

Specific requirements for EC co-financed PCPs

EC co-financing for undertaking joint PCPs is awarded to consortia of public procurers on condition that they take into account a number of requirements in designing the joint PCP procurement (listed in Appendix 6 of the FP7-ICT work programme). The following doc summarises how these requirements intend to help innovation thrive, whilst respecting the conditions for the Article 16f/24e R&D exemption of the public procurement directives, the Treaty principles as well as the competition rules.

(1) Competitive process in phases to reduce the R&D risk for procurers and enable companies of all sizes to participate

Each EC co-financed PCP action focuses on **one jointly identified concrete challenge**, in the mid-to-long term innovation plans of the participating public purchasers, that requires new R&D. The consortium of procurers will procure R&D services from a number of companies, selected through the joint PCP call for tender, and will analyse and validate together alternative solution paths from competing suppliers to address the common challenge set forward by the group of procurers.

In order to reduce fragmentation of public demand, the action shall be carried out as a **joint procurement**, which combines the procurement actions of all participating public procurers into a single procurement that is carried out jointly. There should be only one tender published, and one entity in the consortium awarding the resulting R&D service contracts for all PCP phases, on behalf of all participating public procurers in the consortium. Thus, all participating companies will participate under the same conditions e.g. with regards to taxation, payments and legal framework for the procurement (legal conditions of the Member State where the PCP call for tender is published).

All EC co-financed PCP actions will consist of (minimum) **three R&D phases** covering solution design, prototyping, and original development of a limited volume of products / services in the form of a test series. Splitting up the R&D work in phases enables to reduce the R&D risk for the public procurers, and to work with consecutive R&D tasks that are of a manageable size also for smaller companies. Starting from the solution design/feasibility study phase enables companies to align their developments from the very early stages to an agreed set of joint requirements of a critical mass of potential first buyers. Continuing up to original development of a limited set of products/services tested in a real operational customer environment provides both suppliers and procurers the assurance that products really work under real-life performance requirements and are ready for deployment.

In order to give clear information to all interested companies that are considering making offers for the PCP call for tender, the consortia of public procurers shall **clearly announce up front the practical set-up foreseen for the PCP** in the PCP contract notice. This shall include the intention to select multiple companies to start the pre-commercial procurement in parallel, as well as the number of phases and the expected duration of each phase. The distribution of rights and obligations of the parties shall be clearly published upfront in the tender documents and shall not involve contract renegotiations on rights and obligations taking place after the choice of participating organisations.

The PCP contract that will be concluded with each selected organisation shall take the form of **one single framework contract covering all the PCP phases**. This framework contract shall contain an agreement on the future procedure for **implementing the different phases (through specific contracts)**, including the format of the intermediate evaluations after the solution design and prototype development phases that progressively select organisations with the best competing solutions. Concretely, as a result of the PCP call for tender, a number of offers from competing suppliers will be selected to start phase 1 (those suppliers will be awarded an R&D services framework contract covering the all PCP phases. as well as an R&D services specific contract for phase 1). As the number of suppliers developing in parallel will progressively be reduced after each phase subsequent to evaluations, only those suppliers that - based on the evaluation at the end of phase 1 - may continue further to phase 2, are awarded an R&D service specific contract for phase 2. Similar takes place for the transition from phase 2 to 3.

Public procurers may **buy the limited volume of innovative products or services that were developed for them during the PCP** (e.g. prototypes of phase 2, first test series products of phase 3). Such a Public Procurement of Innovative solutions (also called PPI) can happen after the PCP via a separate negotiated procurement procedure without publication¹.

Note however that PCP is an R&D procurement **separated from any potential follow-up public procurement for large scale commercial roll-out**.

- By doing so, PCP is compliant with competition rules and in particular the WTO GPA non-discrimination obligation that applies to the purchase of subsequent supplies after original development has finished². Indeed, suppliers that are not able to participate to the PCP (e.g. due to commitments with other customers/suppliers), or PCP suppliers that do not make it up to phase 3, can continue developing their innovations using other sources of financing, and are not de facto excluded from procurements targeting deployment of commercial volumes of solutions that may follow after the PCP is finished. Consortia of public procurers in EC co-financed PCP projects publish widely the results of the PCP at the end of the project, sharing information with the market before any follow-up procurement for large scale roll-out take place.

- Separating the PCP contract from supply contracts that go beyond original development also **gives SMEs a bigger chance to win such contracts**: (a) it enables procurers to de-risk new technology approaches with a small budget for the R&D phase without having to reserve larger budgets yet for buying volumes of end-products, which keeps the contract value/required effort of the separate PCP contract manageable for smaller companies to bid for, (b) the separation also enables public procurers not to use in the PCP phase the stringent qualification or turnover requirements that are common practice in large scale deployment contracts, but allows them to use different mechanisms of securing commitment to commercialise products that are more appropriate for smaller companies. This enables smaller companies to gather "during the PCP" extra financial back-up of external investors which can enable them to grow the financial stability of their company to win follow-up contracts for commercial roll-out of newly developed solutions (c) covering only on the R&D phase in the PCP call for tender focuses the selection of offers more on those offers that could truly deliver groundbreaking innovative solutions to the procurers' problem that needs to be solved, instead of those offers that are less innovative, but have very attractive low price commercial sales deals for the large scale deployment stage (see (3)).

