



trentorise

Social Innovation rooted in Research and Education

TRENTO RISE

ICT for Quality of Life

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

Geneva – February XXV, 2015




Procurement Innovation for Cloud Services in Europe


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

OUTLINE

Introduction

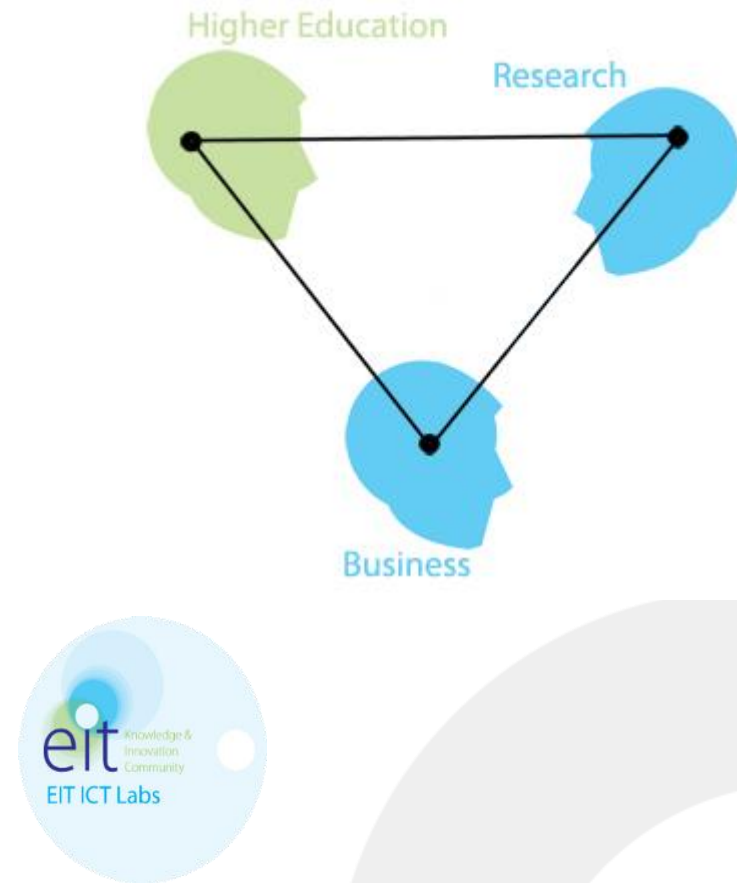
- 1 *Pre-Commercial Procurement*
 - 2 *Different suitable procurement models*
 - 3 *Lessons learned from C4E and NYMPHA-MD*
- 

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

LOCAL GOVERNMENT (PAT)



EDUCATION

RESEARCH

BUSINESS

2. Legal support to Joint EU co-funded PCPs

**Cloud for
Europe**



Agenzia per l'Italia Digitale
Presidenza del Consiglio dei Ministri

NYMPHA-MD

Provincia Autonoma
di Trento



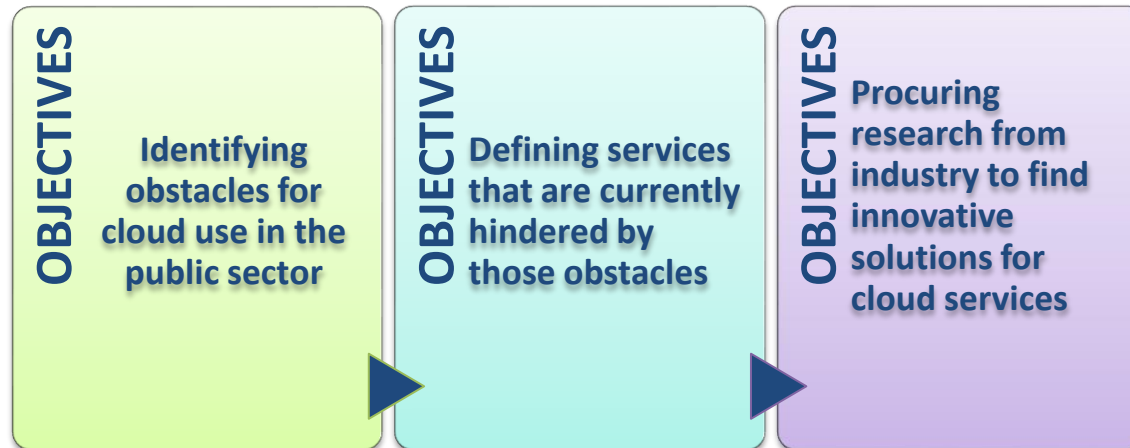
3. Cloud for Europe (C4E)

