

## E. Specific requirements for innovation procurement (PCP/PPI) supported by Horizon 2020 grants

The following requirements apply to PCPs and PPIs for which the tender preparation and/or the call for tender implementation is supported by Horizon 2020, and apply to PCPs and PPIs supported by Cofund actions (ref Annex D) or subcontracting activities in other types of actions.

### *(i) Specific requirements for Pre-Commercial Procurement (PCP)*

The following requirements apply to ensure that the definition and requirements for PCP in the Horizon 2020 rules for participation and the conditions for the R&D services exemption of the EU public procurement directives<sup>1</sup> are respected, that the sharing of IPR rights in PCP takes place according to market conditions and that the Treaty principles<sup>2</sup> and competition rules are fully respected in the PCP process:

- PCPs shall be compliant with the Horizon 2020 definitions:

*'Pre-commercial procurement'* means procurement of R&D services involving risk-benefit sharing under market conditions, and competitive development in phases, where there is a clear separation between the procurement of the R&D services procured from the deployment of commercial volumes of end-products<sup>3</sup>.

*'Risk-benefit sharing under market conditions'* refers to the approach in PCP where procurers share with suppliers at market price the benefits and risks related to the IPRs resulting from the R&D. *'Competitive development in phases'* refers to the competitive approach used in PCP by procurers to buy the R&D from several competing R&D providers in parallel, to compare and identify the best value for money solutions on the market to address the PCP challenge. To reduce the investment risk for the procurer, reward the most competitive solutions and facilitate the participation of smaller innovative companies, the R&D is also split in phases (solution design, prototyping, original development and validation / testing of the first products), with the number of competing R&D providers being reduced after each phase subsequent to intermediate evaluations. *'Separation from the deployment of commercial volumes of end-products'* refers to the complementarity of PCP, which focuses on the R&D phase before commercialisation, and PPI, which does not focus on R&D but on the commercialisation/diffusion of solutions.

- The PCP call for tender shall be launched by a contracting authority or contracting entity as defined in EU public procurement directives 2004/18/EC, 2004/17/EC, and 2009/81/EC.
- PCP only covers the procurement of R&D services, in a way that is clearly separated from any potential subsequent purchases of commercial volumes of end-products. Procurers

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<sup>1</sup> Article 16f of Directive 2004/18/EC, Article. 24e of Directive 2004/17/EC, Article 13(f)(j) of Directive 2009/81/EC

<sup>2</sup> In particular the fundamental Treaty principles on the free movement of goods and workers, the freedom to provide services, the freedom of establishment and the free movement of capital, as well as the principles deriving there from, such as the principles of non-discrimination, transparency and equal treatment

<sup>3</sup> See Rules for Participation and PCP communication COM/2007/799 and associated SEC(1668)2007

undertaking a PCP can if they so desire, but are not obliged to, after the PCP procure at market price R&D results generated during a PCP<sup>4</sup>.

- In preparation of the PCP call for tender, an open dialogue<sup>5</sup> with potential tenderers and end-users shall be held to broach the views of the market about the intended R&D scope. The results of this open market consultation shall be duly taken into account to fine-tune the tender specifications, so that the gap between state-of-the art industry development and the procurement needs justifies the need to procure R&D<sup>6</sup> services.
- In respect of the Treaty principles, EU wide publication shall be ensured for the PCP call for tender<sup>7</sup> in at least English, offers shall be accepted and communication with stakeholders shall be enabled at all stages throughout the PCP in at least English, and all offers shall be evaluated according to the same objective criteria regardless of the geographic location, organisation size or governance structure of the tenderers.
- The prior information notice for the open market consultation and the PCP contract notice shall be promoted and advertised widely using in particular also Horizon 2020 Internet sites and National Contact Points. The Commission shall be informed at least 5 days prior to the expected date of publication of the PIN for the open market consultation and 30 days prior to the expected date of publication of the PCP contract notice and its content. The PCP call for tender shall remain open for the submission of tenders for at least 60 days.
- The PCP contract notice shall contain information on the intended number of R&D providers that will be selected (minimum three) to start the PCP, the number of PCP phases and the expected duration and budget for each PCP phase. The PCP procurement shall cover the full PCP life cycle of solution design, prototyping, and original development including testing of a limited volume of test series products/services. Each of the three PCP phases can be split up into further phases if appropriate.
- Procurers should avoid the use of selection criteria based on disproportionate qualification and financial guarantee requirements (e.g. with regards to prior customer references and minimum turnover). Functional/performance based specifications shall be used, to formulate the object of the PCP tender as a problem to be solved, without prescribing a specific solution approach to be followed. Evaluation of the tenders shall be based on best value for money criteria, not just lowest price.

