fixed in the public service contract, there was no obligation for the public service organisations to use the connectivity services provided by the service provider);
the provision of the network services did not result in additional spare capacities which could have been exploited commercially;
there were appropriate mechanisms to ensure cost-effectiveness over the whole duration of the contract (e.g., benchmarking by means of independent reviews of tariffs and service performance, etc.);
The users of the network were all part of the public administration and exercised public functions (e.g., the National Health Service Wales, local authorities, fire services, police, national parks authorities, the Welsh Assembly Government and the National Assembly for Wales, higher and further education and assembly sponsored public bodies, such as the Welsh language board); these entities were not found to exercise an economic activity and hence did not qualify as 'undertakings' under the State aid rules;

the network was not considered to provide an advantage to third party operators given that the need for significant new infrastructure was unlikely and wholesale access was not envisaged beyond potentially existing regulatory requirements.

See Case N 46/2007 “Welsh Public Sector Network Scheme”, United Kingdom, of 30.5.2007, available at http://ec.europa.eu/competition/state_aid/cases/218491/218491_683319_19_2.pdf

International legal framework (WTO)

PPIs are subject to the WTO government procurement agreement unless the type of product/service procured or the type of procurer that is implementing the PPI is specifically exempted from the WTO.

2.8.2 Legal considerations on drafting the tender documentation

A) Type of procurement approach to be followed

In case of **PCP**, it is recommendable to use an open-like procurement (similar to the open procedure described in the Procurement Directives), in order to ensure compliance with the Treaty principles and the EU State aid rules. Such a procedure entails that the market is challenged in an open and transparent way, that the procurement documentation is published in advance and that all requirements are non-discriminatory and are clearly described therein. All interested market players are invited to submit an offer. Following the deadline for submission, the offers are evaluated based on the criteria described in the published procurement documents.

In principle, it is recommendable that a minimum number of 4 (four) suppliers are awarded Framework Contracts and a PCP Phase 1 contract for conducting a feasibility study (see Module 1). Each supplier will need to pass an assessment of outputs, as a pre-condition for the advancement to the next phase. The legal adviser should ensure that clear criteria are defined for the assessment of the outputs at the end of each Phase. Separate criteria should be defined to assess whether the outputs are satisfactory (for the purpose of payments) and successful (for the purpose of bidding for the following Phase Contract).

Assessment criteria should be defined in objective and measurable terms to avoid giving too much flexibility/subjectivity to the assessors who perform the end of phase assessment, in consideration of the nature and characteristics of each phase.

In case of **PPI**, the legal adviser of the public procurer should make sure that the choice of the applicable procurement procedure complies with the Public Procurement Directives. The types of procedures that could be considered are presented in section 2.8.2 of Module 2.

The chosen procedure could be adapted to the specificities of **PPI**, for example by including conformance tests. The purpose of the conformance tests is to check whether the innovation truly performs at the levels

described in the offer and requested in the tender documents, and whether it shows reliability in the medium to long-term (particularly in the case of IT systems).

The demonstration phase (conformance testing) will precede the final award. The legal adviser should ensure that the conformance testing procedure and the acceptance criteria are clearly described in advance in the procurement documents and are applied in the same manner to all the suppliers.

Examples of tested requirements

- (i) **Capacity:** minimum applications memory per processing unit, file system utility, storage management product, weigh racks before installation, meter racks and cooling infrastructure.
- (ii) **Performance:** for example, external networks connectivity and performance, archive and backup performance, system resilience, start-up and shut-down tested during availability tests.
- (iii) **Functionality:** for example, verify whether the system admin can authorize a user to become an application provider; verifies whether the system only accepts a job description written in a language that is standardized or proposed for standardization.
- (iv) **Flexibility:** upgrades to current system and future technology roadmaps, field upgradability and time to upgrade.

Source: <http://wwwis.win.tue.nl/2R690/projects/spingrid/atp.pdf>

B) Defining the subject-matter of the contract and the technical specifications

Defining the subject-matter of the procurement contract

The subject-matter of the contract is the product, service or work that is being procured.

In the case of **PCP**, the subject matter of the procurement contract is R&D services. The applicability of the procurement principles entails that the subject-matter is defined in clear and non-discriminatory terms.

In the 2006 Communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives,³¹ it is clarified that the subject-matter of contracts (partially) excluded from the Procurement Directives should be described in a non-discriminatory manner.

Succhi di Frutta case (C-496/99)

The Court clarified that the transparency principle “implies that all the conditions and detailed rules of the award procedure must be drawn up in a clear, precise and unequivocal manner in the notice or contract documents so that, first, all reasonably informed tenderers exercising ordinary care can understand their exact significance and interpret them in the same way and, secondly, the

³¹ Commission, ‘Interpretative Communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives’ 2006/C 179/02.

contracting authority is able to ascertain whether the tenders submitted satisfy the criteria applying to the relevant contract” (para.111).

In the case of **PPI**, the new Public Procurement Directives do not prescribe what the public procurer should purchase, but rather how to conduct the procurement processes.

However, the Public Procurement Directives require that tender requirements are linked and proportionate to the value and objectives of the contract.³² This means that the public procurer should define the subject-matter by providing an accurate description of its needs, which justifies setting advanced technical requirements. In the case of innovation procurement, for example, the description of the subject-matter should underline the stringency and importance of the targeted public objectives which should be addressed in an innovative way.

EXAMPLE HOW TO DESCRIBE THE OBJECT OF THE TENDERED CONTRACT

“Erasmus University Medical Centre (Erasmus MC) is renewing its bed washing facility to provide enough clean and disinfected beds for its daily operational needs. This currently exceeds 70,000 beds per annum and is expected to increase. The existing machine is labor intensive and uses a large volume of water and energy to operate. In brief, it is expensive and out of step with the hospital’s sustainability policies and objectives”, to meet the identified need for “a sustainable and low carbon solution to deliver 70,000 clean beds and mattresses per year”.

Source: ERASMUS MC; see www.ecoquip.eu

Defining technical specifications

Technical specifications are minimum requirements that any tender should meet or possess in order to compete for winning the public contract. They are directly related to the characteristics of what is being procured, and not to the general capacities or qualities of the bidder.

In case of **PCP**, the technical specifications should be compliant with the Treaty principles. According to the Commission’s Communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives,³³ these rules are:

- the characteristics required of the contract do not restrict participation of economic operators from other Member States.
- the characteristics required of the contract do not favour a certain solution that is being developed by one specific economic operator;
- equivalent means of proof should be accepted;
- the technical specifications are published in the call for tenders;

³² See recitals (75), (83), (97) (104) of the new Public Sector Directive. See also article 42(1) of the new Public Sector Directive.

³³ Commission, Interpretative Communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives (2006/C 179/02) p.5.

- the technical specifications are clearly described in order to enable all normally informed and diligent economic operators to formulate a suitable tender;
- the technical specifications are applied to all tenders in the same way;
- time-limits for submission of offers are long enough to allow undertakings from other Member States or undertaking who did not participate in the market consultation, to make a meaningful assessment and prepare their offer.

IMPORTANT!

Due to the phased approach in a PCP and the competitive development of the innovative solution in phases, technical specifications and requirements could get more detailed and complex from one phase to the next, also triggering a need to increase the allocated resources. Clear provisions should be included in the tender documents to enable this.

In the case of **PPI**, the Public Procurement Directives define extensive obligations for the definition of technical specifications,

To encourage innovation, the Public Procurement Directives³⁴ allow public procurers to formulate the technical specifications in the following ways:

1. by defining themselves the desired performance and functions, without reference to a standard as proof of compliance;
2. by reference to standards, and in order of preference to:
 - national standards transposing European standards;
 - European Technical Assessments;
 - common technical specifications;
 - international standards;
 - other technical reference systems established by the European standardization bodies;
 - national standards;
 - national technical approvals;
 - national technical specifications relating to the design, calculation and execution of the works and use of the supplies;
3. by specifying performance and functional requirements and requiring a certificate of compliance with a certain standard as proof of compliance;



According to article 42(3)(a) of the Public Sector Directive and, respectively, article 60(3)(a) of the Utilities Directive, the performance or functional requirements should include parameters that are sufficiently precise to allow tenderers to understand what is being procured and to allow the procurer to objectively determine compliance with the requirement.

EXAMPLE of performance requirements:

“By 2012, the procurer wants all its mattresses and pillows not classified as hazardous waste to be

³⁴ Article 42 and Annex VII of the 2014 Public Sector Directive and article 60 and Annex VIII of the 2014 Utilities Directive.

recycled, repurposed or reused instead of going to landfill; and to reduce to 2 per cent the number of mattresses disposed of as hazardous or clinical waste”.

Source: BIS, Forward Commitment Procurement, Know How Programme Part 1
<https://www.gov.uk/.../khp1b-fcp-principles-into-practice.ppt>

4. by reference to standards for certain characteristics and by reference to performance or functional requirements for other characteristics.

Where reference is made to a European standard or, in the absence thereof, to a national standard, tenders based on equivalent arrangements should be considered by public procurers. It should be the responsibility of the economic operator to prove equivalence with the requested standard.

5. by using the appropriate underlying specifications of labels, while requesting the label as proof of compliance with those specifications.³⁵

A procurer can only require a label if all of its requirements are linked to the subject-matter of the contract and the label meets certain standards of objectivity, transparency and availability to the market;

Even where such a label is required, the procurer must still accept labels meeting equivalent criteria and, in cases where bidders cannot obtain a label within the relevant time limits for reasons not attributable to them, other appropriate forms of evidence;

All technical specification, should comply with the following general rules:³⁶

- are published upfront in the tender documentation;

Enterprise Focused Solutions v Spitalul Judetean de Urgenta Alba Iulia (C-278/14)

The Court decided that the procurer may not exclude the offer of a tenderer based on non-compliance with a technical specification that was not mentioned in the contract notice. In this case, the procurer had excluded Enterprise Focused Solutions from the award procedure, because its products allegedly processors of its offered computers had reached their ‘end of life’ and were not being produced anymore.

- lay down the characteristics required of a works, service or supply (specific process or method of production or provision of the requested works, supplies or services or to a specific process for another stage of its life cycle);
- are proportionate to the value and objectives of the procurement;
- afford equal access to the procurement to all potentially interested bidders; to this end, technical specifications shall not refer to a specific make or source, or a particular process which

³⁵ In Case C-368/10 *Commission v Kingdom of the Netherlands*, the Court of Justice seemed to take the view that technical specifications should always refer to the criteria underlying a label instead of just the label itself, unless those criteria are set out in legislation (paras 67-70 of judgment). Note however that this judgment was delivered prior to the new, more stringent requirements for labels introduced under the 2014 directives. See Article 43 of the 2014 Public Sector Directive and article 61 of the 2014 Utilities Directive.

³⁶ Article 42 of the 2014 Public Sector Directive and article 60 of the 2014 Utilities Directive.

characterizes the products or services provided by a specific economic operator, or to trade marks, patents, types or a specific origin or production with the effect of favoring or eliminating certain undertakings or certain products.

Case C-368/10, European Commission v The Netherlands (the “Coffee Arrest case”)

This case regarded a tendering procedure for a public contract for the supply and management of drink dispensing machines and of coffee with the Max Havelaar label. The European Court of Justice found that the public procurer has laid down a technical specification incompatible with Article 23(6) of Directive 2004/18 by requiring that certain products to be supplied were to bear a specific eco-label (Max Havelaar label in this case), rather than mentioning the desired specifications of the label and allowing tenderers to prove compliance by equivalent means (e.g. another label).

- do not create any unjustified obstacles to competition; as a consequence, the requirements should not favour a specific economic operator by mirroring key characteristics of the supplies, services or works habitually offered by that economic operator; they should reflect the “diversity of technical solutions standards and technical specifications in the marketplace, including those drawn up on the basis of performance criteria linked to the life cycle and the sustainability of the production process of the works, supplies and services”;³⁷
- are described in sufficiently clear and precise terms in the tender in order to encourage economic operators to compete in the procurement procedure.
- are verifiable, such as to enable the public procurer to make an objective choice for the best offer.
- shall, when applicable and except in duly justified cases, take into account accessibility criteria for persons with disabilities or design for all users;
- may also specify whether the transfer of intellectual property rights will be required.

GUIDELINES TO KEEP IN MIND WHEN TECHNICAL SPECIFICATIONS IN PPI PROCUREMENTS ARE FORMULATED BY REFERENCE TO STANDARDS

- reference to technical standards can be included directly in the technical specifications;
- The legal expert should ensure that the standard’s requirements are not replacing the advanced requirements that were identified as innovative during the IPR search and market consultation.

The Public Procurement Directives allow the use of standards and other technical specifications issued by formal standardization bodies at EU, international and national level. These standardisation bodies have non-discriminatory procedures in place, that ensure broad participation by industry.

- when reference to a standard is used, it must be accompanied by words “or equivalent”, which means that tenders based on equivalent arrangements (equivalent standards or equivalent solutions not certified according to a specific standard) must be accepted by the public procurer; This will

³⁷ Recital 74 of the Public Sector Directive and, respectively, Recital 83 of the Utilities Directive.

allow suppliers to propose a new solution that has not (yet) been certified in accordance to the standard; the responsibility to prove such equivalence rests with the tenderers; means of proof include third-party verified evidence, technical dossier from the manufacturer etc.;

- existing standards that represent common practice in various sectors in Member States should be identified³⁸;
- requiring -in the case of long term contracts- the contractor to take into consideration standards that are newly released during contract implementation, approach which has the potential to stimulate the contractor to adapt during contract implementation its products/services to higher level requirements stemming from newly arriving standards; [*also see section G) on value engineering below*]
- at the evaluation phase, the public procurers should possess sufficient expertise to evaluate the equivalence of other solutions based on different standards than the specified one or based on other proof (such as a technical dossier etc.) as well as the performance of the product above the requirements of the standard.

GUIDELINES TO KEEP IN MIND WHEN TECHNICAL SPECIFICATIONS IN PPI PROCUREMENTS ARE FORMULATED BY REFERENCE TO LABELS

A procurer may refer to a specific label or eco-label as proof of compliance with the technical specifications in a PPI procurement, exclusively when the following conditions are cumulatively fulfilled:³⁹

- All the requirements laid down in the label are linked to the subject-matter of the contract (are appropriate to define the characteristics of the supplies or services that are the object of the contract, such as characteristics of the product itself, specific process of production or provision of the requested works, supplies or services or of any stage of its life cycle, requirements related to packaging or use). In case the label includes requirements which relate to the company itself or its policy in general, the label cannot be referred to by the public purchaser;
- The label requirements are based on objectively verifiable and non-discriminatory criteria.
- The label requirements are adopted through an open and transparent procedure in which stakeholders, such as government bodies, consumers, social partners, manufacturers, distributors and non-governmental organizations may participate.
- The label is accessible and available to all interested parties.
- The label requirements are set by a third party over which the economic operator applying for the label cannot exercise a decisive influence.

³⁸ This can be done by verifying the existence of national standards with national certification bodies in each of the countries concerned. Moreover, note should be made that, in some countries, the translation of standards into national legislation has been done by way of enactment of mandatory legal provisions, which impose the employment of a specific standard in case of specific construction projects.

³⁹ See article 43 of the Public Sector Directive and article 61 of the Utilities Directive. See also iSeal Alliance & Corvers, 'The role of 'labels' in the new EU Procurement Directives – Guide for ISEAL members and similar schemes' (January 2015), available at [http://www.isealalliance.org/sites/default/files/ISEAL_Guidance_-_The_role_of_labels_in_the_New_EU_Procurement_Directives_v1.0\[Webinar\].pdf](http://www.isealalliance.org/sites/default/files/ISEAL_Guidance_-_The_role_of_labels_in_the_New_EU_Procurement_Directives_v1.0[Webinar].pdf)

When the label also sets out requirements not linked to the subject-matter of the contract (thus contrary to the first condition above), the procurer shall not require the label as such but may define the technical specification by reference to the label's specifications that are linked to the subject-matter of the contract and are suitable to define the characteristics of the subject-matter.

When using a label as means of proof,, the public procurer is mandated to accept as equivalent proof:

- other labels that confirm that the works, supplies or services meet equivalent label requirements;
- any appropriate means of proof such as a technical dossier of the manufacturer, when the economic operator has no possibility to obtain the specific label indicated by the public procurer, or an equivalent label, for reasons that are not attributable to the economic operator (e.g. the time limits established under the procurement procedure are insufficient to obtain such third party certification): it remains the responsibility of the economic operator though to prove the equivalence.
- exclusively third party verification (e.g. test reports or certificates from a specific conformity assessment body and other equivalent bodies)⁴⁰, when the impossibility to obtain the label or an equivalent label certification is attributable to the economic operator.

C) Defining exclusion criteria

For **PCP**, there are no European, but there may be national, legal provisions mandating the public procurer to exclude economic operators from the competition when these find themselves in certain situations related to their criminal record or related to their conomic ability to perform a public contract. Moreover, the exclusion grounds that are mentioned in the Public Procurement Directives⁴¹ could also be used in PCP. This is common practice followed by most of the EU-funded cross-border PCPs.

EXAMPLE of exclusion criteria – Smart@Fire PCP project (http://www.smartatfire.eu)		
A1	<p>Has your organisation or any of it's directors or any other person who has powers of representation, decision or control of the organisation been convicted of any of the following offences:</p> <p>NOTE: Responses to these questions will be assessed as PASS / FAIL. Only those applications achieving a PASS will be put forward for further evaluation.</p>	
NAME OF THE COMPANY:		
A1.1	Conspiracy	Yes / No

⁴⁰ Art.44 Public Sector Directive clarifies that a conformity assessment body is a "body that performs conformity assessment activities including calibration, testing, certification and inspection accredited in accordance with Regulation (EC) No 765/2008 of the European Parliament and of the Council".

⁴¹ Article 57 Public Sector Directive and article 80 Utilities Directive.

A1.2	Corruption	Yes / No
A1.3	Bribery	Yes / No
A1.4	Fraud	
(i)	The offence of cheating the Revenue	Yes / No
(ii)	The offence of conspiracy to defraud	Yes / No
(iii)	Fraud or theft	Yes / No
(iv)	Fraudulent trading	Yes / No
(v)	Defrauding HM Revenue & Customs	Yes / No
(vi)	An offence in connection with taxation in the European community	Yes / No
(vii)	Destroying defacing or concealing of documents or procuring the extension of a valuable security	Yes / No
(viii)	Money laundering	Yes / No
(ix)	Any other offence	Yes / No
PART A.2 –Exclusion criteria– Discretionary Pass *(see note below)		
A.2	Do any of the following apply to your organisation, or to (any of) the director(s) / partners / proprietor(s)? NOTE: Responses to these questions will be assessed as PASS / FAIL. Only those applications achieving a PASS will be put forward for further evaluation.	
A2.1	Bankruptcy, insolvency, compulsory winding up, receivership, composition with creditors, or subject to relevant proceedings	Yes / No
A2.2	A conviction (or convictions) for a criminal offence related to business or professional conduct	Yes / No
A2.3	Legal or administrative finding of a commission of an act of grave misconduct in the course of business	Yes / No
A2.4	Failure to fulfil obligations related to payment of social security contributions	Yes / No
A2.5	Failure to fulfil obligations related to the payment of taxes	Yes / No
A2.6	Failure to provide information required or providing inaccurate / misleading information when participating in a procurement exercise	Yes / No
A2.7	Failure to obtain and maintain relevant licences or membership of an appropriate trading or professional organisation where required by law	Yes / No

A2.8	Has personal or financial connection with an elected member or senior officer of the authority	Yes / No
A2.9	If the answer to any of these is “Yes” please give brief details below, including what has been done to put things right.	

For **PPI**, the Public Procurement Directives explicitly provide several mandatory criteria that public procurers should always include in their tender documentation as well as several facultative exclusion grounds, that the public procurer may include, or may be required by the national legislation (transposing the new Public Procurement Directives) to include. The new Public Procurement Directives also define an exhaustive list of evidence that the public procurer is allowed to require from the economic operator as proof that the exclusion grounds are not applicable.⁴²

The legal expert should check how these provisions have been implemented in national legislation, e.g. regarding the length of the exclusion period. In the Netherlands, for example, the mandatory exclusion criteria may not be applied after 5 years from the final conviction.

Source: art. 2.86 (7) Aanbestedingswet 2012

<http://wetten.overheid.nl/BWBR0032203/2016-07-01>

The same provision is included in the Belgian procurement legislation.

Source: art. 67, § 2

http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=nl&la=N&table_name=wet&cn=2016061719

As a general rule, the public procurer is mandated to accept the European Single Procurement Document (ESPD) as preliminary evidence. The ESPD is a formal electronic statement by the economic operator that the grounds for exclusion do not apply and that the relevant selection criteria are fulfilled. The economic operator shall also indicate in the ESPD which public authority or third party is responsible for providing the supporting document. Through the same declaration, the economic operator will commit to obtain and provide, upon request and without delay, those supporting documents.⁴³ The public procurer is only allowed to request those supporting documents from the highest scored tenderer, before adopting the final award decision.⁴⁴ National legislation (e.g. Poland) may allow public procurers to request the supporting documents from other tenderers as well, under certain circumstances.

Below, we outline the mandatory and the facultative grounds for exclusion and we mentioned the permitted proof for each ground.

⁴² See articles 59 and 60(2) of the new Public Sector Directive.

⁴³ See article 59 of the Public Sector Directive.

⁴⁴ See article 60(4) and Annex XII Part II of the new Public Sector Directive. Moreover, the public procurer should request evidence only in so far as it does not have the possibility of obtaining the evidence directly by accessing a national database in any Member State that is available free of charge (e.g. a national procurement register, a virtual company dossier, an electronic document storage system or a prequalification system).

MANDATORY EXCLUSION CRITERIA

According to the Public Procurement Directives,⁴⁵ public procurers are **mandated** to exclude an economic operator from participation in a tender procedure when:

the economic operator (or a member of the administrative, management or supervisory body of the economic operator) has been subject of a conviction by final judgment for one of the following reasons:

- Participation in a criminal organization;
- Corruption;
- Fraud;
- Terrorist offences or offences linked to terrorist activities;
- Money laundering or terrorist financing;
- Child labour and other forms of trafficking in human beings.

The permitted proof in this case is “an extract from the relevant register, such as judicial records or, failing that, of an equivalent document issued by a competent judicial or administrative authority in the Member State or country of origin or the country where the economic operator is established showing that those requirements have been met.”⁴⁶ When such proof is not issued in the Member State or country in question, a declaration on oath or, where this is also not available, a solemn declaration made by the person concerned before a competent judicial or administrative authority, a notary or a competent professional or trade body, in the Member State or country of origin or in the Member State or country where the economic operator is established, will suffice.

The economic operator is in breach of its obligations relating to the payment of taxes or social security contributions and this has been established by a competent administrative and/or judicial body. In this case, a certificate issued by the competent authority in the Member State or country concerned shall be requested as proof.

OPTIONAL EXCLUSION CRITERIA

The public procurer **may** exclude, but is not mandated to do so, or may be required by the national legislation transposing the Procurement Directives to exclude from participation in a procurement procedure an economic operator, where:

- the public procurer can demonstrate by any appropriate means (in the absence of a decision of a competent administrative and/or judicial body) that the economic operator is in breach of its obligations relating to the payment of taxes or social security contributions;
- the public procurer can demonstrate by any appropriate means that the economic operator failed to comply with its obligations in the fields of environmental, social and labor law established by the Union law, national law, collective agreements or by the international

⁴⁵ Art.57 of the new Public Sector Directive.

⁴⁶ Articles 60(2)(a) of the new Public Sector Directive.

environmental, social and labour law provisions listed in Annex X of the new Public Sector Directive and Annex XIV of the new Utilities Directive;

- the economic operator is bankrupt or is the subject of insolvency or winding-up proceedings, where its assets are being administered by a liquidator or by the court, where it is in an arrangement with creditors, where its business activities are suspended or it is in any analogous situation arising from a similar procedure under national law and regulations; In this case, a certificate issued by the competent authority in the Member State or country concerned shall be requested as proof.
- the public procurer can demonstrate by appropriate means that the economic operator is guilty of grave professional misconduct, which renders integrity questionable;
- the public procurer has sufficiently plausible indications that the economic operator has entered into agreements with other economic operators aimed at distorting competition;
- a conflict of interest cannot be effectively remedied by other less intrusive measures;
- a distortion of competition from the prior involvement of the economic operators in the preparation of the procurement procedure cannot be remedied by other, less intrusive measures;
- the economic operator has shown significant or persistent deficiencies in the performance of a substantive requirement under a prior public contracts, a prior contract which led to an early termination thereof, damages or comparable sanctions;
- the economic operator has been guilty of serious misrepresentation in supplying the information required for the verification of the absence of grounds for exclusion or the fulfilment of selection criteria, has withheld such information or is not able to submit supporting documentation;
- the economic operator has undertaken to unduly influence the decision making process of the public procurer, to obtain confidential information that may confer upon it undue advantages in the procurement procedure or to negligently provide misleading information that may have a material influence on decisions concerning exclusion, selection or award.

Whereas in case of mandatory exclusion criteria, the exclusion of economic operators meeting any of these criteria occurs automatically, the optional exclusion criteria, although mentioned in the tender documentation, might not always lead to an automatic exclusion of tenderers that find themselves in any of the situations covered by the optional exclusion criteria. This is an aspect which the legal expert should further investigate under applicable national legislation. For example, the applicable Dutch law and its interpretative guidance foresee that *'the assessment of whether a tenderer must actually be excluded, having regard to the general principles of Directive 2004/18, must always be **proportional** and be carried out in a non-discriminatory manner'*.⁴⁷

This approach is also confirmed from the perspective of EU law. The case-law of the Court (as well as case-law of national courts) on the optional grounds for exclusion, rejecting their automatic application,


⁴⁷ See *Connexion Taxi Services* case, C-171/15, [EU:C:2016:506](#) (Opinion in C-171/15, para 10).

confirms the need for that consistent interpretation.⁴⁸ Procurers are under a general obligation of acting in a proportionate manner and, consequently, each decision they adopt needs to be proportionate under the circumstances and pro-competitive. Ultimately 'a contracting authority must retain the power to assess, on a *case-by-case basis*, the gravity of the circumstances that would lead to exclusion of the tenderer [...] and also balance them against the effects that such exclusion would have on competition'.⁴⁹ However, the legal expert should make the procurer aware of the fact that defining a more restrictive approach in the tender documentation will prevent the procurer from applying a proportionality assessment. This is illustrated in the *Connexion Taxi Services* case of the Court of Justice of the EU, described below.

RELEVANT CASE LAW

In the *Connexion Taxi Services* case, the public procurer engaged in such proportionality assessment and awarded the contract to the supplier that had been guilty of grave professional misconduct, despite having defined in the published tender documentation an automatic rejection. The tender documentation stated: 'A tender to which a ground for exclusion applies shall be set aside and shall not be eligible for further (substantive) assessment'. The Court of Justice of the European Union concluded that the procurer should strictly comply with the criteria which it has itself laid down in the tender documentation. Applying a proportionality assessment under the current circumstances would breach the principles of non-discrimination and transparency.

See *Connexion Taxi Services* case, C-171/15, [EU:C:2016:506](#) (para 30)

 The legal expert should clearly define in the tender documentation any additional exclusion ground that derives from national case-law or administrative practice.

RELEVANT CASE-LAW

The *Pizzo* case regarded the exclusion of economic operators for not paying an administrative tax, despite the fact that payment of this tax had not been defined in the tender documentation as exclusion ground. The Court of Justice of the European Union ruled that automatic exclusion breached the principles of transparency and non-discrimination. The procurer would need to provide the tenderer an opportunity to regularize its position by paying the administrative fee within a defined period of time.

See *Pizzo* Judgment (C-27/15, [EU:C:2016:404](#))

D) Defining selection criteria

For **PCP**, there are no legal provisions requiring or prohibiting the public procurer to apply certain selection criteria. However, the fundamental principles of the TFEU remain applicable. Consequently, the following general rules should be respected when formulating the selection criteria:

- The requirement is linked and proportionate to the subject matter of the contract.

⁴⁸ See the judgment in *Forposta and ABC Direct Contact* Case that automatic exclusion (of a tenderer guilty of grave misconduct) could go beyond the discretion conferred on Member States by Article 45(2) of Directive 2004/18 ((Opinion in C-171/15, paras 51-52). See also Belgian Council of State, *Heyrman-De Roeck* case, nr. 233.383 of 5 January 2016.