PROJECT ACRONYM: Cloud for Europe (C4E)

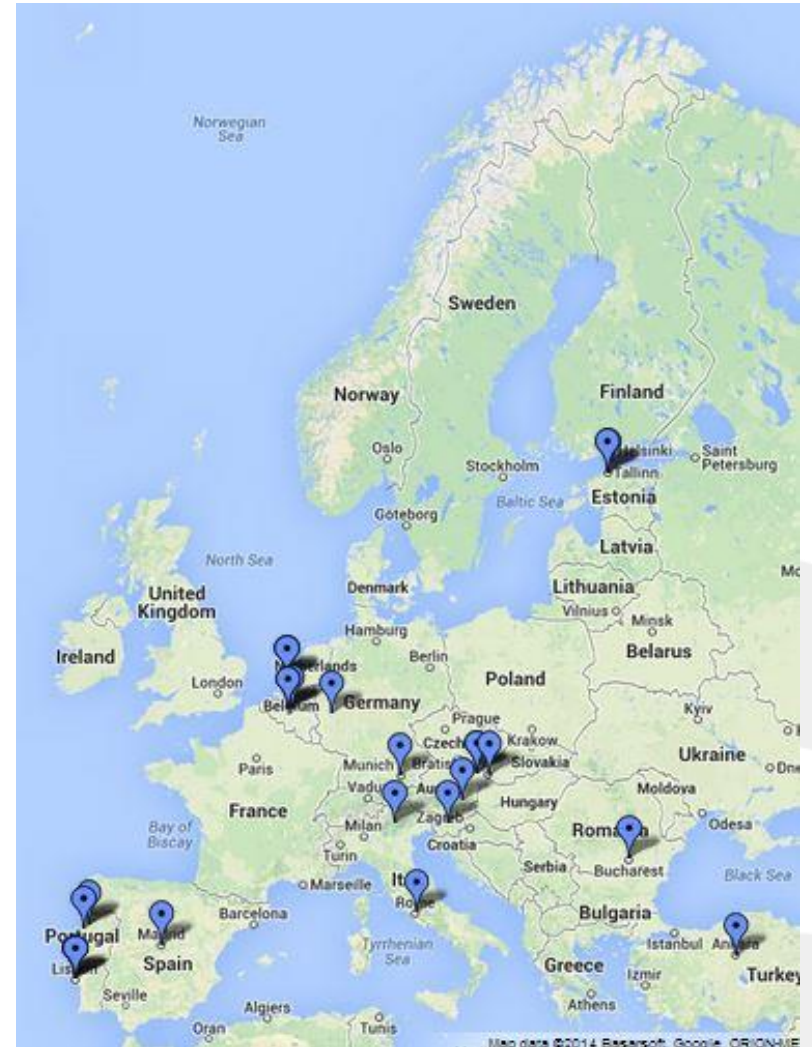
PARTNERS: 24 partners from 13 countries

PROGRAMME: FP7 ICT Call 10

DURATION: June 2013 – November 2016



www.cloudforeurope.eu

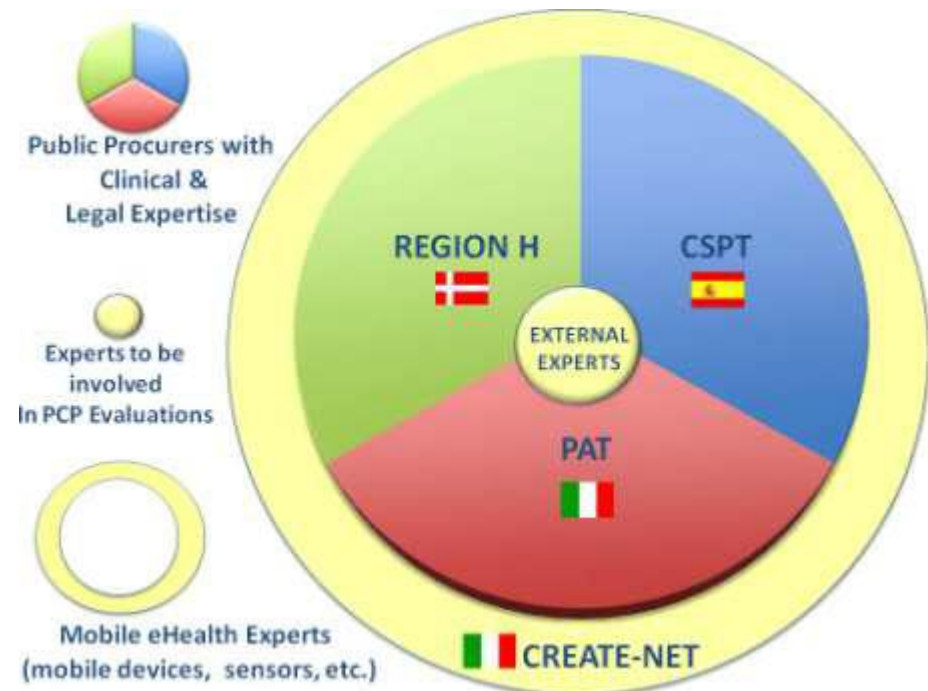


4. NYMPHA-MD

www.nympha-md-project.eu


nympha

- CREATE-NET (Italy)
- PAT (Italy)
- CSPT (Spain)
- REGIONH (Denmark)



1 Pre-Commercial Procurement

