

## **Procuring innovation – will the new Directives help?**

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One of the stated objectives of the reform of the EU Procurement Directives is to promote innovation. The purchase of innovative goods and services by public authorities is frequently cited as a means of improving Europe's economic competitiveness while helping to solve social and environmental problems or deliver public services in new, more efficient ways. Funding and research have gone into the question of how to adapt procurement procedures to encourage more innovative purchasing (see, for example, the recent [Feasibility Study](#) published by DG Enterprise & Industry).

Most public authorities will not decide to purchase something simply because it is innovative, but when the conditions are right they may adopt procurement strategies which balance risk-aversion and cost considerations with a willingness to support new technologies, processes or methods.

Under the current Public Sector Directive (2004/18/EC), an exemption exists for the purchase of R&D services (Article 16 (f)). This only applies where the benefit of the services is not limited to the authority's own operations. This has given rise to the use in some Member States of pre-commercial procurement (PCP) as a means of awarding contracts for R&D services. Outside of the full application of the Directives, there is greater scope to engage with service providers to develop their ideas. It is not however generally possible to proceed directly from the R&D phase to commercial procurement without a separate competition, which may in part explain the low take up of PCP in most Member States.

Article 29 of the proposed new Directive supplements the current exemption with an 'Innovation Partnership', which allows contracting authorities to apply a negotiated procedure for the development and purchase of innovative supplies, services and works. This covers both the R&D phase and the purchase of any resultant innovation – addressing one of the limitations of PCP.

The procedure to establish an innovation partnership, the "competitive procedure with negotiation", allows for the negotiation of all terms of the contract provided this is done in a way which respects the principle of equal treatment and the confidentiality of proposals. The Innovation Partnership itself must be structured in successive stages, allowing for intermediate targets and remuneration of the partner in instalments.

While the creation of a specific procedure may encourage some contracting authorities to pursue innovative procurement, the provisions set out in Article 29 seem overly prescriptive. For example, there are stipulations regarding the duration and value of the different phases of the procurement and of the contract itself, which "shall remain within appropriate limits, taking into account the need to recover the costs, including those incurred in developing an innovative solution, and to achieve an adequate profit." Such a requirement leaves ample room for a supplier to challenge the terms of a contract it is unhappy with, which may scare public authorities off using the procedure.

Other aspects of the procedure also seem regrettably inflexible, for example remuneration in instalments may not be suitable for all types of partnership – particularly where the supplier receives funding for its R&D work from other sources.

Innovative public contracts are essential to sustainability and growth, and a lighter regulatory touch in this important area would be welcome. A procedure which finds the correct balance between the needs and priorities of public authorities and the interests of innovative businesses is difficult to set out in detail in a way which is appropriate for all markets, sectors and contract types. Member States have the option of whether to include the Innovation Partnership in their transposition of the proposed Directive, so its susceptibility to challenge may discourage widespread adoption.

Perhaps a better approach would be to leave the structure of such partnerships open, while allowing the use of the competitive procedure with negotiation for their award. The safeguards included in this procedure, such as respect for the principle of equal treatment and confidentiality would help prevent abuse of this greater flexibility in awarding contracts.