⁴⁹ A Sanchez-Graells, [Public procurement and the EU competition rules](#), 2nd ed. (Oxford, Hart, 2015) 293.

- The requirement is indicated in the contract notice or contract documents.
- The requirement is sufficiently clear and precise.
- The requirements relate to the professional, financial or technical ability of the tenderer to perform the contract.

Moreover, in case of PCP, the public procurer should not impose strict selection requirements related, for example, to the financial capacity (e.g. yearly turnover) and professional qualifications (e.g. prior customer references) of the economic operator or other burdensome requirements. Indeed for a PCP procurement that concerns the development of new solutions that don't exist yet on the market it makes no sense to request prior customer references (as the new solutions are not deployed yet by anyone); The track record of a vendor in supplying existing solutions is not a good measure to evaluate whether a vendor will also be capable to develop totally different new solutions. Likewise, yearly minimum turnover (which is generated from other existing already deployed solutions) is also not a good measure to evaluate the tenderers capacity to develop new innovative solutions; having an impressive turnover from existing solutions does not make a vendor better placed to develop totally different new solutions. Very often new solutions that create the biggest breakthroughs are provided by new small companies that had no previous track record or turnover. Imposing burdensome selection criteria requirements could hamper thus in particular the participation of new and innovative SMEs to the tendering due to their lack of track record and financial turnover comparable to the one of big players in the relevant market.

It is recommended to allow all interested parties to tender in the PCP, including legal entities, start-ups, universities, associations, foundations. To be eligible, all legal entities should show a trustworthy and clear route to the market (e.g. a business-plan).

The principles of equal treatment and non-discrimination do not contain any obligation relating to the decision of the public procurer to allow or not suppliers to submit several tenders, when participating in several consortia. In the context of PCP, though, allowing multiple bidding by one supplier as part of various consortia, may enhance the variety of innovative solutions. It may enable the participation of innovative firms that are not individually able to comply with the selection criteria.

Moreover, an automatic prohibition to multiple bidding may breach the proportionality principle, when it is not justified by competition related concerns. The procurer should adopt the decision to allow or prohibit multiple bidding based on the information gathered during the market consultation on the structure of competition between technology vendors on specific technologies or parts thereof. In order to take the most suitable decision, the procurer may require the members of the consortia to present the justification for their decision to form a consortium.

The change of the consortium during the PCP process could also be necessary (e.g. in case of bankruptcy of the taking over of a specific technology vendor). From a legal perspective these possibilities and the steps to be followed should be outlined upfront in order to avoid any subsequent legal debate.

In assessing the bidders' ability to perform the contract in a PCP procurement, public procurers could look into specific experience and competence of the former, relevant to the subject matter, such as: whether the bidders have the required capacity and equipment to conduct R&D activities; whether the bidders have access to or employ personnel with the required educational and professional background.

For **PPI**, the Public Procurement Directives⁵⁰ define several categories of selection criteria that the public procurer is allowed to use. The public procurer is also limited to requesting only certain supporting documents that prove compliance with the selection criteria. As mentioned above, the public procurer is now mandated to accept the European Single Procurement Document (ESPD) as preliminary evidence.

The public procurer is only allowed to request those supporting documents from the highest scored tenderer, before adopting the final award decision.⁵¹

Below we outline the selection criteria that may be imposed by the public procurer in a **PPI**:

Suitability to pursue the professional activity;


The public procurer may require the economic operator, whenever applicable:

- to be enrolled in one of the professional or trade registers kept in their Member State of establishment, as detailed in Annex XI of the new Public Sector Directive; or
- to hold a particular authorization or membership as may be required by their country of origin in order to be allowed to perform a certain service.

Economic and financial standing;

The public procurer may impose requirements related to the economic and financial capacity of the economic operator to perform the contract. Public procurers may require:⁵²

- That bidders have a certain minimum yearly turnover, including a minimum turnover in the area covered by the contract;

 In order to support innovation and encourage the participation of SMEs to procurements, the new procurement directives specifically state that **the minimum yearly turnover** that economic operators are required to have **shall not exceed** two times the estimated contract value, except in duly justified cases (i.e., justified by the special nature of the contract object, which must be explained in the procurement documents)⁵³.

- Information on their annual accounts showing the ratios, for example, between assets and liabilities; this ratio may be taken into consideration where the public procurer specifies the methods and criteria for such consideration in the procurement documents. The methods and criteria need to be transparent, objective and non-discriminatory.
- An appropriate level of professional risk indemnity insurance.

In order to encourage innovative SMEs to bid in a **PPI**, the public procurer should consider the benefits of minimizing the economic and financial requirements. However, high risks associated with the

⁵⁰ Article 58 Public Sector Directive and article 80 Utilities Directive.


⁵¹ See article 60(4) and Annex XII Part II Public Sector Directive.

⁵² See article 58(2) Public Sector Directive and article 80(2) Utilities Directive.

⁵³ See, for example, article 58(3) Public Sector Directive and article 80(3) Utilities Directive.

implementation of the innovative solution may compel the public procurer to impose stricter economic and financial conditions.


In this case, the Public Procurement Directives allow the economic operator to team up with other undertakings and jointly submit a bid. The economic operator may rely on the financial standing of other entities, regardless of the legal nature of the links which it has with them. The economic operator is though required to prove to the public procurer that it will have at its disposal the invoked resources. One means of proving that is a formal commitment by those entities to that effect.⁵⁴

 The public procurer may also require that the economic operator and those entities be jointly liable for the execution of the contract.⁵⁵

Technical and professional ability

The procurer is given more discretion in the exact formulation of the requirements related to the technical and professional ability of the economic operator to perform the public contract. However, the public procurer may only impose requirements that relate to:

- The necessary human and technical resources; the bidders should, for example, demonstrate that they have access to or employ personnel with the required educational and professional background and that they have access to necessary research infrastructure.


 In a PPI, the public procurer should pay particular attention to the qualifications and experience of the personnel. This may prove crucial in the implementation of an innovative solution.

- Sufficient level of experience to perform the contract to an appropriate quality standard, demonstrated by similar contracts performed in the past.

EXAMPLE

“In the three years prior to the publication date of this Tender Regulation, the tenderer must have realized one other procurement the content of which falls within the area of competence identified in the technical specifications, for an amount of no less than 50.000 Euro.”

Source: Corvers Procurement Services BV

 In a PPI, the supplier might not have prior experience with the implementation of the innovative solution. In this case, the selection criterion should refer though to contracts performed in the past that demonstrate certain competences that are crucial for the implementation of the current solution (e.g. the implementation of an IT systems with a similar level of complexity).

When formulating the aforementioned selection criteria, the public procurer should keep in mind the following rules:

Article 19(2) Public Sector Directive.

- any requirements should be limited to those that are appropriate to ensure that a bidder has the legal and financial capacities and the technical and professional abilities to perform the contract to be awarded;
- all selection criteria related requirements must be related to the subject-matter of the contract;
- the required conditions for participation shall be indicated in the contract notice;
- the requirements may be expressed as minimum levels of ability;
- whenever the public procurer applies a 2-stage procurement procedure (e.g. restricted procedure or the negotiated procedure with prior competition), it may choose to award points to those economic operator who demonstrate above the minimum ability to perform the contracts. In these cases, only those economic operators who accumulate a certain number of points will be invited to submit a tender or to negotiate;
- appropriate means of proof shall be required;
- proof of compliance may also be required of other entities on the capacities of which the economic operator relies; the public procurer is mandated to request the economic operator to whom it has decided to award the contract, to submit up-to-date supporting documents showing compliance with the selection criteria, before the award becomes final.

The Public Procurement Directives also define an exhaustive list of supporting documents that the public procurer is allowed to require from economic operators as proof of compliance with the above mentioned technical and professional requirements. These means of proof are provided by article 60 of the 2014 Public Sector Directive and, respectively, article 62 of the 2014 Utilities Directive.

E) Defining award criteria

For **PCP**, the fundamental TFEU principles imply the following obligations:

1. the award of PCP contracts must be based on award criteria which are objective and relevant for the scope of the tendered contract;
2. the award criteria must relate to the tendered contract requirements;
3. the award criteria must be transparent. This means that all factors which would be taken into consideration by the public procurer when evaluating the received bids, as well as by the bidders in preparing their tenders should be disclosed.

Commission v Ireland case⁵⁶

This case shows that procurements falling outside the application of (several provisions of) the Procurement Directives (in particular article 53 of the Directive 2004/18/EC on contract award criteria), allow public procurers additional discretion in assigning scores to award criteria after the deadline for submission of bids (as long as it happens before the opening of the bids). Commission v Ireland case⁵⁶ concerning the procurement of a contract exempted from the application of several provisions of the Procurement Directives (in casu, IIB services), the procurer allocated weights to the award criteria after

⁵⁶ Case C-226/09 *Commission v Ireland* [2010] ECR I-11807 (Commission v Ireland case).

the deadline for the submission of bids and subsequently amended them after the first investigation of the submitted bids. The Court of Justice of the European Union ruled that the obligation to publicize the weights of the award criteria before the deadline for the submission of bids is not applicable as long as the procured contract is excluded from the scope of article 53 of the Directive 2004/18/EC As a consequence, assigning scores to the award sub-criteria after the deadline for submission of bids was allowed. However, this is not allowed after opening of the bids.⁵⁷

In case of **PCP**, in addition to price, the award criteria could include, for example, quality, implementation and impact⁵⁸. To be more clear:

1. **quality** could refer to:
 - the ability to address the challenge raised in the tender;
 - the novelty/innovativeness of the proposed solution approach (progress beyond-state-of-the-art);
 - the technological soundness of the solution concept;
2. **implementation** could refer to the quality and effectiveness / appropriateness of the proposed R&D work plan and resource allocation;
3. **impact** could refer to the added value for society/economy, the soundness of the commercialisation plan etc.

More examples of award criteria are included in section 2.8.2 of Module 2.



Demand a cost breakdown of the fixed price (quantity and unit price for e.g., personnel, material costs, subcontracting, equipment), in order to allow a follow-up on the costs actually spent; this will facilitate any follow-up project monitoring / processing of payments / audit / verification from the authority during and after the project (e.g. to prove that what was delivered qualifies as R&D services).

In the case of **PPI**, the Public Procurement Directives⁵⁹ define the **main applicable rules when formulating and applying the award criteria**:

- ✓ must be defined in clear and precise terms;

RELEVANT CASE-LAW

In the **EVROPAÏKI DYNAMIKI v EIB case**, the Court of First Instance of the European Union ruled that “while the ‘ability to provide a pool of staff from own resources’ award criterion was intended inter alia to make it possible to determine whether the tenderer had staff with the relevant competences and experience ‘in sufficient number’ to respond to the EIB’s requirements for additional services, it was formulated in a vague and imprecise manner, since, [...] no ‘optimal number’ had been

⁵⁷ It should be stressed that in procurements falling within the scope of the article 53 of the Directive 2004/18/EC **the Court ruled that the procurer was not allowed** to attribute weightings to the award criteria or to define sub-criteria after the publication of the contract notice. See below case LIANAKIS AE E.A. v DIMOS ALEXANDROUPOLIS E.A.

⁵⁹ Article 67 of the Public Sector Directive and article 82 of the new Utilities Directive.

predefined with regard to that staff and the EIB failed to give the tenderers any precise figures in that regard”.

Source: CFI, C-461/08, EVROPAĪKI DYNAMIKI v EIB, para.149

- ✓ public procurers should award the contract to the most economically advantageous (“MEAT”) offer; this ensures better value for money and higher quality of the products / works / services offered;
- ! In order to ensure that the solution does not substantially outweigh the cost of available solutions, award criteria regarding the whole life cycle of the product or service should be considered.

RELEVANT CASE-LAW

In the **EVROPAĪKI DYNAMIKI v EIB case**, the Court of Justice of First Instance of the European Union decided that *“where a contract is to be awarded to the most economically advantageous tender, the contracting authority should set the weightings to be applied to the award criteria by ensuring that the ‘price effect’ is not neutralised or minimised in such a way that the tendering procedure might lead to the award of a public contract that is unreasonably costly in relation to the actual needs of the administration”*.

Source: CFI, C-461/08, EVROPAĪKI DYNAMIKI v EIB

- ✓ must be linked to the subject matter of the contract;

RELEVANT CASE-LAW

In the **EVN Wienstrom case**, the Court ruled that an award criterion related to the amount of *‘green electricity the tenderers can supply to a non-defined group of customers’* was not linked to the subject matter of the contract in question. A lawful criterion would have been the amount of green electricity that the tenderers could annually supply to the contracting authority.

Source: CJEU, C-448/01 Wienstrom v Austria

- ✓ must not confer unrestricted freedom of choice to the public procurer;
This means they must provide an objective basis for distinguishing between tenders, and be adequately specific. In the words of the Court, award criteria must be formulated in such a way that allows all “reasonably well-informed and normally diligent tenderers” to interpret them in the same way.⁶⁰

A further element of the objectivity requirement for award criteria concerns **verifiability**. If award criteria relate to factors which cannot be verified by the public procurer, it will be difficult to demonstrate that they have been applied objectively. This means you should consider in advance what means of proof tenderers can offer under each award criterion and how you will evaluate this. In the Concordia Bus case, before evaluation of the tenders the Community of Helsinki had specified and

⁶⁰ See also Case C-19/2000 SIAC Construction Ltd v County Council of the County of Mayo, at para 42

published a system for awarding extra points for lower levels of noise and nitrogen oxide emissions⁶¹. This system was considered by the Court of Justice to be adequately specific and objective.

RELEVANT CASE-LAW

In the **EVN Wienstrom case**, the Court ruled that “*where a contracting authority lays down an award criterion indicating that it neither intends, nor is able, to verify the accuracy of the information supplied by the tenderers, it infringes the principle of equal treatment, because such a criterion does not ensure the transparency and objectivity of the tender procedure*”.

Source: CJEU, C-448/01 Wienstrom v Austria, para.51

In the **Concordia Bus case**, the Court decided that “*criteria whereby additional points are awarded to tenders which meet certain specific and objectively quantifiable environmental requirements are not such as to confer an unrestricted freedom of choice on the contracting authority*”.

Source: CJEU, C, Concordia Bus Finland Oy Ab v Helsingin kaupunki and HKL para.66

- ✓ must have been advertised in the contract notice, including relative weighting of each criterion and sub-criteria.⁶² In case weighting is not possible, the public procurer must provide objective reasons in this regard and the criteria shall be indicated in decreasing order of importance.

RELEVANT CASE-LAW

In the **LIANAKIS AE E.A. v DIMOS ALEXANDROUPOLIS E.A. case**, the Court of Justice of the European Union decided that in a procurement governed by the Procurement Directives, the transparency and equal treatment principles prohibit the procurer to attribute weightings to the award criteria, or to define sub-criteria, after the publication of the contract notice.

Source: CJEU, C-532/06, LIANAKIS AE E.A. v DIMOS ALEXANDROUPOLIS E.A.

- ✓ must not be mixed with selection criteria (e.g., experience/general capacity);

RELEVANT CASE LAW

In the **Ambisig v Nersant case** however, the Court of Justice of the European Union ruled that ‘quality of the team’ may be used as award criterion, where the performance of the contract is intellectual in nature (in the present case, it concerned training and consultancy services) and the quality of performance depends “*decisively on the ‘professional merit’ of the people entrusted with its performance, which is made up of their professional experience and background*”.

Source: CJEU, C-601/13, Ambisig v Nersant, paras 30-33

⁶¹ In this case, extra points were awarded (amongst other factors), for the use of buses with nitrogen oxide emissions below 4 g/kWh (+ 2.5 points/ bus) or below 2 g/kWh (+ 3.5 points/bus) and with external noise levels below 77 dB (+1 point/bus).

⁶² The Court has considered the level of disclosure required regarding sub-criteria in a number of cases including Case C-532/06 *Lianakis and Others*, Case C-331/04 *ATI EAC and Viaggi di Maio v ACTV Venezia SpA*, and Case T-70/05 *Evropaiki Dynamiki v EMSA*. It is permissible to withhold the weightings of sub-criteria only where these i) do not alter the main criteria, ii) do not contain elements which could have affected the preparation of bids and iii) do not give rise to discrimination against any tenderer (Case C-331/04 *ATI EAC*).

This was also ruled by the Belgian Council of State in **Van Impe case**. The Council of State judged that, although selection criteria cannot in principle be used as award criteria, that “experience of the team” could be an award criterion if it can establish the specific quality of the offer in light of the specifics of the contract.

Source: Belgian Council of State 20 January 2011, nr. 210.527, Van Impe

- ✓ must be suitable of objective and non-discriminatory evaluation. In other words, the procurer must interpret the award criteria in the same way throughout the entire procurement and must apply them objectively and uniformly to all tenderers.

RELEVANT CASE-LAW

In the **EVROPAĪKI DYNAMIKI v EIB case**, the Court of First Instance of the European Union decided that, by requiring the successful tenderer to lower its price and alter the composition of its team, the procurer actually altered the weighting applied to the initial award criteria. In practice, the procurer accorded greater relative importance to the financial criterion than it accorded to the technical criteria, as defined in the tendering documents on the basis of which the bids had not only been prepared by the tenderers but also compared by the evaluation committee. This infringed the principles of equal treatment, non-discrimination and transparency, by unlawfully depriving the other tenderers of a real chance of being awarded the contract.

Source: CFI, C-461/08, EVROPAĪKI DYNAMIKI v EIB

This means that a contracting authority cannot add new award criteria in the evaluation that were not mentioned as such in the procurement documents.⁶³ Only the award criteria mentioned in the procurement documents can be evaluated. But it also means that all the award criteria mentioned in the procurement documents must be evaluated.⁶⁴

F) Deciding on the use of variants

In **PCP**, the use of variants is not necessary, as the PCP inherently requires the development of several alternative solutions in parallel. However, the public procurer could decide, on a case-by-case basis, if allowing variants is beneficial to encourage the (even more) innovative character of the bids or not.

In **PPI**, the use of variants could help the procurer compare tenders for standard solutions and tenders for innovative solutions (particularly on price).

According to the Public Procurement Directives,⁶⁵ the procurer should observe the following rules:

- the acceptance of variants must be clearly stated in the contract notice and tender documentation;
- the minimum requirements which variants must meet must also be clearly defined;

⁶³ See *OPPS* case of the Belgian Council of State, nr. 237.234 of 31 January 2017.

⁶⁴ See *Buccinum* of the Belgian Council of State, nr. 228.133 of 29 July 2014.

⁶⁵ Article 45 Public Sector Directive; article 64 Utilities Directive.

- specific ‘administrative’ requirements that tenderers submitting a variant should comply with must also be clearly communicated (e.g. submission of the variant tender in a separate envelope etc.).

RELEVANT CASE-LAW

In the **Traunfellner GmbH vs Asfinag case**, the Court of Justice of the European Union decided that the obligation to set minimum requirements in order to consider variants is not satisfied “ where the contract documents refer only to a provision of national legislation requiring that alternative tender ensure the performance of work which is qualitatively equivalent to that for which tenders have been invited, without further specifying the comparative parameters on the basis of which such equivalence is to be assessed”.

Source: CJEU, C-421/01, Traunfellner GmbH v Asfinag para. 30

The legal expert should signal the need to distinguish in the tender documentation between minimum requirements, mandatory for both standard and variant bids, and additional requirements which are mandatory only for the standard bid, but do not need to be observed by the variant bid. In defining the minimum requirements for variants, the procurer should aim to allow sufficient flexibility in order to widen the competition and allow tenderers to bring forward alternative, innovative offers that may deliver better results than the standard solution envisaged by the procurer.⁶⁶ Recital (48) of Directive 2014/24/EU and recital (58) of Directive 2014/25/EU expressly encourage procurers to allow variants as often as possible, in order to allow innovative offers.



The legal expert should define the same award criteria for the evaluation of both standard bids and variants. The contract should be awarded to the standard or variant tender that proves the most economically advantageous.

G) Deciding on the use of value engineering

Value Engineering (VE) offers the possibility to improve value for money during the execution of a contract, when it becomes more clear which elements of the project or the contract increase costs. For general information regarding the use of VE in innovation procurement and some example of approaches used in this respect, see section 2.8.2 (G) in Module 2.

A VE clause in public contracts may allow providers to propose, and public procurers to accept, new state of the art solutions during the execution of the public contracts. Thus, VE clauses may lead to amendments of an existing contract.

In case of **PCP** procurements, the employment of a VE clause is subject to the TFEU principles of transparency, equal treatment, non-discrimination and proportionality. Consequently, the public procurer needs to announce the intention to use VE upfront, in all the tender documents. Moreover, the PCP contract should clearly define the conditions for the application of the VE approach, in order to prevent unwarranted modifications to the procurement contract.

⁶⁶ Sanchez (2015) 397.

Whereas the above rules equally apply in case of **PPI**, any potential modifications to the procurement contracts need to be fully compliant with the provisions of the public procurement directives. In this respect, the 2014 Public Procurement Directives expressly include, for the first time, the specific cases in which public contracts could be modified during their term, in article 72 of the Public Sector Directive and, respectively, in article 89 of the Utilities Directive.

However, through the application of VE during the execution of a contract, the substantial or material core of the contract must not change. This means that the functional or performance "minimum" requirements to be accomplished to satisfy a specific need that was defined in the initial tender specifications must remain the same throughout contract implementation, and any improvement in satisfying the need that is created through VE during contract implementation results in "additional" cost savings and quality improvements in the delivered solution. A VE clause could work in practice as an innovation clause.

VE clause – EXAMPLE

Voluntary approach: The Contractor is encouraged to develop, prepare, and submit value engineering change proposals (VECP's), targeting quality improvements and cost-savings, voluntarily. Any savings resulting from the implementation of approved VECPs shall be shared between the Contractor and the public procurer, in accordance with the pre-defined incentive sharing rates

Mandatory approach: The Contractor shall develop, prepare, and submit value engineering change proposals (VECP's), targeting quality improvements and cost-savings. The Contractor shall share with the public procurer in any net acquisition savings realized from accepted VECP's, in accordance with the pre-defined incentive sharing rates.

Source: Value Engineering: US Department of Defense (2011) A Guidebook of Best Practices and Tools

EXAMPLE of Value Engineering clause in a PPI contract

Definition

1. Value engineering

The sum of activities and actions, aiming to ensure that the [Contractor] fulfils its obligations such as to create added value for the [Public Procurer]; these activities and actions target innovative development, effective and/or efficient organization of the project or similar.

2. Value Engineering

- 2.1. The Contractor shall submit twice a year (before 15th of January and before 15th of July) to the [Public Procurer], a written proposal based on Value Engineering. The proposal shall contain the following information:
- (i) a description of the activities that will increase the quality of the project;
 - (ii) the change in the parameters of the Total Cost of Ownership (TCO) calculation, as a direct consequence of the value engineering, as well as an analysis of the estimated savings for the remaining time of the contract;
 - (iii) a risk analysis related to the implementation of Value Engineering and the description of the planned prevention or mitigation measures;

- (iv) an overview of those Contract clauses that need to be amended as a consequence of Value Engineering, and an overview of the reasons why these changes are needed;

2.2. The proposal mentioned in section 2.3 above, will be orally presented and explained by the Contractor to the [Public procurer] within 20 Business Days from the initial submission date. The [Public Procurer] may accept or reject the (amended) proposal, following its presentation. The rejection of the proposal by the [Public Procurer] shall not bear any consequence on the fulfilment of the contractual obligations by the Contractor.

2.3 Savings that are realized through Value Engineering, based on a proposal priorly accepted by the [Public Procurer], will be equally shared between the [Public procurer] and the Contractor.

3.Contract cancellation and termination

3.1. Notwithstanding its right to cancel the Contract based on applicable legislation, the [Public Procurer] has the right to partially or entirely cancel the Contract, out-of-court, by registered letter, containing a notice of default with a remedy period of ten Business Days, provided that the Contractor does not comply with its obligation to submit a Value Engineering proposal, as described above.

3.2. The Party who cancelled the Contract has a right to compensation for the damage that may be caused by the cancellation, except in cases of *force majeure*.

Source: VZVZ, translation by Corvers Procurement Services B.V.

More information on Value Engineering and a glossary of terms used when defining VE clauses are available in Annex 4 of Module 2 on Value Engineering.

The VE clause is always related to quality improvements that generate savings. Sharing the savings between the procurer and the supplier acts as incentive for suppliers to engage in Value Engineering. Whenever the public procurer desires to stimulate the supplier to propose quality improvements that do not necessarily generate savings, he should design other (e.g. financial or reputational) incentives, such as financial bonuses, or supporting vendors in marketing the improved solution to other customers etc.

2.8.3 Drafting the tender documentation

2.8.3.1 The Prior Information Notice (PIN)

Prior Information Notices (**PIN**) serve the purpose for public procurers to make known in a transparent way to all potentially interested bidders on the market their intention / plan to start a procurement in the future, together with any information relevant to the upcoming procurement. For PCPs and PPIs, PINs are an important tool to inform all potentially interested bidders on the market well in advance about:

- the upcoming needs for innovative solutions, so that vendors have enough time to bring innovative solutions to the market with the required quality/price requirements in time for the procurement
- any preparatory activities (e.g. open market consultations, conformance testing) that the procurer plans to organize before the actual purchase

PINs are specifically regulated by article 48 under the 2014 Public Sector Directive and, respectively, by article 67 under the 2014 Utilities Directive, where they are referred to as '*Periodic Indicative Notices*'.

A template for announcing the PIN for a PCP and a PPI is attached to this Toolkit.

PINs to announce open market consultations in preparation of a PCP or PPI procurement

In addition to the typical information on the planned scope (innovative solution requirements), timeframe and budget of the PCP or PPI procurement, the PIN can also contain information about open market consultations that the procurer plans to organize before the PCP or PPI procurement.

In the case of **PPI**, the procurer may also require conformance testing to assess the readiness of solutions/technologies for commercial deployment. The procurer can require conformance testing to take place prior to starting the procurement procedure (before publishing the contract notice, to verify up to what degree vendors on the market are ready to meet the requirements), or during the procurement procedure (as part of the evaluation of tenders), but in any case prior to the final contract award.

DIFFERENT TYPES OF CONFORMANCE TESTING – EXAMPLES

A demonstration of the capabilities of a system prior to final award of a PPI contract may include:⁶⁷

- ❖ **On-site tests** - including all hardware installation and assemble, burn in of all components, installation of software and approved production environment, tests and benchmarks addressing functionality, performance, reliability and quality and run benchmarks to demonstrate performance commitments.
- ❖ **Factory Test** - running tests and verifications even on a subset of the system makes possible to anticipate possible problems before on-site delivery and therefore is desirable.
- ❖ **Availability tests** - usually run for 10-30 contiguous days in a sliding window of 20-60 days and require typically 98% availability – often running a selected system load. Failures taken into account for computing the availability may include unavailability of nodes, inability to access the file system, inability to login, unavailability of full switch bandwidth, inability to launch batch submission.
- ❖ **Functionality demonstrations** - are run on the configuration that will go into production and include remote monitoring, power control and boot capabilities, network connectivity, file-system functionality, batch system, system management software, program development environment and Operating System functionality.

Source: [R Blake, F Robin and M Sbrighi, PRACE 1IP Work Package 8: HPC Systems Procurement Best Practice](#)

In addition to information about the planned scope, timeframe and budget of the procurement, the PIN can also announce specific conformance testing/certification/labelling requirements that vendors will need to meet for the procurement.

The procurer has two options in the PIN for conformance testing/certification/labelling:

⁶⁷ Description based on [R Blake, F Robin and M Sbrighi, PRACE 1IP Work Package 8: HPC Systems Procurement Best Practice.](#)

(1) The procurer can announce in the PIN that conformance testing/certification/labelling will take place by a specific target date (defined in the PIN) that takes place before the PPI will be started. In this case the conformance testing/certification/labelling is used as a way to check whether it makes sense to start procuring, by verifying whether by the target date "if" and "up to what degree" different solutions of different vendors can meet the desired quality/cost improvements.

EXAMPLE

The Swedish Energy Agency classifies/labels at which costs different vendors solutions reach which level of energy improvement via a conformance testing that takes place before the procurers (Swedish cities) launch afterwards PPIs. The advantages of this approach are:

- (i) each procurer (city) only needs to start the whole procurement procedure if and when it is proven that vendors have reached its requirements;
- (ii) each procurer (city) can better specify the quality/price requirements for its PPI (as he knows beforehand which level of quality improvement can be reached at which cost) and
- (iii) this simplifies the PPI procedure and enables different procurers (cities) to reuse a common conformance testing/certification/labelling for their own individual PPI procurements (e.g. the Swedish cities don't need to possess themselves any technical skills to organize the conformance testing, they can simply refer in their tender specs to the fact that they want to buy solution with energy level x and cost y as conformance tested already beforehand by the Swedish Energy Agency).