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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

Recommendations from COM (2007) 799 final
and SEC (2007) 1668

EU Treaty Principles

Competitive, open and transparent way:

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

4. Recommendations



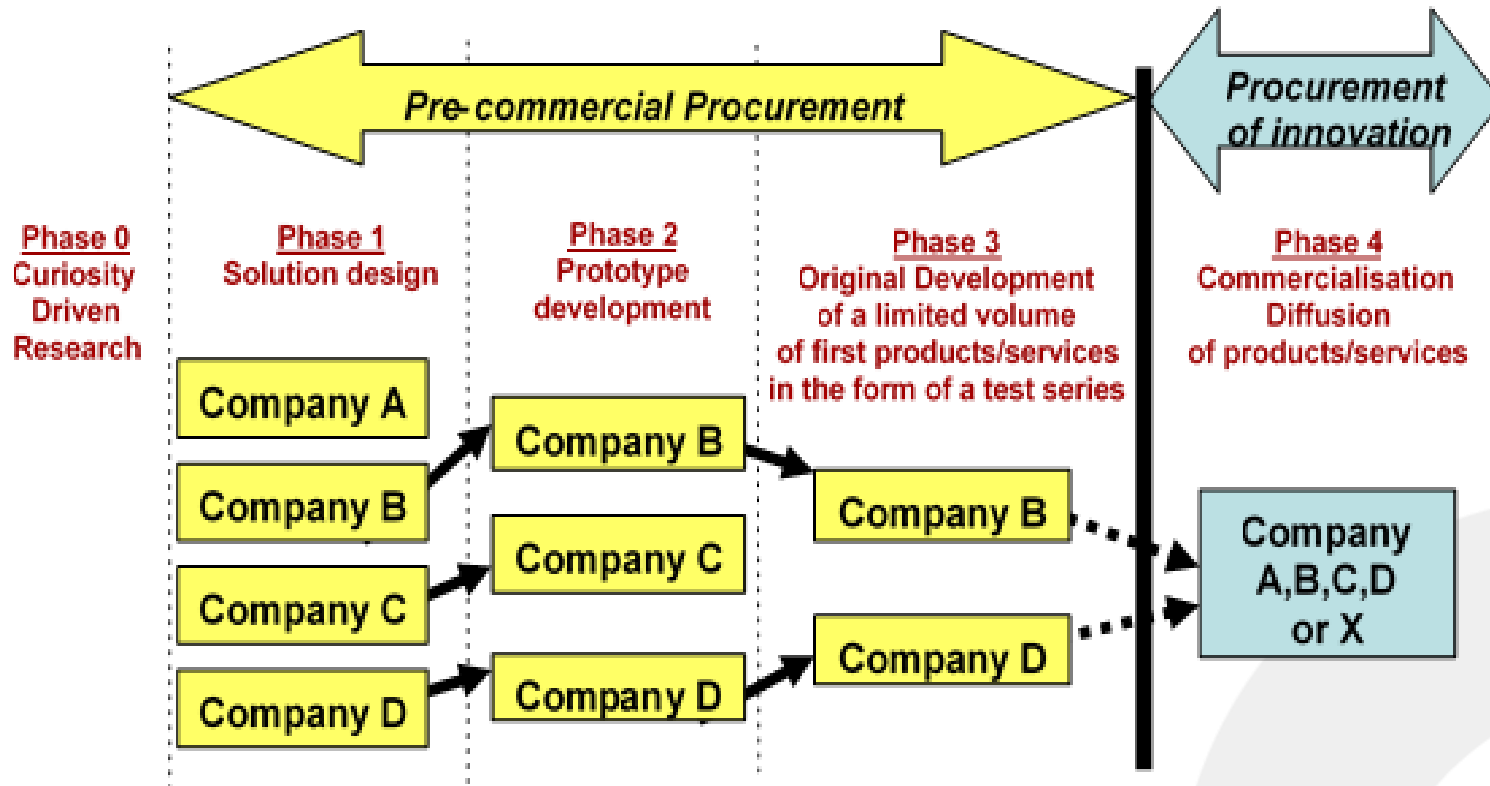
**Competition, Openness,
Transparency and Fairness**