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<sup>4</sup> Negotiated procedure without publication, Article 31(2)(a) resp. Article 40(3)(b) resp. Article 28(2)(b) of public procurement directives 2004/18/EC resp. 2004/17/EC.

<sup>5</sup> The open dialogue should be organised in a way not to preclude or distort competition. In respect of the Treaty principles, the open dialogue shall be announced well in advance and widely via a prior information notice (PIN) in the Official Journal of the EU (OJEU) and enable potential tenderers regardless of the geographic location to participate at least in English. All information given in answers to questions from participants in the dialogue should be documented and published.

<sup>6</sup> In line with WTO GPA Article XV 1e, R&D can cover activities such as solution exploration and design, prototyping, up to the original development of a limited volume of first products or services in the form of a test series. Original development of a first product or service may include limited production or supply in order to incorporate the results of field testing and to demonstrate that the product or service is suitable for production or supply in quantity to acceptable quality standards. R&D does not include quantity production or supply to establish commercial viability or to recover R&D costs, nor 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 represent improvements.

<sup>7</sup> Through the OJEU, using the TED (Tenders Electronic Daily) web Portal

- The PCP process shall be organised while taking care to avoid any conflict of interests, including in the use of external experts. Potential providers of solutions sought for by a PCP cannot be beneficiaries in an action during which this PCP is planned or undertaken.
- The PCP process shall require selected R&D providers to locate the majority of the R&D activities for the PCP contract, including in particular the principal researcher(s) working for the PCP contract, in the Member States or Associated Countries.
- In PCP, procurers do not reserve the R&D results exclusively for their own use. In line with the Horizon 2020 Rules for Participation, an R&D provider generating results in PCP shall own the attached IPRs. The procurers shall enjoy royalty-free access rights to use the R&D results for their own use. The procurers shall also enjoy the right to grant or to require participating R&D providers to grant non-exclusive licenses to third parties to exploit the results under fair and reasonable market conditions without any right to sublicense. A call-back provision shall ensure that if an R&D provider fails to commercially exploit the results within a given period after the PCP as identified in the contract or uses the results to the detriment of the public interest, including security interests, it shall transfer any ownership of results to the procurers. The 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.
- To enable the public procurers to establish the correct (best value for money) market price for the R&D service, in which case the presence of State aid can in principle be excluded, the distribution of rights and obligations between public procurers and R&D providers, including the allocation of IPRs, shall be published in the PCP call for tender documents and the PCP call for tender shall be carried out in a competitive and transparent way in line with the Treaty principles which leads to a price according to market conditions. The public procurers should ensure that the PCP contracts with R&D providers contain a financial compensation according to market conditions<sup>8</sup> compared to exclusive development price for assigning IPR ownership rights to participating R&D providers, in order for the PCP call for tender not to involve State aid.
- The PCP contract that will be concluded with each selected tenderer shall take the form of one single framework agreement covering all PCP phases, which does not involve contract renegotiations after contract award. This framework agreement shall contain information on the future procedure for implementing the different phases (through specific contracts), including the format of the intermediate evaluations (incl. evaluation criteria and weightings) after the solution design and prototype development phases.

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<sup>8</sup> The financial compensation compared to exclusive development cost should reflect the market value of the benefits received and the risks assumed by the participating R&D provider. In case of IPR sharing in PCP, the market price of the benefits should reflect the commercialisation opportunities opened up by the IPRs to the R&D provider, the associated risks assumed by the R&D provider comprise for instance the cost carried by the R&D provider for maintaining the IPRs and commercialising the products.