Source: http://www.bebostad.se/wp-content/uploads/2013/08/Heat_Recycling_Procurement_eng_invitation.pdf

(2) The procurer can announce in the PIN that conformance testing/certification/labelling will take place during the tendering procedure during the evaluation of offers. In this case there is the risk that the procurers starts the procurement procedure (i) at a time when the market is not ready yet to deliver the optimal solution (ii) while still lacking important information to set realistically achievable expected quality/price ratio requirements. Also in this case (iii) each individual procurer needs to have all the technical skills and financial resources to organize itself the conformance testing / certification / labelling.

In order to comply with the TFEU fundamental principles, the PIN should include clear and sufficient information about the conformance testing/certification/labelling to enable tenderers to understand whether they are able to participate (e.g. regarding location, price, scope of the testing etc.). Moreover participation to the conformance testing/certification/labelling should not be unjustifiable restricted (e.g. on basis of nationality, location etc.).

2.8.3.2 The Contract Notice

A contract notice serves the purpose for public procurers to invite potential bidders to make offers for a specific type of service, good or work that is to be procured.

From a legal point of view, publication of the Contract Notice serves the purpose of ensuring compliance with the principle of transparency. To ensure wide dissemination of the upcoming procurement, the public procurer should publish the contract notice in TED (Tenders Electronic Daily), while the text of the contract notice should be written at least in English.

In case of **PCP**, according to the principle of transparency, the Contract Notice should be published in relevant media channels existing in each country (e.g., national procurement portals, procurer's websites, innovation procurement portals etc.). It is advisable to publish the Contract Notice at least in English and the local language of the public procurer. However, the legal expert should ensure that any language requirements set by national legislation are observed.

As PCP is addressing procurement needs for which there can be a multitude of potential technical solution approaches and for which there is a wide commercial market, PCPs are typically of interest to potential bidders from all over Europe. Therefore, although not mandatory by legislation, in the case of **PCP**, it is advisable to use the standard form for a Contract Notice⁶⁸ and to publish it voluntarily also in the Official Journal of the EU.⁶⁹

The PCP contract notice should describe relevant information that a supplier would need to determine whether the call is interesting enough to participate and/or whether it meets the tendered contracts requirements.

The contract notice shall include sufficiently information to enable economic operators to decide whether to submit a tender:

A template contract notice that can be used for PCP is attached to this Toolkit.

In case of **PPI**, the Public Procurement Directives specifically regulate the contract notices under article 49 of the Public Sector Directive and, respectively, article 69 of the Utilities Directive. Accordingly, contract notices shall be issued as a means of calling for competition in respect of all procedures regulated under these directives.

A template contract notice that can be used for PPIs is attached to this Toolkit.

2.8.3.3 The Request for Tender/Tender Regulation/Invitation to Tender

The Request for Tender is the main document that describes the object of the procurement and sets the terms and conditions governing the procurement process. The aspects discussed in the previous section (section 2.8.2) should be included in the Request for Tender, according to the specificities of a PCP or a PPI.

⁶⁸ Available at http://simap.europa.eu/buyer/forms-standard/index_en.htm

⁶⁹ Available at <http://ted.europa.eu>

From a legal perspective, both in case of a PCP and of a PPI, the Request for Tender needs to include, upfront, all the information pertaining to the envisaged procurement, as well as the information that is needed by the bidders in order for them to draft and submit their tenders and to estimate whether their tenders could be successful.

Information regarding the specific information that should be included in the Request for Tender is presented in sections 2.2.3 (B) and 2.2.4 (B) of Module 2.

H) R&D services

The Request for Tenders should clarify the conditions for the execution of the activities under the PCP procurement (e.g. through the use of specific selection and compliance criteria):

- The economic operator needs to perform R&D services;
- The application of place of performance conditions, if any (see page 94 of Module 2 and section E page 32 in Module 3)
- The public procurer has the right to regularly inspect compliance with the above obligations.

2.8.3.4 The procurement contract

According to specific provisions in the PCP Communication and section 2 of the Staff Working Document, in a **PCP**, the public procurer will conclude a contract with several bidders whose offers have been accepted. Each successful bidder will thus be granted a **Framework Agreement**. The PCP Framework Agreement will cover all 3 PCP phases. For each phase, a separate Phase Contract will be concluded. The Phase Contracts will mainly describe the scope of the deliverables within each phase and the price per phase. The Phase Contracts are drafted within the general setting of the Framework Agreement. However, in case of conflict between the Framework Agreement and one or more of the Phase contracts, the former shall prevail. This approach will allow the public procurer to terminate the Framework Agreement with those economic operators at the end of each phase, in case they do not deliver successful results, and do not qualify for receiving an invitation to bid for the subsequent phase.

The **PPI** will result in the signing by the public procurer of a **Procurement Contract** (which could also, but not have to be, a framework contract or framework agreement) with the successful bidder. The PPI Procurement Contract gives evidence of the rights and obligations of the parties thereto, in relation to the specific type of goods, works or services that are being procured.

According to recital (104) of Directive 2014/24/EU, contract performance conditions must be published upfront, as part of the PIN, Contract Notice or tender documentation.

Both the PPI Procurement Contract and the PCP Framework Agreement contain general provisions. These are outlined below. Subsequently we provide an overview of the most important clauses that are specific to the PCP procurements and, respectively, the PPI procurements.

Common Provisions:

Parties' identification and parties' rights and obligations

The procurement contract must expressly include the parties' identification details, as well as their rights and obligations, in line and full compliance with the provisions of the tender documentation, contract notice and award notice.

Scope of the procurement contract

The procurement contract must expressly include the procurement contract's object.

Applicable law

The law governing the contract should also be specified in the contract. From a practical point of view it may be advisable to declare applicable the law of the country in which the activities are executed.

In case of joint procurement, the public procurement directives contain specific provisions regarding the choice of law governing such procurement.

Accordingly, when several public procurers from different Member States, jointly award a public contract, they shall enter into an agreement expressly mentioning the law that will govern such procurement, unless the necessary elements of such procurement, including the governing law, have been regulated by an international agreement concluded between the Member States concerned (see article 39(4) of the Public Sector Directive).

In case of joint procurement taking the form of centralized purchasing activities, the provision of such activities by a central purchasing body located in another Member State shall be conducted in accordance with the national provisions of the Member State where the central purchasing body is located (see article 39(3) of the Public Sector Directive).

In case of institutionalized procurement taking the form of ERICs or EGTCs, the law governing the procurements carried out by them is established pursuant to the provisions of the EC Regulation No 1082/2006 of the European Parliament and of the Council of 5 July 2006 on a European grouping of territorial cooperation in case of EGTCs and, respectively, Council regulation (EC) No 723/2009 of 25 June 2009 concerning the Community legal framework for a European research Infrastructures Consortium (ERIC) as further amended by the Council regulation (EU) No 1261/2013 of 2 December 2013 amending Regulation (EC) No 723/2009 in case of ERICs.

It is important to consider the fact that some Member States regulate the procurement procedure under administrative law while the implementation of the procurement contract falls under private law, whereas other Member States regulate both the procurement procedure and the implementation of the procurement contract under private law. The legal expert should always check which legal system applies to the procurements conducted by its procurer.

Jurisdiction and competent court of law. Alternative dispute resolution

It is important to be aware of the legal regime applicable in the jurisdiction which the procurement contract falls under (see above paragraph) in order to include the court of law competent for the solving of any disputes arising out of or in connection with the procurement contract.

The contract may state a preference for alternative dispute settlement methods, particularly mediation and arbitration, as such dispute fora are often cheaper and more flexible than traditional courts of law. Nevertheless, the legal advisor should check this option under national legislation.

If the national law allows for such alternative dispute resolution mechanisms, (a) mediator(s) or (an) arbitrator(s) could be appointed from the beginning of the contract.

In the case of arbitration, it is advisable to appoint 3 arbitrators, one by each party to the contract and one arbitrator in agreement by both parties to the contract. The Rules of Conciliation and Arbitration of the International Chamber of Commerce or any mutually agreed alternative rules should be declared applicable. Such rules may include their own designation procedure of the arbitrators. Sometimes arbitrators with specialized expertise may be necessary, as in the case where the parties disagree over the acceptance of a deliverable and the conformance of such deliverable to specification. The latter would require specific technical expertise in order to adjudicate successfully.

The arbitration award should be declared final and binding on the parties, excluding any appeal. The enforcement of the award should be governed by the law of the country in which the contract is being executed.

Another mechanism to ensure speedy dispute settlement is to appoint dispute review boards or adjudicators.

EXAMPLE of dispute resolution clauses

Article - Dispute Settlement

- (i) Any disputes between the Parties, arising with reference to the interpretation, performance, validity, effectiveness and termination of this Agreement, shall be resolved in an amicable manner
- (ii) The parties shall defer any disputes arising out of the present Agreement which remain unresolved to the exclusive competence of the *[insert chosen court of law]*.
- (iii) The applicable law to this Agreement is the *[insert law]* law.

Article - Dispute Settlement (Mediation and Arbitration)

1. The parties shall solve disputes arising out of the present contract in an amicably manner.
2. The parties shall defer the disputes arising out of the present contract which remain unresolved to a mediation attempt managed by the *[insert which mediation body you select]*.
3. If the mediation attempt fails, the disputes arising out of or related to the present contract shall be settled by means of arbitration by *[insert which Court of Arbitration you select]*.
4. The language of the arbitration will be *[insert language]*.

Source: Corvers Procurement Services BV

Assignment

The contract should also provide that the winning bidder is not allowed to assign the obligations incumbent there upon under the contract to another entity or change potential sub-contractors mentioned in the tender without prior (written and explicit) authorization from the public procurer. Moreover, the winning bidder should remain liable for the proper execution of the sub-contracts by the sub-contractors.

Replacing the main contractor could trigger the need to organize a new procurement (e.g., when the contract was awarded to a certain contractor given its previous experience in the type of the tendered contract). In the case of PPI, however, according to article 72 of the Public Sector Directive and, respectively, article 89 of the Utilities Directive, the replacement of the contractor shall not trigger the need to organize a new procurement procedure in the following cases:

- A. the possibility for such replacement has been provided for upfront in the tender documents, in an unequivocal manner;
- B. universal or partial succession into the position of the initial contractor, following corporate restructuring, including takeover, merger, acquisition or insolvency, of another economic operator that fulfils the criteria for qualitative selection initially established provided that this does not entail other substantial modifications to the contract and is not aimed at circumventing the law;
- C. the public procurer itself assumes the main contractor's obligations towards its subcontractors, where this possibility is provided for under national legislation.

Contract amendment during execution

The general rule applicable in public procurement is that major amendments of the contract, that change its overall nature, breach the equal treatment principle, both in the case of a PPI Procurement Contract and a PCP Framework Agreement (and Phase contract).

As both PCPs and PPIs deal with innovative solutions, in both cases there may be a need for the vendor to modify its technical solution during contract execution to meet the procurement need. In cases where this requires contract modification, this is possible as long as the possibility for contract modification was explicitly foreseen in the PPI contract/PCP framework agreement and such modifications do not change the overall nature of the contract (no change to the object of the tender and the solution requirements defined in the technical specifications).

Limitation of liability

The public procurer should exclude any liability for infringements of laws in any country by the contractor by placing the burden of conformance to all local laws and regulations on the contractor. The contract shall also exclude liability of the public procurer for infringement of third-party IPR or for damages to third parties by the contractor, as well as indirect, consequential and special damages caused by the contractor under the procurement contract.

Indemnification

'Indemnification' refers to the duty of one party to a contract to reimburse the other party with respect to losses or injury experienced under the contract. In an innovation procurement context, indemnification can relate to losses due to third party IPR infringement claims.

A standard clause would include the IPR owner providing indemnification (for both awarded damages and legal costs) to the licensee if any third party files a suit against the licensee claiming its use of the technology infringes its IPR. An indemnification duty is rarely open-ended so it's important that a 'cap' of financial liability is defined in the contract.

Transfer of IPR ownership

Transfer refers to the sale or transfer of IPR ownership from one party in a licensing contract to a third party. Transfer most often occur in the context of company buy-outs, mergers and acquisitions, joint ventures or other collaboration agreements between companies. The most important point for the legal advisor is to ensure in the PCP/PPI contract that the obligations attached to the licensee continue to be performed by the new IPR owner in case of IPR transfers. This can be assured contractually by inserting a suitable 'IPR transfer' clause in the contract.

Penalties and bonuses

When the contractor fails to meet its obligations under the contract (delays in delivery or completion of works/services, or failure to meet the performance requirements that result in extra costs or loss of revenue or loss of other benefits), he may be mandated to pay a penalty. The total amount of the penalties should be deducted from the contract price. In the case of late delivery, deduction could take place without formal notice. The contractor may be required to pay damages when the late delivery is due to its gross negligence.

In the case of technical shortcomings, the penalties should be imposed only after informing the contractor. When penalties are mentioned in percentages, they will be calculated on that part of the contract's price that corresponds to the portion of the contract that is not executed according to the contract. Good practice in international contracts shows that the amount of the penalties should not go beyond 10% of the value used as a basis for their calculation.

The contract could provide for the payment of a bonus to the contractors when works are completed before the contractual timeline and when this benefits the public procurers and the procurement overall.

Force majeure

When delays are caused by events not attributable to the fault or negligence of the contractor, the public procurers shall allow respite or modification of the contract delivery requirements. It is the obligation of the contractor to show that such force majeure events made the execution of the contract impossible within the time-limits specified therein. Penalties will not be charged in such cases. However, the contractor should also be required to maintain and abide by a mutually-agreed risk management plan (RMP), which details in advance certain procedures to deal with and minimize the disruption of certain unlikely events, e.g. earthquakes or other natural disasters.

The contractor should be mandated to inform the public procurer as soon as it becomes aware of an event that may cause delays in the procurement and should describe what the impact is on the cost and planning, as well as the action he undertakes to mitigate these problems.

Specific provisions in PCP Framework Agreements:

Relation between the PCP Framework Agreement and the Phase Contracts

The PCP Framework Agreement should detail:

- the names of the contracting parties (and possibly additional preferred partners that cooperate with them) and the nature of the contract (R&D services)
- the contractual provisions that define the rights and obligations of all the parties involved in the PCP that remaining binding during the entire duration of the PCP (across the different phases) such as IPR, confidentiality, publication, payment, monitoring, contract termination and/or modifications etc.
- the approach for implementing the different PCP phases (through specific contracts) with intermediate assessment of results at the end of the solution design and prototype development phases.

The PCP Framework Agreement should also clarify whether its provisions take precedence in case of conflicting provisions with the Phase Contract.

Value Engineering (VE)

A VE clause may be included in the PCP Framework Agreement. For more info on value engineering clauses see section 2.8.2 G).

Intellectual Property Rights (IPRs)

For PCPs, the Framework Agreement shall provide the regime of sharing of IPRs between the public procurer and each of the bidders, in accordance with the PCP Communication, section 4 of the related Staff Working Document and the State Aid Framework for R&D&I⁷⁰. These clauses shall not be renegotiated/modified during the execution of the contract.

Monitoring performance clauses

See section 2.10 for information on how to set appropriate monitoring mechanisms to assess development during contract implementation and how to take progress made by the contractors into account.

Exit schemes

Several exit clauses could be included in the Framework Agreement establishing the terms and conditions for terminating a PCP Framework Agreement. These could regard:

- budgetary restrictions;
- insufficient competition at PCP Phase 2 and Phase 3 (e.g. when an insufficient number of supplier have delivered successful Phase result to qualify for bidding on the next Phase Contract).

⁷⁰ Section 2.3 article 33(d) of the State Aid Framework for R&D&I specifically provides, as one of the conditions that need to be met to exclude the state aid element, that “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.” An alternative to this approach is the wide dissemination of all results which do not give rise to IPR and the allocation of any IPR to the public procurer.

- the activities do not represent R&D services.

In the PRACE PCP project⁷¹ for example, an exit clause was included that allows the public procurer to terminate the agreement in case the activities executed by the vendors do not represent R&D services.

Publication of R&D results

The public procurers shall inform tenderers of the procurers' right to publish - after consultation with each participating R&D provider - public summaries of the results of the PCP project, including information about key R&D results attained and lessons learnt by the procurers during the PCP (e.g. on the feasibility of the explored solution approaches to meet the procurers' requirements and lessons learnt for potential future deployment of solutions). Details should not be disclosed that would hinder application of the law, would be contrary to the public interest, would harm the legitimate business interests of the R&D providers involved in the PCP (e.g. regarding IPR protected specificities of their individual solution approaches) or could distort fair competition between the participating R&D providers or others on the market. In addition, publication of R&D results could also be done by the R&D suppliers.

Templates for a PCP Framework Agreement and a complementary Phase Contract template are attached to this Toolkit.

Specific provisions in PPI Procurement Contracts:

Cancellation of the contract

The public procurers should reserve the right to cancel a contract either wholly or in part, at any time upon written notice within an agreed time period. The contractor should be mandated to collaborate in winding up the contract. When possible and depending on the scope of the procurement contract, the public procurers should take over all finished parts as well as other materials already purchased for the execution of the contract, at a fair and reasonable price. However, the public procurers will not take over parts or materials that the contractor chooses to retain.

The public procurers should also indemnify the contractor for foreseeable financial losses that are attributable to the cancellation of the contract. The amount of indemnification shall be fixed by these public procurers on the basis of evidence brought by the contractor and accepted by them. The total sum paid will under no circumstances exceed the total price of the contract.

When the contract is cancelled due to the fault of the contractor, the public procurers shall only pay the contractual value of the accepted deliverables. The contract may also provide that the penalties stipulated in the contract are also charged to the contractor for delivery after the delivery date stipulated in the contract. The contractor could, in principle, be at fault when:

- it fails to meet the technical requirements of the contract or the progress and/or delivery requirements jeopardize seriously the concerned procurement;

⁷¹ See <http://www.prace-ri.eu/IMG/pdf/d2.1.2-3ip.pdf>.

- it has breached the confidentiality clause;
- it transfer his obligations under the contract without prior authorization by the public procurers or does so against their explicit refusal;
- it uses fraudulent practices, such as deceit concerning the nature, quality or quantity if the delivered parts, offering gifts or remuneration as bribery to any person employed by a member of the public procurers or by the entities coordinating the concerned procurement or persons working on its behalf.

IPR arrangements

In order to encourage fair and wide exploitation of results, ownership rights of IPRs generated during the execution of a PPI procurement contract should be assigned to the party generating the IPRs, except in duly justified cases (e.g. when that party is not able to exploit them).

Performance clauses

Safeguarding the promotion of innovation should not be limited to the conduct of the tender procedure and must be given due consideration also during the implementation phase of the procurement contracts awarded in the concerned procurement. Specific clauses which aim at incentivizing contractors are often included in procurement contracts.

Contract performance clauses usually state how a contract must be carried out, in accordance with the requirements published in the tender documentation.

The Public Procurement Directives stipulate that contract clauses must be linked to the performance of the contract, namely to the tasks which are necessary for the provision of works / services procured and may not result in discrimination in favor of interested bidders from a specific Member State.⁷² Performance clauses to be included under procurement contract could include:

- payments related to the achievement of key performance indicators, such as energy efficiency, minimization of waste, efficient use of resources, etc.;
- Provide for the possibility to implement contract extensions for innovative design alterations, however, conditioned upon mentioning this possibility under the tender documentation;
- Guarantees that the contractors having implemented the procurement successfully will be mentioned in the publicity done by the procurer about their new solution.

Monitoring performance clauses

See section 2.10 for information on how to set appropriate monitoring procedures to assess development during contract implementation and how to take the progress made by the contractors into account.

⁷² See article 70 of Public Sector Directive, stating: "Contracting authorities may lay down special conditions relating to the performance of a contract, provided that they are linked to the subject-matter of the contract and indicated in the call for competition or in the procurement documents. Those conditions may include economic, innovation-related, environmental, social or employment-related considerations."

Warranties (more used in case of PPI construction procurements)

The contractor should be mandated to offer to the procurer warranties of at least one year against any defect in any parts of the construction. This entails that the contractor should remedy such defects at its own expense. The warranty period starts from the final acceptance of the construction. The warranty should not cover damage suffered by the public procurers or third parties resulting from the use of the parts after acceptance, unless the damage arises from gross negligence on the part of the contractor.

The warranty does not extend to defects arising from misuse of the items. When defects are remedied, the period of warranty for these items extends with the period that was necessary to remedy them. When items are replaced with new ones, the warranty period of one year applies to these items, starting from the date of replacement.

2.9 Conducting the procurement procedure

2.9.1 Conducting the PCP

Once the procurement documentation is available, the procurement procedure can start. The following steps are generally adopted:

A) Publication of the contract notice

To ensure wide dissemination of the contract notice, as provided by the PCP Staff Working Document, it is recommendable that contract notices are published in the Official Journal of the European Union, more specifically, on TED (Tenders Electronic Daily - <http://ted.europa.eu/TED/main/HomePage.do>), which is the official supplement to the OJEU.

The legal advisor should also pursue to publish the PCP contract notice on the national public procurement portal. Last but not least, contract notices should be published on the procurer's/procurement's website (if any). It is recommendable to publish it on any other media channels available and used in practice (at national and/or European level).

B) Selecting the R&D service providers and awarding the Framework Agreement

In the case of PCP, the procurer should appoint specific committee(s) to evaluate of the received tenders as defined in the tender documentation. The evaluators should be instructed on the specificities of the PCP, and will be requested to sign declarations regarding the lack of (potential) conflict of interests. Subsequently, the following steps will be undertaken.

1 From tender notice to Phase 1

The criteria set out in the tender documentation will be applied in order to select the successful tenderers (i.e., at least 4 bidders should be selected to enter Phase 1).

The following issues should be considered at this stage:

- ❖ The award decision will be notified to both successful and unsuccessful bidders (specifically in the case of rejected bidders, the reasons for their rejection will also be communicated);
- ❖ A 'standstill period' is, even though not specifically required by EU procurement rules for PCPs, recommendable between the award decision and the signing of the Framework Agreement; during this standstill period, any of the interested parties could challenge the result of the evaluation;
- ❖ The public procurer/ lead procurer will sign the Framework Agreement and a Phase 1 contract (which covers all the phases⁷³) with the selected bidders for Phase 1, after the expiry of the standstill period.

2 [From Phase 1 to Phase 2](#)

- ❖ The main procedural steps are described in section 2.9 C) of Module 2. Hereafter we outline the most important aspects from a legal point of view:
 - The end of Phase 1 results will be assessed objectively and uniformly by the end of phase assessment committee against the pre-defined criteria.
 - The outcome of the End of Phase evaluation shall be communicated to all participants;
- ❖ The formal invitation to submit bids for Phase 2, should contain:
 - The details for Phase 2 (timeline, available budget, number of bidders to be accepted etc.);
 - Possibly more detailed definition of the requirements for the phase 2 deliverables including in particular the prototype to be developed during Phase 2;
 - Description of the testing process envisaged for Phase 2 (e.g. whether testing facilities – typically lab testing - of the tenderer or of the procurer should be used etc.);
 - Information regarding submission of bids;
 - Description of the Phase 2 evaluation process, criteria and the applicable scoring scheme;
 - Bid submission related information (timeline etc.);
 - Information regarding the documents to be included in the bid package:
 - Optional: The bid form (including sections to be completed on: price; project concept/plan, methodology and proposed team; subcontracting; commercialization plan; updated list of background IPR etc.);
 - Phase 2 contract;
 - End of Phase 2 report template.

After the expiry of the deadline for the submission of offers for Phase 2, the Evaluation Committee will evaluate the offers submitted by the bidders and select the bidders that will move to Phase 2, based on the award criteria as defined in the initial tender documentation.

At this stage it is important that:

- Each member of the Evaluation Committee awards scores to each bid individually and motivates the scores;
- The Evaluation Committee reaches a consensus as regards the bids that will move to Phase 2 (both on scores and the qualitative motivation for each score);
- The decisions (as well as the hearings/interviews with the tenderers, if applicable) are documented in formal meeting notes.

⁷³ Phase Contracts will be signed with the bidders declared successful to move from one phase to the other.

- All contractors, both successful and unsuccessful, are informed about the outcome of the evaluation;
- The outcome of the evaluations (name of winning bidders, contract value are made public.

3 [From Phase 2 to Phase 3](#)

At this stage, the same legal aspects are relevant, as described in the previous section..

In addition, the assessment of the End of Phase 2 deliverables may entail prototype testing at the location of the PCP participants or of the procurer (as priory specified in the Phase 2 Call for Bid.

- A Call for Bid for Phase 3 is subsequently prepared and sent to the PCP participants whose End of Phase deliverables were scored 'successful'. In addition to the information that was included in the Phase 2 Call for Bid, the Phase 3 Call for Bid will describe the testing process (including information regarding the real-life testing locations) envisaged for Phase 3.
- When evaluating the bids for Phases 1, 2 and 3, the same exclusion and selection are applied throughout the competitive phased process. Technical specifications and award criteria, however may become progressively more specific per phase (e.g. by defining award sub-criteria, or by refining certain performance requirements). These changes however, may not amount to a substantial change of the contract, and consequently a breach of the TFEU fundamental principles of transparency and equal treatment.

4 [End of Phase 3](#)

At the end of Phase 3, the contractors will be offered the opportunity to test the solution developed during Phase 3 in real life settings with real end-users. In case of joint PCPs, tests should preferably take place in the locations of all procurers participating in the buyers group.

- At the end of the PCP, the procurer will publish the summary of the results achieved through various communication channels (press releases, press conferences, workshops, seminars etc.), with the exception of any confidential/commercial information.

Following a PCP, the procurer may proceed with the organization of a separate PPI, to purchase an innovative solution in line with the requirements that were used for the PCP. In this context, the legal expert should define the measures needed to ensure that equal treatment and transparency are observed (e.g. the PPI and does not prescribe a specific solution approach of one vendor that participated in the PCP but uses functional/performance bases specifications to allow all vendors on the market to make offers based on their own solution approach to address the procurement need) and that all PPI tenderers (including those who had not participated in the prior PCP) get access to all relevant information needed to formulate an offer (all information that the procurer also shared with the vendors that participated in the PCP about the procurement need and the operational environment at the procurer's side in which the solution needs to be implemented). Despite the fact that PCP participants have already worked with the procurer during the PCP, the equal treatment principle, as interpreted by the Court of Justice of the European Union, does not prescribe automatic exclusion of the PCP participants for the PPI.

RELEVANT CASE-LAW

In the **Fabricom case**, the Court of Justice of the European Union decided that automatic exclusion of bidders who had previously carried out research, experiments, studies, or development in connection with that procurement was disproportionate and breached the equal treatment principle. According to the Court the firm should be allowed to prove that its involvement in the preceding R&D procurement did not create a risk to competition.

Source: CJEU, C-21/03, Fabricom v Belgian State

In the **European Dynamics case**, The Court of First Instance confirmed that the procurer is not mandated to neutralize all the advantages enjoyed by a tenderer as a result of a previous contractual relation with the procurer, particularly when it is not easy and economically acceptable or it infringes the rights of that tenderer (e.g. IPR). The Court clarified that the procurer does not have to neutralize these 'inherent de facto advantages' that the sitting contractor and its sub-contractors have whenever they decide to participate in tendering for a new contract, as these are not the consequence of any conduct in the part of the procurer.

The procurer, however, has to convey all relevant information to all the potential tenderers that is needed to understand which level of quality and price they need to offer, unless that information is protected by intellectual property rights or is confidential. The tendering requirements should also be precise, such as not to favor the incumbent contractor, who based on previously gained knowledge, finds himself in a better position to assess the real needs of the procurer.

Source: CFI, T-345/03 European Dynamics v Commission

2.9.2 Conducting the PPI

The public procurement directives expressly provide how a PPI procurement should be conducted, once the procedure to be followed has been established. Specifically, Chapter III of the Public Sector Directive and of the Utilities Directive include express provisions regarding:

- A. the preparation of the procurement** – articles 40 – 47 of the Public Sector Directive and articles 58 – 66 of the Utilities Directive (e.g., the organization of market consultations, defining the technical specifications, setting the time limits or deciding on the division of contracts into lots);
- B. publication of the contract notice and the tender documentation and ensuring compliance with the transparency principles** – articles 48 - 55 of the Public Sector Directive and articles 67 - 75 of the Utilities Directive;
- C. selecting economic operators and awarding procurement contracts** – articles 56 - 69 of the Public Sector Directive and articles 76 - 86 of the Utilities Directive (e.g., what exclusion, selection and award criteria a public procurer could use in the selection process, how to reduce the number of candidates, how to apply award criteria and how to conclude the procedure);
- D. monitoring contract performance, amending contracts during their execution and subcontracting matters** – articles 70 – 73 of the Public Sector Directive and articles 87 - 90 of the Utilities Directive

All this information needs to be included in the tender documentation and published upfront, to ensure all the interested bidders have access to it in an equal, transparent and non-discriminatory manner.

