TRENTO RISE
ICT for Quality of Life

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Legal aspects of Joint Pre-Commercial Procurements: from modeling to implementation
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Legal aspects of Joint Pre-Commercial Procurements: from *modeling* to *implementation*

**OUTLINE**

*Introduction*

1. Pre-Commercial Procurement
2. Different suitable procurement models
3. Lessons learned from C4E and NYMPHA-MD
Introduction

1. Trento RISE role
2. Legal support to Joint EU co-funded PCPs
3. Cloud for Europe (C4E)
4. NYMPHA-MD
1. Trento RISE role

- Non profit Association
- Founding members: FBK and UNITN
- Pole of excellence for research, innovation and top-level training in the field of ICT
- Ensure the success of EIT ICT Labs Italy
- Promote partnerships between the research and business sectors
Trento RISE role
www.trentorise.eu/pre-commercial-procurements

**Systemic tool**
for the implementation of the provincial policies in the field of ICT;

**issuing PCPs**
Tourism, Health and Wellbeing at Home, Technology Transfer, Cultural Heritage, Smart Space and Smart Energy

**Link**
between Research and Public Administration for bringing innovation into PA services
2. Legal support to Joint EU co-funded PCPs

Cloud for Europe

NYMPHA-MD
Provincia Autonoma di Trento
3. Cloud for Europe (C4E)

**PROJECT ACRONYM:** Cloud for Europe (C4E)

**PARTNERS:** 24 partners from 13 countries

**PROGRAMME:** FP7 ICT Call 10

**DURATION:** June 2013 – November 2016

- **OBJECTIVES:**
  - Identifying obstacles for cloud use in the public sector
  - Defining services that are currently hindered by those obstacles
  - Procuring research from industry to find innovative solutions for cloud services
4. NYMPHA-MD

www.nympha-md-project.eu

- CREATE-NET (Italy)
- PAT (Italy)
- CSPT (Spain)
- REGIONH (Denmark)
1. Pre-Commercial Procurement (PCP)
2. PCP objectives
3. Legal Framework
4. Recommendations
5. Phased process
6. Intellectual Property Rights
7. Joint PCPs minimum requirements
8. Ongoing PCP projects (FP7)
1. Pre-commercial Procurement (PCP)

PCP is one particular approach for procuring **R&D services only**, which enables public procurers to:

- Develop solutions towards concrete **public sector needs**, whilst comparing/validating alternative solution approaches
- **Share the risks and benefits** with the participating companies, in a way that does not involve State aid
- Create optimal conditions for **wide commercialization of R&D results**
2. PCP objectives

Public sector can challenge industry to develop **new and better solutions** that respond to public sector needs for which there is no cut-and-dry answer yet.

Modernise internal operations of **public services** to make them run more efficiently.

Improve the external quality of **public services** to the citizens.
3. Legal framework

**Outside** EU public procurement directives (2004/18/EC, 2009/81/EC)

**BUT**


**EU Treaty Principles**

Competitive, open and transparent way:

- Equal chances: same contractual conditions
- Different companies able to make competing offers
4. Recommendations

COM (2007) 799 final

- Competition, Openness, Transparency and Fairness
- The scope is R&D services only
- Risk-Benefit Sharing according to market conditions - IPR to companies: - Usage License for Contracting Authority / third parties - % Royalties
- Competitive development in phases
5. Phased process

Phase 0: Curiosity Driven Research
- Company A
- Company B
- Company C
- Company D

Phase 1: Solution design
- Company A
- Company B
- Company C
- Company D

Phase 2: Prototype development
- Company B
- Company C
- Company D

Phase 3: Original Development of a limited volume of first products/services in the form of a test series
- Company B
- Company C
- Company D

Phase 4: Commercialisation Diffusion of products/services
- Company A, B, C, D, or X
5. Phased process: PCP procedure

- Prior Information Notice
- Tender Release
- Initial Offer Evaluation
- Solution Design
- Prototype Development
- First Test Series Production
6. Intellectual Property Rights

- R&D providers generating results in PCP shall own attached IPRs
- Procurers shall enjoy royalty-free access rights to use the R&D results for their own use
- 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
- **No state aid**: the aid element should be excluded through the contract – when the public purchaser buys R&D services at market price, there are no advantages
7. Joint PCPs minimum requirements