The scope is R&D services only

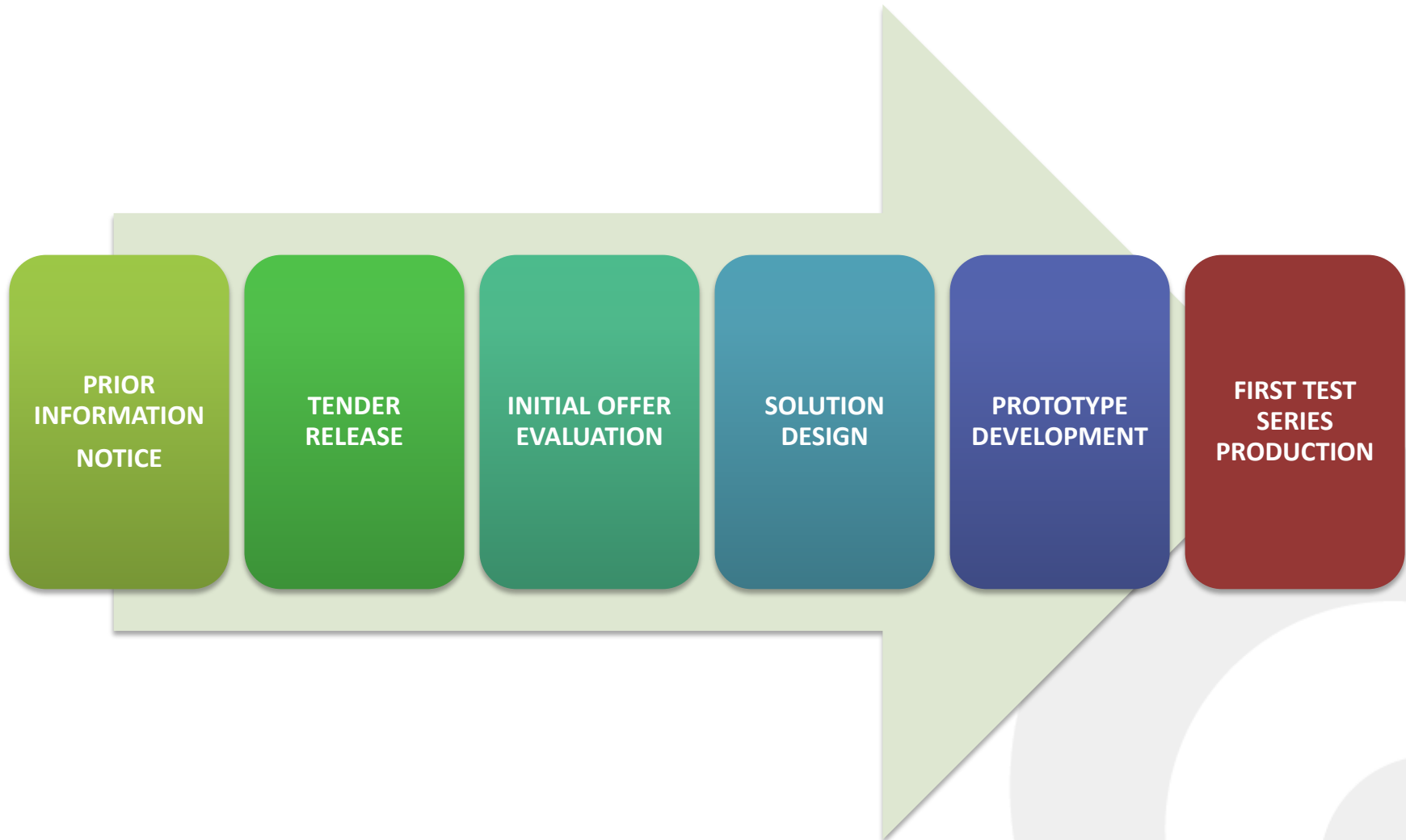
**Risk-Benefit Sharing according
to market conditions - IPR to
companies: - Usage License for
Contracting Authority / third
parties - % Royalties**