If the value of a contract exceeds the European thresholds, publication of the contract notice in the OJEU is mandatory. Infringement of this duty may lead to the whole procurement procedure being declared null and void.

EXAMPLE – Waterboot Amsterdam

In the **Waterboot Amsterdam** case, a Dutch contractor complained that a Belgian contract was only published national Belgian Bulletin of Tenders, but not in the OJEU, even though the European thresholds for European publication were reached. The contractor argued that he, as a Dutch contractor, was not correctly notified of the awarding of the contract and therefore missed out on the opportunity to submit an offer. The Council of State ruled that the contracting authority should have published the contract notice in the OJEU since the European thresholds were reached. By not doing so, basically, the whole tender procedure had to be declared null and void.

Source: Belgian Council of State 14 October 2004, nr. 136.022, Waterboot Amsterdam

During the assessment of the tenderer/tenders, the legal expert should ensure that the process takes place in accordance with the tender documentation, that procurement criteria are not modified (e.g. they are not discarded) and that they are applied equally to all the tenderers. The legal expert may also define guidance for evaluators, listing among others, the criteria against which tenders are evaluated and scoring sheets.

Based on the legal prescripts of the Procurement Directives, the following steps could be taken to organize the evaluation of the tenderers and their tenders:

1 Administrative evaluation

A potential system for evaluating offers is the one in which tenderers are evaluated in stages. The first administrative evaluation stage targets the checking of the bidders' compliance with **exclusion and selection criteria**. In this case, the administrative forms and related documentation are checked by the evaluation committee. Once the administrative evaluation is completed, the technical evaluation will start. based on the application of **award criteria** to the offers received (see below).

2 Technical evaluation

The legal expert will define an evaluation approach that ensures objectivity and equal treatment:

- Experts will be required to score the tenders using the score sheet, based on the criteria and scoring model previously provided
- Each expert will be allocated a certain number of tenders, based on the number of all bids received and the number of available experts

- Evaluation of the tenders will be done individually
- Experts need to justify their scoring qualitatively;
- Once individual evaluations are completed, the scores for each tender will be added and total points per tender calculated
- Based on the results of the individual evaluations, it will be decided which tenders will be passed on to the decision panel
 - it is recommendable that a certain percentage of the maximum score (e.g., 60%) is set as threshold to be met by tenders in order to advance to the decision panel
 - Submission of a tender to the decision panel should also take place in cases when a tender received very different score from different evaluators.
- The numeric outcome from the individual experts could be overridden by the decision panel, subject to the provision of solid grounds for this approach
- Results of the decision panel meetings should be documented in the form of written meeting minutes. These minutes will be used by the procurer to provide reasons to unsuccessful bidders.

European Dynamics Luxembourg and Others v Commission, T-536/11

This case shows to which extent the procurer should provide detailed reasons for not awarding a contract to a bidder. The Court of First Instance judged that *“the contracting authority cannot be required to communicate to a tenderer who was unsuccessful in securing the first place in the cascade, in addition to the reasons for the ranking of its tender, a detailed summary of how each detail of its tender was taken into account when the tender was evaluated.”*

3 Conformance testing prior to contract award

The best scoring bidder may be invited to pass a conformance test before being awarded the contract. The conformance testing aims to test the innovative solutions at the site of the procurer or at the site of an independent party appointed by the procurer perform the conformance testing, before wide deployment. Examples are provided in section 2.9.2 Module 2.

4 Award the Agreement

- Both successful and unsuccessful bidders are informed on the outcome of the evaluation
- A formal, well-grounded decision notice will be sent to both categories aforementioned
 - For successful bidders, a deadline should be provided for acceptance (e.g., 10 days)
 - Unsuccessful bidders should be given the possibility to challenge the results of the assessment process and seek remedy (stand-still period)
- The results of the evaluation should be published:
 - In a contract award notice in TED
 - Optionally also in a press release
 - On the procurer’s website etc.

- The contract is signed and cash advance, if applicable, is paid.

2.9.3 Conflicts of interests

At each stage of the procurement, conflicts of interest may become apparent. Examples of potential conflicts of interest are provided in section 2.9.3 of Module 2.

Conflicts of interest pose a risk to competition and equal treatment of the economic operators.

Therefore, article 24 of the Public Sector Directive and article 42 of the Utilities Directive allow Member States to decide which appropriate measures the public procurer should adopt, in order to effectively prevent, identify and remedy conflicts of interest. Such measures could be:

- regulating through separate national legislation which situations of conflicts of interests are not permitted in the case of public functionaries;
- requiring public procurers to complement the above mentioned national legislation with integrity codes, compliance procedures, internal point for complaints etc.;
- requiring the persons involved in the conduct of public procurement to sign a declaration on the absence of conflicts of interests.

The legal expert of the public procurer needs to be aware of any relevant national legislation, as well as of the integrity codes and procedures that might be in place within the organization of the public procurer. The legal expert should also be aware that conflicts of interest may become apparent at each stage in the procurement process.

One manner of minimizing the risks that the procurement process distorts competition due to conflicts of interest, is to obtain declarations from bidders in the procurement that they do not have conflicting interests in the respective procurement and that they will immediately inform the public procurer when such conflicts interests arise.

Whenever the public procurer identifies conflicts of interest, remedial measures should be undertaken. Available approaches, in the context of the procurement process are, for example:

- (i) excluding from further involvement in the procurement, the functionary who finds him/herself in a conflict of interests;
- (ii) excluding from further involvement in the procurement an economic operator which finds him/herself in a conflict of interest when less intrusive measures are not available.⁷⁴

These measures should be clearly specified in the Request to Tender.

RELEVANT CASE LAW

⁷⁴ See article 57(4)(e) of the New Public Sector Directive and article 80(1) of the new Utilities Directive.

Cases C-315/99

- The Court stated that ‘the fact that a person who helps to evaluate and select bids for a public contract has this contract awarded to him’ is pertinent, relevant and indicative of a serious malfunction of the institution or body concerned.’

Case C-538/13

- The Court concluded that the evaluation of the tenders is unlawful solely on the grounds that the tenderer has had significant connections with experts appointed by the public procurer who evaluated the tenders. According to the Court, ‘the public procurer is, at all events, required to determine the existence of possible conflicts of interests and to take appropriate measures in order to prevent and detect conflicts of interests and remedy them.’
- In the context of the examination of an action for annulment of an award decision on the ground that the experts were biased, ‘the unsuccessful tenderer may not be required to provide tangible proof of the experts’ bias. It is, in principle, a matter of national law to determine whether, and if so to what extent, the competent administrative and judicial control authorities must take account of the fact that possible bias on the part of experts has had an effect on the decision to award the contract.’

2.10 Monitoring contract performance

2.10.1 Checking and assessing contractor’s performance

A monitoring system enables the procurer to supervise vendor activities during contract implementation to ensure compliance with (legal) requirements, and performance targets set forth in a contract. For more information on how to set up such a monitoring system, please see section 2.10 and Annex 5 ‘Step-by-step monitoring methodology’ of Module 2 of this Toolkit.

In particular, monitoring a contract involves checking and assessing contractors’ compliance with minimum requirements, obligations, standards, key performance indicators (KPIs milestones and deliverables set forth in a contract. The clarity and soundness of the procurement (framework) contract are thus essential to carry out monitoring activities. As a result of the monitoring activity, the legal expert, in consultation with the procurer, may need to enforce the contract (namely penalties), modify it or cancel it.

In a **PCP**, regular checks and assessment of the performance delivered by the participating economic operators per R&D phase is embedded in the PCP approach (see section 2.8 above) and even more frequent monitoring during each phase is recommended. This enables the procurer to provide early feedback to the contractors. Moreover, this allows the contractors the opportunity to improve their approach and achieve the next upcoming milestones.

Section 2.8 above clarifies that the assessment of the results of a PCP phase may lead to one of the following conclusions (based on pre-defined criteria):

- The results are satisfactory, OR
- The results are partially satisfactory, OR
- The results are not satisfactory.

The consequences of concluding that the phase results are partially or fully unsatisfactory as defined in the framework agreement and/or phase contracts are either the termination for cause (or not) (& liability) or non-(partial) payment. The decision to enforce or to modify the contract according to the result of the assessment is discussed in the next section.

Within the context of **PPI**, ensuring that the economic operator fulfils its contractual obligations is crucial for ensuring compliance with the procurement directives. Any modification of the contract, whether based on a value engineering clause or not, should be carefully assessed by the legal expert (see section below). In addition, during the performance of the contract, the procurer will continue to check and assess the contractor's performance in conformity with the obligations, standards, key performance indicators (KPIs) and milestones set forth in a contract

The intention to use Value Engineering (VE) in a contract (see Annex 4 of Module 2 on Value Engineering) which should be advertised upfront in the contract notice, may open the possibility to changes in the contract as the result of alternative proposals that can improve the value for money of a solution during the execution of the contract.

2.10.2 Enforcing or modifying the public contract

The application of a monitoring system not only provides relevant information to enforce the obligations set forth in a contract and the provisions of the law, but it also helps to establish whether it may be lawful, necessary and beneficial to modify the contractual terms.

In other words, whenever the monitoring process leads to the conclusion that the contractor does not perform at the levels established in the public contract, the legal expert, in consultation with the procurer, will take one of the following decisions:

a) **enforce the contract:**

- suspend payment and allow the contractor time to improve its performance;
- release partial payment proportional to the achieved targets;
- initiate a direct dialogue with the contractor to find an amiable solution (according to the alternative dispute settlement clause). In case it is not possible to reach an agreement in an amicable manner, the parties may resort to the means of dispute settlement provided in the agreement or contract;
- terminate the contract in case of serious underperformance.

b) **modify the contract:**

- the modification of a contract should be carefully evaluated by the legal expert, to prevent material or substantial changes of the contract that are not allowed according to EU case law and the Public Procurement Directives.

The Public Procurement Directives⁷⁵ establish important rules on the modification of contracts, regarding both the conditions to modify a contract without the need to carry out a new procurement, and the definition of substantial modifications of a contract that require a new procurement procedure.

2.10.2.1 Conditions for a modification of a contract or framework agreement without a new procurement

Modifications to the contract resulting in a minor change of the contract value below the threshold are possible without the need to carry out a new procurement to ensure legal certainty.

The modifications above the thresholds are also possible without the need to carry out a new procurement to the extent they comply with the conditions set in the Procurement Directives and do not alter the overall nature of the contract.

Contracts and framework agreements may be modified without a new procurement procedure in the following cases:

- a) where the modifications, irrespective of their monetary value, have been provided for in the initial procurement documents in clear, precise and unequivocal review clauses, which may include price revision clauses, or options. Such clauses shall state the scope and nature of possible modifications or options as well as the conditions under which they may be used. They shall not provide for modifications or options that would alter the overall nature of the contract or the framework agreement;
- b) for additional works, services or supplies by the original contractor that have become necessary and that were not included in the initial procurement where a change of contractor:
 - cannot be made for economic or technical reasons such as requirements of interchangeability or interoperability with existing equipment, services or installations procured under the initial procurement; and
 - would cause significant inconvenience or substantial duplication of costs for the public procurer.

Any increase in price shall not exceed 50 % of the value of the original contract. In case of several successive modifications, that limitation applies to the value of each modification.

- c) where all of the following conditions are fulfilled:
 - the need for modification has been brought about by circumstances which a diligent public procurer could not foresee;
 - the modification does not alter the overall nature of the contract;
 - any increase in price is not higher than 50 % of the value of the original contract or framework agreement (for each modification);
- d) where a new contractor replaces the one to which the public procurer had initially awarded the contract as a consequence of either:
 - an unequivocal review clause or option in conformity with point (a);

⁷⁵ Directive 2014/24/EU: Recitals 107 – 111; Articles 33, 72, and 73; and Part G (<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0024&from=EN>). Directive 2014/25/EU: Recitals 113 – 118; Articles 89, 90, and Annex XVI. (<http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32014L0025&from=EN>)

- universal or partial succession into the position of the initial contractor, following corporate restructuring, including takeover, merger, acquisition or insolvency, of another economic operator that fulfils the criteria for qualitative selection initially established provided that this does not entail other substantial modifications to the contract and is not aimed at circumventing the application of this Directive; or
 - in the event that the public procurer itself assumes the main contractor's obligations towards its subcontractors where this possibility is provided for under national legislation;
- e) where the modifications, irrespective of their value, are not substantial.

Public procurers having modified a contract in the cases set out under points (b) and (c) should publish a notice to that effect in the Official Journal of the European.

2.10.2.2 Substantial modifications that require a new procurement

A new procurement procedure is required in case of material changes to the initial contract, in particular to the scope and content of the mutual rights and obligations of the parties, including the distribution of intellectual property rights.

Such changes are understood as a demonstration of the parties' intention to renegotiate essential terms or conditions of that contract. This is the case in particular if the amended conditions would have had an influence on the outcome of the procedure, had they been part of the initial procedure.

A modification of a contract or a framework agreement during its term is considered substantial where it renders the contract or the framework agreement materially different in character from the one initially concluded.

This is the case where one or more of the following conditions is met:

- a) the modification introduces conditions which, had they been part of the initial procurement procedure, would have allowed for the admission of other candidates than those initially selected or for the acceptance of a tender other than that originally accepted or would have attracted additional participants in the procurement procedure;
- b) the modification changes the economic balance of the contract or the framework agreement in favour of the contractor in a manner which was not provided for in the initial contract or framework agreement;
- c) the modification extends the scope of the contract or framework agreement considerably;
- d) where a new contractor replaces the one to which the public procurer had initially awarded the contract in other cases than those provided for under the conditions described in the title above.

RELEVANT CASE LAW

[C-337/98 Commission v. France](#)

Amendments to the provisions of a public contract during the currency of the contract constitute a new award of a contract “when they are materially different in character from the original contract and, therefore, such as to demonstrate the intention of the parties to renegotiate the essential terms of that contract”.

[C-454/06 Presstext Nachrichtenagentur GmbH v. Republik Österreich](#)

An amendment to a public contract during its currency may be regarded as material when: (i) it introduces conditions which, had they been part of the initial award procedure, would have allowed for the admission of tenderers other than those initially admitted or would have allowed for the acceptance of a tenderer other than the one initially accepted; (ii) when it extends the scope of the contract considerably to encompass services not initially covered, and (iii) when it changes the economic balance of the contract in favor of the contractor in a manner which was not provided for in the terms of the initial contract).

[C-91/08 Wall v. Stadt Frankfurt am Main](#)

A change of subcontractor, even if the possibility of a change is provided for in the contract, may in exceptional cases constitute such an amendment to one of the essential provisions of a contract where the use of one subcontractor rather than another was, in the view of the particular characteristics of the services concerned, a decisive factor in concluding the contract.

[President of the Belgian Tribunal of First Instance of Courtrai, 7 June 2012, T. Aann. 2013, 276](#)

The President of the Belgian Tribunal of First Instance of Courtrai judged that the replacement of the initial contractor by a new contractor under the given circumstances is a substantial modification of the contract. *In casu* an entity of the contractor was taken over by another company. However, since the transferor took no part in the structure of the transferee that became the new contractor, the President of the Tribunal ruled that the contract was substantially modified which should lead to a new tender procedure.

2.11 Managing after contract issues

Section 2.11 of Module 2 lists those contractual obligations that have a longer life-span than the contract itself and may need to be monitored and managed beyond the contract period. Whenever this is the case, it should be clearly specified in the contract and the procurer should ensure monitoring of compliance.

Contractual obligations that may need to be monitored after the expiration of the **PCP** Framework Agreement include:

- the obligation for PCP suppliers to commercialise the developed solution;
- the obligation for PCP suppliers to grant FRAND licenses to other suppliers;
- the obligation for PCP suppliers to share royalties resulting from commercialization with the procurer (if the procurer opted for a royalty approach);

- the obligation of PCP suppliers to contribute to standardization processes (if requested by the procurer in the tender documents).

In the case of a **PPI** Procurement Contract, clauses that may require monitoring beyond the expiration of the contract include:

- the obligation of the PPI supplier to provide warranties on the proper functioning of the installed solution;
- the obligation of the PPI supplier to indemnify the procurer in case of third-party IPR infringement;
- the obligation of the PPI supplier to participate in standardisation processes (if, requested by the procurer in the tender documents).

Breach of some of these obligations may be signalled to the public procurer by third parties (e.g. market players who have attempted to secure a FRAND licence agreement for the use of the innovation). Other obligations may require pro-active periodic monitoring by the public procurer.

3 Joint procurement

Section 3 of Module 2 describes the main benefits of undertaking joint procurement in innovation procurements, as well as the steps that a public procurer could take in this regard. In this section, we will further provide the legal background against which joint procurement could be implemented.

3.1 Introduction and legal basis

Joint procurement benefits from express regulation under the EU public procurement directives. Accordingly, article 38 et seq. of the 2014 Public Sector Directive and, respectively, article 56 et seq. of the 2014 Utilities Directive specifically provide that:

“Two or more contracting authorities may agree to perform certain procurements jointly.

Where the conduct of a procurement procedure in its entirety is carried out jointly in the name and on behalf of all the contracting authorities concerned, they shall be jointly responsible for fulfilling their obligations. This applies also in cases where one contracting authority manages the procedure, acting on its own behalf and on the behalf of the other contracting authorities concerned.

Where the conduct of a procurement procedure is not in its entirety carried out in the name and on behalf of the contracting authorities concerned, they shall be jointly responsible only for those parts carried out jointly. Each contracting authority shall have sole responsibility for fulfilling its obligations in respect of the parts it conducts in its own name and on its own behalf.”

The new 2014 rules on joint procurement are intended to facilitate cooperation between public procurers, which can encourage risk and benefit-sharing for innovative projects and the pooling of demand.

Joint procurement can occur between or among procurers from the same Member State or between or among public procurers originating from different Member States (cross-border joint procurement, specifically regulated by article 39 of the Public Sector Directive and, respectively, article 57 of the Utilities Directive). Furthermore, joint procurement can take two different forms: (i) occasional / ad-hoc joint procurement and (ii) institutionalized joint procurement. Both forms are described in section 3.2 of Module 2. The legal implications thereof are further addressed in section 3.2 below.

As **PPI** is, in principle, fully covered by the provisions of the public procurement directives, the provisions under the EU procurement directives regarding joint procurement are fully applicable.

PCP, when conducted in compliance with the PCP Communications and the Staff Working Document, falls outside the scope of the public procurement directives. Nevertheless, public procurers could follow the principles regarding joint procurement as provided for under the EU public procurement directives.

3.2 Forms of joint / coordinated procurement

The EU public procurement directives regulate two different forms of joint/coordinated procurement:

3.2.1 Occasional / ad-hoc procurement

In this case, the procurement is undertaken via an ad-hoc cooperation between a group of procurers that is formed solely for the purpose of one procurement and does not entail the set-up of a separate entity / permanent cooperation structure.

When several public procurers from different Member States decide on occasional/ad hoc basis to conduct a procurement and award a public contract, they need to conclude an agreement determining the responsibilities of the parties, the internal organization of the procurement and the law governing the procurement. For procurers established in different Member States, this is expressly referred to under the new public procurement legal framework (article 39(4) of the Public Sector Directive and article 57 (4) of the Utilities Directive). A template for a joint procurement agreement is attached to this Toolkit.

See section 3.2 (b) in Module 2 for an analysis of the legal aspects related to occasional/ad-hoc joint/coordinated procurement.

3.2.2 Institutionalized procurement

In the institutionalized joint or coordinated procurement set-up, the participating procurers establish or designate an external legal entity (i.e., European Groupings of Territorial Cooperation – EGTCs, European Research Infrastructure Consortia – ERICs, centralized purchasing bodies etc.) to conduct the joint procurement or the preparation of the coordinated procurement with a joint mandate of all public procurers

Pursuant to express provisions under the new public procurement legal framework (article 39(5) of the Public Sector Directive and article 57(5) of the Utilities Directive), in case several public procurers from different Member States have set up a joint/common entity, such as a EGTC or other entities established under the Union Law (for the purpose of conducting a joint cross-border procurement), the participating public procurers shall agree on the applicable national procurement rules of one of the following Member States:

- i. the national provisions of the Member State where the joint entity has its registered office;
- ii. the national provisions of the member State where the joint entity is carrying out its activities.

See section 3.2 (b) in Module 2 for an analysis of the legal aspects related to institutionalized / joint/coordinated procurement.

3.2.3 Piggy backing

Piggy-backing happens when a public procurer carries out the procurement on its own but allows other public procurers the option of utilizing the contract. It can be combined with institutionalized or occasional joint or coordinated procurement.

Piggy-backing involves very little extra work from the public procurer (essentially stating in the Contract Notice that other named public procurers may also wish to set up a contract with the winning supplier), and provides direct access to more environmentally sound products for a wider range of authorities.

However, the procurer is not allowed to foresee a piggy-backing clause that enables unspecified (number of) procurers (e.g. all other fire brigade procurers in Europe) to piggy-back on a contract.

Such an approach would be contrary to the transparency principle, as interpreted by the Court of Justice of the EU in case-law.⁷⁶

4 Templates and annexes – PCP procurement documents

This section provides the templates and annexes to use as guidance when preparing a PCP project.

⁷⁶ Case C-496/99 *Commission of the European Communities v CAS Succhi di Frutta SpA* [2004] ECR I-3801 paras 110-1. In this case, the Court stated that all the conditions and detailed rules of the procurement procedure must be drawn up in a clear, precise and unequivocal manner in the notice or contract documents.



PCP procurement documents

Version 1.0
November 2018

Disclaimer

This document is aimed at assisting public procurers that implement PCP procurements. It is provided for information purposes only and is not intended to replace professional legal advice. The *eafip* team cannot be held responsible for the use made of this document.

IMPORTANT NOTICE

This document has been prepared by the *eafip* team to help public procurers who implement PCPs with their procurement documents (*i.e. the request for tenders (RFT) and the [notices](#) for OJ publication on the [TED – tenders electronic daily](#) website*).

The documents are presented in the order they should be prepared. (The RFT is shown before the contract notice because you should start preparing it well in advance.)

The notices are to be filled out online. The [blue](#) instructions in this document will help you.

The RFT can be used as a template. This template uses as example a PCP that consists of 3 phases, but it is also possible to use a PCP with two phases or with more than 3 phase in which case the template needs to be adjusted accordingly.

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1. Prior information notice (PIN)**PCP PRIOR INFORMATION NOTICE (PIN) FOR THE OPEN MARKET CONSULTATION****⚠ How does this document work?**

- **Guidance is in blue.**
- **Recommended text is in black.**
- **Options are in blue [in square brackets].**
- **Data to be added is shown in [grey in square brackets].**

⚠ The PIN has to be filled out online on the [TED — tenders electronic daily website](#).

Use the version of the simap standard form that is most appropriate for your type of organisation:

- **for procurers in the public sector: ‘Prior information notice’**
- **for procurers in the utilities sector: ‘Periodic indicative notice — utilities’.**
- **for procurers in the defence and security sector: ‘Prior information notice for contracts in the field of defence and security’**



Supplement to the Official Journal of the European Union

Info and online forms: <http://simap.ted.europa.eu>

Prior information notice

Directive 2014/24/EU

This notice is for prior information only

This notice aims at reducing time limits for receipt of tenders

This notice is a call for competition

Interested operators must inform the contracting authority of their interest in the contract(s). The contract(s) will be awarded without publication of a further call for competition.

Select the first bullet, *i.e. this notice is for prior information only.*

I.1) Name and addresses¹ (please identify all contracting authorities responsible for the procedure)

Official name:			National registration number: ²
Postal address:			
Town:	NUTS code:	Postal code:	Country:
Contact person:			Telephone:
E-mail:			Fax:
Internet address(es)			
Main address: (URL)			
Address of the buyer profile: (URL)			

Give the contact details of the procurer.

In the Internet addresses section, give the project website or the general website of the procurer. Use the address of the buyer profile of the procurer.

I.2) Joint procurement

<input type="checkbox"/> The contract involves joint procurement In the case of joint procurement involving different countries, state applicable national procurement law:
<input type="checkbox"/> The contract is awarded by a central purchasing body

Select accordingly.

I.3) Communication

<input type="radio"/> The procurement documents are available for unrestricted and full direct access, free of charge, at: <i>(URL)</i> ¹² <input type="radio"/> Access to the procurement documents is restricted. Further information can be obtained at: <i>(URL)</i> ¹²
Additional information can be obtained from <input type="radio"/> the abovementioned address <input type="radio"/> another address: <i>(please provide another address)</i>
Tenders or requests to participate must be submitted ^{5,19} <input type="checkbox"/> electronically via: <i>(URL)</i> <input type="radio"/> to the abovementioned address <input type="radio"/> to the following address: <i>(please provide another address)</i>
<input type="checkbox"/> Electronic communication requires the use of tools and devices that are not generally available. Unrestricted and full direct access to these tools and devices is possible, free of charge, at: <i>(URL)</i>

Select the applicable options to clarify how interested tenderers can obtain the procurement documents and additional information and how they must submit their tenders.

I.4) Type of the contracting authority

<input type="radio"/> Ministry or any other national or federal authority, including their regional or local subdivisions <input type="radio"/> National or federal agency/office <input type="radio"/> Regional or local authority	<input type="radio"/> Regional or local agency/office <input type="radio"/> Body governed by public law <input type="radio"/> European institution/agency or international organisation <input type="radio"/> Other type:
---	--

This section is to be filled in ONLY if the procurer is a contracting authority (i.e. NOT a contracting entity).

I.5) Main activity

<input type="radio"/> General public services <input type="radio"/> Defence <input type="radio"/> Public order and safety <input type="radio"/> Environment <input type="radio"/> Economic and financial affairs <input type="radio"/> Health	<input type="radio"/> Housing and community amenities <input type="radio"/> Social protection <input type="radio"/> Recreation, culture and religion <input type="radio"/> Education <input type="radio"/> Other activity:
--	--

Select the procurer's main activities.

Section II: Object³

II.1) Scope of the procurement

II.1.1) Title:	Reference number: ²
----------------	--------------------------------

You may use this title: 'Pre-commercial procurement (PCP) to buy R&D (research and development) services to [specify in a few words the subject and scope of this PCP e.g. *improving the energy efficiency of buildings*]'.

II.1.2) Main CPV code: [] [] . [] [] . [] [] . [] [] Supplementary CPV code: ^{1,2} [] [] [] []

Use CPV 73100000 for R&D services and additional other CPVs, if relevant to the object of the contract (e.g. CPV for medical equipment if the PCP is for medical equipment-related R&D, CPV for software development services if software-related R&D is needed).

II.1.3) Type of contract Works Supplies Services

Select 'Services' (not 'Supplies' or 'Works'; PCP is an R&D services contract).

II.1.4) Short description:

You may use this text:

This PIN provides **early information** about the expected starting date and purchase volume for a **pre-commercial procurement (PCP)** and about the open market consultation that is organised in preparation of this procurement. More information about the open market consultation is provided in section II.2.14.

The procurement aims to trigger new solutions to be developed and tested to address the following **challenge**: [specify briefly the subject and scope of this PCP e.g. *improving the energy efficiency of buildings*].

[OPTION for PCPs with lots: As the common challenge exists of a number of sub-challenges, the procurement will be divided into the following lots, each corresponding to one sub-challenge:

- lot 1: [insert name of the sub-challenge to which the lot corresponds]
- lot 2:
- ...]

The main technical challenges to be addressed [per lot] are: [indicate the main target quality/efficiency and/or functionality/performance improvements compared to the current state-of-the-art technology – per lot, if applicable - e.g. *30 % energy efficiency improvement, 20% cost reduction, etc*].

Provide any other relevant information. If needed to cope with the character-limit in the forms, distribute text also over 'II.2.4) Description of the procurement' and 'II.2.14) Additional information'.

II.1.5) Estimated total value²

Value excluding VAT: [] Currency: [] [] []

(for framework agreements or dynamic purchasing systems – estimated total maximum value for the entire duration of the framework agreement or dynamic purchasing system)

Give the total estimated value of the PCP framework agreement in euros/other currency (excluding VAT).