**Procedure**: Compliance with applicable national procurement rules + compliance with additional specific requirements

- EU-wide published **open market dialogue** and **call for tender**
- PCP call for tender open for at least **60 days**
- Same **objective** evaluation criteria
- **Best value for money** award criteria
- Majority of R&D activities performed in Member States/Associated Countries
Joint PCPs minimum requirements

Combining the procurement actions of all the Contracting Authorities (at least 3) minimum 2 of which are public procurers from 2 different Member States or associated countries. Sole participant possible, if minimum participation requirements met

Only one tender published on behalf of all participating authorities

Only one entity awarding the resulting R&D service contracts for all PCP phases on behalf of all participating authorities
8. Ongoing PCP projects (FP7)

www.cordis.europa.eu
Different suitable procurement model

1. Project implementation
2. Procurers Agreement
3. Lead Authority
4. Common Entity
5. Tender documents
1. Project implementation
2. Procurers Agreement

Establish a principle agreement of the Joint PCP action of the Project.
Have the basis of the actual contract to be signed between procurers, to define:

- the model to be followed for the Joint procurement
- the identification of the final list of procurers and the Lead authority
Procurers Agreement: legal aspects

Annex to the Consortium Agreement detailing the mechanism for collaboration among the procurers

Legal Aspects

- Sharing of responsibilities
- Management of the procedure
- Governance
- Applicable National Law
Governance: Steering Body

RESPONSIBLE FOR:

- Joint PCP Procedure
- Approval of all the tender documents
- Any amendments to the Framework Agreement draft
- Any legal action under the Joint PCP Procedure or the F.A.
- Lack of compliance or breaches by either Tenderers or by one of the Procurers
- Amicable settlement of disagreements between Procurers
Governance: Evaluation Committee

Evaluation Committees

Administrative
selection on the basis of the exclusion and selection criteria

Technical
evaluation on the basis of the award criteria
Different suitable procurement model

LEAD AUTHORITY with JOINT FRAMEWORK CONTRACT

COMMON PROCURING ENTITY
3. Lead Authority

A group of procurers collaborate in such a way that one procurer of the group is designated as Lead Authority.

Each procurer will authorise the Lead Procurer to act on its behalf, in accordance with the Lead Procurer law.

Conduct of the Joint PCP Procedure.

Award, signature and management of the Framework Contract.

All in consultation with other procurers involved in the Joint PCP.
4. Common entity

All the involved public purchasing authorities commonly establish or designate one external legal entity to conduct the joint procurement with a joint mandate and joint resources of all public purchasing authorities.
Model: Lead Authority

“Close collaboration between all participants at each stage of the procurement life cycle, sharing out individual tasks but also responsibilities (e.g. in evaluating tender offers and selecting winning suppliers)”
5. Tender documents

Distribution of rights and obligations of the parties published in tender documents:

- **Contract Notice**
  - **SECTION I:** CONTRACTING AUTHORITY
  - **SECTION II.B:** OBJECT OF THE CONTRACT
  - **SECTION III:** LEGAL, ECONOMIC, FINANCIAL AND TECHNICAL INFORMATION
  - **SECTION IV:** COMPLEMENTARY INFORMATION

- **Tender Regulation (Annex I)**
  - context, goals, Procurers, procedure, tendering requirements

- **Framework Agreement (Annex II)**
  - one single Framework Agreement covering all the PCP phases, which shall contain an agreement on the future procedure for implementing the different phases, through specific contracts

- **Technical Document (Annex III)**
  - technical requirements, descriptive document
3 Lessons learned from C4E and NYMPHA-MD

1. Intellectual Property Rights
2. Other issues
1. Intellectual Property Rights

- **Ex ante** (license to Procurers – license to third parties)
- **Ex post** (royalties)

- % can be included in the award criteria
- Procurers will have to decide the Sharing rules (=)
- check difficulties for P.A.

- If company fails to exploit IPRs within a given timeframe following completion of PCP phases
- Right – not obligation
2. Other issues

- Choose the Lead procurer

- Ask for **unit prices** and not total price
  - Offer with and without IPR (discount)

- Only English
  - Language of the Lead Procurer + English
  - Authentic version in each of the Procurers language
  - Preferable at least an authentic version of the language of competent Court
THANK YOU FOR YOUR ATTENTION!

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