



Legal aspects of PCP/PPI

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PCP/PPI

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Overview Schramm Öhler

- Founded in 1996, specialised in public procurement law, 25 employees
- leading Austrian law firm in public procurement (Legal 500, Chambers, Juve)
- Several leading cases before the European Court of Justice, inter alia:
 - ECJ C-94/99 – *Effenberg* - participation of subsidised tenderers
 - ECJ C-314/01 - *Siemens* – participation of subcontractors
 - ECJ C-448/01 – *Wienstrom* – green award criteria
 - ECJ C-454/06 - *presstext* – contractual changes
- Reviewing several PCP projects for the European Commission



Agenda

- PCP and PPI - overview
- PCP: legal framework and recommendations
- PPI: available procedures and implementation



PCP and PPI - overview

- **PCP**

- procurement of R&D services
- procurement directives are **not applicable**, only general principles of the EU Treaty
- PCP Communication COM(2007) 799 final; PCP Staff Working Document SEC(2007) 1668; State Aid Framework for RDI COM(2014) 3282

- **PPI**

- procurement of innovative public works, supply & services contracts
- Contracting authority (“CA”) acts as first buyer of innovative commercial end-solutions newly arriving on the market
- procurement directives are **applicable**: 2014/24/EU („Classic Directive“), 2014/25/EU („Utilities directive“), Remedies Directives (in particular 2007/66/EC)



PCP – legal framework

- R&D Procurement is exempted from Directives if CA receives only non-exclusive IPR (Art 14 Dir 2014/24)
- **R&D definition:**
 - **Fundamental research** (theoretical work primarily to acquire new knowledge without any particular application or use in view)
 - **industrial research** (also aims to acquire new knowledge; however, directed primarily towards a specific practical aim or objective).
 - **Experimental development** (based on existing knowledge; directed to produce new materials/products/services/processes/systems or substantially improve them)
- **No R&D:** commercial development (quantity production), supply to establish commercial viability or to recover R&D costs, integration, customisation; see OECD (2002), *Frascati Manual*.
- For R&D exemption, > 50 % of contract value must be R&D services, not products or supplies or other services