II.1.6) Information about lots

This contract is divided into lots yes no

Tenders may be submitted for¹² all lots maximum number of lots: [] one lot only

Maximum number of lots that may be awarded to one tenderer: []

The contracting authority reserves the right to award contracts combining the following lots or groups of lots:

For PCPs with lots select 'yes'. Consider carefully the consequences of restricting the number of lots that tenders may be submitted for, if applicable.

II.2) Description¹

II.2.1) Title: ²	Lot No: ²
-----------------------------	----------------------

Only fill in if lots are used. Fill in the title and number of each lot.

II.2.2) Additional CPV code(s) ² Main CPV code: ¹ [] [] . [] [] . [] [] . [] [] Supplementary CPV code: ^{1,2} [] [] [] []
--

Only fill in if lots are used. Use the CPV codes for each lot.

II.2.3) Place of performance NUTS code: ¹ [] [] [] [] [] Main site or place of performance:

Do NOT fill out the fields 'NUTS code' and 'main site or place of performance'. (The place of performance meant here is a specific place; it has nothing to do with the place of performance recommended for performance of the R&D services under the PCP framework contract (*i.e. to perform a share (e.g. 50%) of the contracted R&D services in the EU or in countries with which the EC has a public procurement agreement as part of a stabilisation or association agreement in the context of the EU neighbouring policy*).

II.2.4) Description of the procurement: <i>(nature and quantity of works, supplies or services or indication of needs and requirements)</i>

Provide any further relevant information on differences in scope per lot.

You may use this text to describe the procurement:

The procurement will take the form of a pre-commercial procurement (PCP) under which R&D service contracts will be awarded to a number of R&D providers in parallel in a phased approach. This will make it possible to compare competing alternative solutions.

Each selected operator will be awarded a framework agreement that covers 3 R&D phases.

The **3 phases**¹ are:

- solution design
- prototyping
- original development and validation and testing of a limited set of first products or services.

After each phase, intermediate evaluations will be carried out to progressively select the best of the competing solutions. The contractors with the best-value-for-money solutions will be offered a specific contract for the next phase. *[OPTION for PCPs with lots: The phased approach with parallel contracts and intermediate evaluations will be followed within each lot.]*

Testing is expected to take place in [add the locations where testing is expected to take place, in particular test locations of the procurer and other additional test locations, if applicable]. This testing may also serve as a first customer test reference for the contractors. The procurement is expected to start in [add expected starting date of the PCP] and end in [add expected completion date of the PCP].

The selected operators will retain ownership of the **intellectual property rights (IPRs)** that they generate during the PCP and will be able to use them to exploit the full market potential of the developed solutions *i.e. beyond the procurement*. *[The market potential is estimated at [insert available figures about the potential total market size, i.e. beyond the procurer].]*

¹ This template uses as example a PCP with 3 phases, but it is also possible to use a PCP with 2 phases or with more than 3 phase, in which case the template needs to be adjusted accordingly.

II.2.5) Award criteria ¹²

- Criteria below
- Quality criterion – Name: / Weighting: ^{1,2,20}
- Cost criterion – Name: / Weighting: ^{1,20}
- Price – Weighting: ²¹
- Price is not the only award criterion and all criteria are stated only in the procurement documents

Select one of the 2 options ('the criteria below' OR 'price is not the only award criterion and all criteria are stated only in the procurement documents').

If you select the first option ('the criteria below'), you must indicate all the criteria and their weighting.

II.2.6) Estimated value ^{2,5,6,19}

Value excluding VAT: [] Currency: [][][]
(for framework agreements or dynamic purchasing systems – estimated total maximum value for the entire duration of this lot)

Only fill in if lots are used.

II.2.7) Duration of the contract, framework agreement or dynamic purchasing system ^{5,6,19}

Duration in months: [] or Duration in days: []
 or Start: (dd/mm/yyyy) / End: (dd/mm/yyyy)

- This contract is subject to renewal
 Description of renewals:

Enter the duration.

II.2.10) Information about variants ¹²

- Variants will be accepted

Select 'No'. In PCP, the use of variants is not necessary, since the PCP approach inherently supports the development of several alternative solutions in parallel.

II.2.11) Information about options ^{5,6,19}

- Options
 Description of options:

Complete if applicable.

II.2.13) Information about European Union funds ^{5,19}

The procurement is related to a project and/or programme financed by European Union funds yes no
 Identification of the project:

Select 'yes' or 'no' accordingly.

II.2.14) Additional information:

All interested operators are invited to take part in an **open market consultation** (regardless of their geographic location, the size or governance structure of their organisation).

The open market consultation will provide you with an overview on the procurement objectives, the PCP process and the main clauses of the contract. You will also have the opportunity to ask questions. It will be held in [[add language(s)]].

The open market consultation will be organised in the form of a [insert the format e.g. meeting, online meeting, webinar or online Q&A forum, or a combination of those] that will be held:

- when: [insert date and time or period]
 - ⚠ Choose the timing in such a way that you ensure that this PIN is published [e.g. 2] months before the start of the open market consultation.
- where: [insert venue e.g. via the project/procurer's website].

[Please register by [insert date].]

[OPTION if tenderers are allowed to supply additional confidential information in a face-to-face meeting during the open market consultation: Please indicate [by [insert date]] [together with the registration for the open market consultation] if you want to supply (under a non-disclosure agreement) additional confidential information that you do not wish to reveal in public during the open market consultation.]

⚠ Procurers must ensure equal treatment to all interested economic operators also in face-to-face meetings. Such meetings can therefore only be used to *listen* to the economic operators, but may not be used to *give* any additional information to the economic operators (except information also provided to all other operators).

[OPTION if for example a questionnaire is used: Please submit the following information [insert information, e.g. questionnaire] by [insert date].]

You can participate in the PCP call for tender even if you did not participate in the open market consultation.

Offers will be accepted in [insert language(s)]. All communication (before, during and after the procurement) will be carried out in [add language(s)].

All information provided during the open market consultation and other background information will be published online in [add language(s)] on the project/procurer's website ([insert the project /procurer's website]).

Provide any other relevant additional information.

II.3) Estimated date of publication of contract notice: ^{9,19} (dd/mm/yyyy)

Enter the date.

Section III: Legal, economic, financial and technical information ^{5,6,19}

III.1) Conditions for participation

III.1.1) Suitability to pursue the professional activity, including requirements relating to enrolment on professional or trade registers ¹²

List and brief description of conditions:

Complete if applicable. Avoid conditions that might unduly restrict participation.

III.1.2) Economic and financial standing ¹²

Selection criteria as stated in the procurement documents

List and brief description of selection criteria:

Minimum level(s) of standards possibly required: ²

Complete if applicable. Avoid conditions that might unduly restrict participation.

III.1.3) Technical and professional ability ¹²

Selection criteria as stated in the procurement documents

List and brief description of selection criteria:

Minimum level(s) of standards possibly required: ²

Complete if applicable. Avoid conditions that might unduly restrict participation.

III.1.5) Information about reserved contracts ²

The contract is reserved to sheltered workshops and economic operators aiming at the social and professional integration of disabled or disadvantaged persons

The execution of the contract is restricted to the framework of sheltered employment programmes

The options for reserved contracts do not apply.

III.2) Conditions related to the contract ²**III.2.1) Information about a particular profession** (*only for service contracts*)

Execution of the service is reserved to a particular profession

Reference to the relevant law, regulation or administrative provision:

Complete if applicable. Avoid conditions that might unduly restrict participation.

III.2.2) Contract performance conditions:

Complete if applicable. Avoid conditions that might unduly restrict participation.

III.2.3) Information about staff responsible for the performance of the contract

Obligation to indicate the names and professional qualifications of the staff assigned to performing the contract

Select 'yes'. Further explanation is provided in the section about the place of performance requirement in the PCP request for tenders.

Section IV: Procedure**IV.1) Description****IV.1.1) Type of procedure** ⁵

Restricted procedure

Competitive procedure with negotiation

Do not fill in. This is not a notice for a call for competition.

IV.1.3) Information about a framework agreement or a dynamic purchasing system ^{5,19}

- The procurement involves the establishment of a framework agreement
- Framework agreement with a single operator
 - Framework agreement with several operators
- Envisaged maximum number of participants to the framework agreement: ² []

- The procurement involves the setting up of a dynamic purchasing system
- The dynamic purchasing system might be used by additional purchasers

In the case of framework agreements, provide justification for any duration exceeding 4 years:

Select 'Framework agreement with several operators'.

Do not fill in any number under 'Envisaged *maximum* number of participants to the framework agreement'. In the free text field, state the *minimum* number of framework agreements that you plan to award (according to the request for tenders, there should be one per selected operator). For PCPs with lots, enter the total *minimum* number of framework agreements counted across all the lots.

Complete 'The procurement involves the setting up of a dynamic purchasing system', if applicable.

IV.1.6) Information about electronic auction ¹²

- An electronic auction will be used
- Additional information about electronic auction:

Select 'no'.

IV.1.8) Information about the Government Procurement Agreement (GPA)

The procurement is covered by the Government Procurement Agreement yes no

Select 'no'.

IV.2) Administrative information**IV.2.2) Time limit for receipt of expressions of interest** ⁵

Date: (dd/mm/yyyy) Local time: (hh:mm)

Do not fill in. This is not a notice for a call for competition.

IV.2.4) Languages in which tenders or requests to participate may be submitted: [] [] ^{1,5}

Do not fill in. This is not a notice that is calling for tenders or requests to participate.

IV.2.5) Scheduled date for start of award procedures: (dd/mm/yyyy) ^{4,5,19}

Enter the date.

Section VI: Complementary information**VI.2) Information about electronic workflows** ^{5,19}

- Electronic ordering will be used
- Electronic invoicing will be accepted
- Electronic payment will be used

Do not fill in. This is not a notice for a call for competition or a notice that aims at reducing time limits for receipt of tenders.

VI.3) Additional information:²

--

You may use this text:

This procurement is exempted from the WTO Government Procurement Agreement (GPA), the EU public procurement directives and the national laws that implement them. This is because it concerns the procurement of R&D services where the benefits do not accrue exclusively to the contracting authority for its use in the conduct of its own affairs.

Publication of this contract notice in the EU Official Journal is not to be understood as a waiver of this exemption. Publication is made on a voluntary basis and the procurement will not follow the procedures under the EU public procurement directives, but rather the procedure described in the tender documentation.

This PIN is published to announce an open market consultation on a future procurement procedure. The PIN is not a commitment to procure.

VI.4) Procedures for review^{5,19}

VI.4.1) Review body		
Official name:		
Postal address:		
Town:	Postal code:	Country:
E-mail:		Telephone:
Internet address: (<i>URL</i>)		Fax:

Do not fill in. This is not a notice for a call for competition or a notice that aims at reducing time limits for receipt of tenders.

VI.4.2) Body responsible for mediation procedures ²		
Official name:		
Postal address:		
Town:	Postal code:	Country:
E-mail:		Telephone:
Internet address: (<i>URL</i>)		Fax:

Do not fill in. This is not a notice for a call for competition or a notice that aims at reducing time limits for receipt of tenders.

VI.4.3) Review procedure
Precise information on deadline(s) for review procedures:

Do not fill in. This is not a notice for a call for competition or a notice that aims at reducing time limits for receipt of tenders.

VI.4.4) Service from which information about the review procedure may be obtained ²		
Official name:		
Postal address:		
Town:	Postal code:	Country:
E-mail:		Telephone:
Internet address: (URL)		Fax:

Do not fill in. This is not a notice for a call for competition or a notice that aims at reducing time limits for receipt of tenders.

VI.5) Date of dispatch of this notice: (dd/mm/yyyy)

Enter the date.

It is the contracting authority's/contracting entity's responsibility to ensure compliance with European Union law and any applicable laws.

¹ please repeat as many times as needed

² if applicable

³ please repeat as many times as needed if this notice is for prior information only

⁴ if this information is known

⁵ please provide this information if the notice is a call for competition

⁶ as far as information is already known

⁹ please provide this information only if this notice is a prior information notice

¹² please provide this information here or in the invitation to confirm interest, if the notice is a call for competition or aims at reducing time limits for receipt of tenders

¹⁹ if the notice aims at reducing time limits for receipt of tenders

²⁰ importance may be given instead of weighting

²¹ importance may be given instead of weighting; if price is the only award criterion, weighting is not used

2. Request for tenders (RFT)**PCP REQUEST FOR TENDERS (RFT)****⚠ How does this document work?**

- Instructions are in blue.
- Recommended text is in black.
- Options are in blue [in square brackets].
- Data to be added is shown in [grey in square brackets].

PCP REQUEST FOR TENDERS [If applicable: Project acronym/name]**Table of contents**

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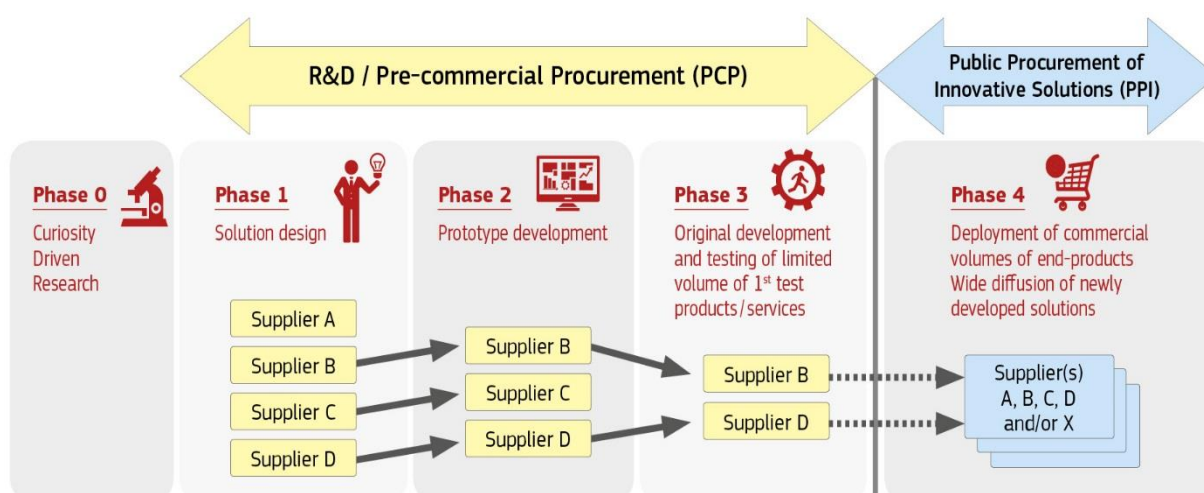
Annex 1	Model framework agreement
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Annex 4	Templates for exclusion and on/off requirements (if needed, e.g. declaration of honour for exclusion criteria, absence of conflict of interest and absence of incompatible other public financing)
Annex 5	Tender form (optional; only needed if the request for tenders does not specify the information requested from tenderers for each of the award criteria)
Annex 6	Template for reports or deliverables (optional; only needed if the request for tenders does not specify the minimum information contractors are required to submit in the reports or deliverables)

1. General context & background

Explain the general context:

This procurement is a **pre-commercial procurement (PCP)**.

PCP means that public procurers challenge innovative players on the market, via an open, transparent and competitive process, to develop new solutions for a technologically demanding mid- to long-term challenge that is in the public interest and requires new R&D services.



PCP is characterised by the following four **features**:

- × Competitive development in phases to identify the solutions offering the best value for money

PCP targets situations that require radical innovation or R&D and for which there are typically no solutions on or close to the market yet. Different competing providers may have different ideas for solutions to the problem. As R&D is yet to take place, there is not yet any proof as to which of these potential alternative solutions would best meet customers' needs.

PCP therefore awards R&D contracts to a number of competing contractors at the same time, in order to compare different approaches to solving the problem. It thus offers innovators an opportunity to show how well their solution compares with others. It also allows a first customer test reference to be obtained from countries of the procurers that will test the solutions.

The R&D is split into **3 phases** (solution design, prototyping, original development and testing of a limited set of 'first' products or services). Evaluations after each phase progressively identify the solutions that offer the best value for money and meet the customers' needs. This phased approach allows successful contractors to improve their offers for the next phase based on lessons learnt and feedback from procurers in the previous phase. Using a phased approach with gradually growing contract sizes per phase also makes it easier for smaller companies to participate in the PCP and enables SMEs to grow their business step-by-step with each phase.

Depending on the outcome of the PCP, procurers may or may not decide to follow-up the PCP with a public procurement to deploy the innovative solutions (PPI).

× Public procurement of R&D services

PCP addresses mid- to long-term public procurement needs for which either no commercially stable solutions yet exist on the market, or existing solutions exhibit structural shortcomings that it requires further R&D to resolve. PCP is a way for procurers to trigger the market to develop new solutions that address these shortcomings. PCP focuses on specific identified needs and provides customer feedback to businesses from the early stages of R&D. This improves the likelihood of commercial exploitation of the newly developed solutions.

PCP is explained in the [PCP communication COM/2007/799](#) and the associated [staff working document SEC/2007/1668](#). The R&D services can cover research and development activities ranging from solution exploration and design, to prototyping, right through to the original development of a limited set 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 demonstrate that the product or service is suitable for production or supply in quantity to acceptable quality standards. R&D does not include quantity production or supply to establish the commercial viability or to recover R&D costs.² It also excludes commercial development activities such as incremental adaptations or routine or periodic changes to existing products, services, production lines, processes or other operations in progress, even if such changes may constitute improvements.

× Open, transparent, non-discriminatory approach — No large-scale deployments

PCP is open to all operators on equal terms, regardless of the size, geographical location or governance structure.

Note:

Procurement may set a requirement that a minimum percentage [e.g. 50%] of the contracted R&D services should be performed in the EU or in countries with which the EC has a public procurement agreement as part of a stabilisation or association agreement in the context of the EU neighbourhood policy.

Any subsequent public procurement of innovative solutions (PPI), for the supply of commercial volumes of the solutions, will be carried out under a separate procurement procedure. Providers that did not take part in this PCP (or were not chosen to go through as far as the last phase) will thus still be able to compete on an equal basis in any subsequent procurement looking for contractors to provide a solution on a commercial scale.

× Sharing of IPR-related risks and benefits under market conditions

PCP procures R&D services at market price, thus providing contractors with a transparent, competitive and reliable source of financing for the early stages of their research and development. Giving each contractor the ownership of the IPRs attached to the results it generates during the PCP means that they can widely exploit the newly developed solutions commercially. In return, the tendered price must contain a financial compensation for keeping the IPR ownership compared to the case where the IPRs would be transferred to the procurers (the tendered price must be the 'non-

² See also Article XV(1)(e) [WTO GPA 1994](#) and the Article XIII(1)(f) of the [revised WTO GPA 2014](#).

exclusive development price'). Moreover, the procurers must receive rights to use the R&D results for internal use and licensing rights subject to certain conditions.

① For more information, see *PCP on the [Europa website](#)*.

× Exemption from EU public procurement directives, the WTO Government Procurement Agreement (GPA) and EU state aid rules

PCP procurements are exempted from the **EU public procurement directives** because the procurers do not retain all the benefits of the R&D (the IPR ownership stays with the contractors).³

They are also exempted from the **WTO Government Procurement Agreement (GPA)** because this Agreement does not cover R&D services⁴ (the PCP being limited to such services — and any subsequent PPI procurements relating to commercial-scale supply of such solutions not being part of the PCP procurement).

PCP procurements do not constitute state aid under the **EU state aid rules**⁵ if they are implemented as defined in the PCP communication⁶, namely by following an open, transparent, competitive procedure with risk- and benefit-sharing at market price. (The division of all rights and obligations (*including IPRs*) and the selection and award criteria for all phases must be published at the outset; the PCP must be limited to R&D services and clearly separated from any potential follow-up PPI procurements; PCP contractors may not be given any preferential treatment in a subsequent procurement for provision of the final products or services on a commercial scale.)

× Open market consultation

The start of this PCP procurement was preceded by an open market consultation (see *summary and Q&A on [insert project/procurer's website]*).

2. Tender profile: Services to be procured, tender closing time, procurer, contracting approach, budget, timetable and IPR

2.1 Description of services to be procured

PCP challenge

Explain the common challenge to be addressed and the scope of the R&D services to be procured:

This procurement is for **R&D services** to develop **solutions** to tackle the following **challenge**: [specify briefly the subject and scope of this PCP, e.g. *improving the energy efficiency of buildings*] [*OPTION for PCPs with sub-challenges*]: and the following sub-challenges: [specify the sub-challenges].]

The **main quality/efficiency improvements** sought for: [indicate the target quality/efficiency and/or functionality/performance improvements, compared to the current best available solutions, e.g. *30 % energy efficiency improvement, interoperability*]

[OPTION for PCPs that include the purchase of some of the R&D results: The PCP includes the **purchase** of a limited set of [**prototype(s)**] [and]/[or] [first test products or services] resulting from the R&D.

Explain clearly which/how many prototypes/test products will be procured and where and when they need to be delivered.

Explain the drivers behind the PCP (*i.e. why the solutions are needed: to improve which aspects in the quality and efficiency of the public services that the procurer is responsible for; to meet regulatory*

³ See Article 16(f) of Directive [2004/18/EC](#) (Article 14 of Directive [2014/24/EU](#)), Article 24(e) of [Directive 2004/17/EC](#) (Article 32 of Directive [2014/25/EU](#)) and Article 13(f)(j) of Directive [2009/81/EC](#).

⁴ See the EU's Annex IV of Appendix I to the [WTO GPA](#).

⁵ See Point 33 of the [Commission Communication on a framework for state aid for research and development and innovation](#) (C(2014) 3282).

⁶ [Commission Communication: Pre-Commercial Procurement: driving innovation to ensure sustainable, high quality public services \(COM\(2007\) 799\)](#) and [PCP staff working document \(SEC\(2007\)1668\)](#).

requirements and/or to meet a need for standardisation or certification). Explain also why current solutions don't meet the need.

Note:

Ensure that the targets for the quality/efficiency improvements are set so that they clearly enable to make a step-change beyond what currently available solutions are able to deliver. Use functional or performance-based specifications that include technical minimum requirements that innovative solutions must meet, rather than prescribing a specific solution. Take into account your analysis on the shortcomings of solutions available on the market, the analysis of the needs of the procurers and the outcome of the open market consultation. Alert tenderers as far as possible to any specific requirements of the subsequent phases (e.g. for phase 2: local technical and safety conditions where prototype testing is planned to take place at the procurer's lab; for phase 3: local technical, (if applicable) ethics and safety/security requirements for field-testing). Provide the metrics or indicators that the procurers will use to evaluate and validate, at the end of each PCP phase, to what extent each competing solution has made progress towards reaching the targets.

For PCPs that include the purchase of a limited set of prototype(s) or first test products or services resulting from the R&D, specify why these are needed for R&D purposes (e.g. if the existing solution used by the procurers has to be destroyed in order to test the new solutions developed during the PCP and/or the procurers need to carry out further testing of the newly developed solutions after the PCP is finished). Specify which and how many prototypes or first products are to be procured.

Expected outcomes (per phase)

Describe the objectives, their associated output and results and the tasks to be carried out (milestones and deliverables) for each of the 3 phases (solution design, prototyping, original development and testing of a limited set of 'first' products or services):

Expected outcomes					
Phase 1: Solution design					
	Objective:	Perform research to: 1. elaborate the solution design and determine the approach to be taken to develop the new solutions and 2. demonstrate the technical, financial and commercial feasibility of the proposed concepts and approach to meet the procurement need			
	Output and results:				
	Milestones and deliverables	By when?	How?	Output and results	
	Milestones:	M1.1) [milestone 1.1]	[dd.mm.yyyy]	[e.g.sent by email to procurer, on-site visit]	...
		M1.2) [milestone 1.2]
				
	Deliverables:	D1.1)[deliverable 1.1]			
		D1.1a)[interim deliverable 1.1a]			
		D1.1b)[interim deliverable 1.1b]			
		D1.2)[deliverable 1.2]			

		D1.3)[deliverable 1.3]			
		D1.3a)[interim deliverable 1.3a]			
		D1.4)[deliverable 1.4]			
		...			
Phase 2: Prototyping					
	Objective:	Develop, demonstrate and validate prototypes in lab conditions			
	Output and results:				
	Milestones and deliverables		By when?	How?	Output and results
	Milestones:	M2.1) [milestone 2.1]	[dd.mm.yyyy]	[e.g.sent by email to procurer, on-site visit]	...
		M2.2) [milestone 2.2]	
				
	Deliverables:	D2.1)[deliverable 2.1]			
		D2.1a)[interim deliverable 2.1a]			
		D2.1b)[interim deliverable 2.1b]			
		D2.2)[deliverable 2.2]			
		D2.3)[deliverable 2.3]			
		D2.3a)[interim deliverable 2.3a]			
		D2.4)[deliverable 2.4]			
		...			
	Points to be addressed in report:				
Phase 3: Development & testing					
	Objective:	Original development and field-testing of a limited set of first [products] [services] (the test series)			
	Output and results:				
	Milestones and deliverables		By when?	How?	Output and results
	Milestones:	M3.1) [milestone 3.1]	[dd.mm.yyyy]	[e.g.sent by email to procurer, on-site visit]	
		M3.2) [milestone 3.2]	...		

				
	Deliverables:	D3.1)[deliverable 3.1]			
		D3.1a)[interim deliverable 3.1a]			
		D3.1b)[interim deliverable 3.1b]			
		D3.2)[deliverable 3.2]			
		D3.3)[deliverable 3.3]			
		D3.3a)[interim deliverable 3.3a]			
		D3.4)[deliverable 3.4]			
		...			
	Points to be addressed in report:				

Specify the tasks and expected outcomes of each milestone and deliverable in more detail:

M1.1)

M1.2) ...

D1.1)

D1.2) ...

Note:

Do not forget to include the following deliverables:

- for each end-of phase deliverable, a section that explains the IPR measures taken by the contractor to protect the results and lists the names and location of personnel that carried out the R&D activities
- a deadline by which the contractors must deliver a summary of the results achieved from the PCP, for publication by the procurer

For phase 2, specify whether prototype validation is expected to be done at the premises of the procurer or the contractor. For PCPs with lots, clarify if there is a need for validating prototypes of contractors from different lots together (to test dependencies between lots and to ensure that building blocks developed in different lots will ultimately work together as expected).

For phase 3, provide information on the timing and the site(s) where the procurer will carry out the testing and validation of the test series. Indicate whether they need to plan to have resources available to carry out testing sequentially or in parallel at different sites. For PCPs with lots, clarify if there is a need for field testing of products/services developed by contractors in different lots together (to test dependencies between lots and to ensure that building blocks developed in different lots ultimately work together as expected).

2.2 Tender closing time

Tender closing time will be: [**date and hour, e.g. 5 September 2017, 17.00h**]

2.3 Procurer [and other parties involved in the PCP]

Explain the procurer set-up:

This procurement will be carried out by the following **procurer**: [name and country of the procurer]

Explain the responsibilities the procurer. (For example, a regional health procurer should explain here for how many hospitals in his region he is responsible to procure solutions, how many patients are served by these hospitals, how many of these patients are affected by the problem that the PCP aspires to solve etc.)

2.4 Contracting approach

Explain the contracting approach:

The PCP will be implemented by means of a **framework agreement** with call-offs for **specific contracts** for each of the 3 R&D phases (altogether 'contracts').

Following the tendering stage, a framework agreement and a specific contract for phase 1 will be awarded to a minimum of [indicate number: minimum 3] contractors.

A call-off will be organised for phase 2, with the aim of awarding a minimum of [indicate number] phase 2 contracts. Only offers from contractors that successfully completed phase 1 will be eligible for phase 2. The procurers will validate the phase 2 prototypes [identify the site: in the procurer's labs or the contractors' lab].

A second call-off will be organised for phase 3, with the aim of awarding a minimum of [indicate number: minimum 2] phase 3 contracts. Only offers from contractors that successfully completed phase 2 will be eligible for phase 3. Phase 3 field-testing is expected to take place [insert where].

The framework agreement will set all the framework conditions for the entire duration of the PCP (covering all the phases). There will be no renegotiation. The framework agreement will remain binding for the duration of all phases for which contractors remain in the PCP. Tenderers that are awarded a framework agreement will also be awarded a specific contract for phase 1 (evaluation of tenders for the framework agreement and phase 1 are combined). Tenderers are therefore asked not only to submit their detailed offer for phase 1, but also to state their goals, and to outline their plans (including price conditions) for phases 2 and 3 — thus giving specific details of the steps that would lead to commercial exploitation of the R&D results.

