Metodebeskrivelse: før-kommersielle anskaffelser

Metoden før-kommersielle anskaffelser er utførlig beskrevet i eafip Toolkit: https://eafip.eu/toolkit/

I det følgende gjengis de meste sentrale elementene i prosessen. Dette er utdrag fra eafip Toolkit modul 3.2 seksjon 2.9.3 og Toolkit modul 2 seksjon 2.9.2 For ytterligere spørsmål anbefaler vi å konsultere øvrige deler av disse to modulene.

Det er spesifisert i ESAs retningslinjer pkt. 33 hva som må til for at det ikke skal anses å gå statsstøtte til foretak ved førkommersielle anskaffelser. ESAs retningslinjer pkt. 33 er inkludert til slutt i dette dokumentet.

Utdrag hentet fra eafip toolkit modul 3 seksjon 2.9.3 (s.79 – 82)

(http://eafip.eu/toolkit/module-3-2/)

2.9.2 Conducting the PCP

Once the procurement documentation is available, the procurement procedure can start. The following steps are generally adopted:

A) Publication of the contract notice

To ensure wide dissemination of the contract notice, as provided by the PCP Staff Working Document, it is recommendable that contract notices are published in the Official Journal of the European Union, more specifically, on TED (Tenders Electronic Daily - http://ted.europa.eu/TED/main/HomePage.do), which is the official supplement to the OJEU.

The legal advisor should also pursue to publish the PCP contract notice on the national public procurement portal. Last but not least, contract notices should be published on the procurer's/procurement's website (if any). It is recommendable to publish it on any other media channels available and used in practice (at national ad/or European level).

B) Selecting the R&D service providers and awarding the Framework Agreement

In the case of PCP, the procurer should appoint specific committee(s) to evaluate of the received tenders as defined in the tender documentation. The evaluators should be instructed on the specificities of the PCP, and will be requested to sign declarations regarding the lack of (potential) conflict of interests. Subsequently, the following steps will be undertaken.

1) From tender notice to Phase 1

The criteria set out in the tender documentation will be applied in order to select the successful tenderers (i.e., at least 4 bidders should be selected to enter Phase 1).

The following issues should be considered at this stage:

❖ The award decision will be notified to both successful and unsuccessful bidders (specifically in the case of rejected bidders, the reasons for their rejection will also be communicated);

❖ A 'standstill period' is, even though not specifically required by EU procurement rules for PCPs, recommendable between the award decision and the signing of the Framework Agreement; during this standstill period, any of the interested parties could challenge the result of the evaluation;

❖ The public procurer/ lead procurer will sign the Framework Agreement and a Phase 1 contract (which covers all the phases[1]) with the selected bidders for Phase 1, after the expiry of the standstill period.

2) From Phase 1 to Phase 2

❖ The main procedural steps are described in section 2.9 C) of Module 2. Hereafter we outline the most important aspects from a legal point of view:

▪ The end of Phase 1 results will be assessed objectively and uniformly by the end of phase assessment committee against the pre-defined criteria.

▪ The outcome of the End of Phase evaluation shall be communicated to all participants;

❖ The formal invitation to submit bids for Phase 2, should contain:

▪ The details for Phase 2 (timeline, available budget, number of bidders to be accepted etc.);
▪ Possibly more detailed definition of the requirements for the phase 2 deliverables including in particular the prototype to be developed during Phase 2;

▪ Description of the testing process envisaged for Phase 2 (e.g. whether testing facilities – typically lab testing - of the tenderer or of the procurer should be used etc.);

▪ Information regarding submission of bids;

▪ Description of the Phase 2 evaluation process, criteria and the applicable scoring scheme; ▪ Bid submission related information (timeline etc.);

▪ Information regarding the documents to be included in the bid package:

- Optional: The bid form (including sections to be completed on: price; project concept/plan, methodology and proposed team; subcontracting; commercialization plan; updated list of background IPR etc.);

- Phase 2 contract;

- End of Phase 2 report template.