**Competitive development in
phases**

5. Phased process



5. Phased process: PCP procedure



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



DECIPHER PCP

nympha

smart@fire



Thalea)))

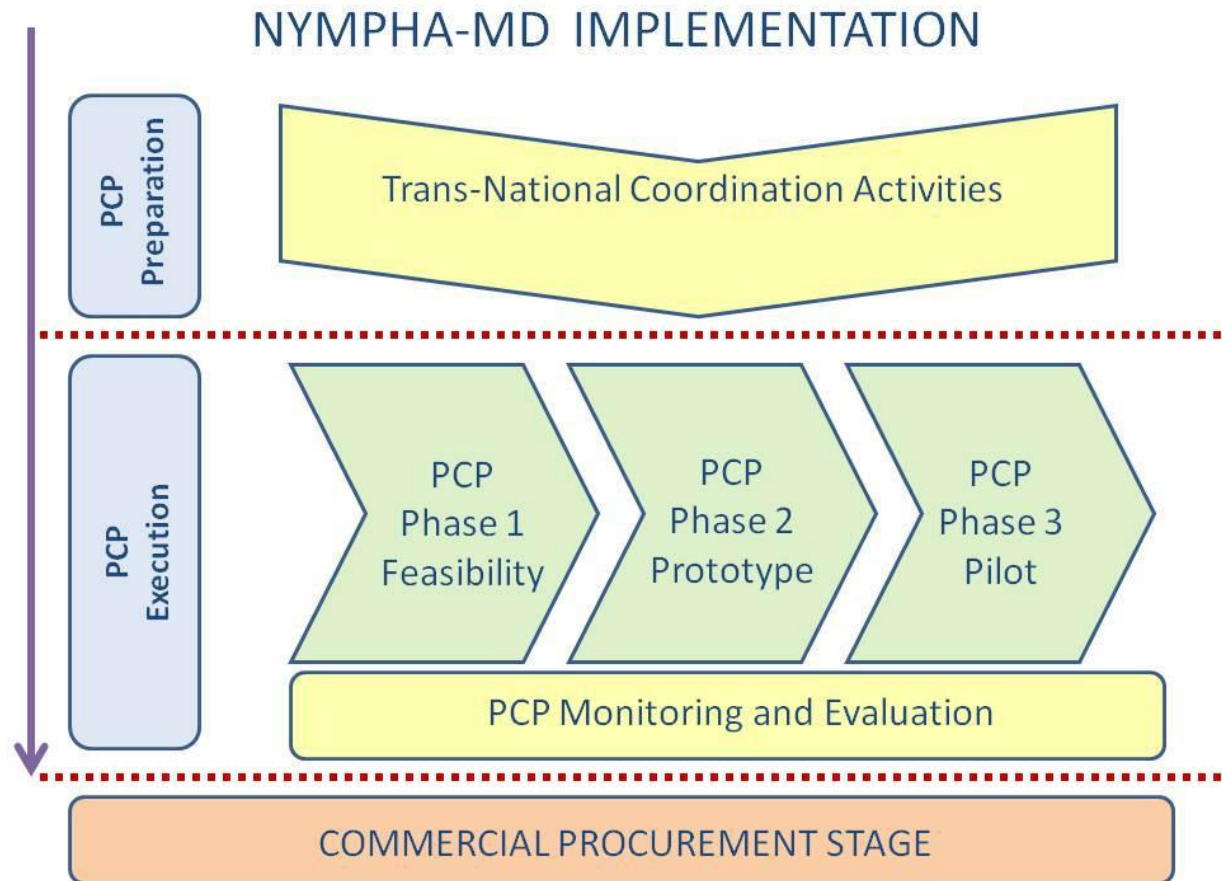


2 Different suitable procurement model

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

1. Project implementation