Provide a brief overview of the overall timing of the PCP (including the expected start and finish dates) and of the individual phases.

Indicate clearly (in this section and in the time schedule table below) if:

- the offers for the next phase will be requested together with the end-of phase deliverables for the previous phase (In this case all contractors of the previous phase will be invited to make offers for the next phase, successful completion of the previous phase is evaluated before evaluating the offers for the next phase, to determine which offers are eligible to proceed to the evaluation of offers for the next phase)

or if

- the offers for the next phase will be requested only *after* the end-of phase deliverables of the previous phase and after the contractors have been informed of successful completion of the previous phase (In this case only the contractors that successfully completed the previous phase will be invited to make offers for the next phase.)

2.5 Total budget and budget distribution (per phase)

Explain the budgetary set-up, specifying in particular:

- the total budget for the PCP
- the maximum budget per phase (and per lot, where applicable)

- the maximum budget per tender per phase (and per lot, where applicable)
- the 'minimum' number of contractors that are expected to be selected per phase (and per lot, where applicable)
- the maximum duration per phase.

Provide for the flexibility to transfer leftover budget from one phase to the next phase in case you receive offers with lower price than expected: For phases 1 and 2, contracts will be financed until the remaining budget is insufficient to fund the next best tender. The exact number of contracts finally awarded will thus depend on the prices offered and the number of tenders passing the evaluation. As leftover budget from the previous phase will be transferred to the next phase, the total budget available for phases 2 and 3 may eventually be higher than stated here (but the maximum budget per contractor for phases 2 and 3 will remain the same). The lower the average price of tenders, the more contracts can be awarded. However, the total value of the contracts awarded can also be lower than initially expected if there are fewer tenders than expected that meet the minimum evaluation criteria.

Note:

State the minimum instead of the maximum expected number of contractors, to allow more contracts than initially expected to be awarded if there are more high quality tenders at cheaper prices than expected.

It is recommendable that the budget distribution of the PCP:

- starts with minimum of 3 contractors and ends with a minimum of 2 contractors in the last phase
- contains a minimum of 3 phases that between them cover the entire PCP lifecycle: solution exploration; prototyping; initial development and testing of a limited set of first products or services. (If needed, each phase may be split up into more phases, e.g. in complex PCPs.)

2.6 Time schedule

Explain the planned time schedule:

Planned time schedule	
Date	Activity
	<u>First tender procedure (framework agreement and phase 1 contracts)</u>
[dd.mm.yyyy]	Publication of contract notice in TED
...	Deadline for requesting tender documents
	Deadline for submitting questions about tender documents
	Deadline for procurer to publish replies to questions (Q&A document)
	Deadline for submission of tenders for the framework agreement and phase 1
	Opening of tenders
	Tenderers notified of decision on awarding contracts
	Signing of framework agreements and phase 1 specific contracts
	Publication of contract award notice in TED
	<u>Implementation of phase 1</u>
	Start of phase 1
	Visit of phase 1 contractors to the premises(s) of the procurer to learn about the operational boundary conditions governing the design of targeted solutions
	Deadline for phase 1 interim milestone(s)/interim deliverable(s)
	Visit(s) of the phase 1 supervisor/monitoring team to the contractor's premises to check completion of milestone(s)/interim deliverable(s)

	Feedback from phase 1 supervisor/monitoring team on phase 1 interim milestone(s)/interim deliverable(s)
	Interim payments (if applicable)
	Deadline for phase 1 final milestone(s)/final report/deliverable(s)
	Assessment of phase 1 final milestone(s)/final report/deliverable(s)
	Phase 1 contractors notified as to whether they have completed this phase satisfactorily and successfully
	End of phase 1
	Payment of balance for phase 1 to contractors that completed this phase satisfactorily
	<u>Second tender procedure (call-off for phase 2)</u>
	Launch call-off for phase 2 (only offers from contractors that successfully completed phase 1 are eligible)
	Deadline for submitting questions on phase 2 call-off documents
	Deadline for procurer to circulate replies to questions to phase 2 tenderers
	Deadline for submitting phase 2 offers
	Opening of phase 2 offers
	Contractors notified of decision on awarding phase 2 contracts
	Signing of phase 2 specific contracts
	<u>Implementation phase 2</u>
	Start of phase 2
	Visit of phase 2 contractors to the premises(s) of the procurer(s), where applicable
	Deadline for phase 2 interim milestone(s)/deliverable(s)
	Visit(s) of the phase 2 supervisor/monitoring team to the contractor's premises to check completion of interim milestone(s)/deliverable(s)
	Feedback from phase 2 supervisor/monitoring team on phase 2 interim milestone(s)/deliverable(s)
	Interim payments (if applicable)
	Lab testing of the prototype developed during phase 2
	Feedback from phase 2 supervisor/monitoring team on lab testing of the prototype
	Deadline for submission of phase 2 final milestone(s)/final report /deliverable(s)
	End of phase demonstration of prototype
	Assessment of phase 2 final milestone(s)/final report/deliverable(s)
	Phase 2 contractors notified as to whether they have completed this phase satisfactorily and successfully
	End of phase 2
	Payment of balance for phase 2 to contractors that completed this phase satisfactorily
	<u>Third tender procedure (call-off for phase 3)</u>
	Launch call-off for phase 3 (only offers from contractors that successfully completed phase 2 are eligible)
	Deadline for submitting questions about phase 3 call-off documents
	Deadline for procurer to circulate replies to questions to phase 3 tenderers
	Deadline for submitting phase 3 offers
	Opening of phase 3 offers
	Contractors notified of decision to award phase 3 contracts
	Signing of phase 3 specific contracts

	<u>Implementation phase 3</u>
	Start of phase 3
	Visit of phase 3 contractors to premises(s) of procurer(s), where applicable
	Deadline for phase 3 interim milestone(s)/deliverable(s)
	Visit(s) of the phase 3 /monitoring team to the contractor's premises to check completion of phase 3 interim milestone(s)/deliverable(s)
	Feedback from phase 3 monitoring supervisor/monitoring team on phase 3 interim milestone(s)/deliverable(s)
	Interim payments (if applicable)
	Field-testing of products/services developed during phase 3
	Feedback from phase 3 supervisor/monitoring team on field-testing of the products/services
	Deadline for submission of phase 3 final milestone(s)/final report/ deliverable(s)
	Final demonstration of products/services developed during phase 3
	Assessment of phase 3 final milestone(s)/final report/deliverable(s)
	Phase 3 contractors notified as to whether they have completed this phase satisfactorily and successfully
	End of phase 3
	Payment of balance for phase 3 to contractors that completed this phase satisfactorily

2.7 IPR issues

Ownership of results (foreground)

Each contractor will keep ownership of the IPRs attached to the results they generate during the PCP implementation. The tendered price is expected to take this into account.

The ownership of the IPRs will be subject to the following:

- the procurer has the right to:
 - access results, on a royalty-free basis, for their own use
 - grant (or to require the contractors to grant) non-exclusive licences to third parties to exploit the results under fair and reasonable conditions (without the right to sub-license)
- the procurer has the right to require the contractors to transfer ownership of the IPRs if the contractors fail to comply with their obligation to commercially exploit the results (*see below*) or use the results to the detriment of the public interest (*including security interests*).

Commercial exploitation of results

[The market potential of the results is estimated at [insert available figures for the expected size and type of the potential total market size, *i.e. beyond the PCP procurers*].]

The contractors are expected to start commercial exploitation of the results at the latest [insert number of years (e.g. minimum of four years)] years after the end of the framework agreement.

Provide information about:

- whether contractors are required to undertake specific activities beyond product development to commercially exploit the results, *e.g. certification of solutions or contribution to standardisation*
- activities that the procurer himself plans to undertake to help remove barriers to the introduction onto the market of the solutions to be developed during the PCP (*e.g. promotion of R&D results among other public procurers, contribution made by the demand side to regulation, standardisation, and certification*).

The feasibility of the business plan to commercially exploit the R&D results will be assessed as part of the award criteria.

Declaration of pre-existing rights (background)

The ownership of pre-existing rights will remain unchanged.

In order to be able to distinguish clearly between results and pre-existing rights (and to establish which pre-existing rights are held by whom):

- tenderers are requested to list the pre-existing rights for their proposed solution in their offers
- procurers and contractors will be requested to establish a list of pre-existing rights to be used before the start of the contract.

[OPTION if already known that NO relevant background is held by the procurer: The procurer does not hold any pre-existing rights relevant to the PCP contracts.]

[OPTION if already known that relevant background is held by the procurer: The following pre-existing rights are already known: [list all pre-existing rights that tenderers should be aware about to prepare their offer — and specify those that are available for use and those that must be used to build upon for carrying out the R&D for the PCP].]

The framework agreement will contain a provision that describes in more detail the rights and obligations of the different parties regarding the pre-existing rights and results.

3. Evaluation of tenders

3.1 Eligible tenderers, joint tenders and subcontracting

Explain that the call for tenders is open to all operators (companies or other type of legal entities):

Participation in the tendering procedure is **open** on equal terms to **all types of operators from any country**, regardless of their geographic location, size or governance structure.

Tenders may be submitted by a **single entity** or in collaboration with others. The latter can involve either submitting a **joint tender** or subcontracting, or a combination of the 2 approaches.

For joint tenders:

- explain that the group of tenderers must assume joint and several liability for the performance of the contract
- require that the group of tenderers must mandate one of them with the power to sign the framework agreement and specific contracts provide in their name and on their behalf ('lead contractor')

For subcontracting:

- specify if there are restrictions on the allowed amount(s) that can be subcontracted
- indicate the provisions of national law that apply to subcontracting
- explain that the tender must mention which parts of the contract will be subcontracted
- specify that the contractors remain fully liable to the procurer for the performance of the contract (and that subcontracts must comply with the obligations related to: *the place of performance, the definition of R&D services, confidentiality, results and IPRs, conflicts of interest, language, the processing of personal data*).

Participation in the **open market consultation** is not a condition for submitting a tender.

Attention:

If applicable: There will, however, be a requirement relating to the place of performance of the R&D services (*see below*).

For phases 2 and 3, participation is limited to tenderers that successfully completed the preceding phase.

3.2 Exclusion criteria

List the exclusion criteria and the evidence to be provided that will be used for the evaluation of the tender.

The exclusion criteria are as follows:

Exclusion criteria	Evidence
Include conflict of interest and all mandatory (and if applicable, optional) exclusion criteria according to national law.	Specify the required evidence for each criterion.
A) Conflict of Interest	A) a declaration of honour for 'absence of conflict of interest'
B) ...	

 Tenderers that do not comply with these criteria will be excluded.

Explain each exclusion criterion in more detail:


A) Conflict of interest

Tenderers that are subject to a conflict of interest will be excluded. If there is a potential conflict of interest, tenderers must immediately notify the procurer in writing.

A conflict of interest covers both personal and professional conflicts.

Personal conflicts are any situation where the impartial and objective evaluation of tenders and/or implementation of the contract is compromised for reasons relating to economic interests, political or national affinity, family, personal life (*e.g. family of emotional ties*) or any other shared interest.

Professional conflicts are any situation in which the contractor's (previous or ongoing) professional activities affect the impartial and objective evaluation of tenders and/or implementation of the contract.

 **Attention:** If an actual or potential conflict of interest arises at a later stage (*i.e. during the implementation of the contract*), the contractor must inform the procurer and take these steps to rectify the situation.

The framework agreement contains a provision on conflict of interest.

B) ...

3.3 Selection criteria

List the selection criteria and the evidence to be provided.

The selection criteria are as follows:

Selection criteria	Evidence
A) Ability to perform R&D up to original development of the first products or services and to commercially exploit the results of the PCP, <i>including intangible results in particular IPRs</i>	Description of the capacity, materials and equipment that are available to the tenderer for research, prototyping and limited production and supply of the first set of products or services Description of the financial and organisational structures that are available to the tenderer for management, exploitation and transfer of IPRs and for generating revenue by marketing commercial applications of the results
B) ...	

Explain how you apply the selection criteria (e.g. tenderers score points for compliance with the selection criteria; in this case include a score matrix) and indicate the minimum number of tenderers (e.g. minimum 3) you aim to select.

Explain each selection criterion in more detail:

A) Ability to perform R&D up to original development of the first products or services and to commercially exploit the results of the PCP, including intangible results in particular IPRs

Tenderers must have:

- the capacity, tools, material and equipment to:
 - carry out research and lab prototyping
 - produce and supply a limited set of first products or services and demonstrate that these products or services are suitable for production or supply in quantity and to quality standards defined by the procurers
- the financial and organisational structures to
 - manage, exploit and transfer or sell the results of the PCP (*including tangible and intangible results, such as new product designs and IPRs*)
 - generate revenue by marketing commercial applications of the results (*directly or through subcontractors or licensees*).

B) ...

⚠ Attention: Should there be any doubt as to any of these criteria, tenderers may be requested to provide additional information.

Note:

Avoid selection criteria that are based on disproportionate qualification and financial guarantee requirements (e.g. with regard to references from past customers, references for professional or technical qualifications and minimum turnover). Instead, use the business plan as one of the award criteria for deciding whether to award a contract (i.e. by requiring tenderers to show that they are able, during the PCP, to gradually build up sufficient financial capacity to successfully market their results).

3.4 Award criteria

Before assessing the tenders based on the weighed award criteria (described in section B below), the procurer will check whether the tenders comply with the on/off requirements described in section A below.

A. On/off requirements

 Tenders that do not comply with the following on/off requirements will be excluded.

List the on/off requirements and the evidence to be provided. Explain that the offers for each phase will be checked for compliance with these requirements.

On/off requirements	Evidence
A) Compliance with the definition of R&D services	
B) Compatibility with other public financing	
<p>OPTIONAL:</p> <p>You may exclude tenderers who do not perform the pre-defined share of the contract in the EU or in a country with which the EC has a public procurement agreement as part of a stabilisation or association agreement in the context of the EU neighbourhood policy.</p> <p>C) Compliance with the requirements regarding the place of performance of the contract</p>	
<p>OPTIONAL (IF APPLICABLE):</p> <p>You may exclude tenderers who do not comply with national rules related to ethics.</p> <p>D) Compliance with ethics requirements</p>	
<p>OPTIONAL (IF APPLICABLE):</p> <p>You may exclude tenderers who do not comply with security requirements you define in compliance with national/EU rules.</p> <p>E) Compliance with security requirements</p>	
Additional on/off requirements for the call-off for phase 2	
X) ...	
Additional on/off requirements for the call-off for phase 3	
X) ...	

Explain each on/off requirement in more detail:

A) Compliance with the definition of R&D services

At least 50% of the total value of the activities offered in a tender shall consist of R&D services. Tenders that do not fulfil this requirement will be excluded.

R&D covers fundamental research, industrial research and experimental development, as per the definition given in the [EU R&D&I state aid framework](#)⁷. It may include exploration and design of solutions and prototyping up to the original development of a limited volume of first products or

⁷ See Point 15 of the [Commission Communication on a framework for state aid for research and development and innovation](#) (C(2014) 3282).

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.⁸ R&D does not include quantity production or supply to establish commercial viability or to recover R&D costs. It also excludes commercial development activities such as incremental adaptations or routine or periodic changes to existing products, services, production lines, processes or other operations in progress, even if such changes may constitute improvements. The purchase of commercial volumes of products or services is not permitted.

The definition of services means that the value of the total amount of products covered by the contract must be less than 50 % of the total value of the PCP framework agreement.

Specify the evidence to be provided to demonstrate compliance with this requirement.

The following evidence is required:

- the financial part of the offer for the framework agreement must provide binding unit prices for all foreseeable items for the duration of the whole framework agreement
- the financial part of the offer for each phase must give a breakdown of the price for that phase in terms of units and unit prices for every type of item in the contract, distinguishing clearly the units and unit prices for items that concern products
- the offers for all 3 phases may include only items needed to address the challenge in question and to deliver the R&D services described in the request for tenders
- the offers for all 3 phases must offer services matching the R&D definition above
- the total value of products offered in phase 1 respectively phase 2 must be less than 50 % of the value of the phase 1 respectively phase 2 contract and the total value of products offered in phase 3 must be so that the total value of products offered in all phases (1,2 and 3) is less than 50% of the total value of the PCP framework agreement.
- ...

Both percentages for the product value inside phase 1 and phase 2 must be set at less than 50 % to ensure that tenders that do not go through to phase 2 or 3 still satisfy the definition of an R&D services contract.

B) Compatibility with other public financing

Tenders that receive public funding from other sources will be excluded if this leads to double public financing or an accumulation of different types of public financing that is not permitted by applicable EU or national legislation (e.g. *EU state aid rules*).

Specify the evidence to be provided to demonstrate compliance with this criterion. Require for example a declaration of honour for absence of other incompatible public financing.

OPTIONAL: C) Compliance with requirements relating to the place of performance of the contract

Tenders will be excluded if they do not meet the following requirements relating to the place of performance of the contract:

- at least [add percentage — e.g. minimum 50%] of the total value of activities covered by each specific contract for PCP phase 1 and 2 must be performed in the EU Member States or in other countries with which the EC has a public procurement agreement as part of a stabilisation or association agreement in the context of the EU neighbourhood policy. The principal R&D staff working on each specific contract must be located in the EU Member States or in other countries with which the EC has a public procurement agreement as part of a stabilisation or association agreement in the context of the EU neighbourhood policy.
- at least [add percentage — minimum 50%] of the total value of activities covered by the framework agreement (*i.e. the total value of the activities covered by phase 1 + the total value of the activities covered by phase 2 + the total value of the activities covered by phase 3*) must be performed in the EU Member States or in other countries with which the EC has a public procurement agreement as part of a stabilisation or association agreement in the context of the EU neighbourhood policy. The principal R&D staff working on the PCP must be

⁸ See Article XV(1)(e) [WTO GPA 1994](#) and the Article XIII(1)(f) of the [revised WTO GPA 2014](#).

located in the EU Member States or in other countries with which the EC has a public procurement agreement as part of a stabilisation or association agreement in the context of the EU neighbourhood policy.

The percentage is calculated as the part of the total monetary value of the contract that is allocated to activities performed in the EU Member States or in other countries with which the EC has a public procurement agreement as part of a stabilisation or association agreement in the context of the EU neighbourhood policy. All activities covered by the contract are included in the calculation (*i.e. all R&D and operational activities that are needed to perform the R&D services, e.g. research, development, testing and certifying solutions*). This includes all activities performed under the contract by contractors and, if applicable, their subcontractors.

The principal R&D staff are the main researchers, developers and testers responsible for leading the R&D activities covered by the contract.

Both percentages for phase 1 and phase 2 must be set at a minimum of 50% to ensure that tenders that do not go through to phase 2 or 3 still satisfy the place of performance requirement.

Specify the evidence to be provided to demonstrate compliance with this criterion:

The following evidence is required:

- the financial part of the offer must provide binding unit prices for all foreseeable items for the duration of the whole framework agreement and give a breakdown of the price for the current phase in terms of units and unit prices (*hours and unit price per hour*), for every type of item in the contract (*e.g. junior and senior researchers*)
- a list of staff working on the specific contract (*including for subcontractors*), indicating clearly their role in performing the contract (*i.e. whether they are principal R&D staff or not*) and the location (*country*) where they will carry out their tasks under the contract
- a confirmation or declaration of honour that, where certain activities forming part of the contract are subcontracted, subcontractors will be required to comply with the place of performance obligation to ensure that the minimum percentage of the total amount of activities that has to be performed in the EU Member States or in other countries with which the EC has a public procurement agreement as part of a stabilisation or association agreement in the context of the EU neighbourhood policy, is respected
- ...

[OPTION: in case ethics requirements affect the PCP contracts] **D) Ethics and research integrity**

Tenders will be excluded if they do not comply with the following ethical principles [add ethical principles (e.g. *the highest standards of research integrity*⁹)] or international, EU and national law applicable to the activities performed during the PCP contracts[detail the applicable requirements].

[in case the tender involves activities that raise ethical issues, indicate which actions or proof of compliance the tenderers should submit (e.g. consent procedure, protection of data, description of measures undertaken to comply with the applicable ethical rules etc.).]

⚠ Attention: Call-offs for phases 2 and 3 may request that this information be updated in the offers submitted for these phases.

The framework agreement contains a provision on ethics.

[OPTION: in case security requirements affect the PCP contracts] **E) Security**

Tenders will be excluded if they do not comply with applicable security-related EU, national and international law. *[in case the output of activities or results proposed in the tender raise security issues or uses EU/national classified information, indicate which actions the tenderer is required to undertake and which proof of compliance he needs to submit in order to comply with the applicable security requirements (e.g. provide evidence of the adequate clearance of all relevant facilities; examine any issues (such as those relating to access to classified information or export or transfer control) with the national authorities before submitting their offer; include a draft security classification guide (SCG), indicating the expected levels of security classification; ensure appropriate security clearance for third parties (e.g. for personnel); provide a copy of any export or transfer*

⁹ The [European Code of Conduct for Research Integrity](#) of ALLEA (All European Academies).

licences required under EU, national or international law etc.]. Tenders themselves must not contain any classified information.

Call-offs for phases 2 and 3 may request that this security information be updated in the offers submitted for that phase.

The framework agreement and/or the specific contracts contain a provision on security.

F)...

B. Weighted award criteria

Specify the award criteria (and sub-criteria, where applicable), weightings and thresholds for each of the 3 phases (*solution design, prototyping, original development and testing of a limited set of 'first' products or services*):

Weighted award criteria	Maximum points	Thresholds	Weighting
Phase 1: Solution design			
Technical quality criteria			
A) [insert technical quality criterion 1]			
B) [insert technical quality criterion 2]			
C) [insert technical quality criterion 3]			
D)...			
Total technical quality criteria			
Price			
Phase 2: Prototyping			
Technical quality criteria			
A) [insert technical quality criterion 1]			
B) [insert technical quality criterion 2]			
C) [insert technical quality criterion 3]			
D)...			
Total technical quality criteria			
Price			
Phase 3: Development & testing			
Technical quality criteria			
A) [insert technical quality criterion 1]			
B) [insert technical quality criterion 2]			
C) [insert technical quality criterion 3]			
D)...			

Total technical quality criteria			
Price			

Explain each weighted award criterion in more detail:

A) ...

B)...

⚠ Attention:

Additional sub-criteria may be added for the call-offs for phases 2 and 3, as a way of making the award criteria more precise, provided that they do not substantially change the existing criteria.

Should there be any doubt as to any of these criteria, tenderers may be requested to provide additional information.

Note:

The weighted award criteria should ensure that the procurer gets the best value for money. It is therefore not recommendable to use either lowest price as the sole criteria, without taking quality into account, or highest quality as the sole criteria, without taking price into account.

Set the technical quality and price award criteria, weightings and thresholds so as to favour the most economically advantageous tenders. Define the thresholds per criterion and the total threshold.

Pay particular attention to the weighting given to price. It should be sufficiently high to avoid this criteria being neutralised in the evaluation. *(For example, a weighting of less than 20 out of 100 for price is too low for it to have a significant effect on the result.)*

State clearly whether all the award criteria will be evaluated by examining the written tender or whether some award criteria will be evaluated on the basis of hearings with or presentations to the evaluation committee.

3.6 Evaluation procedure: Opening of tenders & evaluation

Opening of tenders

Describe the composition of the opening committee, *i.e. the number and type of members, without giving their names.*

Specify which points will be checked during the opening of tenders, in particular in relation to compliance with the conditions on the content and format of the offer *(see above)*.

State that tenders not complying with the formal requirements will be excluded from the tender evaluation.

Give the date for the opening of the tenders and explain how tenderers can participate.

For phases 2 and 3, explain any differences in the composition of the opening committee or in the procedure.

Evaluation

Describe the composition of the evaluation committee (and its panels, where applicable), *i.e. specify:*

- *whether the evaluation committee is the same as the opening committee*
- *the number and type of members, without giving their names*

- *whether, in addition to the procurer, there will be independent experts on the committee (e.g. technical experts on the subject, financial experts for evaluating the commercial viability of the solutions proposed or, if applicable, ethical or security experts).*

The evaluation committee will evaluate the tenders, carrying out the following four steps:

- Step 1 — Checking whether the tenderer is not in one of the situations covered by the exclusion criteria
- Step 2 — For tenderers passing Step 1, assessing whether the tenderer has the capacities necessary to perform the contract, on the basis of the selection criteria
- Step 3 — For tenderers passing Step 2, checking whether the tender complies with the on/off requirements
- Step 4 — For tenders passing Step 3, evaluating the tender based on the weighted award criteria

Explain the tasks of the chair and the members (and the different panels, where applicable).

Specify which members will be involved in the different steps of the evaluation.

Describe how the committee (and its panels) will work (e.g. *when and how they will meet*), and explain the process to be used for making decisions at each of the different steps (e.g. *decision by unanimity*).

Explain the system for scoring, qualitative appraisal and ranking (e.g. *starting from a first round of individual evaluations and concluding with a final agreed qualitative appraisal; the scoring for each tender and the final ranking list of all tenders agreed by the procurer*).

Specify the type of feedback tenderers will receive from the evaluation of their tender.

For phases 2 and 3, explain any differences in the composition of the evaluation committee or in the procedure (Highlight in particular that the evaluation of offers for phase 2 has only 2 steps: evaluating the offers based on the on/off requirements and weighted award criteria.)

4. Content & format of tenders

4.1 Format

Explain the formal requirements that tenders must meet (*including the address for submission of the tender and requirements relating to the presentation of the offer and its packaging*).

State that all tenders must:

- contain administrative, technical and financial sections
- indicate their minimum validity period (from submission)
- be signed.

Specify that tenders that do not comply with the formal requirements will automatically be rejected.

Explain that more detailed information about the final layout requirements for the phase 2 and 3 offers will be provided in the call-off.

4.2 Administrative section

List the information that must be included in this section of the tender (*including the documentary evidence necessary to identify the tenderer and to evaluate the tender against the exclusion, selection and on/off requirements B and — for joint tenders — the mandate for the lead contractor*).

Mention that the procurer may request clarification or additional evidence where there is any doubt.

Explain that more detailed information for the phase 2 and 3 offers will be provided in the call-offs.

4.3 Technical section

Explain what the technical section of the tender must include:

Tenders must include a **technical offer**, containing:

- a technical plan that outlines: 1. the tenderer's idea for addressing all the requirements given in the PCP challenge description, relating both to functionality and performance; and 2. technical details of how this would be implemented
- a draft business plan that explains the proposed approach to commercially exploit the results of the PCP and to bring a viable product or service onto the market
- a list of the pre-existing rights (*background*) relevant to the tenderer's proposed solution, in order to allow IPR dependencies to be assessed
- a risk assessment and risk mitigation strategy
- *[If applicable]* a reply to the question "Does this tender involve **ethical issues**? (YES/NO)" and if YES, information on how the ethical issues will be addressed
- *[If applicable]* a reply to the question "Does this tender involve: activities or results that may raise **security issues** and/or **classified information** as background or results? (YES/NO)" and if YES information on how these issues will be addressed
- ...

Attention:

Tenders failing to meet these requirements will be excluded.

The technical part must provide a *detailed* technical offer for phase 1 (*including an explanation of the methodology, a work plan and details of deliverables and milestones*), and must specify the plans for and objectives of the subsequent phases 2 and 3 and beyond (*including a plan for commercial exploitation of the results*).

Explain how the technical section of the tender should be drafted (possibly by providing a template).

State that the information provided in the technical section of the tender will be used to evaluate the tenders, on the basis of the technical award criteria and the on/off requirements A, D and E.

Explain that more detailed information for the phase 2 and 3 offers (in particular on the technical implementation plan, updated business plan and list of IPRs) will be provided in the call-offs.

4.4 Financial section

Explain what the financial section of the tender must include:

The tender must include a detailed **financial offer** specifying:

- binding **unit prices** for all items needed for carrying out phase 1 and for items that are expected to be needed for phases 2 and 3 (*given in euros, excluding VAT but including any other taxes and duties*)
- a fixed **total price** for phase 1 and an estimated total price for phases 2 and 3, broken down to show unit prices and the number of each unit needed to carry out phase 1 (*given in euros, excluding VAT but including any other taxes and duties*).