After the expiry of the deadline for the submission of offers for Phase 2, the Evaluation Committee will evaluate the offers submitted by the bidders and select the bidders that will

[1] Phase Contracts will be signed with the bidders declared successful to move from one phase to the other.

move to Phase 2, based on the award criteria as defined in the initial tender documentation. At this stage it is important that:

▪ Each member of the Evaluation Committee awards scores to each bid individually and motivates the scores;

▪ The Evaluation Committee reaches a consensus as regards the bids that will move to Phase 2 (both on scores and the qualitative motivation for each score);

▪ The decisions (as well as the hearings/interviews with the tenderers, if applicable) are documented in formal meeting notes.

▪ All contractors, both successful and unsuccessful, are informed about the outcome of the evaluation;

▪ The outcome of the evaluations (name of winning bidders, contract value are made public.)

3) From Phase 2 to Phase 3

At this stage, the same legal aspects are relevant, as described in the previous section. In addition, the assessment of the End of Phase 2 deliverables may entail prototype testing at the location of the PCP participants or of the procurer (as priory specified in the Phase 2 Call for Bid.)

▪ A Call for Bid for Phase 3 is subsequently prepared and sent to the PCP participants whose End of Phase deliverables were scored 'successful'. In addition to the information that was included in the Phase 2 Call for Bid, the Phase 3 Call for Bid will describe the testing process (including information regarding the real-life testing locations) envisaged for Phase 3.

▪ When evaluating the bids for Phases 1, 2 and 3, the same exclusion and selection are applied throughout the competitive phased process. Technical specifications and award criteria, however may become progressively more specific per phase (e.g. by defining award sub-criteria, or by refining certain performance requirements). These changes however, may not amount to a substantial change of the contract, and consequently a breach of the TFEU fundamental principles of transparency and equal treatment.

4) End of Phase 3

At the end of Phase 3, the contractors will be offered the opportunity to test the solution developed during Phase 3 in real life settings with real end-users. In case of joint PCPs, tests should preferably take place in the locations of all procurers participating in the buyers group.

▪ At the end of the PCP, the procurer will publish the summary of the results achieved through various communication channels (press releases, press conferences, workshops, seminars etc.), with the exception of any confidential/commercial information.

Following a PCP, the procurer may proceed with the organization of a separate PPI, to purchase an innovative solution in line with the requirements that were used for the PCP. In this context, the legal expert should define the measures needed to ensure that equal treatment and transparency are observed (e.g. the PPI and does not prescribe a specific solution approach of one vendor that participated in the PCP but uses functional/performance bases specifications to allow all vendors on

the market to make offers based on their own solution approach to address the procurement need) and that all PPI tenderers (including those who had not participated in the prior PCP) get access to all relevant information needed to formulate an offer (all information that the procurer also shared with the vendors that participated in the PCP about the procurement need and the operational environment at the procurer's side in which the solution needs to be implemented). Despite the fact that PCP participants have already worked with the procurer during the PCP, the equal treatment principle, as interpreted by the Court of Justice of the European Union, does not prescribe automatic exclusion of the PCP participants for the PPI.

RELEVANT CASE-LAW

In the Fabricom case, the Court of Justice of the European Union decided that automatic exclusion of bidders who had previously carried out research, experiments, studies, or development in connection with that procurement was disproportionate and breached the equal treatment principle. According to the Court the firm should be allowed to prove that its involvement in the preceding R&D procurement did not create a risk to competition. Source: CJEU, C-21/03, Fabricom v Belgian State

In the European Dynamics case, The Court of First Instance confirmed that the procurer is not mandated to neutralize all the advantages enjoyed by a tenderer as a result of a previous contractual relation with the procurer, particularly when it is not easy and economically acceptable or it infringes the rights of that tenderer (e.g. IPR). The Court clarified that the procurer does not have to neutralize these 'inherent de facto advantages' that the sitting contractor and its sub-contractors have whenever they decide to participate in tendering for a new contract, as these are not the consequence of any conduct in the part of the procurer.

The procurer, however, has to convey all relevant information to all the potential tenderers that is needed to understand which level of quality and price they need to offer, unless that information is protected by intellectual property rights or is confidential. The tendering requirements should also be precise, such as not to favor the incumbent contractor, who based on previously gained knowledge, finds himself in a better position to assess the real needs of the procurer.

