

EGNSS Innovation procurement opportunities within Horizon 2020 and Horizon Europe

April 11th 2019

European GNSS agency

Prague

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PCP and PPI

PCP consists of a procurement of R&D services



R&D is out of the scope of PPI



PCP and PPI are legally separated procurements and PCP may or may not precede a PPI.

PCP legal framework: a quick overview

- **Procurement directives are not applicable.**
- The main source for this specific category of contracts is the **Communication on PCP** in the field of public procurement of research and development (R&D) services and the Commission Staff Working Document accompanying the Communication.
- **Competition Law:** The Communication on PCP establishes that entire procurement process must ensure *“maximum competition, transparency, openness, fairness and pricing at market conditions enables the public purchaser to identify the best possible solutions the market can offer”*
- The 2014 State aid rules on R&D&I (Research, Development and Innovation) establish that PCP and potential follow-up PPI procurements to deploy innovative solutions do not involve State aid, when the PCP is implemented in line with the conditions already previously listed in Communication on PCP and when the PPI is implemented through a separate open procurement procedure as provided for in the EU public Procurement Directives.
- **IPRs provisions:** are encompassed in the Framework for State Aid for research and development and innovation (C(2014) 3282, Point 33(b) and Commission Guidelines (C(2018) 3051 final, Section 4.1.6 p. 37 ff.).

For PCP sharing of the intellectual property rights is conditioned.

The legal requirements characterising PCP instruments

- The following specific requirements shall be carefully considered before starting the procedure:
 1. Risk-benefit sharing according to market conditions
 2. Absence of exclusive assignment of rights to the public purchase (including IPRs)
 3. Competitive development in 3 phases
 4. Capabilities to provide innovative solutions in the long run
 5. Separation of the R&D phase from deployment of commercial volumes of end-products
 6. Three or more participants in a PCP

1. Risk-benefit sharing according to market conditions

- Procurers and industry share risks and benefits of the R&D needed for developing innovative solutions, which are better improved than those available on the market.
- They share, at market price*, the benefits and risks related to the IPRs resulting from the R&D.

* i.e. the price paid to the contractor must be fixed at market conditions in order not to give an unjustified advantage to the contractor itself. It should therefore be remunerative in relation to the service received. A higher price is a form of financing and the procedure for State aid in the field of research and innovation applies.

2. Absence of exclusive assignment of rights to the public purchase (including IPRs)

- R&D results are not reserved exclusively to procurers. R&D providers generating results in PCP must own the attached IPRs and the procurers must have royalty-free access rights to use the R&D results for their own use.
- The providers, to which results give rise to IPR are allocated, shall grant the procurers unlimited access to the results free of charge. The providers shall also grant access to third parties adopting, for example, an IPR licencing agreement.
- The procurers that financed the PCP phase shall have license free use and the right to decide about third party licensing.
- It is possible for the public procurers to have ownerships of their generated IPRs whereas the companies will have full ownership of their own generated IPRs. Jointly generated IPRs are instead owned by both procurers and companies.
- There are other possible IPRs arrangements that could be envisaged depending on the type and sector of the activity carried out.

3. Competitive development in 3 phases

➤ **R&D is split in phases:**

1. solution design

2. prototyping

3. original development of the products/services

➤ Procuring R&D in phases allows the procurers to reduce the investment risks and costs and to reward the most competitive solutions.

➤ By means of the competitive development in phases, the R&D providers are reduced after each phase, with the aim of having the best providers capable to perform all the R&D activities required.

3. Competitive development in 3 phases

Duration of the project: terms and conditions of the project are defined in the tender specifications by the procurers.

The **average duration** for the PCP's phases is:

- 6 months for phase 1 (solution design)

- 6 to 9 months for phase 2 (prototyping)

- 6 to 9 months for phase 3 (development of limited test series)

- 2 months for preparation and finalisation for the PCP project.



4. Capabilities to provide innovative solutions in the long run

➤ Why the 'long run'?

The long run is envisaged because the quality/price ratio and the overall development process are most likely to be higher whereas in the short term the competitive development process could probably need a higher investment.

5. Separation of the R&D phase from deployment of commercial volumes of end-products

- The separation is due to the risk of failure in R&D → only at the end of the PCP that the procurers know whether the developed solutions outperform other solutions available at the same time on the market or not.
- PCP focuses on the R&D phase before commercialization → it allows procurers to detect technological R&D risks of alternative solutions before undertaking procurement for the large-scale commercial production.

6. Three or more participants in a PCP

- The minimum conditions laid down in the H2020 legal framework establish the participation of at least three legal entities.



PCP: Some practical tips

1. Assessment of the business case
2. Carry out market research
3. Carry out a market consultation:
 - Produce preparatory documents
 - Define roadmap and identify the rules for the consultation and timeline for the PCP
 - Accept advice from independent experts or authorities or from market participants

PCP: Some practical tips

- Even though they are not applicable, try to stay close to the Directives if you are uncertain about some rules → principles of transparency, economy, efficiency, impartiality, equal treatment, proportionality and publicity apply

- **IPR allocation could follow these arrangements:**
 - Contractor keeps IPR and the Contracting Authority receives free license to use IPR
 - Contracting Authority shall be entitled to grant licenses to third parties
 - Contractor shall grant license to third parties under fair and reasonable market conditions

- ➔ For each PCP, decide individually IPR allocation.
- ➔ No renegotiations after the award of the contract.

PCP: Some practical tips

- Draft one single framework agreement for the 3 phases defining all rights and obligations of the parties;
- or
- Draft a contract for each phase. In each phase specify right and obligations.
- Tenderers should divide the price in different unit prices (for example material costs, personnel costs ...) and quantities (these unit prices should be binding throughout the whole PCP)

Thank you!

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