In addition, the financial section must include:

- a **price breakdown** that shows the price for R&D services and the price for supplies of products (to demonstrate compliance with the definition of R&D in on/off requirement A)
- a **price breakdown** that shows the location or country in which the different categories of activities are to be carried out (*e.g. x hours of senior researchers in country L at y euro/hour; a hours of junior developers in country M at b euro/hour*) (to demonstrate compliance with the requirement relating to place of performance in on/off requirement C)
- the **financial compensation** valuing the benefits and risks of the allocation of ownership of the **IPRs** to the contractor (*i.e. IPRs generated by the contractor during the PCP*), either:

- *[OPTION if the procurers choose 'ex ante' valuation of the IPRs: by giving an absolute value for the price reduction between the price offered in the tender compared to the exclusive development price (i.e. the price that would have been quoted were IPR ownership to be transferred to the procurers)]*
- *[OPTION if the procurers choose 'ex post' valuation of the IPRs: by confirming the tenderer's agreement with the chosen royalty scheme specified by the procurers, including the percentage of royalties that contractors will have to pay on sales/profits made from commercial exploitation of the IPRs]*

in order to ensure compliance with the [EU R&D&I state aid framework](#).

⚠ Attention: The unit prices quoted for each category of items (e.g. hourly rates for junior and senior researchers, developers and testers) remain binding for all phases (i.e. for the duration of the framework agreement).

Explain how the financial section of the tender should be written.

Explain whether and according to which formula unit prices can be indexed for phases 2 and 3.

Explain that the financial compensation for allocating IPR ownership to the contractor must reflect the market value of the benefits received (i.e. the opportunity that the IPRs offer for commercial exploitation) and the risks assumed by the contractor (e.g. the cost of maintaining IPRs and bringing the products onto the market). (Note that when the value of the risks equals or exceeds the value of the benefits, the financial compensation offered by vendors may be zero.)

State that the information provided in the financial section of the tender will be used to evaluate the tenders on the basis of the price award criteria and the on/off requirements A and C.

Explain that more detailed information for the phase 2 and 3 offers will be provided in the call-off. The price for phase 2 and 3 offers must be based on the binding unit prices in the tender and the price conditions set out in the framework agreement. Where new units/unit prices (e.g. for new tasks or equipment) are subsequently added to the phase 2 or 3 offers, they will become binding for the remaining phases.

Similar price breakdowns will be requested for the call-offs for phase 2 and 3.

5. Miscellaneous

5.1 Language

Specify in which language the communication must be carried out.

All communication (relating to either the tender procedure or the implementation of the contract) must be carried out in **[add language]**.

Tenders as well as offers for phase 2 and 3 call-offs must be submitted in **[insert language]**.

Deliverables must be submitted in **[insert language]**.

5.2 Tender constitutes binding offer

A signed tender will be considered to constitute a firm, irrevocable, unchangeable and binding offer from the tenderer.

The signature of an authorised representative will be considered as the signature of the tender (and will be binding on the tenderer or, for joint tenders, the group of tenderers).

5.3 Unauthorized communication – Questions

The Q&A from the open market consultation can be found on [indicate the website where the Q&A from the open market consultation phase can be found].

For further questions, you may contact [the procurer via email and/or by other means] until [insert date].

The summary of all questions and answers will be presented in an anonymised Q&A document that will be published on [indicate the website where the Q&A will be uploaded] (final version planned for [insert date]). For phases 2 and 3, the answers will not be published, but distributed to all contractors that successfully completed the previous phase.

⚠ Attention: All other contacts (or attempted contacts) will be considered unauthorised and may lead to the exclusion of your tender.

5.4 Confidentiality

Tenderers must keep confidential any information obtained in the context of the tender procedure.

5.5 Contract implementation

Successful tenderers will be requested to sign both a framework agreement and specific contracts for phases 1, 2 and 3 (*see the models given in Annexes 1 and 2*).

Monitoring

During each phase, contract implementation will be monitored periodically and reviewed against the expected outcomes (*milestones, deliverables and output or results*) for the phase.

Each contractor will be assigned a main contact person (their supervisor) from the monitoring team appointed by the procurer.

There will be regular monitoring meetings between contractor and the supervisor/monitoring team.

Explain how often they will take place, how they will be conducted (physical meetings or remote/online meetings), and what they will involve. The contractors could be asked to discuss the results achieved in the preceding period and present their updated work plan; the monitoring team or supervisor could visit the contractor's premises to periodically monitor progress; the contractors could visit the procurer's premises (in particular at the start of a phase to get to know better the operational environment that solutions need to be designed for). Clarify that the contractor must cover its own costs and thus foresee personnel and travel budgets in its offer. In case of PCPs with lots, clarify if and when there will be meetings that involve contractors from the different lots to sort out dependencies between lots and to ensure that building blocks under development in different lots will ultimately work together as expected.

The monitoring team [or supervisor] will provide regular feedback to contractors after meetings or visits.

Explain how and when this will take place and how this will allow contractors to continuously improve the way in which their solutions address the problem set out in the PCP description.

Payments based on satisfactory completion of milestones and deliverables of the phase

Payments corresponding to each PCP phase will be subject to the *satisfactory* completion of the deliverables and milestones for that phase.

Satisfactory completion will be assessed by an assessment committee composed of [describe the composition of the assessment committee, without mentioning their names].

Satisfactory completion will be assessed according to the following requirements:

- if the work corresponding to that milestone / deliverable has been carried out

- if a reasonable minimum quality has been delivered
- if the reports have been submitted on time
- if the monies have been allocated to the planned objectives
- if the monies have been allocated and the work has been carried out according to the On/off requirements (place of performance, public funding and R&D definition criteria)

and

- if the work has been carried out in compliance with the provisions of the contract (*including in particular verification if the contractor has duly protected and managed IPRs generated in the respective phase*).

'Reasonable minimum quality' of a report means that:

- the report can be read by somebody who is familiar with the topic, but not an expert
- the report gives insight in the tasks performed in and the results
- the report is made using the end of phase report form or (if applicable) the milestone report form and the requirements of this form have been met
- ...

'Reasonable minimum quality' of a demonstration (for phase 2 or 3) means:

- the demonstration can be understood by somebody who is familiar with the topic, but not an expert (for instance, somebody with operational but not technical knowledge)
- the demonstration shows how the innovation works, how it can be used and (if applicable) how it is operated and maintained
- the demonstration is accessible to parties appointed by the procurers, unless these are direct competitors of the contractor
- ...

Satisfactory completion in each of the phases does not mean successful completion. (A PCP could, for instance, be satisfactorily completed even if it concludes that the innovation is not feasible.)

The assessment will consider the efforts made by contractors to take into account the feedback from the supervisor or the monitoring team.

Specify the terms of approval for deliverables (for reports and demonstrations respectively), in particular how many days the contractor has to approve/request modifications/reject deliverables, how many days the contractor has to resubmit deliverables.

Where the assessment committee judges the completion of deliverables or milestones to be unsatisfactory, [explain what happens, in particular the possible consequences in terms of reducing or withdrawing payments for that deliverable and/or terminating the contract].

Contractors' invoices must provide:

- a **price breakdown** showing the price for R&D services and the price for supplies of products (in order to demonstrate compliance with the definition of R&D in on/off requirement A)
- a **price breakdown** showing the location or country in which the different categories of activities were performed (*e.g. x hours of senior researchers in country L at y euro/hour, a hours of junior developers in country M at b euro/hour*) (in order to demonstrate compliance with the requirement relating to the place of performance in on/off requirement C).

Explain when payments will be made. Provide information on the amounts of the pre-instalments and interim payments (where applicable) and the payment of the balance.

Eligibility for the next phase based on successful completion of the phase

Eligibility for participation in the next phase will be subject to *successful* completion of the current phase.

Successful completion of a phase will be assessed by the assessment committee against the following requirements:

- if all milestones have been successfully completed

- if the R&D results meet the minimum functionality/performance requirements of the challenge description (*i.e. the minimum quality/efficiency improvements which the procurer set forward for the innovative solutions to achieve*)
- if the results of the R&D are considered to be promising
- ...

'Promising' means:

- for phase 1, that the feasibility is convincing
- for phase 2, that the feasibility, the applicability in an operational setting and the potential impact of the product is convincing

Note: There is a difference between satisfactory completion (requirement for payment) and successful completion (prerequisite for passing from one phase to the next).

Finalisation of phase 3: Possible follow-up PPI procurements

Follow-up PPI procurements for a *limited* set of prototypes and/or test products developed during this PCP procurement (*'limited follow-up PPIs'*) may be awarded by negotiated procedure (*with invitation to at least 3 potential providers, including those that successfully completed this PCP*).

Follow-up PPI procurements for a *commercial volume* of the innovative solutions developed in this PCP procurement will be subject to a new call for tenders.

If possible, please provide an indicative schedule for the procurement process that the procurer would organise for deploying commercial volumes of the solutions, were the PCP to be completed successfully.

5.6 Cancellation of the tender procedure

The procurer may, at any moment, cease to proceed with the tender procedure and cancel it.

The procurer reserves the right not to award any contracts at the end of the tender procedure.

The procurer is not liable for any expense or loss the tenderers may have incurred in preparing their offers [, except for [insert if mandatory limits under national law]].

5.7 Procedures for appeal

Specify:

- the names of the appeal and mediation bodies foreseen under the national law applicable to the procurer and the time periods for filing a complaint and the different stages of dispute settlement.

Annex 1**PCP Framework Agreement****PREAMBLE**

This is a framework agreement (“Agreement” or “Framework Agreement”) between the following parties:

on the one part,

the “procurer”, [insert details of the procurer],

and on the other hand, the “contractor”, [insert details of the contractor],

[OPTION for joint tenders: acting in the name and on behalf of the other members of group of tenderers:

1. [insert the details of the members of the group of tenderers]

2.

The members of the group of tenderers are hereafter collectively referred to as “the contractor” and will be jointly and severally liable vis-à-vis the procurer for the performance of this Framework Agreement and the Specific Contracts.]

The procurer and the contractor(s) shall be referred to together as “parties”, unless otherwise specified.

By signing this Agreement the parties agree to implement the pre-commercial procurement in accordance with the Agreement and all the obligations it sets out.

The Agreement is composed of:

- Preamble
- Terms and Conditions
- Annex 1 Request for tenders
- Annex 2 Contractor's tender

TERMS AND CONDITIONS**Article 1 – Subject of the agreement**

This Framework Agreement defines the general terms and conditions for the implementation of the PCP procurement of R&D services set out in Article XX and for the Specific Contracts that will be awarded for each of the 3 PCP phases.

Article XX – Duration

Define the duration for the framework agreement and starting and end date for the implementation of the tasks.

Specify that the period of execution of the tasks may be extended only with the express written agreement of the parties before the expiration of the period for execution of the tasks.

Article XX – R&D services to be provided

The contractor shall provide the R&D services (tasks, deliverables and milestones) to develop solutions to tackle the challenge set out in the tender and the Specific Contracts.

Article XX — Pricing, payment and accounting

The price for the R&D services to be implemented for each PCP phase will be set out in the Specific Contracts.

The prices shall be based on the binding unit prices in the tender and the following price conditions:

- if new units/unit prices are added to phase 2 or 3 offers, they shall become binding for the remaining phases
- ... specify the other price conditions

Specify the payment and invoicing conditions that will apply. Ensure consistency with the request for tenders/tender (if needed via cross-references).

Article XX — Ownership of the results (foreground), pre-existing rights (background) and sideground (including intellectual and industrial property rights)

Include provisions that clarify the rights and obligations related to pre-existing rights (background), sideground and results (foreground) for:

- procurer,
- the contractor and
- its subcontractors (if any).

Provide **definitions**, notably for:

- 'results (*i.e. foreground*)' means any tangible or intangible output, such as data, knowledge or information, that is generated in the PCP, whatever its form or nature, whether or not it can be protected, as well as any rights attached to it, including intellectual property rights ('attached IPRs' or 'IPRs attached to the results')
- 'pre-existing rights (*i.e. background*)' means any data, know-how or information — whatever its form or nature (tangible or intangible), including any attached rights such as intellectual property rights ('background IPRs') — that is held prior to the signing of the framework agreement, identified by the parties involved in the PCP as background and needed to implement the PCP or exploit the results of the PCP
- 'sideground' means any data, know-how or information — whatever its form or nature (tangible or intangible), including any attached rights such as intellectual property rights ('sideground IPRs') — that is generated during the timespan of the PCP but not in the PCP and needed to implement the PCP or to exploit the results of the PCP
- 'fair and reasonable conditions' means appropriate conditions, including financial terms or royalty-free conditions, taking into account the specific circumstances of the request for access (*for example, the actual or potential value of the results or background to which access is requested and/or the scope, duration or other characteristics of the exploitation envisaged*)
- 'Generated in the PCP' means in activities described in the PCP framework agreement or specific contracts
- 'Not generated in the PCP' means not generated in activities described in the PCP framework agreement or specific contracts

Provide for the rights and obligations in relation to **results**. Specify:

- that each contractor that generates results **owns** the attached IPRs
- who will **own results that are not IPRs** (*e.g. prototypes and first products resulting from the R&D, design, prototype and first product/service specifications, simulations, data models, drawings, source code*)
- that each contractor is responsible for the **management** (*including protection*) of its IPRs and bears the costs associated with this
- that the procurer has the right to **monitor** the management of the IPRs
- that the contractor must inform the procurer of results that can be **exploited**, regardless of whether they can be protected or not, within [insert number] days from when they are generated. The information submitted to the procurer must include information about the contents of the results, the confirmation by the contractor to protect them and the planned timing for protection.

- that if a contractor does not seek **protection** for results that should be protected, the procurer has the right to request that the results are transferred to him
- that the contractor grants to the procurer irrevocable, royalty-free, non-exclusive, world-wide **access** rights to use the results, for his own purposes (for IPRs: until their expiry date)
- that, for results that are an implementation of design specifications into simulations, prototypes, demonstrators or first products /services, those access rights are limited to a duration of [insert duration] years and to the following purposes for fulfilling the R&D objectives of the PCP: [specify those purposes for your PCP]
- that the procurer has [the right to grant] [the right to require the contractor to grant – within a reasonable time period specified in the request –] **non-exclusive licences to third parties** to commercially or non-commercially exploit the results under fair and reasonable conditions, without the right to sub-license
- that the contractor may grant non-exclusive licences to third parties allowing them to exploit the results (or otherwise give the right to exploit them) – unless this impedes the access rights of the procurer
- that the contractor may **transfer ownership** of its results – unless this is prohibited (or restricted) by the security obligations (if applicable) and provided that it ensures that its obligations (in respect of the results) apply to the new owner and that this new owner is obliged to pass them on in any subsequent transfer (e.g. by including a requirement to do so in their arrangements with the new owner)

You may foresee a right of first refusal for the procurer to buy the results.

You should also foresee a procedure for transfers (e.g. that the contractor must give the procurer at least 45 days advance notice of its intention to transfer ownership of the results and that this notification must include sufficient information on the new owner to enable the procurer to assess the effects on their access rights. A procurer can object within 30 days of receiving notification, if it can show that the transfer would adversely affect its access rights. Should an objection be raised, the transfer may not take place until agreement has been reached between the parties concerned).

- whether the contractor is required to **deposit copies** of results (e.g. the source code and design specifications), for example, under an ESCROW agreement designed to guarantee the procurer continued access to results in the case of financial bankruptcy of the contractor (or any of its subcontractors).

Provide for the rights and obligations concerning **pre-existing rights** (background) and sideground. Specify:

- rules regarding **ownership** of pre-existing rights and sideground (normally remains unchanged)
- that the parties must inform each other about the generation of/changes in pre-existing rights and sideground within [insert number] days from the generation /change
- that the contractor introducing background must within [define period e.g. 2 weeks] of the signing of the PCP framework agreement provide the procurer with a **list of the pre-existing rights** it holds and/or has access to (e.g. via its subcontractors) (at the date of the agreement) and a list of the software necessary for the operation of the prototype and first [products]/[services] that will be developed during the PCP, specifying which software is closed source software. An updated list (to the extent necessary) must be provided with each bid for the next phase
- the **access** that the parties must grant each other to each other's pre-existing rights and sideground for carrying out the tasks assigned to them in the PCP, for exploitation of results generated in the PCP and for using the results for their own purposes (normally at least to the procurer)

The conditions for access should be fair and reasonable to all parties, e.g. – if appropriate for your PCP –

- on a royalty-free, non-exclusive basis, access to each other's background, for carrying out the tasks assigned to them in the PCP
- under fair and reasonable conditions and on non-exclusive basis, access to each other's background, for exploitation of results generated in the PCP and for using the results for their own purposes
- under fair and reasonable conditions and on non-exclusive basis, access to each other's sideground, for carrying out the tasks assigned to them in the PCP, for

exploitation of results generated in the PCP and for using the results for their own purposes

Note:

The limitation of the scope and duration of the access rights (to 'what is needed by the procurer to fulfil the R&D objectives of the PCP') is needed for the PCP to remain an 'R&D procurement' where the 'procurer does not retain all the benefits' and thus be exempted from the WTO rules and the EU public procurement directives.

Don't forget to foresee:

- rules on subcontractor rights and obligations with respect to the above points on results, pre-existing rights and sideground (*e.g. that the contractor must ensure that it complies with its obligations under the framework agreement and specific contracts if it uses subcontractors; that it must obtain all necessary rights (transfer, licences or other) from subcontractors, as if they were generated by itself; that it should refrain from using subcontractors if obtaining those rights is impossible*)

You may specify additional intellectual property provisions, provided they help the procurer or the contractor to implement the PCP as well as exploit the results.

Article XX – Confidentiality

The parties shall keep confidential any data, documents or other material (in any form) that is identified as confidential at the time it is disclosed. This applies during the implementation of the Framework Agreement and Specific Contracts and up to [insert number of years (e.g. minimum 4 years)] years after their end.

If information has been identified as confidential only orally, it shall be considered to be confidential only if this is confirmed in writing within 15 days of the oral disclosure.

The parties may disclose confidential information to their staff only if:

- (a) they need to be aware of this information in order to implement the PCP activities under the Framework Agreement and Specific Contracts; and
- (b) they are bound by an obligation of confidentiality.

The confidentiality obligations cease to apply if:

- (a) the disclosing party agrees to release the other party from the obligation;
- (b) the information was already known by the recipient or is given to him without obligation of confidentiality by a third party that was not bound by any obligation of confidentiality;
- (c) the recipient proves that the information was produced without the use of confidential information;
- (d) the information becomes generally and publicly available, without breaching any confidentiality obligation; or
- (e) the disclosure of the information is required by EU or national law.

[If applicable] This does not change the security obligations, which still apply. Stricter confidentiality obligations apply for information that is EU-classified or subject to a security recommendation.

Article XX – Commercial exploitation of results

The contractor shall, for at least [insert number of years (e.g. minimum 4 years)] years after the end of the Framework Agreement and the Specific Contracts, take measures to ensure that its results are exploited commercially (directly or indirectly, in particular through transfer or licensing).

If the contractor fails to commercially exploit the results within this period (or uses the results to the detriment of the public interest, *including security interests*), the procurer has the right to require that ownership of the results be transferred to them.

'Failure to commercially exploit results' means not marketing a commercial application of the results (directly or indirectly, through a subcontractor or licensee).

Note:

Set the period of time allowed in such a way as to give the contractor a fair and reasonable amount of time to exploit the results in the relevant sector. This will ensure that the potential for marketing

the product or service is valued correctly (an appropriate length of time would typically be longer than 4 years, e.g. 5 years). The period should take account of the fact that: 1. the contractor needs to start producing the good or service in quantity and to invest in large scale promotion activities; and 2. the potential first customers, public procurers, generally take time to prepare and launch a PPI after the PCP has been completed.

Article XX – Conflicts of interest

XX.1 The contractor shall take all measures necessary to prevent a situation arising where the impartial and objective implementation of the Framework Agreement or a Specific Contract is compromised for reasons involving economic interests, political or national affinity, family, personal life or any other shared interest.

The contractor shall also take all measures necessary to prevent a situation in which its (previous or ongoing) professional activities affect the impartial and objective implementation of the Framework Agreement or a Specific Contract.

XX.2 The contractor shall notify the procurer without delay of any situation constituting or likely to lead to a conflict of interest (*including changes of ownership*) and shall immediately take all steps necessary to rectify this situation.

The procurer may instruct the contractor to take specific measures to remedy the situation.

[If applicable] **Article XX – Ethics and research integrity**

XX.1 The contractor shall carry out the tasks assigned to it in the Framework Agreement and Specific Contracts in compliance with the [insert reference to the applicable rules on ethics and research integrity].

[OPTION] The contractor shall respect the fundamental principle of research integrity — as set out in the European Code of Conduct for Research Integrity¹⁰.

This implies compliance with the following essential principles:

- **reliability** in ensuring the quality of research reflected in the design, the methodology, the analysis and the use of resources;
- **honesty** in developing, undertaking, reviewing, reporting and communicating research in a transparent, fair and unbiased way;
- **respect** for colleagues, research participants, society, ecosystems, cultural heritage and the environment;
- **accountability** for the research from idea to publication, for its management and organisation, for training, supervision and mentoring, and for its wider impacts

This means that beneficiaries must ensure that persons carrying out research tasks follow the good research practices and refrain from the research integrity violations described in this Code.

The contractor may not:

- *[Specify the activities that the contractor is not allowed to conduct]*

[If applicable] **Article XX – Security-related obligations**

[OPTION if the contracts involve dual-use goods or dangerous materials or substances: XX.X Activities involving dual-use goods or dangerous materials and substances shall comply with applicable EU, national and international law.

¹⁰ The European Code of Conduct for Research Integrity of ALLEA (All European Academies) and ESF (European Science Foundation) of March 2011.
http://www.esf.org/fileadmin/Public_documents/Publications/Code_Conduct_ResearchIntegrity.pdf

Before starting the activity, the contractor shall provide the procurer with a copy of any export or transfer licences required.]

[*OPTION if the contracts involve classified information* Tasks involving classified information may not be subcontracted without prior written approval from the procurer.

The contractor shall inform the procurer of any changes relating to security and, if necessary, request an amendment.]

Article XX – Processing of personal data

The contractor shall process personal data in compliance with the applicable EU and national law on data protection (*including as relates to authorisations and notification requirements*).

The contractor may grant its staff access to data only in so far as is strictly necessary for implementing, managing and monitoring the Framework Agreement and Specific Contracts.

The contractor must inform the staff whose personal data are collected and processed by the procurer. For this purpose, the contractor must provide them with the privacy statements of the procurer, before transmitting their data. If explicit prior consent from the data subjects is needed, the contractor must obtain such consent.

Article XX – Obligation to provide information and keep records

XX.1 The contractor must, at any time during the implementation of the Framework Agreement and Specific Contracts or afterwards, provide any information requested by the procurers in relation to the Agreement or Contracts.

XX.2 The contractor must keep, for a period of up to [insert number of years (e.g. minimum 5 years)] years after the end of the Framework Agreement and Specific Contracts, records and other supporting documentation relating to their implementation.

This obligation includes records and other supporting documentation on scientific and technical implementation (in line with the accepted standards in the field) and on the price charged and the costs incurred by the contractor.

The contractor must keep the original documents. Digital and digitalised documents are considered originals if they are authorised under national law.

Should there be ongoing checks, reviews, audits, investigations, litigation or other pursuits of claims (*including claims by a third party against the procurers*), the contractor must keep all records and other supporting documentation until the end of these procedures.

Article XX – Procurer impact evaluation

Should the procurer carry out an impact evaluation, the contractor must make available all information, records and other supporting documents relating to the implementation of the Framework Agreement and Specific Contracts.

Article XX – Breach of contract

Set out the consequences in case of breach of contract (in line with the law applicable to the contract).

Don't forget provisions on partial/improper implementation of tasks and breach of other obligations.

Include a section on liability for damages:

XX.1 The contractor must compensate and indemnify the procurer if he is held liable by a third party for damage sustained as a result of the implementation of the Framework Agreement or a Specific Contract.

Article XX – Amendments

Include a provision on amendments. Specify that they must be made in writing.

Include a clause that the amendment may not have the purpose or the effect of making changes to the contracts which might call into question the decision awarding the contracts or result in unequal treatment of tenderers.

Article XX – Interpretation

Include a provision specifying that the terms set out in the framework agreement have precedence over those in annexes and that the terms set out in Annex 1 (request for tenders) have precedence over those set out in Annex 2 (contractor's tender).

Specify that the same applies to the specific contracts.

Article XX – Applicable law and dispute settlement

Specify:

- *the law applicable to the framework agreement and to the specific contracts*
- *the dispute settlement mechanisms, in particular the competent court or other dispute settlement mechanisms (e.g. arbitration or mediation, if allowed under national law) and the deadlines to respect.*

Article XX – Entry into force

Define the entry into force (*e.g. upon signature of the last party*)

SIGNATURES

The procurer signs and — in case of joint tenders — the lead contractor for the group of contractors.

Annex 2**PCP Specific contract for phase [1][2][3]**

Specific contracts must contain at least the following elements/provisions:

PREAMBLE

Similar set-up as the framework agreement:

Annex the contractor's offer.

TERMS AND CONDITIONS**Article 1 – Subject of the contract**

This Specific Contract defines the specific terms and conditions for the implementation of the PCP procurement of R&D services set out in Article XX — for the [1st][2rd][3rd] PCP phase.

Article XX – Duration

Specify the duration of the specific contract and starting and end date for the implementation of the tasks.

Specify that the period of execution of the tasks may be extended only with the express written agreement of the parties before the expiration of the period for execution of the tasks.

Article XX – R&D services to be provided

The contractor shall provide the R&D services (tasks, deliverables and milestones) set out in the offer for this phase.

Specify the scope of the specific contract (*i.e. which phase and which lot, if any*).

Specify the individuals in charge of carrying out the R&D activities for the specific contract and their location (country where they carry out the R&D activities).

Article XX – Price and payment arrangements

The price to be paid by the procurer for the R&D services set out in Article XX shall be [currency][other currency] [amount in figures and in words].

Specify the amounts of pre-instalments and interim payments (if applicable) and final payment in figures and words.

Specify how many days after receipt of the invoice payment(s) have to be made to the contractor.

Specify the contractor's bank account details and the currency in which payments will be made.

[If applicable] Article XX – Security related obligations

Add a provision on security if specifically needed for the phase and not already covered by the provision in the framework agreement.

Article XX – Entry into force

Specify the entry into force date.

SIGNATURES

Same as for framework agreement: The procurer signs and — in case of joint tenders — the lead contractor for the group of contractors.

3. Contract notice

PCP CONTRACT NOTICE

⚠ How does this document work?

- **Instructions are in blue.**
- **Recommended text is in black.**
- **Options are in blue [in square brackets].**
- **Data to be added is shown in [grey in square brackets].**

⚠ The contract notice has to be filled out online on the [TED — tenders electronic daily website](#). Use the version of the simap standard form that is most appropriate for your type of organisation:

- **for procurers in the public sector: ‘Contract notice’**
- **for procurers in the utilities sector: ‘Contract notice — utilities’**
- **for procurers in the field of defence and security: ‘Contract notice for contracts in the field of defence and security’**



Supplement to the Official Journal of the European Union

Info and online forms: <http://simap.ted.europa.eu>

Contract notice

Directive 2014/24/EU

Section I: Contracting authority

I.1) Name and addresses¹ (please identify all contracting authorities responsible for the procedure)

Official name:		National registration number: ²	
Postal address:			
Town:	NUTS code:	Postal code:	Country:
Contact person:		Telephone:	
E-mail:		Fax:	
Internet address(es)			
Main address: (URL)			
Address of the buyer profile: (URL)			

In the contact points section, give the contact details of the procurer.

In the Internet addresses section, give the (project) website of the procurer. Use the address of the procurer’s buyer profile.

I.2) Joint procurement

- | |
|--|
| <input type="checkbox"/> The contract involves joint procurement
In the case of joint procurement involving different countries, state applicable national procurement law: |
| <input type="checkbox"/> The contract is awarded by a central purchasing body |

Select 'yes' for the first question when *the contract involves joint procurement*.

Only select 'yes' for the second question, *when the contract is awarded by a single procurer*.

I.3) Communication

<input type="radio"/> The procurement documents are available for unrestricted and full direct access, free of charge, at: <i>(URL)</i> <input type="radio"/> Access to the procurement documents is restricted. Further information can be obtained at: <i>(URL)</i>
Additional information can be obtained from <input type="radio"/> the abovementioned address <input type="radio"/> another address: <i>(please provide another address)</i>
Tenders or requests to participate must be submitted <input type="checkbox"/> electronically via: <i>(URL)</i> <input type="radio"/> to the abovementioned address <input type="radio"/> to the following address: <i>(please provide another address)</i>
<input type="checkbox"/> Electronic communication requires the use of tools and devices that are not generally available. Unrestricted and full direct access to these tools and devices is possible, free of charge, at: <i>(URL)</i>

Select the applicable options to clarify how interested tenderers can obtain the procurement documents and additional information and how they must submit their tenders.