Source: CFI, T-345/03 European Dynamics v Commission

Hentet fra Eafip toolkit modul 2 seksjon 2.9.1 (s.117-120)

(https://eafip.eu/toolkit/module-2/)

2.9.1 Conducting the procurement procedure for a PCP

Once the PCP tender package is drafted, the public procurer will take the following steps:

A) Publication of the contract notice

PCP is exempted from the EU public procurement directives. However as PCP concern innovations of wide potential market interest (also across borders in the EU) it is recommended that the public procurer publishes the Contract Notice in TED (Tender Electronic Daily), the Supplement to the Official Journal of the EU, at least in English, to attract enough good quality offers for the multi-competitor PCP approach.

B) Selecting R&D providers and awarding the framework agreement

The public procurer will open the offers that have been received within the pre-defined deadline. The first evaluation stage targets the checking of the bidders' compliance with exclusion and selection criteria. To this end, the administrative forms and related documentation are checked by the evaluation committee. Once the administrative evaluation is completed, the technical evaluation will start. This evaluation will be based on the application of award criteria (and possibly additional project specific compliance or minimum criteria) to the offers received. Please see below a suggested scheme for the organization of the evaluation exercise.

The procurer needs to decide on:

- the composition of the evaluation panel(s) (and allocate the required resources internally for it)
- how the panel(s) will make decisions (by unanimous decision or by majority voting)

Public procurers can make use of external experts in the evaluation panel. The evaluation committee could include both internal as well as external experts. In any case, they should cover the main sectors of expertise needed to assess the offers: internal experts from the procurer side experienced in operating the public service that needs to be modernised with the innovative solution, technical/R&D domain experts and possibly economic and financial experts (to assess the commercialisation plan).

> *Decipher is an EU-funded PCP conducted by a consortium of public health procurers that aims to innovate cross-border mobile healthcare through the use of electronic patient records. In this PCP, the consortium of procurers appointed venture capitalists as evaluators to assess the commercialisation plan of the tenderers. This was used as an alternative to asking financial turnover figures and prior expertise with commercialisation as selection criteria.*
>
> *Source: Decipher project, www.decipherpcp.eu*

If external experts are used, it is up to the public procurer to set up a remuneration scheme for the experts. It is also up to the procurer to ensure safeguarding of confidentiality and fairness, by: ▪ Asking the experts to sign non-disclosure agreements; ▪ Asking the experts to sign a declaration of absence of conflicts of interests. For more details and a practical example on how to conduct the evaluation, please refer to section 2.9.1 in Module 3.

The best scoring offers[2] as a result of the evaluation will be awarded a Framework Agreement and will be invited to sign a Phase 1 contract for starting solution design. The 2007 PCP Communication and Staff Working Document recommend to start Phase 1 with at least 4 economic operators to end up with a competitive market of at least 2 providers by the end of the PCP. As the R&D failure rate in

[2] The minimum number is decided by the procurer depending on budget availability and prices offered.

many sectors is higher (around 75%) it is however advisable to start PCPs with around 8-10 economic operators.

C) The phased approach – from one Phase to the other

The award of the framework agreement and phase 1 contract marks the beginning of the Phase 1 contract implementation stage. In case the satisfactory / successful approach for the completion of phase is used, the call-offs after phase 1 and 2 open again a mini tendering competition between the R&D providers that have successfully completed the previous phase, after which the contract implementation stage for phase 2 respectively phase 3 starts.

Phase 1: Solution exploration

▪ During Phase I the R&D providers will start solution design and verify the technical, economic and organizational feasibility of their solution approach to address the PCP challenge.[3]

▪ On completion of Phase 1, the R&D providers will each deliver End of Phase 1 deliverables requested by the procurer (e.g. copies of designs, drawings, calculations, plans, list of IPRs generated/used etc.) and an End of Phase 1 report, describing the performed activities and the obtained Phase 1 results and a business/commercialisation plan;

▪ For Phase 1 payment purposes, the Phase 1 performance assessment committee (possibly other experts than those who evaluated the offers for Phase 1) will assess whether the results delivered by the R&D providers are satisfactory; The committee will also assess which R&D providers achieved successful completion of Phase 1 (solution meeting the expected quality/cost requirements).