**(ii) Specific requirements for Public Procurement of Innovative solutions (PPI)**

PPIs shall be compliant with the Horizon 2020 definitions:

*'Public procurement of innovative solutions (PPI)'* means procurement where contracting authorities act as a launch customer of innovative goods or services which are not yet available on a large-scale commercial basis, and may include conformance testing<sup>9</sup>. *'Launch customers'*, also called early adopters, refers to the first approx. 20% customers on the EU Internal Market in the market segment of the procurers that are deploying innovative solutions to tackle the challenge addressed by the PPI procurement. PPI shall result in the first application/commercialisation of innovative solutions, meaning that the solutions have to be new to the procurers' market segment or new to the EU Internal Market, and relevant to procurers in other Member States and/or Associated Countries. *'Innovative solutions'* are innovative goods or services with better than best available performance levels which suppliers are called to meet through production innovation. This includes solutions that typically have already been (partially) technically demonstrated with success on a small scale, and may be nearly or already in small quantity on the market, but which owing to residual risk of market uncertainty have not been produced at large enough scale yet to meet mass market price/quality requirements and have therefore not widely penetrated the market segment of the procurers yet. This also includes solutions based on existing technologies that are to be utilised in a new and innovative way. PPI does not include the procurement of R&D.

- The PPI call for tender shall be launched by a contracting authority or contracting entity as defined in EU public procurement directives 2004/18/EC, 2004/17/EC and 2009/81/EC.
- Procurers should avoid the use of selection criteria based on disproportionate qualification and financial guarantee requirements (e.g. with regards to prior customer references and minimum turnover). Functional/performance based specifications shall be used, to formulate the object of the PPI tender as a problem to be solved, without prescribing a specific solution approach to be followed. Evaluation of the tenders shall be based on best value for money criteria (not just lowest price).
- The distribution of rights and obligations between procurers and the solution provider(s), including the allocation of IPRs, shall be published in the PPI call for tender documents. The PPI call for tender shall be carried out in a competitive and transparent way in line with the Treaty principles which leads to a price according to market conditions. In order to encourage fair and wide exploitation of results, ownership rights of IPRs generated during the execution of a PPI 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).
- Procurers shall organise their procurement so as to avoid any conflict of interest, including in the use of external experts. Potential providers of solutions sought for by a PPI cannot be beneficiaries in an action during which this PPI is planned or undertaken.
- Procurement procedures covered by the EU public procurement directives that do not involve procurement of R&D can be used. Restricted procedures with shortened timeframes for submission of offers for urgency reasons shall not be used.

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<sup>9</sup> See Rules for Participation

Unless the PPI is undertaken by (a) procurer(s) that has conducted a PCP in line with the requirements described in section (i) of this Annex E, to buy the prototypes or limited first test products/services that were developed during the PCP<sup>10</sup>:

- In preparation of the PPI call for tender, an open market consultation<sup>5</sup> with potential tenderers and end-users shall be held to inform the market well in advance of the upcoming PPI and broach the views of the market about the intended scope of the PPI. Information retrieved from this consultation about the gap between perceived procurement needs and on-going industry developments shall be taken into account in the PPI tender specifications, so that the PPI duly focuses on 'early adoption' of 'innovative' solutions.
- The market shall be informed well in advance<sup>11</sup> of the target date by when the PPI is expected to be launched. Market readiness prior to deployment can be verified through the organisation of e.g. conformance testing, certification or quality labelling of solutions.
- EU wide publication shall be ensured for PPI contract notices<sup>7</sup> in at least English, offers shall be accepted and communication with stakeholders shall be enabled at all stages throughout the procurement in at least English, and all offers shall be evaluated according to the same objective criteria.
- The prior information notices for the open market consultation, early announcement of the target date for launching the PPI, and the PPI contract notice shall be promoted and advertised widely using in particular also Horizon 2020 Internet sites and National Contact Points. The Commission shall be informed at least 5 days prior to the expected date of publication of the PIN for the open market consultation and 30 days prior to the expected date of publication of the PPI contract notice and its content. The PPI call for tender shall remain open for the submission of tenders for at least 60 days.
- Where the WTO Government Procurement Agreement does not apply, participation in PPI tendering procedures shall be open on equal terms to bidders from EU Member States and all countries with which the EU has an agreement in the field of public procurement under the conditions laid down in that agreement, including all countries associated to Horizon 2020. Where the WTO Government Procurement Agreement applies, PPI contracts shall be also open to bidders from States which have ratified this agreement, under the conditions laid down therein.

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<sup>10</sup> The negotiated procedure without publication foreseen for this in the EU public procurement directives can then be used; Article 31(2)(a) resp. Article 40(3)(b) of directives 2004/18/EC resp. 2004/17/EC. At least three offers shall be asked including from the R&D providers that successfully completed the pre-ceding PCP.

<sup>11</sup> By means of a Prior Information Notice (PIN) in the OJEU