I.4) Type of the contracting authority

<input type="radio"/> Ministry or any other national or federal authority, including their regional or local subdivisions <input type="radio"/> National or federal agency/office <input type="radio"/> Regional or local authority	<input type="radio"/> Regional or local agency/office <input type="radio"/> Body governed by public law <input type="radio"/> European institution/agency or international organisation <input type="radio"/> Other type:
---	--

This section is to be filled in ONLY if the procurer is a contracting authority (i.e. NOT a contracting entity).

I.5) Main activity

<input type="radio"/> General public services <input type="radio"/> Defence <input type="radio"/> Public order and safety <input type="radio"/> Environment <input type="radio"/> Economic and financial affairs <input type="radio"/> Health	<input type="radio"/> Housing and community amenities <input type="radio"/> Social protection <input type="radio"/> Recreation, culture and religion <input type="radio"/> Education <input type="radio"/> Other activity:
--	--

Select the procurer's main activities.

Section II: Object

II.1) Scope of the procurement

II.1.1) Title:	Reference number: ²
----------------	--------------------------------

Use this title: 'Pre-commercial procurement (PCP) to buy R&D (research and development) services to [specify in a few words the subject and scope of this PCP e.g. *improving the energy efficiency of buildings*]'.

II.1.2) Main CPV code: [] [] . [] [] . [] [] . [] [] Supplementary CPV code: ^{1,2} [] [] [] []

Use CPV 73100000 for R&D services and additional other CPVs, if relevant to the object of the contract (e.g. CPV for medical equipment if the PCP is for medical equipment-related R&D, CPV for software development services if software-related R&D is needed).

II.1.3) Type of contract Works Supplies Services

Select 'Services' (not 'Supplies' or 'Works'; PCP is an R&D services contract).

II.1.4) Short description:

This contract notice **invites** interested operators to **submit tenders** to a procurement.

The procurement aims to trigger new solutions to be developed and tested to address the following **challenge**: [specify briefly the subject and scope of this PCP e.g. *improving the energy efficiency of buildings*].

[OPTION for PCPs with lots: As the common challenge exists of a number of sub-challenges, the procurement will be divided into the following lots, each corresponding to one sub-challenge:

- lot 1: [insert name of the sub-challenge to which the lot corresponds]
- lot 2:
- ...]

The main technical challenges to be addressed [per lot] are: [indicate the main target quality/efficiency and/or functionality/performance improvements compared to the current state-of-the-art technology – per lot, if applicable – e.g. 30% energy efficiency improvement, 20% cost reduction, etc].

Provide any other relevant information. If needed to cope with the character-limit in the forms, distribute text also over 'II.2.4) Description of the procurement' and 'II.2.14) Additional information'.

II.1.5) Estimated total value ²

Value excluding VAT: [] Currency: [] [] []

(for framework agreements or dynamic purchasing systems – estimated total maximum value for the entire duration of the framework agreement or dynamic purchasing system)

Give the total estimated value of the PCP framework agreement in euros/other currency (excluding VAT).

II.1.6) Information about lots

This contract is divided into lots yes no

Tenders may be submitted for all lots maximum number of lots: [] one lot only

Maximum number of lots that may be awarded to one tenderer: []

The contracting authority reserves the right to award contracts combining the following lots or groups of lots:

For PCPs with lots select 'yes'. Consider carefully the consequences of restricting the number of lots that tenders may be submitted for, if applicable.

II.2) Description ¹

II.2.1) Title: ²

Lot No: ²

Only fill in if lots are used. Fill in the title and number of each lot.

II.2.2) Additional CPV code(s)²Main CPV code: ¹ [] [] . [] [] . [] [] . [] [] Supplementary CPV code: ^{1,2} [] [] [] []

Only fill in if lots are used. Use the CPV codes for each lot.

II.2.3) Place of performanceNUTS code: ¹ [] [] [] [] [] [] Main site or place of performance:

Do NOT fill out the fields 'NUTS code' and 'main site or place of performance'. (The place of performance meant here is a specific place; it has nothing to do with the place of performance requirement specified in the Request for Tenders (*namely to do at least 50% of the contracted R&D services in EU Member States or in other countries the EC has a public procurement agreement as part of a stabilisation or association agreement in the context of the EU neighbourhood policy*)).

II.2.4) Description of the procurement:*(nature and quantity of works, supplies or services or indication of needs and requirements)*

Provide any further relevant information on differences in scope per lot.

Use this text to describe the procurement:

The procurement will take the form of a pre-commercial procurement (PCP) under which R&D service contracts will be awarded to a number of R&D providers in parallel in a phased approach. This will make it possible to compare competing alternative solutions.

Each selected operator will be awarded a framework agreement that covers 3 R&D phases.

The 3 phases are:

- R&D up to solution design
- R&D up to a prototype
- R&D up to original development, validation and testing of a limited set of first products or services.

After each phase, intermediate evaluations will be carried out to progressively select the best of the competing solutions. The contractors with the best-value-for-money solutions will be offered a specific contract for the next phase. *[OPTION for PCPs with lots: The phased approach with parallel contracts and intermediate evaluations will be followed within each lot.]*

Testing is expected to take place in [add the locations where testing is expected to take place, in particular test locations of the procurers and other additional test locations]. This testing may also serve as a first customer test reference for the contractors. The procurement is expected to start in [add expected starting date of the PCP] and end in [add expected completion date of the PCP].

The selected operators will retain ownership of the intellectual property rights (IPRs) that they generate during the PCP and will be able to use them to exploit the full market potential of the developed solutions *i.e. beyond the procurers*. *[The market potential is estimated at [insert available figures about the potential total market size, i.e. beyond the procurers].]*

II.2.5) Award criteria

- Criteria below
- Quality criterion – Name: / Weighting: ^{1,2,20}
- Cost criterion – Name: / Weighting: ^{1,20}
- Price – Weighting: ²¹
- Price is not the only award criterion and all criteria are stated only in the procurement documents

Select one of the 2 options ('the criteria below' OR 'price is not the only award criterion and all criteria are stated only in the procurement documents').

If you select the first option ('the criteria below'), you must indicate all the criteria and their weighting.

II.2.6) Estimated value

Value excluding VAT: [] Currency: [] [] []
(for framework agreements or dynamic purchasing systems – estimated total maximum value for the entire duration of this lot)

Only fill in if lots are used.

II.2.7) Duration of the contract, framework agreement or dynamic purchasing system

Duration in months: [] or Duration in days: []
 or Start: (dd/mm/yyyy) / End: (dd/mm/yyyy)
 This contract is subject to renewal yes no Description of renewals:

Enter the duration.

II.2.9) Information about the limits on the number of candidates to be invited *(except in open procedures)*

Envisaged number of candidates: []
 or Envisaged minimum number: [] / Maximum number: ? []
 Objective criteria for choosing the limited number of candidates:

Do not fill in.

II.2.10) Information about variants

Variants will be accepted yes no

Select 'No'. In PCP, the use of variants is not necessary, since the PCP approach inherently supports the development of several alternative solutions in parallel.

II.2.11) Information about options

Options yes no Description of options:

Complete if applicable.

II.2.12) Information about electronic catalogues

Tenders must be presented in the form of electronic catalogues or include an electronic catalogue

Complete as applicable. Avoid conditions that might unduly restrict participation.

II.2.13) Information about European Union funds

The procurement is related to a project and/or programme financed by European Union funds yes no
 Identification of the project:

Select 'yes' or 'no' accordingly.

II.2.14) Additional information:

Use this text:

Participation in the open market consultation that was held as part of the preparation for this procurement is not a prerequisite for submitting a tender.

This procurement is exempted from the WTO Government Procurement Agreement (GPA), the EU public procurement directives and the national laws that implement them. This is because it concerns the procurement of R&D services where the benefits do not accrue exclusively to the contracting authority for its use in the conduct of its own affairs.

Publication of this contract notice in the EU Official Journal is not to be understood as a waiver of this exemption. Publication is made on a voluntary basis and the procurement will not follow the procedures under the EU public procurement directives, but rather the procedure described in the tender documentation.

The [open]/[negotiated] procedure was chosen in Section IV.1.1) 'Procedure' for formal reasons only. This is because it is not possible to publish a contract notice without selecting one of the listed procedures.

Offers may be submitted in [insert language]. All communication (before, during and after the procurement) can be made in [add language].

More information:

See:

- the project website (see [insert address])
- the open market consultation Q&A (see [insert address])

or contact:

- [insert email address or interactive web address]

Provide other additional information (if applicable).

Please ensure that interested operators can ask questions about the procurement and tender documents and give them sufficient time to do so.

Section III: Legal, economic, financial and technical information**III.1) Conditions for participation**

III.1.1) Suitability to pursue the professional activity, including requirements relating to enrolment on professional or trade registers

List and brief description of conditions:

Complete as applicable. Avoid conditions that might unduly restrict participation.

You can refer to the tender documents for further information.

III.1.2) Economic and financial standing

Selection criteria as stated in the procurement documents

List and brief description of selection criteria:

Minimum level(s) of standards possibly required: ²

Complete as applicable. Avoid conditions that might unduly restrict participation (in particular disproportionate financial guarantee requirements *e.g. minimum turnovers*).

You can refer to the tender documents for further information.

III.1.3) Technical and professional ability

Selection criteria as stated in the procurement documents

List and brief description of selection criteria:

Minimum level(s) of standards possibly required: ²

Complete as applicable. Avoid conditions that might unduly restrict participation (in particular disproportionate qualification requirements *e.g. references from past customers*).

You can refer to the tender documents for further information.

III.1.5) Information about reserved contracts ²

The contract is reserved to sheltered workshops and economic operators aiming at the social and professional integration of disabled or disadvantaged persons

The execution of the contract is restricted to the framework of sheltered employment programmes

The options for reserved contracts do not apply.

III.2) Conditions related to the contract ²**III.2.1) Information about a particular profession (only for service contracts)**

Execution of the service is reserved to a particular profession

Reference to the relevant law, regulation or administrative provision:

Complete if applicable. Avoid conditions that might unduly restrict participation.

III.2.2) Contract performance conditions:

Complete if applicable. Avoid conditions that might unduly restrict participation.

III.2.3) Information about staff responsible for the performance of the contract

Obligation to indicate the names and professional qualifications of the staff assigned to performing the contract

Select 'yes'. Further explanation is provided in the section about the place of performance requirement in the PCP request for tenders.

Section IV: Procedure**IV.1) Description****IV.1.1) Type of procedure**

Open procedure

Accelerated procedure

Justification:

Restricted procedure

Accelerated procedure

Justification:

Competitive procedure with negotiation

Accelerated procedure

Justification:

Competitive dialogue

Innovation partnership

For procurers in the public or utilities sector: select 'open'.

For procurers in the defence and security sector: select 'negotiated'.

Provide information on the PIN announcing the open market consultation.

Provide information on other previous publications (if applicable).

IV.2.2) Time limit for receipt of tenders or requests to participate

Date: (dd/mm/yyyy) Local time: (hh:mm)

Enter date and time.

IV.2.3) Estimated date of dispatch of invitations to tender or to participate to selected candidates ⁴

Date: (dd/mm/yyyy)

Do not fill in. Tendering is not restricted to selected tenderers or candidates.

IV.2.4) Languages in which tenders or requests to participate may be submitted: [] [] ¹

Select applicable languages.

IV.2.6) Minimum time frame during which the tenderer must maintain the tender

Tender must be valid until: (dd/mm/yyyy)

or Duration in months: [] (from the date stated for receipt of tender)

Complete as applicable.

IV.2.7) Conditions for opening of tenders

Date: (dd/mm/yyyy) Local time: (hh:mm) Place:

Information about authorised persons and opening procedure:

Complete as applicable.

Section VI: Complementary information

VI.1) Information about recurrence

This is a recurrent procurement yes no

Estimated timing for further notices to be published: ²

Select 'No'.

VI.2) Information about electronic workflows

- Electronic ordering will be used
 Electronic invoicing will be accepted
 Electronic payment will be used

Complete as applicable.

VI.3) Additional information: ²

Provide any other additional relevant information.

VI.4) Procedures for review

VI.4.1) Review body		
Official name:		
Postal address:		
Town:	Postal code:	Country:
E-mail:		Telephone:
Internet address: <i>(URL)</i>		Fax:

Give the names of the review bodies (also called 'appeal bodies') foreseen under the national law applicable.

Depending on the country, this may or may not be the same body that is competent when the EU public procurement directives do apply.

VI.4.2) Body responsible for mediation procedures ²		
Official name:		
Postal address:		
Town:	Postal code:	Country:
E-mail:		Telephone:
Internet address: <i>(URL)</i>		Fax:

Give the names of the mediation bodies foreseen under the national law.

VI.4.3) Review procedure
Precise information on deadline(s) for review procedures:

Use the following text:

The procurement is exempted from the EU public procurement directives (*including the EU procurement remedies directives 89/665/EEC and 92/13/EEC — see above*) and the national laws that implement them.

Publication of this notice in the Official Journal is not to be understood as a waiver of this exemption by the contracting authority.

The deadlines for the review procedures at the bodies for review and mediation, mentioned in IV.4.1) and IV.4.2) are: [complete].

VI.4.4) Service from which information about the review procedure may be obtained ²		
Official name:		
Postal address:		
Town:	Postal code:	Country:
E-mail:		Telephone:
Internet address: <i>(URL)</i>		Fax:

Give the contact details of a contact person at the procurer.

Make sure that this contact person has sufficient information about the context and background of the procurement.

VI.5) Date of dispatch of this notice: *(dd/mm/yyyy)*

Enter date.

It is the contracting authority's/contracting entity's responsibility to ensure compliance with European Union law and any applicable laws.

¹ *please repeat as many times as needed*

² *if applicable*

⁴ *if this information is known*

²⁰ *importance may be given instead of weighting*

²¹ *importance may be given instead of weighting; if price is the only award criterion, weighting is not used*

4. Contract award notice

PCP CONTRACT AWARD NOTICE

⚠ How does this document work?

- Instructions are in blue.
- Recommended text is in **black**.
- Options are in blue [in square brackets].
- Data to be added is shown in [grey in square brackets].

⚠ Since framework agreements are used, verify whether your national law requires publishing separate contract award notices for each contract based on the agreement (or grouped notices on a quarterly basis).

⚠ The contract award notice has to be filled out online on the [TED — tenders electronic daily website](#).

Use the version of the simap standard form that is appropriate for your type of organisation:

- for procurers in the public sector: ‘Contract award notice’
- for procurers in the utilities sector: ‘Contract award notice — utilities’
- for procurers in the field of defence and security: ‘Contract award notice for contracts in the field of defence and security’



Supplement to the Official Journal of the European Union

Info and online forms: <http://simap.ted.europa.eu>

Contract award notice Results of the procurement procedure

Directive 2014/24/EU

Section I: Contracting authority

I.1) Name and addresses ¹ (please identify all contracting authorities responsible for the procedure)

Official name:		National registration number: ²	
Postal address:			
Town:	NUTS code:	Postal code:	Country:
Contact person:		Telephone:	
E-mail:		Fax:	
Internet address(es)			
Main address: (URL)			
Address of the buyer profile: (URL)			

In the contact points section, give the contact details of the procurer.

In the Internet addresses section, give the (project) website of the procurer. Use the address of the procurer’s buyer profile.

The PCP procurement compared competing alternative solution approaches to address the following **challenge**: [specify briefly the subject and scope of this PCP e.g. improving the energy efficiency of buildings].

[OPTION for PCPs with lots: As the common challenge exists of a number of sub-challenges, the procurement is divided into the following lots, each corresponding to one sub-challenge:

- lot 1: [insert name of the sub-challenge to which the lot corresponds]
- lot 2:
- ...]

The main technical challenges to be addressed [per lot] are: [indicate the main target quality/efficiency and/or functionality/performance improvements compared to the current state-of-the-art technology – per lot, if applicable - e.g. 30% energy efficiency improvement, 20% cost reduction, etc].

Provide any other relevant information. If needed to cope with the character limit in the forms, distribute text also over 'II.2.4) Description of the procurement' and 'II.2.14) Additional information'.

<p>II.1.6) Information about lots This contract is divided into lots <input type="radio"/> yes <input type="radio"/> no</p>

Provide any other relevant information. If needed to cope with the character limit in the forms, distribute text also over 'II.2.4) Description of the procurement' and 'II.2.14) Additional information'.

<p>II.1.7) Total value of the procurement (excluding VAT) Value: [] (Please give the total value of the procurement. For information about individual contracts, please use section V) or Lowest offer: [] / Highest offer: [] taken into consideration Currency: [] [] [] (for framework agreements – total maximum value for their entire duration) (for dynamic purchasing systems – value of contract(s) not included in previous contract award notices) (for contracts based on framework agreements, if required – value of contract(s) not included in previous contract award notices)</p>

Indicate the total final value of all contract(s)/agreement(s) awarded (and not already included in previous contract award notices), across different specific contracts and across all lots (if applicable), in euros/other currency.

Details on the value of the individual contracts must be given in Section V. 'Award of contract'.

II.2) Description ¹

II.2.1) Title: ²	Lot No: ²
------------------------------------	----------------------

Only fill in if lots are used. Fill in the title and number of each lot.

<p>II.2.2) Additional CPV code(s) ² Main CPV code: ¹ [] [] . [] [] . [] [] . [] [] Supplementary CPV code: ^{1,2} [] [] [] []</p>

Only fill in if lots are used. Use the CPV codes for each lot.

<p>II.2.3) Place of performance NUTS code: ¹ [] [] [] [] [] [] Main site or place of performance:</p>
--

Do NOT fill out the fields 'NUTS code' and 'main site or place of performance'. (The place of

performance meant here is a specific place; it has nothing to do with the place of performance requirement (namely to do at least 50% of the contracted R&D services in EU Member States or in other countries with which the EC has a public procurement agreement as part of a stabilisation or association agreement in the context of the EU neighbourhood policy).

II.2.4) Description of the procurement:

(nature and quantity of works, supplies or services or indication of needs and requirements)

Use this text:

The procurement was announced in the form of a pre-commercial procurement (PCP) with a phased approach, i.e. a framework agreement covering 3 R&D phases:

- R&D up to solution design
- R&D up to prototype
- R&D up to original development and validation and testing of a limited set of first products or services.

After each phase, intermediate evaluations are carried out to progressively select the best competing solutions. The contractors with the best-value-for-money solutions will be offered a specific contract for the next phase.

A total budget of [enter the total estimated budget for the PCP that was announced in the contract notice] was earmarked for awarding the contracts to a minimum of:

- [enter minimum number of R&D providers that were expected to start phase 1 as announced in the contract notice] contractors for phase 1
- [enter minimum number of R&D providers that were expected to start phase 2 as announced in the contract notice] contractors for phase 2 and
- [enter minimum number of R&D providers that were expected to start phase 3 as announced in the contract notice] contractors for phase 3.

[OPTION if the procurement is started:

[OPTION if the award of contracts proceeded as planned: Sufficient amount of good quality tenders were received to award the planned amount of contracts [for lot x] (see section V for more information).]

[OPTION if the award of contracts proceeds with less contracts as planned: The PCP is started with fewer contracts than initially planned [for lot x] because [insert reason: e.g. insufficient amount of good quality tenders were received] (see section V for more information).]

The abstracts of the winning tenders are available on [insert (project) website].

The PCP is expected to start in [enter expected start date for phase 1] and end in [add expected completion date for phase 3].]

[OPTION if the procurement will not be started: [Lot x of] the PCP will not be started because [insert reason: e.g. insufficient amount of good quality tenders were received [for lot x]] (see section V for more information).]

If needed to cope with the character limit in the forms, distribute text also over 'II.1.4) Description of the procurement' and 'II.2.14) Additional information'.

II.2.5) Award criteria

- Quality criterion – Name: / Weighting: ^{1,2,20}
- Cost criterion – Name: / Weighting: ^{1,20}
- Price – Weighting: ²¹

Specify the award criteria that were used and their weighting.

II.2.11) Information about options

Options yes no Description of options:

Complete if applicable.

II.2.13) Information about European Union funds

The procurement is related to a project and/or programme financed by European Union funds yes no

Identification of the project:

Select accordingly.

II.2.14) Additional information:

Add any other relevant additional information.

Section IV: Procedure

IV.1) Description

IV.1.1) Type of procedure

- Open procedure
 Accelerated procedure
 Justification:
- Restricted procedure
 Accelerated procedure
 Justification:
- Competitive procedure with negotiation
 Accelerated procedure
 Justification:
- Competitive dialogue
 Innovation partnership
 Award of a contract without prior publication of a call for competition in the Official Journal of the European Union in the cases listed below
(please complete Annex D1)

For procurers in the public or utilities sector: select 'open'.

For procurers in the defence and security sector: select 'negotiated'.

In Section VI.3 Additional information, you will have to state that this procurement is exempted from the EU public procurement directives and the national laws that implement them (*i.e. it is not an open and negotiated procedure subject to the EU public procurement directives; the choice here must be made for formal reasons only, because it is mandatory for filling out the form*).

IV.1.3) Information about a framework agreement or a dynamic purchasing system

- The procurement involves the establishment of a framework agreement
 A dynamic purchasing system was set up

Complete if applicable.

IV.1.6) Information about electronic auction

- An electronic auction has been used

Select 'No'.

IV.1.8) Information about the Government Procurement Agreement (GPA)

The procurement is covered by the Government Procurement Agreement yes no

Select 'No'.

IV.2) Administrative information**IV.2.1) Previous publication concerning this procedure ²**

Notice number in the OJ S: [] [] [] [] /S [] [] []-[] [] [] [] [] []

(One of the following: Prior information notice used as a call for competition; Contract notice; Voluntary ex ante transparency notice)

Provide information on the PIN announcing the open market consultation and the contract notice.

Provide information about other previous publications, if applicable.

IV.2.8) Information about termination of dynamic purchasing system

The notice involves the termination of the dynamic purchasing system published by the above contract notice

Complete if applicable.

IV.2.9) Information about termination of call for competition in the form of a prior information notice

The contracting authority will not award any further contracts based on the above prior information notice

Do not fill in. This does not concern the termination of a call for competition via a prior information notice.

Section V: Award of contract ¹

This section must be filled out as many times as needed, *i.e.*

- *in case lots are used, for every lot and every contractor that was awarded a contract for that lot*
- *for every contractor that was awarded a framework agreement and/or specific contracts*
- *for all the contracts that were awarded and not already announced in previous contract award notices.*

Contract No: [] **Lot No:**² [] **Title:**

A contract/lot is awarded yes no

Complete for every framework agreement and for every specific contract.

Complete for every lot, if applicable.

V.1) Information on non-award

The contract/lot is not awarded

- No tenders or requests to participate were received or all were rejected
 Other reasons (discontinuation of procedure)

Notice reference: [] [] [] []-[] [] [] [] [] []⁷ (year and document number)

Complete as applicable in case of non-award.

V.2) Award of contract

V.2.1) Date of conclusion of the contract: (dd/mm/yyyy)

Enter date.

V.2.2) Information about tenders

Number of tenders received: []
 Number of tenders received from SMEs: [] (SME – as defined in Commission Recommendation 2003/361/EC)
 Number of tenders received from tenderers from other EU Member States: []
 Number of tenders received from tenderers from non-EU Member States: []
 Number of tenders received by electronic means: []
 The contract has been awarded to a group of economic operators yes no

Complete as applicable per awarded specific contract (and per lot, if applicable) that was not already included in previous contract award notices.

V.2.3) Name and address of the contractor ¹

Official name:		National registration number: ²	
Postal address:			
Town:	NUTS code:	Postal code:	Country:
E-mail:		Telephone:	
Internet address: (URL)		Fax:	
The contractor is an SME <input type="radio"/> yes <input type="radio"/> no			

Give the name and address of the operator that won the contract in question per awarded specific contract (and per lot, if applicable) that was not already included in previous contract award notices.

V.2.4) Information on value of the contract/lot (excluding VAT)

Initial estimated total value of the contract/lot: ² []
(for framework agreements or dynamic purchasing systems – estimated total maximum value for the entire duration of this lot)
 Total value of the contract/lot: []
 or
 Lowest offer: [] / Highest offer: [] taken into consideration
 Currency: [] [] []
(for framework agreements – total maximum value for this lot)
(for dynamic purchasing systems – value of contract(s) for this lot not included in previous contract award notices)
(for contracts based on framework agreements, if required – value of contract(s) for this lot not included in previous contract award notices)

Complete as applicable per awarded specific contract (and per lot, if applicable) that was not already included in previous contract award notices.

V.2.5) Information about subcontracting

The contract is likely to be subcontracted
 Value or proportion likely to be subcontracted to third parties ⁴
 Value excluding VAT: [] Currency: [] [] []
 Proportion: [] %
 Short description of the part of the contract to be subcontracted:

Complete as applicable per awarded specific contract (and per lot, if applicable) that was not already included in previous contract award notices.

Section VI: Complementary information

VI.3) Additional information: ²

--

Complete if applicable.

VI.4) Procedures for review

VI.4.1) Review body		
Official name:		
Postal address:		
Town:	Postal code:	Country:
E-mail:		Telephone:
Internet address: <i>(URL)</i>		Fax:

Give the names of the review bodies (also called 'appeal bodies') foreseen under the national law.

VI.4.2) Body responsible for mediation procedures ²		
Official name:		
Postal address:		
Town:	Postal code:	Country:
E-mail:		Telephone:
Internet address: <i>(URL)</i>		Fax:

Give the names of the mediation bodies foreseen under the national law .

VI.4.3) Review procedure
Precise information on deadline(s) for review procedures:

Use the following text:

The procurement is exempted from the EU public procurement directives (*including the EU procurement remedies directives 89/665/EEC and 92/13/EEC — see above*) and the national laws that implement them.

Publication of this notice in the Official Journal is not to be understood as a waiver of this exemption by the contracting authority.

The deadlines for the review procedures at the bodies for review and mediation, mentioned in IV.4.1) and IV.4.2) are: [complete].

VI.4.4) Service from which information about the review procedure may be obtained ²		
Official name:		
Postal address:		
Town:	Postal code:	Country:
E-mail:		Telephone:
Internet address: <i>(URL)</i>		Fax:

Give the contact details of a contact person at the procurer.

Make sure that this contact person has sufficient information about the context and background of the procurement.

VI.5) Date of dispatch of this notice: (dd/mm/yyyy)

Enter date.

It is the contracting authority's/contracting entity's responsibility to ensure compliance with European Union law and any applicable laws.

¹ please repeat as many times as needed

² if applicable

⁴ if this information is known

⁷ mandatory information not to be published

²⁰ importance may be given instead of weighting

²¹ importance may be given instead of weighting; if price is the only award criterion, weighting is not used

Annex D1 – General procurement

Justification for the award of the contract without prior publication of a call for competition in the Official Journal of the European Union

Directive 2014/24/EU

(please select the relevant option and provide an explanation)

Do not complete. Not applicable.

1. Justification for the choice of the negotiated procedure without prior publication of a call for competition in accordance with Article 32 of Directive 2014/24/EU

No tenders or no suitable tenders/requests to participate in response to

open procedure

restricted procedure

The products involved are manufactured purely for the purpose of research, experiment, study or development under the conditions stated in the directive *(for supplies only)*

The works, supplies or services can be provided only by a particular economic operator for the following reason:

absence of competition for technical reasons

procurement aiming at the creation or acquisition of a unique work of art or artistic performance

protection of exclusive rights, including intellectual property rights

Extreme urgency brought about by events unforeseeable for the contracting authority and in accordance with the strict conditions stated in the directive

Additional deliveries by the original supplier ordered under the strict conditions stated in the directive

New works/services, constituting a repetition of existing works/services and ordered in accordance with the strict conditions stated in the directive

Service contract to be awarded to the winner or one of winners under the rules of a design contest

Procurement of supplies quoted and purchased on a commodity market

Purchase of supplies or services on particularly advantageous terms

from a supplier which is definitively winding up its business activities

from the liquidator in an insolvency procedure, an arrangement with creditors or a similar procedure under national laws and regulations

2. Other justification for the award of the contract without prior publication of a call for competition in the Official Journal of the European Union

- The procurement falls outside the scope of application of the directive

Do not complete. Not applicable.

3. Explanation

Please explain in a clear and comprehensive manner why the award of the contract without prior publication in the Official Journal of the European Union is lawful, by stating the relevant facts and, as appropriate, the conclusions of law in accordance with the directive: *(500 words maximum)*

Do not complete. Not applicable.