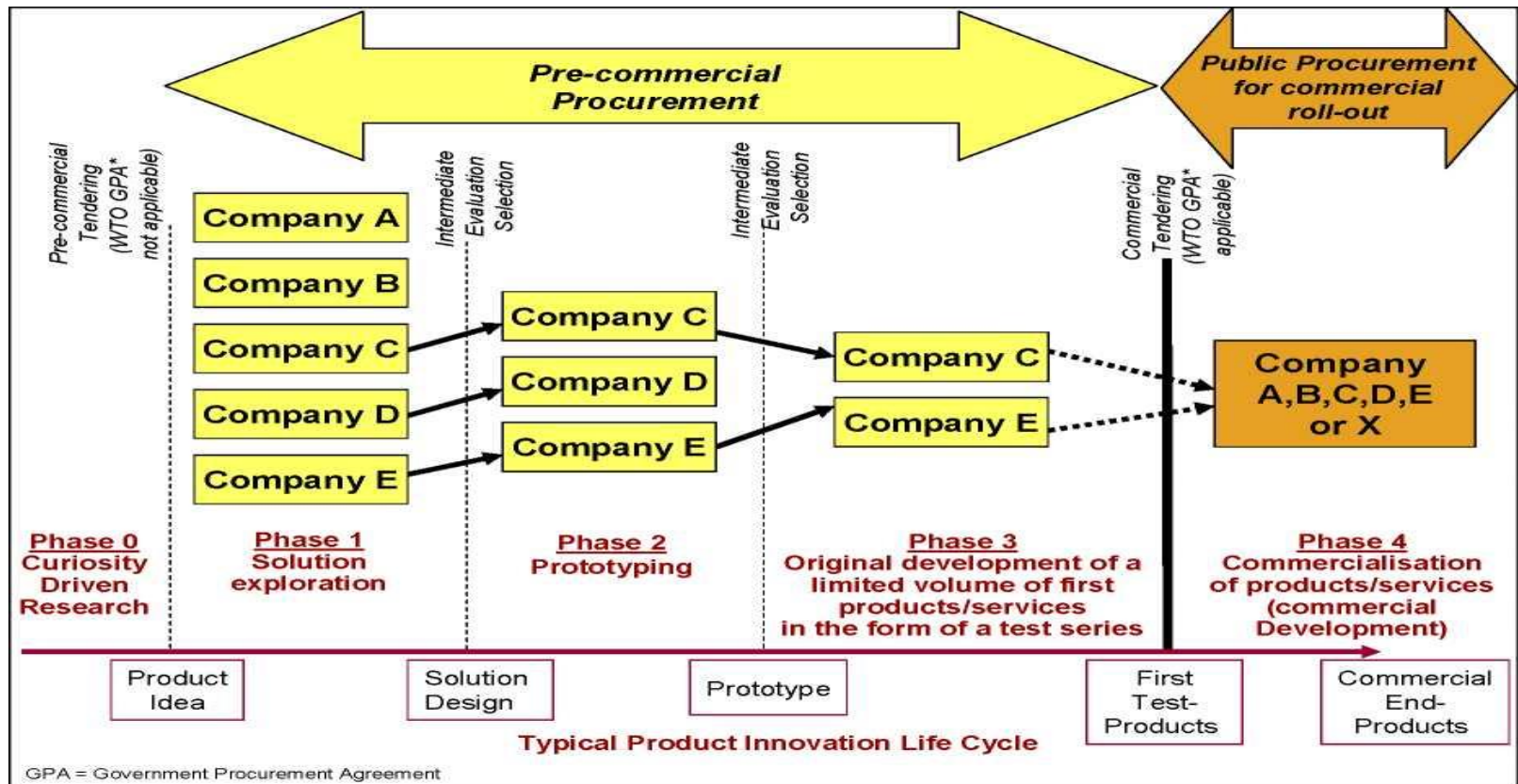


PCP- phase structure

- EU wide **publication**: call for tender/submission of concepts: the best (e.g. 5) tenderers receive contract for
 - **Phase 1 (solution exploration)**: at the end evaluation of studies → reduction to 3 suppliers which receive orders for
 - **Phase 2 (prototype)**: at the end of the evaluation of the prototypes → reduction to e.g. 2 suppliers which receive orders for
 - **Phase 3 (original development of first products/services in the form of a test series)**: verification and comparison (interoperability, scalability) of different solutions in real-life operational conditions
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- **Afterwards („Phase 4“)**: CA may conduct **separate** public procurement procedure under the procurement directives for commercial roll-out with participation of PCP-winning companies and other companies



PCP- phase structure





PCP – recommendations (1)

Preparing for your PCP:

- Conduct needs assessment, investigate business case
- Conduct market research
- Conduct market consultation (see Art 40 Dir 2014/24)
 - Announce via prior information notice (PIN) in the OJEU
 - Produce preparatory documents (eg background info, PCP goals, questionnaires)
 - Define roadmap and rules for the consultation and timeline for the PCP



PCP – recommendations (2)

- **One single framework agreement (FWA):** “umbrella” for the 3 phases, all rights and obligations of the parties are defined **upfront**;
 - **Separate Call off – contract** for each phase
 - If tenderers cannot quote binding price for all 3 phases, then there will be 3 consecutive price tenders:
 - 1) General Tender for FWA/Phase 1
 - 2) Contractors successfully completing Phase 1 will be invited to tender for Phase 2
 - 3) Contractors successfully completing Phase 2 will be invited to tender for Phase 3
- Tenderers should break down the price for phase 1 in different unit prices (eg personnel categories, material costs, ...) and quantities – these unit prices should be binding throughout the whole PCP



PCP – recommendations (3)

- Use **output based specifications** → room for innovative solutions
- Award criteria for phase 2 and 3 should be **outlined upfront**, further detailed before tender for phase 2 and 3; high weighting of quality criteria; results of previous phase should be taken into account when assessing bid for next phase
- Try to stay close to the Directives (even though they are not applicable)
- **IPR allocation** e.g by following arrangements:
 - Contractor keeps IPR; CA receives free license to use foreground IPR
 - CA shall be entitled to grant licenses to 3rd parties or Contractor shall grant license to 3rd parties under fair and reasonable market conditions
 - call-back option for CA if Contractor does not exploit the IPRs within a given period after the PCP
 - IPR allocation needs to be decided **individually for each PCP**
 - **no renegotiations after the award of the FWA!**



PPI – available procedures

New Procurement Directives 2014/24 and 2014/25:

- **Negotiated procedure** (Art 26): specs are negotiable
- **Competitive dialogue** (Art 30): specs are developed with tenderers
- **NEW: innovation partnership** (Art 31):
 - if CA has need that cannot be met by products/services/works already available on the market
 - phased structure with intermediate targets (similar to PCP)
 - With one or more companies
 - development and subsequent purchase of innovative solution if the solution corresponds to agreed performance levels & costs
- **cross-border joint procurements**: applicable national procurement law may be decided by CAs of Member States (Art 39)



PPI – recommendations

- Conduct **needs assessment & market consultation** (see above slide 8)
- Use **output based specifications** → better use of creativity of potential suppliers to provide innovative solutions
- Use **technical / quality award** criteria (not only price)
- Consider **life cycle costs (LCC)** approach
- Consider allowing **variations** in the tenders (and define minimum criteria that must be met by variations, otherwise variations cannot be taken into account – ECJ C-421/01 *Traunfellner*)

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