Call off for Phase 2

▪ The Phase 1 R&D providers who successfully completed Phase 1[4] are invited to bid for Phase 2 contracts; ▪ The Phase 2 evaluation committee (could be different than the Phase 1 evaluation committee) evaluates the submitted Phase 2 offers, based on the phase 2 award criteria;

▪ The best scoring Phase 2 offers (ideally more than 3) are awarded a Phase 2 contract;

Phase 2: Prototyping

▪ During Phase 2, the winning R&D providers will develop a prototype and will test this in lab conditions (lab of the R&D provider or procurer, as chosen by the procurer);

▪ On completion of Phase 2, the R&D providers will deliver End of Phase 2 deliverables requested by the procurer (e.g. software code of simulations, data lists, updated list of IPRs generated/used etc.) and an End of Phase 2 report, describing the performed activities and

[3] Lieve Bos, Stephan Corvers, 'Pre-commercial Public Procurement. A missing link in the European Innovation Cycle. Public Needs as a driver for innovation', Tijdschrijft Aanbestendingsrecht (2006).
[4] The conditions to reach satisfactory and successful completion must be defined in the tender documentation.

Phase 2 results (e.g. product specification, tested prototype, production plan and an updated business / commercialisation plan);

▪ For Phase 2 payment purposes, the Phase 2 performance assessment committee will assess whether the results of the R&D providers are satisfactory; The committee will also assess which R&D providers achieved successful completion of Phase 2 (solution meeting the expected quality/cost requirements).

Call off for Phase 3

▪ The Phase 2 R&D providers who successfully completed Phase 2 are invited to bid for Phase 3;

▪ The Phase 3 evaluation committee, after the deadline for the submission thereof.

▪ The Phase 3 evaluation committee evaluates the submitted Phase 3 offers, based on the phase 3 award criteria;

▪ The best scoring Phase 3 offers (ideally more than 3) are awarded a Phase 3 contract;

Phase 3: Original development of a first limited set of products/services validated through field tests

▪ During Phase 3, the successful R&D providers will produce a first limited set of products/services and after testing by the procurer in relevant environments/real-life operational conditions, will subsequently incorporate the results of the field testing in a final limited set of products/services that demonstrate suitability for large scale production after the PCP;

▪ On completion of Phase 3, the economic operators will deliver End of Phase 3 deliverables requested by the procurer (e.g. completed limited series of tested end-products, updated list of IPRs generated/used etc.) and an End of Phase 3 report, describing the undertaken activities and the obtained Phase 3 results (e.g. final product specifications, tested products/services, refined production and commercialisation/business plan);

▪ For payment purposes, the Phase 3 performance assessment committee will assess whether the Phase 3 results can be qualified as satisfactory. The committee will also assess which R&D providers achieved successful completion of Phase 3 (solution meeting the expected quality/cost requirements). For evaluation bids for the call-offs for phase 2 & 3 also exclusion, selection and award criteria are applied. It is common practice that exclusion and selection criteria remain the same throughout the competitive phased process, whereas the award criteria can become progressively more specific per phase (e.g. via the use of award sub-criteria that can become more specific per phase).

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33. In all other cases, including pre-commercial procurement, the Authority will consider that no State aid is awarded to undertakings where the price paid for the relevant services fully reflects the market value of the benefits received by the public purchaser and the risks taken by the participating providers, in particular where all of the following conditions are fulfilled:

(a) the selection procedure is open, transparent and non-discriminatory, and is based on objective selection and award criteria specified in advance of the bidding procedure;

(b) the envisaged contractual arrangements describing all rights and obligations of the parties, including with regard to IPR, are made available to all interested bidders in advance of the bidding procedure;

(c) the procurement does not give any of the participant providers any preferential treatment in the supply of commercial volumes of the final products or services to a public purchaser in the EFTA State concerned (30); and

(d) one of the following conditions is fulfilled:

— all results which do not give rise to IPR may be widely disseminated, for example through publication, teaching or contribution to standardisation bodies in a way that allows other undertakings to reproduce them, and any IPR are fully allocated to the public purchaser, or

— any service provider to which results giving rise to IPR are allocated is required to grant the public purchaser unlimited access to those results free of charge, and to grant access to third parties, for example by way of non-exclusive licenses, under market conditions.