(2) IPR rights distributed among public procurers and suppliers so to encourage widespread commercialisation of results.

The public procurers involved in EC co-financed PCP projects will be assigned a **free licence to use** the R&D results for internal use as well as the **right to require participating companies to license IPRs to third parties under fair and reasonable market conditions**. The **IPR ownership rights** resulting from R&D undertaken by companies in the PCP project will be assigned to the individual companies in question (even if they do not continue up to PCP phase 3), in return for a market conform financial compensation - compared to exclusive development price - that companies will include as part of their offer in the PCP call for tender. PCP contracts will be awarded to those companies offering the best value (addressing in an innovative way the problem posed by the group of procurers) for money (cost of the solution approach incl. cost for carrying out the R&D work, which includes the aspect of the financial compensation for the IPR ownership rights). A call-back provision should ensure that IPRs from companies that do not succeed to exploit the IPRs themselves under fair and reasonable market conditions within a given period after the PCP project or that abuse the IPRs against the public interest, return back to the public procurers.

It is possible for the group of procurers to request the financial compensation for assigning IPR ownership rights to suppliers in the form of a **price reduction** for the PCP development work, by asking suppliers to detail in their offer both the price they would have offered to do the R&D work for

¹ A negotiated procedure without publication (article 31/2/a of directive 2004/18/EC) for procuring product that were developed purely for the purpose of R&D, as is the case for PCP: PCP is an R&D services contract for the purpose of research, experimentation, study or development; which does not extend to quantity production to establish commercial viability or to recover research and development costs.

² Article XV(1)(e) of WTO GPA on limited tendering

in case all IPR rights were to be left with the procurers (exclusive development price offer) and the price they are offering to do the R&D work for under PCP conditions where they are able to obtain IPR ownership rights (PCP price offer).

It is also possible for the group of procurers to request the financial compensation in the form of a **royalty on sales** that are made by participating companies based on results obtained during the PCP project. Projects can use those collected royalties for example to setup an evergreen fund that would enable other public procurers around Europe to join the consortium and benefit from solutions that are newly developed during the PCP project.

Consortia of public procurers will **widely publish the results of PCP at the end of the projects**, and are encouraged to contribute to standardisation based on the jointly defined solution requirements specifications, and undertake regulatory action together where needed to remove potential obstacles for newly developed PCP innovations to reach the market.

(3) PCP Process inviting European wide industry involvement

EC co-financed PCP projects must ensure **European wide publication of the PCP call for tender, at least in English**, in the OJEU and online Tenders European Daily (TED).

In view of encouraging tenderers to send in innovative offers, **functional specifications** shall be used in order to formulate the object of the PCP tender as a problem to be solved without prescribing a specific solution approach to be followed.

EC co-financed PCP projects are encouraged to foresee **industry consultation events** in the preparation phase of the project, where the public procurers involved in the project can broach the views of the market in an open competitive way.

In view of encouraging tenderers to send in innovative offers the selection of offers shall not be based on lowest price only. The PCP contracts shall be awarded to the tenders offering **best value for money**, that is to say, to the tender offering the best price-quality ratio, while taking care to avoid any conflict of interests.

EC co-financed PCP projects are also encouraged to remove barriers to the participation of SMEs to the PCPs. In line with the EU Treaty principles, companies from all sizes and any geographic location will be able to participate on equal basis to the cross-border PCPs. As such, the PCP calls for tender launched during PCPs are not be restricted to companies of a certain size or nationality.

- However, in order to **remove administrative burdens for SMEs to participate** to the cross-border PCPs, the consortia organise the R&D work into phases that are of manageable size also for smaller companies to participate, the consortia are encouraged to use light submission templates for companies to bid to the PCP call for tender, as well as not to use unnecessary stringent selection criteria such as company size and annual turn-over as selection criteria for companies to submit PCP bids. The consortia of public procurers may however choose to implement other ways of obtaining some form of assurance that the PCP project will lead to products that will get commercialised in the end (e.g. requiring participating companies to submit a commercialisation plan backed up - e.g. by the middle of the PCP project - by an investment commitment of a financial investor or first customer).

- As the procurement of R&D services is not covered by the WTO Government Procurement Agreement, PCP can help to encourage **job creation "in Europe"**. All offers submitted to the PCP call for tender shall be evaluated according to the same objective criteria regardless of the geographic location of company head offices, company size or governance structure. However, EC co-financed PCP projects are encouraged to consider how to organise the PCP process so as to stimulate companies to locate a relevant portion of the R&D and operational activities related to the PCP contract in the European Economic Area or a country having concluded a Stabilisation and Association Agreement with the EU.