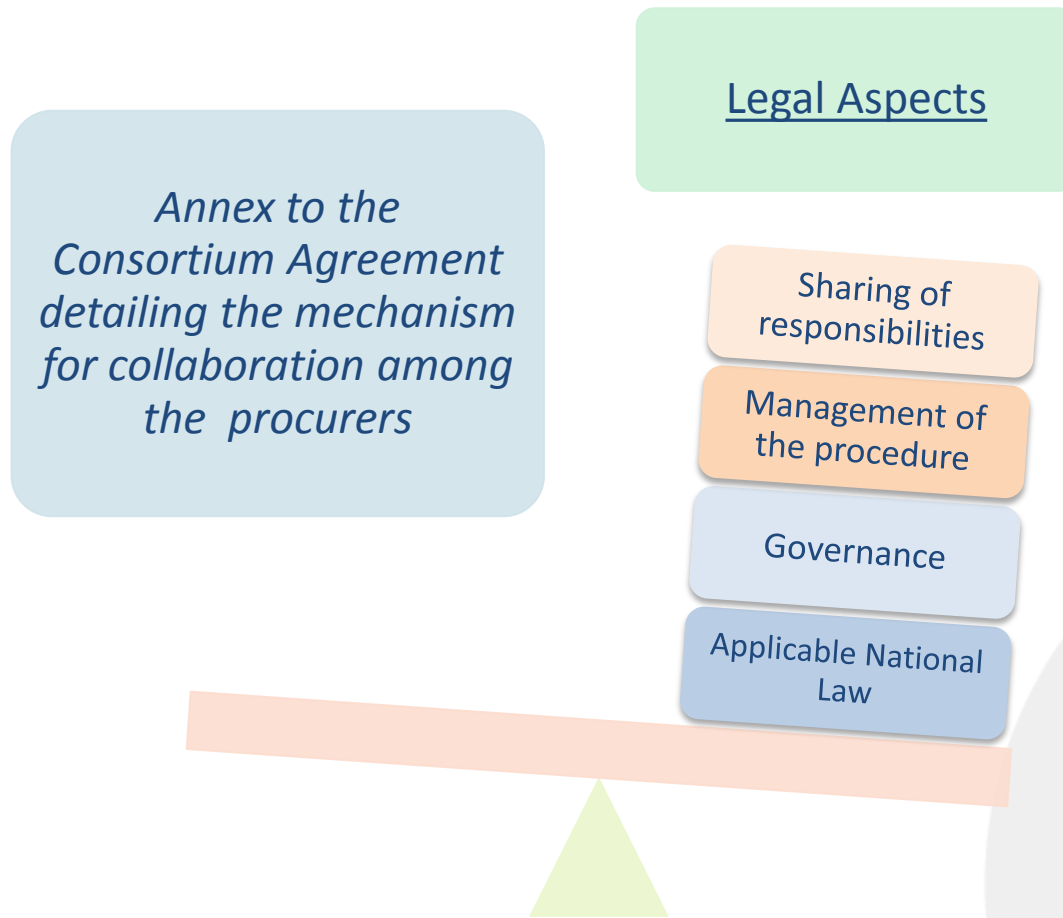
2. Procurers Agreement

Establish a principle agreement of the Joint PCP action of the Project

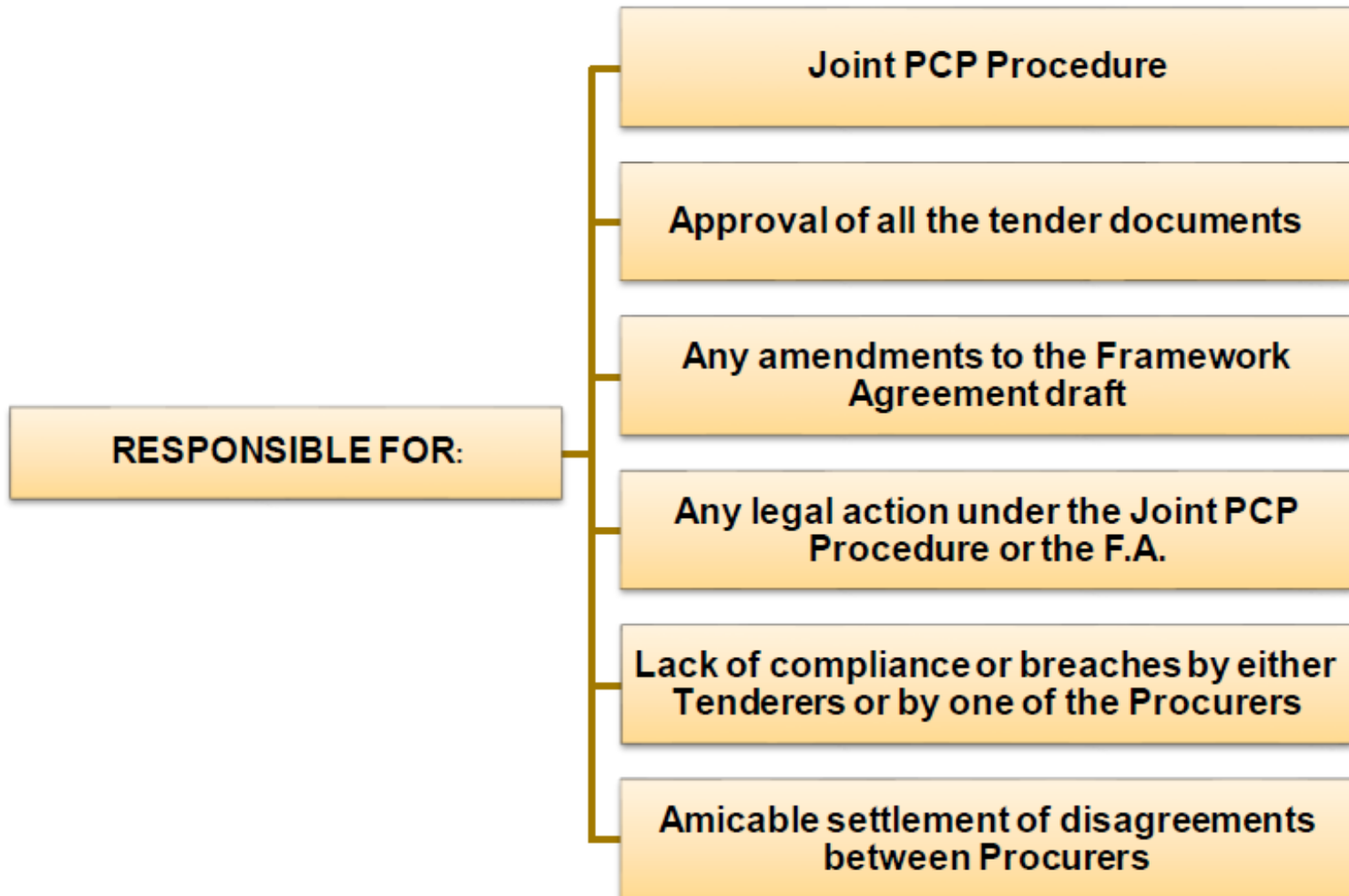
Have *the basis of the actual contract* to be signed between procurers, to define:

- the **model** to be followed for the Joint procurement
- the identification of the final list of **procurers** and the **Lead authority**

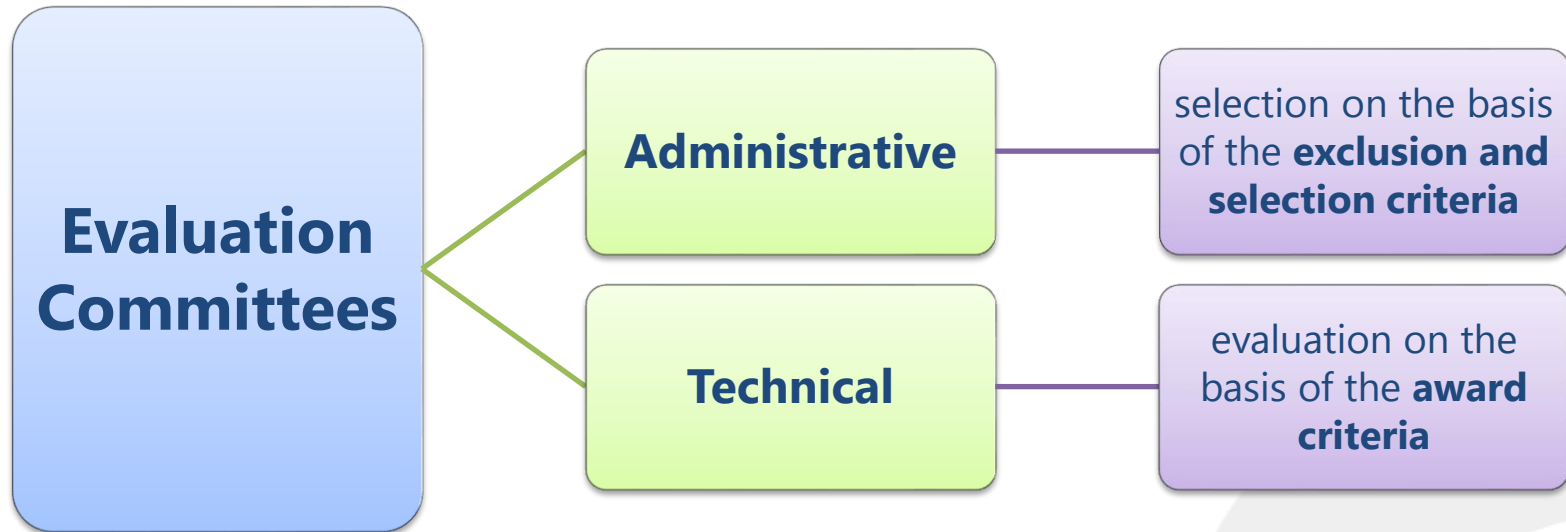
Procurers Agreement: legal aspects



Governance: Steering Body



Governance: Evaluation Committee



Different suitable procurement model

**LEAD AUTHORITY with
JOINT FRAMEWORK
CONTRACT**

**COMMON PROCURING
ENTITY**

3. Lead Authority

LEAD AUTHORITY WITH JOINT FRAMEWORK CONTRACT

- A group of procurer 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

COMMON PROCURING 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

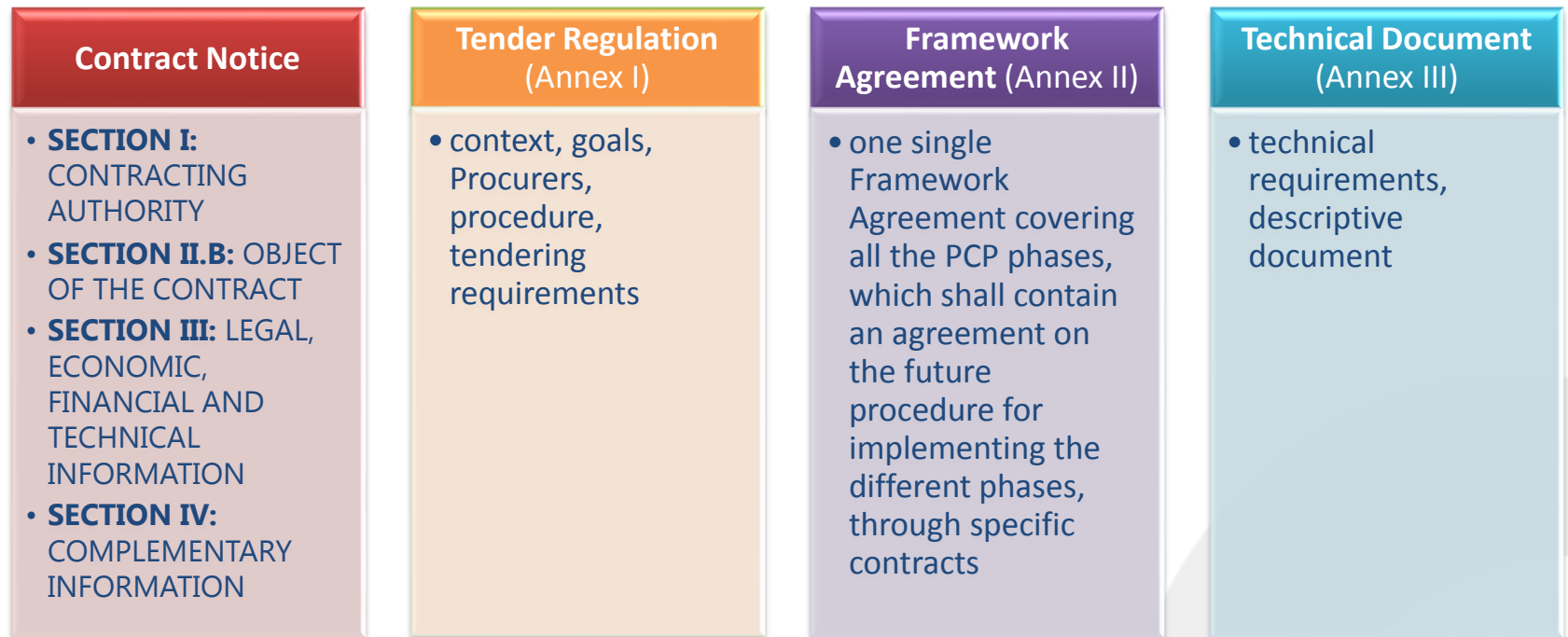
Model: Lead Authority

“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:



3 Lessons learned from C4E and NYMPHA-MD

3

1. Intellectual Property Rights
2. Other issues



1. Intellectual Property Rights



RISK BENEFIT SHARING

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

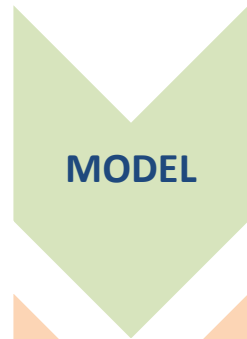
ROYALTIES

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

CALL BACK PROVISION

- 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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